

123 FERC ¶ 61,041
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.

Marseilles Hydro Power, LLC

Project No. 12020-016

ORDER TERMINATING LICENSE

(Issued April 17, 2008)

1. On December 17, 2007, Commission staff issued a notice finding that Marseilles Hydro Power, LLC (Marseilles LLC), licensee for the 4,745-kilowatt (kW) Marseilles Hydroelectric Project No. 12020, had failed to commence construction of the project by the statutory deadline, and notifying Marseilles LLC of the consequent probable termination of the license. On January 15, 2008, Marseilles LLC filed a response in opposition to termination, contending that the start of construction had taken place. For the reasons set forth below, we find that, for purposes of section 13 of the Federal Power Act (FPA), construction did not timely commence, and we terminate the license, as section 13 requires.

Preliminary Matters

2. On January 28, 2008, Marseilles Land and Water Company (MLWC), owner of certain project property, filed a motion to intervene in this proceeding, and Marseilles LLC replied in opposition.

3. In post-licensing proceedings, the Commission will entertain motions to intervene where the proceeding entails a material change in the plan of project development or in the terms and conditions of the license, could adversely affect the rights of a property holder in a manner not contemplated by the license, or involves an appeal by an agency or entity specifically given a consultation role with respect to the proceeding.¹ None of the prerequisite conditions for entertaining intervention apply here. Probable termination of the license involves only a determination that construction of the project has not timely commenced, a matter solely between the Commission and its licensee. This action does

¹ See, e.g., *Pacific Gas and Electric Company*, 115 FERC ¶ 61,070 (2006), citing *Kings River Conservation Dist.*, 36 FERC ¶ 61,365 (1986).

not involve a change in project design or adversely affect MLWC's property rights, and MLWC has no consultation role here. Accordingly, MLWC's motion to intervene is denied.

Background

4. The Marseilles Hydroelectric Project was licensed to Marseilles LLC in 2003.² It was to be located at the U.S. Army Corps of Engineers (Corps) Marseilles Dam on the Illinois River in the City of Marseilles, LaSalle County, Illinois. As licensed, the project includes: (1) an existing 55-foot-high by 40-foot-wide by 229-foot-long reinforced concrete powerhouse, housing thirteen generating units ranging in capacity from 220 kW to 500 kW, with a total capacity of 4,745 kW; (2) the 2,730-foot-long, 15-foot-deep, and 80- to 200-foot-wide North Channel Headrace that conveys water from the head gates to the powerhouse; and (3) a 210-foot-long trashrack to be constructed along the upstream side of the forebay area with an additional set of 40-foot-long trashracks.
5. The project's original dam was built in the late 1800s pursuant to state legislation enacted in 1867. Power was added in 1911, and in 1933, the Corps replaced the original dam with the Corps' higher dam. The existing Marseilles Hydroelectric Plant was placed on the *National Register of Historic Places* in 1989. The powerhouse and existing turbine generators need substantial rehabilitation work.
6. Marseilles LLC proposed to rebuild seven original generating units and restore them to operation, and to purchase six additional generating units and install them in restored turbine bays.³
7. Article 301 of the license required Marseilles LLC to commence project construction within two years of license issuance, i.e., by November 28, 2005. Marseilles LLC requested and was granted a two-year extension of the commencement of construction (the maximum permitted by law), until November 28, 2007.⁴
8. By letter dated October 22, 2007, about one month before the deadline to begin project construction, Commission staff notified Marseilles LLC of the upcoming deadline and reminded Marseilles LLC that it must file its detailed plans and specifications and a

² *Marseilles Hydro Power, LLC and Marseilles Land and Water Company*, 105 FERC ¶ 62,131 (2003) (November 2003 Order), *order on reh'g*, 107 FERC ¶ 61,066 (2004). The order issuing the license also dismissed a competing preliminary permit application for the site filed by MLWC.

³ See November 2003 Order, 105 FERC ¶ 62,131 at P 9.

⁴ See March 1, 2006 staff order (unpublished), granting Marseilles LLC's October 6, 2005 extension request.

Quality Control and Inspection Program, and that construction could not commence until these items had been reviewed and approved by Commission staff. On October 26, 2007, Marseilles LLC met with Commission staff from the Commission's Chicago Regional Office and explained that it had purchased a number of generating units at auction, but had decided not to use them at the project. Marseilles LLC planned instead to have six or seven new turbine/generator units manufactured. It stated that it had received bids for the manufacture of the units, but that it had not yet determined the precise number of turbine-generators that it intended to install at the project.⁵

9. As noted, on December 18, 2007, Commission staff notified Marseilles LLC of the probable termination of the license for failure to commence construction by the deadline, and Marseilles LLC filed a response on January 15, 2008.

