

124 FERC ¶ 61,036
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. 12020-017

ORDER DENYING REHEARING

(Issued July 17, 2008)

1. Marseilles Hydro Power LLC (Marseilles) has filed a request for rehearing of the Commission's April 17, 2008 order terminating Marseilles' license for the Marseilles Hydroelectric Project No. 12020 for failure to timely commence construction.¹ Because Marseilles shows no error in our prior order, we deny rehearing.

Background

2. In 2003, the Commission issued Marseilles a license for the proposed 4,745-kilowatt Marseilles Hydroelectric Project, 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.² The project was to include an existing powerhouse, housing thirteen generating units. Marseilles proposed to rebuild and restore to operation seven of the original generating units, and to purchase six additional generating units and install them in restored turbine bays.³

3. Article 301 of the license required Marseilles to commence project construction within two years of license issuance, i.e., by November 28, 2005. Marseilles requested

¹ *Marseilles Hydro Power LLC*, 123 FERC ¶ 61,041 (2008) (April 17 Order). In its request for rehearing, Marseilles refers to an April 28, 2008 order. Because no order was issued in these proceedings on April 28, and because Marseilles later cites to the above-cited order, which was issued April 17, 2008, we presume that this is the order Marseilles seeks to challenge.

² *Marseilles Hydro Power, et al.*, 105 FERC ¶ 62,131 (2003), *order on reh'g*, 107 FERC ¶ 61,066 (2004).

³ *See* 105 FERC ¶ 62,131 at P 9.

and was granted a two-year extension of the commencement of construction (the maximum permitted by law), until November 28, 2007.⁴

4. By letter dated October 22, 2007, about one month before the deadline to begin project construction, Commission staff notified Marseilles of the upcoming deadline, and reminded Marseilles that it was required to file detailed plans and specifications and a quality control and inspection program, and that construction could not commence until these items had been reviewed and approved. On November 6, 2007, Marseilles met with 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 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

5. On December 18, 2007, Commission staff notified Marseilles of the probable termination of the license for failure to commence construction by the deadline.⁶ Marseilles filed a response to the notice on January 15, 2008.

6. In the April 17 Order, the Commission explained that, where a project will use an existing dam and powerhouse, the off-site manufacture of site-specific turbines or generators may constitute the commencement of construction, where the time needed to manufacture that equipment is equal to or greater than the period required for physical, on-site construction.⁷ The Commission concluded that Marseilles had not demonstrated that fabrication of the turbines would take longer than on-site construction.⁸ We also

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

⁵ See Chicago Regional Office memorandum, filed November 19, 2007, summarizing the October 26, 2007 meeting.

⁶ See letter from William Guey-Lee (Commission staff) to Mr. Charles Alsberg (Marseilles' representative).

⁷ See April 17 Order, 123 FERC ¶ 61,041 at P 12 and cases cited therein. For example, if a licensee were to demonstrate that it would take 12 months to manufacture turbines and only 10 months to complete on-site activities, the beginning of work on the turbines could constitute the commencement of construction. If, however, it would take 12 months to rehabilitate the project site and 10 months to construct the turbines, "bending metal" on the turbines would not be the start of construction.

⁸ *Id.* at P 13.

explained that, because the equipment with respect to which Marseilles asserted it had started construction was significantly different than that authorized in the project license, the fabrication of that equipment could not amount to the commencement of construction.⁹ Finally, we concluded that Marseilles had not, prior to commencing construction filed with the Commission final contract drawings and specifications, as required by the license.¹⁰ In light of these holdings, we found that Marseilles had failed to commence construction by the deadline established pursuant to section 13 of the Federal Power Act,¹¹ and we terminated the project license.¹²

7. On May 19, 2008, Marseilles filed a timely request for rehearing.

Discussion

A. The Showing for the Commencement of Construction

8. Marseilles admits that it did not “specifically address[] with an affirmative statement” the issue of whether off-site construction could qualify as the commencement of construction.¹³ It asserts, however, that the Equipment Procurement Contract (EPC) attached as Appendix II to its January 15, 2008 filing demonstrates that the time period for fabrication and delivery of equipment extends through December 2008 and that, “[a]t

⁹ *Id.* at P 14-19.

¹⁰ *Id.* at P 20-22.

¹¹ 16 U.S.C. § 806 (2000). Section 13 provides, 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.

