

130 FERC ¶ 61,112
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

L.S. Starrett Company

Docket No. UL09-1-001

ORDER DENYING REHEARING

(Issued February 18, 2010)

1. On November 20, 2009, L.S. Starrett Company (Starrett) filed a request for rehearing of an October 21, 2009 order issued by Commission staff (2009 Order).¹ In accordance with section 23(b)(1) of the Federal Power Act (FPA),² the 2009 Order found that Starrett's Crescent Street Dam Project, located on the Millers River in Athol, Worcester County, Massachusetts, is required to be licensed if Starrett completes proposed rehabilitation activities. For the reasons discussed below, we deny rehearing.

Background

2. The Crescent Street Dam Project is a run-of-river project that currently includes: (1) an 87-acre-foot reservoir; (2) a 20-foot-high, 127-foot-long concrete gravity dam; and (3) two powerhouses, one on either side of the dam, with a 250-kilowatt (kW) turbine/generator in the right powerhouse and a 112-kW turbine/generator in the left powerhouse.

3. Section 23(b)(1) of the FPA requires a non-federal hydroelectric project without a valid pre-1920 permit to be licensed if it: (1) is located on a navigable water of the United States; (2) occupies lands of the United States; (3) utilizes surplus power or water power from a government dam; or (4) is located on a stream over which Congress has

¹ *L.S. Starrett Co.*, 129 FERC ¶ 62,053 (2009).

² 16 U.S.C. § 817(b)(1) (2006).

commerce clause jurisdiction, is constructed or modified on or after August 26, 1935, and affects the interests of interstate or foreign commerce.³

4. On December 11, 1992, Commission staff issued an *Order Finding Licensing of Hydroelectric Project Not Required*, which found that the Crescent Street Dam Project was not located on a navigable waterway, does not occupy public lands of the U.S., does not use surplus water from a government dam, and, of significance to the current proceeding, has not undergone post-1935 construction.⁴ Therefore, the 1992 Order concluded that the project was not required to be licensed.

5. In 2006, Starrett decided to replace the 112-kW turbine/generator in the left powerhouse because of frequent outages and malfunctions. On March 18, 2009, the New England Field Office of the Fish and Wildlife Service, U.S. Department of the Interior (FWS), filed with the Commission a request to investigate the jurisdiction of the Crescent Street Dam Project because FWS was concerned that an increase in Starrett's generating capacity will increase the likelihood of fish entrainment and result in injury or mortality of salmon smolts. In response, the Commission sought additional information from Starrett regarding its proposal to replace the failed turbine/generator with a 198-kW turbine/generator. In a letter dated June 5, 2009, in Docket No. UL09-1-000, Starrett informed the Commission that the repair and rehabilitation activities would not increase the project's capacity above the 362 kW total capacity referenced in the 1992 Order. Starrett explained that the turbine/generator in the right powerhouse had an installed capacity of 250 kW, but in fact could only operate at 80 kW because of the limited availability of hydrostatic head and flow at the site. Thus, Starrett reasoned, replacing the 112-kW turbine/generator in the left powerhouse with a new 198-kW turbine/generator would bring the total capacity of the project to 278 kW (198 kW plus 80 kW), which is less than the installed capacity of 362 kW described in the 1992 Order.

6. In the 2009 Order, Commission staff found that Starrett's argument is incorrect. The 2009 Order explained that, in determining post-1935 construction, the relevant factor is the project's installed capacity, which is the lesser of the ratings of the generator or turbine units.⁵ The 2009 Order further explained that the Commission does not consider other capacity-limiting factors, such as stream flow, available head, or other operational constraints in determining installed capacity. Thus, the 2009 Order found that Starrett's use of an actual capacity of 80 kW rather than the installed capacity of 250 kW for the turbine/generator in the right powerhouse to calculate total capacity for the project was

³ *Id.*

⁴ *L.S. Starrett Co.*, 61 FERC ¶ 62,200 (1992) (1992 Order).