Discussion

10. Section 13 of the FPA⁶ states in pertinent part:

[T]he licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof The periods for the commencement of construction may be extended once but not longer than two additional years In case the licensee shall not commence actual construction of the project works . . . within the time prescribed in the license . . . , then, after due notice given, the license shall . . . be terminated upon written order of the Commission.

⁵ See Chicago Regional Office memorandum, filed November 19, 2007, summarizing the October 26, 2007 meeting. At the meeting, Marseilles LLC noted that it had completed some site work on the powerhouse (replacing windows and doors, removing trashrack, repairing piers), but that additional powerhouse work was required, including fabrication and installation of the new trashrack system, a new dewatering bulkhead, a new sluice gate, and reconfiguring concrete pits to accept the turbines and generators to be selected. Marseilles LLC does not claim (nor would we accept) that its minor site work constitutes the coordinated, continuous, and significantly intense and active construction on major project features required to constitute the start of project construction on site. See, e.g., *Hydro Matrix Limited Partnership*, 121 FERC ¶ 61,048, at P 16 (2007), citing *Utilities Commission and City of Vanceburg, Kentucky*, 39 FERC ¶ 61,031, at 61,088 (1987).

⁶ 16 U.S.C. § 806 (2000).

11. Commencement of project construction under section 13 of the FPA occurs upon the start of work on facilities or machinery considered to be significant, permanent elements of the project.⁷ Because construction requirements range from building new dams and powerhouses to refurbishing existing ones, the acts which constitute commencement of construction will vary from project to project.

12. In cases where a project will use an existing dam and an existing powerhouse, if the actual time for manufacture of site-specific turbines or generators is equal to or greater than the period of physical construction at the site, the start of manufacture of turbines or generators can be considered the commencement of project construction,⁸ provided that the manufacture is commenced pursuant to an enforceable contract.⁹ In such cases, the licensee must show actual fabrication of turbines or generators in accordance with the engineering specifications for the turbines or generators specifically authorized in the license.¹⁰ The purchase of already-manufactured turbines does not qualify as commencement of project construction.¹¹

13. As an initial matter, Marseilles LLC has not demonstrated that the off-site manufacture of equipment could properly constitute the commencement of construction here. The company states in its January 15, 2008 filing that “much of the ‘construction’ work is repair and restoration of the powerhouse and related structures,” but “also has included manufacturing and fabrication of equipment specified for the Project.”¹² The remainder of its pleading discusses fabrication of project turbines, but provides no information, such as construction schedules, comparing the time needed for the construction of equipment with the time required for on-site construction.¹³ Marseilles LLC’s equivocal and unsupported statements are insufficient to allow us to conclude that the manufacture of turbines, as opposed to on-site work, could constitute the commencement of construction. The cases in which we consider the beginning of off-site manufacture to suffice as the commencement of construction are the exception, rather than the norm, and we would need more, and stronger, evidence than the little that

⁷ See *Cascade Water Power Development Corporation*, 69 FERC ¶ 61,167 (1994).

⁸ See *Atlantic Power Development Corporation*, 37 FERC ¶ 61,131 (1986).

⁹ See *UAH-Braendly Hydro Associates*, 46 FERC ¶ 61,178 (1989).

¹⁰ See *Geoffrey Shadroui*, 70 FERC ¶ 61,237 (1995).

¹¹ *Id.*

¹² January 15, 2008 filing at 2.

¹³ As detailed in n.5, *supra*, required on-site construction in this instance would be substantial.

Marseilles LLC has provided to conclude that off-site manufacture constitutes the commencement of construction in this case.

14. Second, even if we were to determine that the manufacture of off-site equipment could constitute the commencement of construction, Marseilles LLC has not shown that the equipment that it has ordered was authorized under the license.

15. Marseilles LLC claims that construction of the project commenced with the “repair and manufacture” of seven turbines, occurring both prior to as well as after the issuance of the license, under an agreement with Thomas Brothers Hydro, Inc.¹⁴ (Thomas Brothers) and with the commencement of the manufacture of four new turbine units after issuance of the license, begun in anticipation of executing an agreement with the manufacturer, James Leffel & Company (James Leffel). Marseilles LLC admits that any repair or manufacture of the seven Thomas Brothers turbines that occurred prior to issuance of the license does not qualify for the start of project construction, but it argues that turbine repair work done after issuance of the license on five of the seven Thomas Brothers turbines, as well as the start of construction on the four James Leffel turbines, constitute the start of project construction.

