

132 FERC ¶ 61,036  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

L.S. Starrett Company

Docket No. UL09-1-002

ORDER DENYING MOTION FOR STAY

(Issued July 15, 2010)

1. On November 20, 2009, L.S. Starrett Company (Starrett) filed a motion for stay Commission staff's October 21, 2009 Order Finding Licensing of Hydroelectric Project Required (2009 Order) pending the appeals process.<sup>1</sup> The 2009 Order found that Starrett's Crescent Street Dam Project, located on the Millers River in Athol, Worcester County, Massachusetts, would require licensing if Starrett undertakes proposed rehabilitation activities. As discussed below, we deny the motion for stay.

**Background**

2. The Crescent Street Dam Project is an existing run-of-river project that 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. The 2009 Order determined that Starrett's plan to increase the installed capacity of its project by replacing the 112-kW turbine/generator with a 198-kW turbine/generator would constitute post-1935 construction. The 2009 Order therefore found that if the proposed rehabilitation activities were conducted, licensing would be required pursuant to section 23(b)(1) of the Federal Power Act (FPA),<sup>2</sup> because the proposed modifications would constitute post-1935 construction, the project is located on a Commerce Clause stream, and the project affects interstate commerce by connecting to the interstate grid. The 2009 Order required Starrett to file within 90 days: (1) a schedule for submitting, no

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

<sup>2</sup> 16 U.S.C. § 817(1) (2006).

later than 36 months after the issuance of the order, a license or exemption application conforming to Part 4 of the Commission's regulations (Licensing Schedule), and (2) a schedule for complying with Part 12 of the Commission's regulations, which requires filing an emergency action plan, in accordance with section 12.20 of the Commission's regulations, no less than six months from the issuance of the order (Part 12 Schedule).<sup>3</sup> On November 20, 2009, Starrett filed a request for rehearing and a motion to stay the 2009 Order. On February 18, 2010, the Commission denied Starrett's request for rehearing.<sup>4</sup>

4. On December 16, 2009, the Department of the Interior (Interior) filed an answer urging the Commission to deny Starrett's motion for stay. Interior asserts that granting the stay would permit construction in violation of section 23(b)(1) of the FPA,<sup>5</sup> would circumvent the licensing process required by section 4 of the FPA,<sup>6</sup> and would bypass the necessary environmental considerations required by the National Environmental Policy Act (NEPA).<sup>7</sup>

5. On December 17, 2009, the Deerfield/Millers Chapter of Trout Unlimited (Trout Unlimited) filed comments opposing the motion for stay. Trout Unlimited is concerned that during much of the year, there is insufficient flow to supply the amount of spill necessary for fish and eel to pass over the dam, and that the one-inch space between the bars on the trash rack will not prevent eel and fish from passing into the turbines. Trout Unlimited asserts that this situation, combined with the new crossflow turbine's high fish and eel mortality rate, would provide inadequate protection for aquatic life.

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<sup>3</sup> 18 C.F.R. Part 12 (2010).

<sup>4</sup> *L.S. Starrett Co.*, 130 FERC ¶ 61,112 (2010), *appeal filed*, No. 10-1470 (1st Cir. filed Apr. 15, 2010). The Commission upheld the 2009 Order's finding that the project's proposed rehabilitation constituted post-1935 construction because the larger replacement turbine/generator in the left powerhouse would increase the installed capacity of the entire project, the powerhouse floor would be lowered by 5.2 feet to provide nearly 7 feet of additional hydrostatic head, approximately 10 cubic feet of bedrock would be excavated from the river floor, and the powerhouse would be renovated to improve the plunge pool for installation of the draft tube and to widen the outlet portal.

<sup>5</sup> 16 U.S.C. § 817(1) (2006).

<sup>6</sup> 16 U.S.C. § 799 (2006).

<sup>7</sup> 42 U.S.C. § 4321 (2006).

## Discussion

6. As noted above, the 2009 Order required Starrett to file a Licensing Schedule and a Part 12 Schedule. Although Starrett has filed a Licensing Schedule, the Part 12 Schedule remains outstanding. In its motion for a stay of the 2009 Order, Starrett argues that it should be allowed to complete construction, and to test the new turbine/generator in preparation for its installation.<sup>8</sup> Starrett states that it has lowered the powerhouse floor and wants to continue making the scheduled improvements. Starrett also states that it has begun, and wants to continue, dredging the Millers River, and that it wants to install the new turbine/generator, which has been delivered. Starrett contends that granting the stay would not prejudice the Commission or any interested party, and that requiring Starrett to comply with the 2009 Order would impose economic harm on Starrett because of the cost of complying with the 2009 Order, and the potential inability to utilize hydropower while this matter is pending. Starrett also argues that construction activities must continue for safety reasons, because the basement foundation of the powerhouse building has been exposed and is being temporarily supported by steel beams behind a coffer dam. Starrett explains that this coffer dam could be overtopped by high seasonal flows, putting the work to date at risk. Starrett further argues that it relied upon staff advice in determining that the new turbine/generator would not alter the Crescent Street Dam Project's status as an unlicensed project.<sup>9</sup>

7. In arguing it should be allowed to complete construction and test the new turbine/generator, Starrett incorrectly assumes that if the Commission grants the motion for stay, it would be authorizing these activities. The 2009 Order concluded that Starrett's rehabilitation activities, including the installation of the new turbine, require licensing. Despite Starrett's assertion to the contrary, granting the motion for stay would not have the effect of approving construction. The 2009 Order found that Starrett's

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<sup>8</sup> Motion for Stay at 6.