¹² *See* April 17 Order, 123 FERC ¶ 61,041 at P 23.

¹³ Request for rehearing at 4.

the time [Marseilles] entered into the EPC Contract, the major on-site work was to start in April 2008 and be completed in September 2008.”¹⁴

9. The contract referenced by Marseilles is dated November 26, 2007, and indeed does provide that the final turbine will be delivered on December 31, 2008. However, Marseilles has provided no information whatsoever regarding the amount of time needed for on-site construction, other than the unsupported assertion by counsel in the request for rehearing that, at the time the EPC was executed, major on-site work was expected to be completed between April and September 2008. This *post hoc* statement, accompanied as it is by no documentation, does not constitute substantial evidence that the time for off-site manufacture would exceed that needed for on-site construction.¹⁵ Moreover, as discussed below, the fact that the equipment on which fabrication began was not authorized by the license precludes our considering work on it to qualify for the start of construction.

10. Marseilles also states that the Commission’s suggestion that Marseilles erred in not demonstrating that off-site construction could qualify as the commencement of construction “is perplexing, inasmuch as there was no procedural or legal obstacle precluding the Commission from soliciting further information from [Marseilles] prior to proceeding with [the April 17] Order.”¹⁶

11. It is a licensee’s responsibility to provide the Commission information sufficient to demonstrate that it has complied with the terms of its license, in this case, the commencement of construction deadline. As discussed in the April 17 Order,¹⁷ there is substantial precedent regarding the showing a licensee must make to demonstrate that

¹⁴ *Id.*

¹⁵ While, in the absence of documentation from Marseilles, we cannot estimate with certainty how long on-site construction would take, it is apparent that on-site work will be substantial. It will include: removal of an earthen ramp upstream of the powerhouse; reconstruction of a retaining wall; vegetation removal; sediment removal; placement of rip rap to protect portions of the project canal; rehabilitating some project gates to automate them; installing a steel trashrack and supporting beams; building a new steel intake dewatering bulkhead and a new sluice gate; reworking concrete pits to hold the turbine and generators; and other concrete work, such as the repair of supporting piers and lengthening powerhouse intake piers. *See* Commission staff memorandum, *supra* n.5.

¹⁶ Request for rehearing at 4.

¹⁷ *See* April 17 Order, 123 FERC ¶ 61,041 at P 12 and 22.

off-site construction satisfies a construction deadline, putting Marseilles on full notice of our requirements. Moreover, Marseilles has now had two opportunities – in responding to the December 18, 2007 notice of probable license termination and in seeking rehearing of the April 17 Order – to make the case that it has properly commenced construction, and has not done so.

B. Marseille's Switch in Equipment

12. Marseilles does not dispute the conclusion in the April 19 Order that the turbines it ordered were not those authorized in the license. It asserts, however, that the unauthorized design changes, rather than representing disregard of license requirements, were “minor design changes” that would allow the installation of efficient, economical new units. Marseilles asserts that it would limit the gate openings of the new, higher-capacity turbines to keep their capacity at the licensed level.¹⁸ The company maintains that the April 17 Order errs in concluding that no deviation from a license can be permitted as “de minimus, substantial completion, revised specifications, or drawings to be approved as built.”¹⁹

13. In fact, the Commission will, as Marseilles suggests, approve after-the-fact minor changes in project design. However, the changes in question here are not minor. The turbines Marseilles ordered were significantly different than those authorized in the license, both in size and capacity and in number (seven instead of 13).²⁰ Indeed, as recently as its January 15, 2008 filing, it appeared that Marseilles has not yet settled on a final turbine configuration.²¹ Different turbines may require different construction techniques and different powerhouse design, and, as discussed below, may have different environmental impacts. The alterations that Marseilles proposed are simply not so minor in nature as to be permissible without further Commission review.²²

¹⁸ Request for rehearing at 5.

¹⁹ *Id.*

²⁰ *See* April 17 Order, 123 FERC ¶ 61,041 at P 16-18.

²¹ *Id.* P 19.

²² *See, e.g., Boise-Kuna Irrigation District, et al.*, 111 FERC ¶ 61,271, *reh'g denied*, 112 FERC ¶ 61,240 (2005) (license terminated where licensee proposing to construct different-sized turbines, among other changes); *CPS Products, Inc.*, 111 FERC ¶ 61,071 (2005) (terminating license in case where licensee alleged it began construction on turbines different than those authorized in the license).