⁵ *See* 18 C.F.R. § 11.1(i) (2009).

improper because it was based on physical limitations of head and flow at the site, rather than the turbine capacity as a limiting factor. The 2009 Order further explained that jurisdictional determinations must be made consistently and therefore we could not base our determination in the 1992 Order on the project's installed capacity and then use the project's actual capacity for assessing jurisdiction in the 2009 Order. The 2009 Order concluded that the rehabilitated and new equipment will increase the installed capacity of the project by approximately 76 kW, from the 362 kW (112 kW plus 250 kW) cited in the 1992 Order to 448 kW (198 kW plus 250 kW).

7. On rehearing, Starrett disputes the 2009 Order's findings (1) that the replacement of the turbine/generator in the left powerhouse constitutes post-1935 construction, and (2) that connection to the interstate grid "affects interstate commerce."⁶

Discussion

A. Post-1935 Construction

8. As noted above, the Crescent Street Dam Project is required to be licensed if it: (1) is located on a stream over which Congress has commerce clause jurisdiction; (2) is constructed or modified on or after August 26, 1935; and (3) affects the interests of interstate or foreign commerce.⁷ While ordinary repair, maintenance, or reconstruction at a project built before 1935 does not constitute post-1935 construction,⁸ the enlargement of a dam or other project works, including the addition of generating capacity, constitutes post-1935 construction for section 23(b)(1) purposes.⁹

9. In the 2009 Order, Commission staff found that Starrett's proposal to install a 198-kW turbine/generator in the left powerhouse to replace the failed 112-kW turbine/generator would increase the project's total installed capacity by 76 kW. The 2009 Order found that, in combination with the 250-kW turbine/generator in the right powerhouse, the rehabilitated and new equipment will increase the capacity of the project

⁶ Starrett does not take issue with the 2009 Order's finding that the project is located on a Commerce Clause stream. It is well-settled that the headwaters and tributaries of navigable waters are commerce clause streams. *Fed. Power Comm'n v. Union Electric Co.*, 381 U.S. 90, 94-96 (1965).

⁷ 16 U.S.C. § 817(b)(1) (2006).

⁸ See, e.g., *Puget Sound Power and Light Co. v. Fed. Power Comm'n*, 557 F.2d 1311 (9th Cir. 1977); *Farmington River Power Co. v. Fed. Power Comm'n*, 455 F.2d 86, 88-91 (2d Cir. 1972).

⁹ *Gilman Brothers Co.*, 67 FERC ¶ 61,151, at 61,436 (1994).

from the 362 kW referenced in the 1992 order to 448 kW. The 2009 order concluded that because Starrett's proposed rehabilitation would increase the project's installed capacity, the project will have undergone post-1935 construction, and will be required to be licensed.

10. On rehearing, Starrett argues that the operating capacity of the project will remain below the 362 kW described in the 1992 Order, which found licensing was not required. Starrett states that it is not proposing post-1935 construction because it is simply replacing a generator that has failed, and making minor changes to accommodate the replacement generator.¹⁰ Starrett asserts that the Commission's practice of finding post-1935 construction solely on the basis of an increase in installed capacity has no rational basis. Starrett points out that if it had instead replaced the 250-kW turbine/generator in the right powerhouse with the same 198-kW turbine/generator that it currently proposes in the left powerhouse, the total installed capacity of the project would have been reduced from 362 kW to 310 kW, and the Commission would not have required licensing because there would not have been an increase in installed capacity.

11. It is well-settled that licensing is required of projects constructed prior to 1935 where there has been a post-1935 increase in installed capacity.¹¹ The installed capacity of a project is the lesser of the maximum generator capacity or the maximum turbine

¹⁰ Starrett states that it sought Commission staff advice regarding replacement of the turbine and that staff indicated through telephone conversations that the project could remain non-jurisdictional as long as the amount of power produced was not increased above the level referenced in the 1992 order. Staff's advice to Starrett is not memorialized in the written record of this proceeding, therefore we cannot evaluate whether Starrett's conclusion, that the actual capacity of one turbine could be combined with the installed capacity of the other turbine, represented a reasonable reliance on staff advice. In any event, the opinion or advice of staff does not bind the Commission. 18 C.F.R. § 4.32(h) (2009).