16. As noted above, the license for the Marseilles Project authorizes an initial phase in which seven generating units are to be restored to operation, and a second phase, in which six additional units are purchased and installed.¹⁵ Ordering Paragraph (A) of the license order states that the authorized project works are as set forth in pages A-1.1 through A-1.4 of the license application.¹⁶ Those pages of the license application, in turn, describe 13 turbines of different sizes: one 33 inches, one 39 inches, one 40.5 inches, four 42 inches, one 44 inches, one 72 inches, and four 74 inches. Each turbine is also described by manufacturer and model.¹⁷ Appendix I to Marseilles LLC’s January 15 filing includes a letter from Thomas Brothers, describing work that Thomas Brothers has

¹⁴ Marseilles LLC submits a list compiled by one of its employees of manufacturing and repair work done by Thomas Brothers on turbine equipment both before and after the issuance of the license. *See* January 15 filing at Appendix I. The list shows that all of the work done prior to the issuance of the license (which by definition was not done pursuant to the license and therefore does not qualify for determining the start of project construction) involved manufacturing work. The work done after issuance of the license is confined to less substantial repair work, such as painting, welding, and re-assembling certain equipment parts.

¹⁵ *See* November 2003 Order, 105 FERC ¶ 62,131 at P 9.

¹⁶ *Id.* at 64,288.

¹⁷ *See* license application filed by Marseilles LLC (March 15, 2001) at A.1.2.

done and will do on five “74 F, James Leffel turbines.”¹⁸ However, Marseilles LLC’s license application includes (and the license therefore authorizes) only one James Leffel 74 F turbine.¹⁹ Thus, it appears that the turbines on which Thomas Brothers were working have only a partial congruity with the turbines authorized in the license.²⁰ In addition, the contract with James Leffel that Marseilles LLC includes as Appendix II to the January 15 filing states under “scope of supply” that Leffel will supply four “54 S” turbines.²¹ The James Leffel invoice included in the January 15 filing also refers to four 54 S turbines. Marseilles LLC’s application did not seek authorization for, and the Commission did not authorize, any turbines of this size and model.

17. Moreover, in a February 25, 2008 filing entitled “Design Report for Project Rehabilitation,” Marseilles LLC states that it is proposing to install six turbine generating units, rather than the 13 authorized by the license. According to the filing, the turbines will be six identical vertical Leffel Francis turbines (Type 54 S RH). Each unit is rated at 1,060 horsepower (hp) (equivalent to 795 kW) at a design head and flow of 16 feet and 696 cfs, respectively. The generators for Units 1 through 4 are identical vertical Boise units, each with a rating of 800 kW, and generator Units 5 and 6 are identical vertical Edwards units, each with a rating of 790 kW. In contrast, section A.1.1 of the license

¹⁸ See letter from Thomas Brothers Hydro, Inc. to Marseilles Hydroelectric LLC (dated November 22, 2007) at 1. The January 15 filing appears to indicate that at least two of the Thomas Brothers turbines were used turbines that were to be remanufactured for installation in the project. Appendix I of Marseilles LLC’s January 15 filing also includes a November 28, 2007 letter from Marseilles LLC’s parent company, North American Hydro, to Thomas Brothers attaching a November 22, 2007 memorandum from Thomas Brothers to Marseilles LLC stating that Thomas Brothers has two rebuilt turbines “ready for installation” and that it can furnish parts for three more, all for payment of \$80,000. However, the January 15 filing fails to clearly delineate which of the Thomas Brothers turbines were existing (non-project) turbines (which as noted, cannot be used to determine the start of project construction); which turbines were manufactured for Marseilles LLC; and which turbines, if any, were the existing project turbines removed and shipped to Thomas Brothers for rehabilitation work, as described in the license.

¹⁹ The application lists two Leffel 42 Z turbines, one 72 Leffel F, three 74 Leffel Samsons, one Leffel 74 F, one Leffel 39 Z, one Leffel 33 Z, one S. Bennett Smith 40.5 Francis, two 42 Holyoke Hercules D, and one 44 Holyoke Hercules D.

²⁰ Indeed, based on Marseilles LLC’s statement to our Chicago Regional staff that it no longer intended to use old units, but rather to purchase new ones, it is not clear that the Thomas Brothers work has any relevance to the project.

²¹ Appendix II to January 15, 2008 filing at 6.

application describes Units 1 through 6 as having capacities of between 375 and 500 kW. The units now contemplated by Marseilles LLC are clearly not those authorized by the license.