14. Marseilles states that it specifically advised Commission staff of its intentions, so that “their guidance and cooperation was sought.”²³ We note, however, that Marseilles does not suggest that staff in any way advised it that the changes in project design were minor and did not require prior approval. In fact, in a June 27, 2007 e-mail message to the licensee, staff from our Chicago Regional Office noted that the licensee appeared to be proposing to install seven turbines, as opposed to the 13 authorized by the license and stated that “any deviation from the number of proposed generating units will require a possible amendment of License. . . . Your earliest attention to this situation is urgently requested.”²⁴ Marseilles ignored this guidance.

15. The Commission has a well-recognized process for considering license amendments. Had Marseilles been able to timely settle on a project design, there is no reason why it could not have filed an amendment application seeking authorization for changes to its license. The fact that Marseilles waited to the eleventh hour before contemplating significant alterations to the project is a problem of its own making. Moreover, while we do not favor last-minute amendment requests or requests for stay, absent compelling justification, we will, in appropriate cases, consider staying commencement of construction deadlines in order to give us time to consider timely-filed amendment applications.²⁵ Marseilles failed to take advantage of these regulatory options, and must live with the consequences.

C. Article 302

16. Article 302 of the license for the Marseilles Project provides as follows:

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

²³ Request for rehearing at 5.

²⁴ E-mail from Witold Palikowski (Commission staff) to nah@nahydro.com (Marseilles’ representatives). Even had Commission staff informally advised Marseilles to follow the course it contemplated, such advice would not have been binding on the Commission. *See, e.g., Aliceville Hydro Associates*, 30 FERC ¶ 61,121, *aff’d, Aliceville Hydro Associates v. FERC*, 800 F.2d 1147 (D.C. Cir. 1986).

²⁵ *See, e.g., City of Marion, Kentucky and Smithland Hydroelectric Partners, Ltd.*, 85 FERC ¶ 61,401 (1998).

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.

17. In the April 17 Order, we explained that, contrary to assertions by Marseilles, Article 302 applies to both on-site and off-site construction, because

[t]he 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 over the project design and implementation process, we could not adequately protect the public interest.^[26]

18. On rehearing, Marseilles asserts that our interpretation of Article 302 "is not compelling," because the "the enumerated structures addressed in the text of the article are all inherently on-site project works," and that "there is no basis to suggest that [the] circumstances of this case somehow demonstrate that approval under this article prior to off-site construction is required to prevent the Commission losing control of the project design and implementation process."²⁷

19. Article 302, which has, in similar form, been included for years in all licenses that involve construction, requires Commission approval, prior to construction of "pertinent project features." It is true, as Marseilles notes, that Article 302 modifies "pertinent features" by the phrase "such as water retention structures, powerhouses, trashracks, and minimum flow release structures." However, our use of the phrase "such as" makes clear

²⁶ April 17 Order, 123 FERC ¶ 61,041 at P 22.

²⁷ Request for rehearing at 6.

that the features listed thereafter are some examples of pertinent features, but not the universe of them. Indeed, the list in Article 302 does not include key project works, such as penstocks and transmission lines, but it would not be reasonable to suggest prior approval of the plans for such facilities is not required. It is also true that Article 302 of the Marseilles license does not specify off-site works, but that does not mean that they are not covered by it. An assertion that key components like turbines and generators are not “pertinent” to a project is simply not credible. That the Article 302 list includes only on-site works was most likely because those types of works involve the major construction activity in most cases involving new projects, not because other project features are intended to be excluded.

20. Contrary to Marseilles’ contentions, we do indeed need to retain control over design changes such as those to project turbines and generators in order to carry out our public interest responsibilities. Because different turbines have different characteristics, changes in the number, size, and configuration of turbines may have a direct effect on a project’s ability to meet water quality requirements such as those related to minimum flows, dissolved gases, and water temperature. Different turbines also have different effects on particular fish species that pass through them. Thus, we cannot allow a licensee to significantly alter a licensed project without prior Commission authorization, as Marseilles as proposed to do here, and then claim that beginning work on unauthorized works constitutes the commencement of construction.

The Commission orders:

The request for rehearing filed by Marseilles Hydro Power, LLC on May 19, 2008 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.