¹¹ See, e.g., *Gilman Brothers*, 67 FERC ¶ 61,151, at 61,436 (1994) (finding post-1935 construction because replacement turbine increased installed generating capacity from 142.5 kW to 250 kW); *Habersham Mills*, 56 FERC ¶ 61,077 (1991), *aff'd on other grounds*, 976 F.2d 1381 (1992) (finding post-1935 construction because replacement turbine increased the generating capacity of the project); *Puget*, 557 F.2d 1311, 1316 (9th Cir. 1977) (project reconstructed to its original specifications and configuration, where the electrical generating capacity remains the same today as before 1935, does not constitute post-1935 construction).

capacity.¹² The Commission does not take into account other limiting factors such as stream flow, available hydrostatic head, or other operational constraints in determining a licensed project's authorized installed capacity.¹³

12. Starrett's replacement of the turbine/generator in the left powerhouse with a turbine/generator that has a larger installed capacity will increase the installed capacity of the entire project. To make a determination that Starrett's actual realized capacity will be less than the installed capacity in the 1992 Order would be inconsistent with both our 1992 Order, which made a capacity determination based on installed capacity, and our regulations and practice. The very purpose of a standardized definition for installed capacity is to avoid case-specific adjustments, based on physical conditions that might affect the capacity realized by a turbine, that are neither necessary in the FPA context nor administratively feasible.¹⁴ Therefore, Commission staff correctly concluded that replacing the turbine/generator in the left powerhouse will result in a 76 kW increase in the project's installed capacity for a total installed capacity for the project of 362 kW (112 kW plus 250 kW), which will constitute post-1935 construction.¹⁵

¹² See 18 C.F.R. § 11.1(i) (2009) (defining "authorized installed capacity" for purposes of assessing annual charges). The term "authorized" simply refers to the installed capacity that is authorized in the license. Installed capacity is also used for jurisdictional purposes. See, e.g., *Thomas Hodgson & Sons, Inc.*, 67 FERC ¶ 61,202, at 61,633 (1994), *rev'd on other grounds*, 49 F.3d 822 (1st Cir. 1995); *Gilman Brothers*, 67 FERC ¶ 61,151 at 61,436 n.10 (the project's installed capacity, not actual generation, is the relevant factor in determining post-1935 construction).

¹³ See, e.g., *Nekoosa Packaging Corp.*, 73 FERC ¶ 61,291, at 61,811 (1995) (denying exemptee's rehearing request to use the actual realized capacity of its turbine because the Commission's definition of "authorized installed capacity" was chosen specifically to avoid having to calculate project-by-project adjustments to turbine ratings to reflect the myriad possible site-specific hydraulic conditions that can affect a turbine's performance); *Public Utility District No. 2 of Grant County, Wash.*, 62 FERC ¶ 61,229, at 62,557-58 (1993) (declining to adjust administrative annual charges based on authorized installed capacity where stream flow, rather than a turbine limitation, causes a generation unit to operate at less than maximum capacity).

¹⁴ *Nekoosa Packaging Corp.*, 73 FERC ¶ 61,291, at 61,811 (1995); *Charges and Fees for Hydroelectric Projects*, Order No. 576, FERC Stats. & Regs. ¶ 31,016, at 31,303-304 (1995).

¹⁵ We acknowledge Starrett's argument that if the turbine/generator in the right powerhouse had been proposed to be replaced, there would not be an increase in the project's installed capacity, and therefore no post-1935 construction on that basis.

(continued...)

13. In the 2009 Order, Commission staff also found that the powerhouse floor will be lowered by 5.2 feet to provide nearly seven feet of additional head, approximately 10 cubic feet of bedrock will be excavated from the river bottom, and the powerhouse will undergo renovation to improve the plunge pool for installation of the draft tube, and to widen the outlet portal from the powerhouse. On rehearing, Starrett argues that in fact, no additional head is provided because the total head from headwater to tailwater is unchanged. We note that in Starrett's June 5, 2009 letter to the Commission, Starrett included tables indicating that net head for the original turbine/generator in the left powerhouse was 8.5 feet, and net head for the proposed replacement would be 15.1 feet. While Starrett now argues that total head is unchanged, it provides no specific information to dispute this earlier identification of almost seven feet of additional head. Therefore, without more specific information, we have no basis for accepting Starrett's statement that total head will remain unchanged. The referenced construction and increase in head provides an independent basis for the conclusion that Starrett proposes post-1935 construction, even were it not also proposing to increase turbine capacity.¹⁶

