

121 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Metro Hydroelectric Company, LLC

Project No. 12484-002

ORDER DENYING REHEARING

(Issued October 18, 2007)

1. Metro Hydroelectric Company, LLC (Metro Hydro) filed a request for rehearing of the June 14, 2007 letter order terminating the Integrated Licensing Process (ILP) for the Metro Hydroelectric Project, proposed to be located on the Cuyahoga River in the Gorge Metro Park in Summit County, Ohio.¹ The Director, Office of Energy Projects, terminated the ILP for the Metro Project, without prejudice, because Metro Hydro was unable to conduct certain pre-license-application studies. For the reasons discussed below, we are denying rehearing.

Background

2. Metro Hydro proposes to restore electrical generation at the existing Ohio Edison Gorge Dam, which is owned by FirstEnergy Corporation (FirstEnergy).² Proposed new project facilities and components include a powerhouse, turbines, penstock, extended access road, and transmission lines. The proposed project will have a total capacity of

¹ The park is managed by Metro Parks Serving Summit County (Metro Parks), which was established in 1921 as a separate political subdivision of the State of Ohio. Today, it manages nearly 9,000 acres, including 13 developed parks, six conservation areas, and more than 120 miles of trails.

² FirstEnergy is a diversified energy company headquartered in Akron, Ohio. Its subsidiaries and affiliates are involved in the generation, transmission, and distribution of electricity, as well as energy management and other energy-related services.

2.4 megawatts (MW) and a net annual generation of between 10,000 and 12,000 MW hours.

3. In 1929, FirstEnergy's predecessor in interest, the Northern Ohio Power and Light Company, transferred 144.47 acres of land to the Akron Metropolitan Park District, but reserved certain rights to use the property, including the river and its embankments. This property, along with approximately ten additional contiguous acres, is now the Gorge Metro Park. On September 9, 2004, Ohio Edison Company (one of FirstEnergy's operating companies) granted to Metro Hydro an easement for the investigation and potential development of hydroelectric power at the dam.

4. On March 15, 2005, Commission staff issued a three-year preliminary permit to Metro Hydro to study the feasibility of the project.³ On May 5, 2005, Metro Hydro initiated an ILP for its project by filing a Notice of Intent to file a license application (NOI) and a Pre-Application Document (PAD).⁴ On October 13, 2005, as revised on February 8, 2006, Metro Hydro filed its proposed plan for studies that needed to be done in order to prepare a license application. Commission staff reviewed Metro Hydro's study proposal and issued a study plan determination on March 9, 2006, approving Metro Hydro's revised study plan with certain modifications.

5. The approved plan identified eight study areas: (1) Aesthetic (visual, noise, odors) Impacts; (2) Recreation and Socioeconomics; (3) Protected Plants and Wetlands; (4) Grading, Geotechnical, Slope Stability and Erosion Evaluation; (5) Cultural Resources; (6) Indiana Bat/Bald Eagle; (7) Aquatic Life/Use Attainment, Water Quality and Minimum Flows; and (8) Combined Sewer Overflow Impacts. Each of the studies included a schedule for gathering the necessary data and completing the study. All the studies except one were to be completed in 2006. The Recreation and Socioeconomic Study would be finished by early 2007.⁵

³ *Metro Hydroelectric Company, LLC*, 110 FERC ¶ 62,260 (2005).

⁴ The process is set forth in 18 C.F.R. Part 5 (2007).

⁵ Most of the studies would take between three and six months to complete. For the Aesthetic Impact Study, it would take four months to complete the visual and noise studies and six months to complete the odor study. The park user survey portion of the Recreation and Socioeconomic Study was to take place in spring 2006, the recreational boating instream flow study was to be completed in three months, and the socioeconomic study was to be completed in early spring 2007. The Protected Plant and Wetland Study was to be initiated in July 2006 and completed in four months. The Grading,

(continued)

6. To date, Metro Hydro has completed the visual and odor portions of the Aesthetics Study and the wetland survey portion of the Protected Plant and Wetland Study. No other studies have been done. Metro Parks Serving Summit County (Metro Parks), which manages Gorge Metro Park, opposes the project. It claims that Metro Hydro lacks authority to develop the project on park property, and has denied Metro Hydro access to the Gorge Park property.