18. In sum, the equipment on which Marseilles LLC may have begun construction is not that authorized by the license. Our concern about such unauthorized changes in project detail is far more than academic. We carefully analyze the safety and environmental impacts of proposed projects. Unreviewed changes in project works may have significant impacts. For example, a larger turbine may not be able to be safely supported by the same structure as a smaller one, or a difference in configuration or flows from an altered model of turbine may have greater adverse impacts on fish passing through a project. We cannot allow substantial changes to project design without Commission approval, and we do not consider the manufacture of facilities other than those authorized to constitute the commencement of construction.²²

19. In its January 15 filing Marseilles LLC states that, sometime in 2007, it concluded that fewer, larger generating units would better utilize the water resource than the thirteen small units authorized under the license, but that the imminent deadline for commencing construction precluded seeking an amendment of the license to authorize the different generating units.²³ Marseilles LLC does not state the exact number or capacities of the larger units. Indeed it states that it is “reviewing the option of ordering additional new units ... in lieu of the refurbished units.”²⁴ Marseilles LLC contends that although the turbines it plans to install at the project are different from, and larger than, those authorized in the license, it will limit the gate openings of the units so that the capacity of the units will be limited to the authorized capacity.²⁵ Based on Marseilles LLC’s filings, it is simply not possible to ascertain the company’s current plans with any certainty. However, it appears clear that the company has ordered work on turbines that are not consistent with its license. A significant change in project works requires our prior approval, regardless of whether altered facilities can possibly be run in a similar fashion to authorized works, and Marseilles LLC must live with the consequences of its decision to make an eleventh-hour change in project design, without first seeking necessary authorization from the Commission.

²² See *Electric Plant Board of the City of Augusta, Kentucky*, 112 FERC ¶ 61,342, at P 23 (2005), citing *CPS Products, Inc.*, 111 FERC ¶ 61,071, at P 13 (2005).

²³ See Marseilles LLC’s January 15, 2008 filing at 2-3.

²⁴ *Id.* at 5.

²⁵ *Id.* at 5, n.2.

20. As a separate matter, Article 302 of the project license requires the licensee to file for Commission review, by 30 days prior to commencing project construction, final contract drawings and specifications for pertinent features of the project.²⁶ On October 26, 2007, Marseilles LLC filed drawings and specification pursuant to Article 302 which did not include details as to the project turbines. As noted above, when the licensee did describe, in its February 25, 2008 filing, the facilities it now proposes to install, they were considerably different from those authorized.

21. Marseilles LLC suggests that Article 302 applies only to on-site construction, and not to the off-site construction of turbine-generator equipment, such that it would be proper for the company to begin off-site activity, which then could be considered the start of project construction, without first obtaining Commission approval of final drawings and specifications of the off-site equipment.²⁷

22. We cannot agree. The language of Article 302 does not distinguish between the start of on-site and off-site construction, and properly so, since off-site construction of project equipment like turbine generators can affect the design of on-site project features such as powerhouses. Adopting Marseilles LLC's interpretation of Article 302 would unduly limit the Commission's reserved authority in Article 302 to make necessary changes in project features. Indeed, this proceeding demonstrates precisely why Article 302 must apply to both off-site and on-site activity: if the company's theory were to prevail, a licensee could make significant changes to project components, without prior Commission knowledge or approval, and then assert that beginning work on the unauthorized components constituted the start of construction. Were we to lose control

²⁶ Article 302, as amended, states in its entirety:

Article 302. Final contract drawings and specifications. The licensee shall file, at least 30 days prior to the start of construction, one copy to the Commission's Division of Dam Safety and Inspections Chicago Regional Director and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the final contract drawings and specifications for pertinent features of the project, such as water retention structures, powerhouse, trashracks, and minimum flow release structure. The Commission may require changes in the plans and specifications to assure a safe and adequate project. If the licensee plans substantial changes to location, size, type, or purpose of the water retention structures, powerhouse, trashracks, and minimum flow release structure, the plans and specifications must be accompanied by revised Exhibit F and G drawings, as necessary.

²⁷ January 15 filing at 5-6.

over the project design and implementation process, we could not adequately protect the public interest.

23. In light of the foregoing, we find that Marseilles LLC has failed to commence construction by the deadline established pursuant to section 13 of the FPA. We therefore must terminate the license.

The Commission orders:

(A) The motion to intervene, filed January 28, 2008, by Marseilles Land and Water Company is denied.

(B) The license for the Marseilles Hydroelectric Project No. 12020 is terminated, effective Monday, May 19, 2008, for failure to commence construction by the deadline in Article 301 of the license, as amended. No license, exemption, or preliminary permit applications for the project site may be filed until Tuesday, May 20, 2008.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.