<sup>9</sup> *Id.* at 3-5. In the order denying rehearing, we responded to Starrett's contention that, when it sought Commission staff advice regarding replacement of the turbine, staff had indicated through telephone conversations that the project could remain non-jurisdictional as long as it did not increase the amount of power produced above the level referenced in the 1992 Order Finding Licensing Not Required. *L.S. Starrett Co.*, 61 FERC 62,200 (1992). We noted that staff's advice to Starrett was not memorialized in the written record, and therefore the Commission could not evaluate whether Starrett's conclusion, that the total capacity could be calculated by combining the actual capacity of one turbine with the installed capacity of the other turbine, represented a reasonable reliance on staff advice. *L.S. Starrett Co.*, 130 FERC ¶ 61,112, at n.10 (2010). Moreover, as noted in that order, the opinion or advice of staff does not bind the Commission. 18 C.F.R. § 4.32(h) (2010).

proposed modifications to the Crescent Street Dam Project constitute post-1935 construction. Engaging in post-1935 construction at an unlicensed project on a commerce clause stream that affects interstate commerce triggers the licensing requirement under section 23(b)(1) of the FPA.<sup>10</sup> The 2009 Order is simply an administrative recognition of this statutory requirement. Regardless of whether the Commission had issued the 2009 Order, any post-1935 construction at the Crescent Street Dam Project without a license would be in violation of FPA section 23(b)(1).<sup>11</sup> Given our conclusion that Starrett's activities cannot be conducted without a license, the Commission cannot authorize Starrett to continue with unlicensed post-1935 construction. The FPA gives us no authority to allow otherwise unlawful activities pending judicial review. Thus, granting a stay would not give Starrett the relief it seeks.

8. In addition, Starrett has failed to demonstrate that justice requires a stay. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act:<sup>12</sup> a stay will be granted if the Commission finds that "justice so requires."<sup>13</sup> Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest.<sup>14</sup>

9. In order for the requirement of irreparable injury to be met for a stay, the injury must be both certain and great, actual and not theoretical.<sup>15</sup> Economic loss alone does not constitute irreparable harm.<sup>16</sup> Starrett contends that compliance with the 2009 Order will injure it by imposing significant compliance costs and by potentially halting its generation of hydroelectric power while this matter is pending. Both of these injuries are economic in nature and fail to meet the irreparable injury standard. Starrett further contends that compliance with the 2009 Order will create safety issues due to seasonal flows potentially overtopping the coffer dam if construction is halted, thereby putting its

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<sup>10</sup> 16 U.S.C. § 817(1) (2006).

<sup>11</sup> *Fed. Power Comm'n v. Union Power Co.*, 381 U.S. 90, 91 (1965).

<sup>12</sup> 5 U.S.C. § 705 (2006).

<sup>13</sup> *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 8 (2008).

<sup>14</sup> *See, e.g., Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

<sup>15</sup> *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at P 26 (2001), (citing *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n.*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

<sup>16</sup> *Id.*

construction to date at risk.<sup>17</sup> Starrett has not provided any evidence that overtopping the coffer dam would raise safety concerns. Rather, as with Starrett's other alleged injuries, this one is also economic in nature and therefore does not constitute an irreparable injury. Granting Starrett's motion for stay would not authorize Starrett to engage in post-1935 construction; it would only stay the requirement that Starrett file a Licensing Schedule and a Part 12 Schedule. Such a requirement does not cause irreparable injury to Starrett.<sup>18</sup>

10. Starrett also argues that a stay is warranted because the Commission and other interested parties would not be prejudiced if a stay were granted. Interior and Trout Unlimited filed comments expressing concern that there may be impacts to fish and wildlife if Starrett's proposed rehabilitation continues. Interior and Trout Unlimited emphasized that the Commission's licensing process, which balances development purposes, energy conservation, and environmental protection, should be followed. Licensing of the Crescent Street Dam Project is required under FPA section 23(b)(1) because Starrett has proposed, or is possibly engaged in, post-1935 construction. The fish and wildlife concerns raised by Interior and Trout Unlimited would occur only if Starrett continues with its plans for post-1935 construction. Thus, even if we could allow Starrett to continue construction, doing so would alter, rather than maintain, the status quo, and could negatively affect aquatic resources, contrary to the public interest. As previously explained, unless licensed or exempted by the Commission, any post-1935 construction violates FPA section 23(b)(1).<sup>19</sup>

11. We do not believe granting a stay here would be in the public interest. Granting the motion for stay would merely stay the 2009 Order's requirement that Starrett file a Licensing Schedule and a Part 12 Schedule. Starrett has already filed its Licensing Schedule, and can request an extension to submit its Part 12 Schedule. Therefore, justice does not require that the Commission grant Starrett's motion for stay, and the motion is denied.

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<sup>17</sup> Motion for Stay at 5.

<sup>18</sup> Starrett may request an extension of time to file a Part 12 Schedule.

<sup>19</sup> If Starrett nevertheless elects to proceed with its plans, it does so at its own risk, and could face the need to make substantial future modifications to its project.

The Commission orders:

The motion for stay by L.S. Starrett Company filed on November 20, 2009, is denied.

By the Commission. Commissioner LaFleur voting present.

( S E A L )

Kimberly D. Bose,  
Secretary.