7. On June 14, 2007, the Director issued a letter terminating the ILP for the Metro Project without prejudice. The letter explained that Metro Parks' continuing refusal (from May 1, 2006) to grant Metro Hydro access to the park prevented Metro Hydro from conducting studies according to the prescribed schedule. The letter further explained that, if Metro Hydro is able to gain access to the site, it may file a notice of intent and preliminary application document and request waivers for those studies that have been completed, so that it may take advantage of the work that it has already done.

8. On June 28, 2007, Metro Hydro requested that the Director reconsider his decision to terminate the ILP. Metro Hydro argued that it was diligently pursuing a license, had not failed to meet any applicable requirements, and intended to meet all future deadlines and requirements under the Commission's ILP. On July 11, 2007, the Director declined to reconsider his decision, explaining that:

The decision to terminate the ILP was based on the inarguable fact that, regardless of fault, Metro Hydro has not been able to follow the prescribed process plan and schedule. According to the process plan, the required studies were to be conducted during the spring/summer of 2006. Metro Hydro's March 9, 2007 initial study report indicated that the majority of the required studies were either not initiated or had to be halted due to the access issue. Although the ILP contemplates a second study season if needed, nothing in the record indicates that Metro Hydro will be able to access the project site in order for studies to commence this summer.

Geotechnical, Slope Stability and Erosion Evaluation Study was to be initiated in late winter 2006 and completed in four months with a final work product completed in fall 2006. The Cultural Resources Survey was to be performed in spring and summer 2006 and completed in fall 2006. The Indiana Bat Study was scheduled to have a field survey in spring 2006, a mist-netting survey in May through August 2006, with final results in September 2006. The Aquatic Life/Use Attainment, Water Quality and Minimum Flow Study was to be initiated in late winter 2006 and completed in late 2006. The Combined Sewer Overflow Impact Evaluation was to be completed in summer 2006.

9. On July 16, 2007, Metro Hydro filed a request for rehearing of the termination of its ILP.

Discussion

A. Study Schedule Deadlines

10. Metro Hydro asserts that it has met every deadline in the process plan and schedule for all pre-application activity, which it submitted with its NOI and PAD in May 2005.⁶ Metro Hydro states that the process plan provides for a second study season in the spring/summer of 2007, and termination of the ILP before those deadlines had passed was therefore premature. We reject this argument.

11. Section 5.15(a) of our regulations requires the applicant to “gather information and conduct studies as provided for in the approved study plan and schedule.”⁷ As explained above, the required studies were to be conducted in the spring/summer of 2006, with all but one being completed by the end of 2006.⁸ Instead, Metro Hydro’s March 9, 2007 initial study report indicated that the majority of the required studies either had not been initiated or had to be halted due to the access issue.

12. Metro Hydro further asserts that its March 9, 2007 filing requested modifications to the study plan schedule to delay the studies until the spring/summer of 2007 and extend the deadline for completing the studies until March 2008, the end of the second study season. It asserts that these modifications were deemed approved pursuant to section 5.15(c)(7) of the regulations because no participant or Commission staff filed a disagreement with the modification request within 30 days.⁹

13. The March 9, 2007 study plan progress report provided a summary of study plan actions. The only request for a plan modification was to remove the Grading, Geotechnical and Slope Stability and Erosion Potential Study Plan from the final plan

⁶ Rehearing Request at 7.

⁷ 18 C.F.R. § 5.15(a) (2007).

⁸ *See* n. 6, *supra*.

⁹ 18 C.F.R. § 5.15(c)(7) (2007).

determination and move those activities to a post licensing.¹⁰ With respect to all other studies, Metro Hydro made no request to modify the schedules.

14. Moreover, even assuming that Metro Hydro requested, and was granted, a study schedule modification to delay the studies until the second study season, it would not have been able to meet the extended deadline. In order to meet the March 2008 deadline for the results of a second study season, most of the studies would need to have been conducted in the spring/summer of 2007. Yet, at the time the Director terminated the ILP in June 2007, there was no indication that Metro Hydro had initiated any of the spring 2007 studies, or was any closer to resolving the site access issue. It is now fall 2007, and Metro Hydro still has not been able to access the project site. Indeed, in an August 31, 2007 filing summarizing its progress, Metro Hydro itself acknowledges that it is not planning to conduct the required studies until 2008: “[it] will continue the court case against [Metro Parks] ... and begin planning for an additional study season in the spring, summer and fall of 2008 when access is allowed by a positive court decision.”