B. Interests of Interstate or Foreign Commerce

14. Once it has been determined that a project is on a commerce clause stream and has undergone post-1935 construction, a project is required to be licensed if it would affect the interests of interstate or foreign commerce.¹⁷ It is well-settled that a project that is interconnected to the interstate electrical grid affects the interests of interstate or foreign commerce.¹⁸

However, this is because replacing a 250-kW turbine/generator with a 198-kW turbine/generator would reduce rather than increase the project's installed capacity, and, in any event, is not what Starrett proposes here.

¹⁶ Even if Starrett were not increasing hydrostatic head, we would have to determine whether the construction, standing alone, would be considered post-1935 construction. There is clearly a point at which construction, even if it does not increase capacity, must be considered post-1935 construction, for example, building a new powerhouse.

¹⁷ In adopting the language requiring an effect on the interests of interstate commerce in FPA section 23(b)(1), Congress intended to invoke "its full authority over commerce, without qualification." *Fed. Power Comm'n. v. Union Elec. Co.*, 381 U.S. 90, 97 (1965).

¹⁸ *Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992).

15. In *Habersham Mills*, two small developments supplied electric power to the Habersham Mills (Habersham) plant, and sold occasional excess electricity to the local utility, from which Habersham also purchased any additional electrical power needed by the plant.¹⁹ The Commission found that the Habersham projects affect interstate commerce even though their sole purpose is to supply electricity to the Habersham plant.²⁰ Habersham subsequently ceased all sales of excess electricity to the local utility, but the Commission found that licensing was still required for the Habersham projects because they affect interstate commerce by altering the supply of, or the demand for, electricity flowing across state lines.²¹ On appeal to the United States Court of Appeals for the Eleventh Circuit, Habersham argued that the impact of its projects is too trivial to justify federal regulations under the Commerce Clause. The court upheld the Commission's conclusion that small hydroelectric projects like Habersham's affect interstate commerce by displacing power from the grid and affirmed the Commission's conclusion that the cumulative effect of similar small hydroelectric projects on interstate commerce is significant.²²

16. In the 2009 Order, Commission staff found that the Crescent Street Dam Project affects interstate commerce because it is connected to the interstate grid. On rehearing, Starrett argues that its project does not affect the interests of interstate commerce. Starrett asserts that although it is connected to the interstate grid, the hydropower produced by the project is consumed onsite, with additional electric power purchased through a local utility as needed.

17. As in *Habersham Mills*, the use of power from the Crescent Street Dam Project by Starrett displaces power that Starrett would otherwise receive from the interstate grid. The Crescent Street Dam Project is a member of a national class of judicially-recognized small hydroelectric projects whose activities collectively affect interstate commerce by displacing power that would otherwise be generated elsewhere on the interstate system.²³ Furthermore, because our analysis focuses on the class of small hydroelectric projects that collectively affect interstate commerce, there is no *de minimus* threshold that must be met before determining that a project displaces power on the interstate system.

¹⁹ *Habersham Mills*, 56 FERC ¶ 61,077 (1991); *Habersham Mills*, 55 FERC ¶ 61,158 (1991).

²⁰ *Id.*

²¹ *Habersham Mills*, 57 FERC ¶ 61,351 (1991).

²² *Habersham Mills*, 976 F.2d 1381, 1385 (11th Cir. 1992).

²³ *Id.*

Therefore, because the Crescent Street Dam Project is connected to the interstate grid and because it provides power to Starrett that it would otherwise receive from the interstate grid, rehearing is denied on this issue.

18. Since the Crescent Street Dam Project is located on a commerce clause stream and affects the interests of interstate commerce, licensing of the project is required if Starrett engages in post-1935 construction by replacing the left powerhouse turbine as proposed, or increasing hydrostatic head, or, possibly, altering the existing powerhouse and outlet portal.

The Commission orders:

The request for rehearing filed by the L.S. Starrett Company on November 20, 2009, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.