

122 FERC ¶ 61,147
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.

Fort Dodge Hydroelectric Development Company

Project No. 12447-001

ORDER DISMISSING LICENSE APPLICATION

(Issued February 21, 2008)

1. On March 21, 2006, Fort Dodge Hydroelectric Development Company (Fort Dodge Hydro) filed, pursuant to Part I of the Federal Power Act (FPA),¹ an application for an original minor license to construct, operate, and maintain the 1.4-megawatt (MW) Fort Dodge Mill Dam Project No. 12447, to be located at an existing dam and vacant powerhouse owned by the City of Fort Dodge, Iowa (the City), on the Des Moines River, in the City, in Webster County, Iowa. The project would not occupy any federal lands.
2. As discussed below, the record shows that Fort Dodge Hydro does not have sufficient rights in the City's dam, nor is there any evidence that, were the project to be licensed, Fort Dodge Hydro could acquire the necessary rights to ensure that urgently-required dam safety repairs could be made in a timely manner. Because issuing a license for this project cannot ensure, and indeed may delay, the timely resolution of these dam safety issues, we are dismissing the license application, without prejudice.

Background

3. The proposed project would include the existing 342-foot-long, 18-foot-high concrete dam with a spillway and five tainter gates; a 90-acre reservoir; an existing intake structure and powerhouse (integral with the dam) that would contain two new turbine generating units with a total installed capacity of 1.4 MW; and an existing 2,400-foot-long transmission line.²

¹ 16 U.S.C. §§ 791a - 825r (2000).

² The Fort Dodge dam and powerhouse were constructed by the City in 1916. Electric generation ceased in 1972, when the project turbines, generators, and electrical equipment were removed and decommissioned.

4. The City filed comments on the application, explaining that, under a September 2005 agreement between the City and Fort Dodge Hydro, after Fort Dodge Hydro received a license for the project, it would transfer the license to the City; and the City would be responsible for construction and operation of the project.³ However, the City subsequently filed a letter stating it had terminated its contract with Fort Dodge Hydro, and that it does not want the dam licensed and will not accept the license from Fort Dodge Hydro. Noting that it has a lawsuit pending against Fort Dodge Hydro over the development of the project, the City requested that the Commission stop processing the license application, and noted that it has no intention to operate the project and will not provide financing to develop it.⁴

5. On March 5 and June 21, 2007, staff sent letters to Fort Dodge Hydro requesting clarification whether a portion of the proposed project would occupy city parklands.⁵ Staff noted that section 21 of the Federal Power Act,⁶ as amended by the Energy Policy Act of 1992 (1992 Act), bars a licensee's use of eminent domain authority to acquire any lands in a public park established before enactment of the 1992 Act. To acquire rights in parklands established after the 1992 Act, section 21 of the FPA establishes certain requirements that must be met before eminent domain authority is available to a licensee.

6. Fort Dodge Hydro and the City responded, each submitting deeds, maps, and other information. The submittals show that portions of the existing Fort Dodge dam west abutment wing wall and powerhouse are within the boundaries of Hydro Electric Park, a city-owned public park.⁷

³ See January 5, 2007 filing of the City. The City expressed concern, however, that the project as proposed by Fort Dodge Hydro was not economically feasible and asked the Commission to withhold approval of the license application until the project was redesigned to make it so. In response, Fort Dodge Hydro stated that a change in the City's elected leadership had resulted in a dispute between the City and itself with respect to payments to be made pursuant to the terms of the contract, but that Fort Dodge Hydro was committed to moving forward with the project. See January 15, 2007 filing of Fort Dodge Hydro.

⁴ See City's filing of September 26, 2007.

⁵ The project appeared to overlap with the City's Loomis Park on the east side and Hydro Electric Park and a boat launch ramp on the west side of the project reservoir.

⁶ 16 U.S.C. § 814 (2000).

⁷ See May 3 and September 25, 2007 filings of Fort Dodge Hydro; October 31, 2007 filing of the City.

7. Commission dam safety staff conducted a pre-license inspection of the project, and by report dated April 18, 2007, recommended repair of the dam's tainter gates and intake structure, upgrade of project instrumentation, and rehabilitation of concrete structures.⁸ The report also recommended that the applicant perform a dam breach analysis to confirm the dam's then-current classification as having a low hazard potential.⁹

8. On June 12, 2007, Commission staff notified Fort Dodge Hydro that the pre-license inspection had revealed several structures located downstream of the project, and that the dam must therefore be reclassified from low hazard to significant hazard potential due to possible impacts to the downstream structures.¹⁰ The letter also addressed the project structure deficiencies observed in the inspection report, and listed nine items requiring remedial action.¹¹

9. On July 3, 2007, Fort Dodge Hydro responded that all safety items identified in the staff's June 12 Letter would be addressed "after the license is received, final project engineering is completed, and during the construction phase of the project."

10. A high water event in late August 2007, which caused the right embankment to be overtopped and required sandbagging, heightened Commission staff concerns regarding the safety of the dam.¹² On September 7, 2007, Commission staff met with

⁸ The report was placed in the record of this proceeding on May 18, 2007.

⁹ *Id.* at 6. "Low hazard potential" applies to dams whose failure would not appear to pose a risk to life or property.

¹⁰ "Significant hazard potential" means that failure of the dam could be expected to cause damage to downstream property, cause economic loss, environmental damage, and disruption of lifeline facilities. While loss of life would not be expected if the Fort Dodge dam were to fail, the uncontrolled release of a reservoir under a dam failure situation can always result in unanticipated impacts.

¹¹ The items included repairing the tainter gates, intake structure, trashracks, and right downstream tailrace wall; developing an in-house inspection program, a public safety plan, and an emergency action plan; removing all vegetation growing on the project structures; and submitting a revised dam breach analysis.