15. The ILP was designed to create efficiencies by integrating a potential license applicant’s pre-filing consultation with the Commission’s scoping pursuant to the National Environmental Policy Act.¹¹ The ILP provides discrete time frames for studying a proposed project and developing a license application. The ILP includes increased assistance by Commission staff during the development of the license application, increased public participation in pre-filing consultation, development by the applicant of a Commission-approved study plan, opportunities for better coordination between the Commission’s processes and those of federal and state agencies and Indian tribes, encouragement of informal resolution of study disagreements and issuance of public schedules.¹²

16. The Director’s decision to terminate the ILP was based on the fact that, regardless of fault, Metro Hydro has not been able to follow the prescribed process plan and schedule, and it is not clear whether, or when, it may be able to do so. We find that, in

¹⁰ See March 9, 2007 filing at 3. Under the ILP regulations, a proposed amendment is deemed approved if no participant or the Commission files a disagreement within 30 days. 18 C.F.R. § 5.15(c)(7) (2007). On March 16, 2007, Metro Parks filed in opposition to the modification request.

¹¹ 42 U.S.C. § 432, *et seq.* (2000).

¹² See *Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, 68 Fed. Reg. 51,121(August 25, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,150 (2003).

these circumstances, it was reasonable for the Director to terminate the ILP. As the Director explained, this termination is without prejudice. If Metro Hydro is able to gain access to the site, it may file a notice of intent and preliminary application document and request waivers for those studies that have been completed. Moreover, as noted in the Director's July 11, 2007 letter, our determination here is made regardless of fault. It is simply not an efficient use of our limited resources to keep our staff working on an ILP proceeding that is not moving forward.

B. Prior Notice Not Required

17. Metro Hydro asserts that its ILP may not be terminated without prior notice of probable termination or other notice and opportunity for hearing. In support of its argument, Metro Hydro cites to Commission regulations that require notice (of either 30 or 90 days) to a licensee before its license can be terminated for failure to commence project construction¹³ and asserts that such notice requirements should apply equally to license application proceedings (and we presume Metro Hydro would argue to ILP proceedings as well). We disagree. The regulations to which Metro Hydro cites implement section 13 of the Federal Power Act,¹⁴ which requires notice to a licensee before its license is terminated for failure to commence project construction by the statutory deadline.

18. The Commission has broad discretion to structure its proceedings and to choose the procedures used to acquire relevant information. Here, no purpose would be served by prior notice of the Director's action. The record contains sufficient information on which to make a decision, and there are no material issues of fact in dispute. The Director's letter terminating the ILP gave notice to Metro Hydro, and Metro Hydro was given sufficient opportunity to respond to the termination letter through our rehearing process.

C. Request to Extend Study Schedule or Hold ILP in Abeyance

19. Metro Hydro asserts that good cause exists to extend the study schedule or hold the ILP in abeyance. We disagree. Under the circumstances of this proceeding, there is no likelihood of a prompt resolution of the property rights issue, which is prohibiting Metro Hydro from accessing the site to perform the studies needed to prepare a license application. The ILP has strict timetables, and extending these deadlines or holding the

¹³ See 18 C.F.R. §§ 6.3 and 375.308(f)(1) (2007).

¹⁴ 16 U.S.C. § 806 (2000).

ILP in abeyance for an unknown period is not in the public interest. The Director terminated the ILP without prejudice and Metro Hydro may re-apply for the ILP when the validity of the easement is determined. In any event, the studies at issue here will be necessary for the Commission to make an informed decision on the merits of any license application.

The Commission orders:

(A) The request for rehearing filed by Metro Hydroelectric Company, LLC, on July 16, 2007, is denied.

(B) The request for an extension of time, or in the alternative, to hold the proceeding in abeyance, filed by Metro Hydroelectric Company, LLC is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.