¹² The river had crested at 14 feet (four feet above flood stage). The National Weather Service's Advanced Hydrologic Prediction Service considers flood stage on the Des Moines River at the City to be at 10 feet, with moderate flooding at approximately 13 feet and major flooding at approximately 14 feet. *See* <http://www.crh.noaa.gov/ahps2/hydrograph.php?wfo=dmx&gage=fodi4&rssDate=1200517200>.

representatives of Fort Dodge Hydro and discussed the condition of the dam, the need for an emergency action plan, a dam breach analysis, and a schedule for installing headwater and tailwater monitoring devices to alert the project operator of rising waters upstream and downstream of the dam.¹³

11. On October 4, 2007, Commission staff notified Fort Dodge Hydro that many of the needed safety repairs are urgent in nature, and that it is unacceptable to wait for the issuance of the license to perform dam safety maintenance and repairs. Rather, staff stated that, by December 31, 2007, Fort Dodge Hydro should develop and file an emergency action plan and an in-house inspection program, inspect and test the five tainter gates, install a mechanism to monitor headwater elevation, and assess and report on the condition of the headwater stoplogs and tailwater stoplogs. Fort Dodge was to submit a plan and schedule for this work by November 4.

12. Between October 18 and 20, 2007, there was another high water event at the project.¹⁴ On October 22, 2007, Fort Dodge Hydro requested an extension of time until November 14 to respond to staff's October 4 Letter.

13. On October 26, 2007, Commission staff sent a certified letter to Fort Dodge Hydro denying the extension request and reiterating the importance of immediate work necessary to ensure the safety of Fort Dodge dam, particularly the spillway tainter gates. Staff noted that three of five spillway gates at the dam are currently inoperable, which could seriously compromise the capability of the dam to safely pass even minor flood events and could result in dam failure or breach during flood loading conditions. Referring to the flood event in August 2007, staff stated that inoperable spillway gates and/or lack of proper operation of the gates had restricted passage of the flood flows, increased upstream flooding, and caused the right embankment to be overtopped. Finally, staff concluded that if Fort Dodge Hydro was unwilling or unable to ensure the necessary remedial measures and repairs to bring the dam into compliance with current dam safety criteria and guidelines are undertaken promptly, its licensing application might be dismissed.

14. In a November 15, 2007 filing, the City stated that Fort Dodge Hydro has no authority to engage in any repairs or operation on the dam, and that the City is working directly with the Iowa Department of Natural Resources, which has the responsibility for

¹³ On the same day, Fort Dodge Hydro filed a letter describing its August 30, 2007 site inspection of the project following the high-water event at the dam.

¹⁴ See October 18, 2007 filing of Fort Dodge Hydro (stating that a flood warning was issued by the National Weather Service's Advanced Hydrologic Service, indicating that at 1:00 p.m., the river was at 7.41 feet stage and the river would be at 9 feet stage at 1:00 p.m. on October 20, 2007).

regulating dam safety in Iowa,¹⁵ to address issues regarding the need for repairs on the dam.

15. Also on November 15, 2007, Fort Dodge Hydro filed a response to staff's October 26, 2007 Letter, stating that it neither owns nor has access to the Fort Dodge dam; that the City has ownership and financial responsibility for the dam; and that it is necessary for the City to complete the dam safety repairs.¹⁶

Discussion

16. The project's dam urgently requires significant safety repairs. Issuing a license for the project would bring the dam within the Commission's jurisdiction and obligate Fort Dodge Hydro to make the repairs,¹⁷ but the record shows that Fort Dodge Hydro does not now possess, nor, given the location of some project works within a public park, will it likely be able to quickly acquire, sufficient rights in the dam to make the urgently-needed repairs. The City opposes issuance of a license to Fort Dodge Hydro and, if a license were issued, likely would fight any efforts by Fort Dodge Hydro to acquire the dam and other project property and facilities.

17. Without the use of eminent domain authority, it is unclear whether or when Fort Dodge Hydro could obtain the necessary rights in the dam.¹⁸ Yet, even if it could successfully use eminent domain authority to obtain the rights, the eminent domain process would, at best, impose an unacceptable delay in Fort Dodge Hydro's acquisition of the rights and completion of the urgently-needed safety repairs. Moreover, as noted, the City is working with the state's dam safety agency to address dam safety issues. Issuance of a license could compromise the City's willingness or ability to continue working with the state, and instead leave us with the responsibility, but not the capability, to require immediate dam safety repairs. While we are not unmindful of Fort Dodge Hydro's efforts in the license application process, our decision must be guided by the paramount concern for ensuring the timely completion of dam safety repairs. Under

¹⁵ In an October 31, 2007 conference call, Commission staff explained that, because currently there is no project at the site that is under license or unlicensed but operating, the Commission cannot require the City to make the necessary repairs.

¹⁶ The letter attached a November 1, 2007 letter from Fort Dodge Hydro to the City identifying the dam safety measures needing immediate attention.

¹⁷ See section 10(c) of the FPA, 16 U.S.C. § 803(c) (2000), which embodies a licensee's fundamental responsibility to keep a project safe and operational. The Commission's hydro project safety regulations are at 18 C.F.R. Part 12 (2007).

¹⁸ See P 5-6 of this order.

these circumstances, we must dismiss Fort Dodge Hydro's application for license, without prejudice to its reapplying for a license at such time as either the dam safety repairs have been completed or it can demonstrate that it has obtained or can quickly obtain the property rights required to make any necessary dam safety repairs in a timely manner.

The Commission orders:

The license application for the Fort Dodge Mill Dam Project filed by Fort Dodge Hydro Development Company on March 21, 2006, is dismissed, without prejudice.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.