

132 FERC ¶ 61,225
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.

City of Broken Bow, Oklahoma

Project No. 12646-012

ORDER GRANTING STAY IN PART

(Issued September 16, 2010)

1. On May 12, 2010, the City of Broken Bow, Oklahoma, licensee for the Pine Creek Lake Hydroelectric Project No. 12646, filed a request for a stay of the project license pending a detailed risk assessment and dam safety modification study to be completed by the U.S. Army Corps of Engineers (Corps). As discussed below, we will grant the request in part.

Background

2. The 6.4-megawatt (MW) Pine Creek Project was licensed on April 8, 2009.¹ The project is to be located at the Corps Pine Creek Lake Dam on the Little River, near the town of Broken Bow, McCurtain County, Oklahoma. The project will involve installing a steel liner in the Corps' existing 13-foot-diameter conduit and constructing a new 130-foot-long outlet structure that will connect to the conduit and act as the new intake structure for a new powerhouse also to be constructed. Article 301 of the license requires the City to commence construction of the project within two years from the issuance date of the license, which is April 8, 2011.²

3. Article 305 of the license states that the licensee's design and construction of the facilities affecting the structural integrity of the Government project must be conducted under the review and approval of the Corps.³ Further, Article 307 requires the licensee to

¹ *City of Broken Bow, Oklahoma*, 127 FERC ¶ 62,022 (2009).

² *Id.*

³ *Id.*

submit to periodic or continuous inspections by the Corps.⁴ Article 310 requires written approval by the Corps prior to any project construction.⁵

4. On March 1, 2010, the City informed the Commission that the City received notice from the Corps that a potentially serious issue was identified with the Pine Creek embankment and conduit, placing the project into a high risk category. The Corps officially notified the Commission of this issue on March 25, 2010,⁶ stating that no modification of the conduit would be approved before a detailed risk assessment and dam safety modification study (DSMS) was completed. Due to other high priority projects within the Corps, the Corps stated in the same letter that the DSMS could take several years to complete.

5. The City stated in its March 1, 2010 letter that it did “not see any way to proceed effectively since the [Corps] is required to review and approve all structural designs that affect the existing project.”⁷ On May 12, 2010, the City formally requested a “Stay of License” for the Pine Creek Project. Due to the Corps’ required DSMS, the City asserts that “other work cannot proceed without a decision on this issue,” and the entire project is “on-hold” during the Corp’s design review process.⁸ Thus, the City requests a stay of license for this project.

Discussion

6. Section 13 of the Federal Power Act requires a licensee to commence project construction no later than four years after issuance of the license; otherwise, the Commission is required to terminate the license.⁹ Hence, the City’s failure to commence construction by April 8, 2013, would cause the termination of its license.

⁴ *Id.*

⁵ *Id.*

⁶ Corps’ March 17, 2010 Letter to the Commission’s Secretary, filed March 25, 2010.

⁷ City of Broken Bow’s March 1, 2010 Letter at 2.

⁸ City of Broken Bow’s May 12, 2010 Letter at 2.

⁹ 16 U.S.C. § 806 (2006). That section states in pertinent part:

That the 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

(continued)

7. It is Commission policy to grant requests for a stay of the commencement of construction deadline, or of the entire license, only in narrowly circumscribed circumstances.¹⁰ Such circumstances may occur where there are preconditions to project construction that are beyond a licensee's control, but which appear likely to be resolved within a definitive timeframe.¹¹

8. In acting on stay requests such as the City's, which involve delay of construction of licensed projects at federal dams pending the conclusion of federal activities at the dam that preclude such construction, the Commission has required the licensee to provide a statement from the federal dam agency setting forth the necessary prerequisites to, and likely timing of, that agency's approval of project construction.¹² In this case, the City has presented evidence that the Corps' studies "could take several years." The Commission finds that this is sufficient proof that the City likely will not be able to timely commence construction.¹³ However, because the extent of the delay caused by the Corps' study is speculative, we will grant the stay for two years, and only Article 301's

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 or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission.

¹⁰ *Gull Industries, Inc.*, 70 FERC ¶ 61,253, at 61,784 (1995).

¹¹ *Gallia Hydro Partners*, 65 FERC ¶ 61,274, at 62,260 (1993)(*Gallia*).

¹² *See Gallia*, 65 FERC at 62,260 (granting licensee a partial stay of license due to Corps' statement that its rehabilitation work on the Corps dam would prevent project construction for two years); *see also East Bench Irrigation District*, 59 FERC ¶ 61,277, at 62,006 (1992) (issuing a 60-day stay of license for a project to be built at a Bureau of Reclamation dam, subject to the licensee filing additional information from the Bureau about the completion of a study of the Bureau's existing dam structure, which was a prerequisite to the Bureau's approval of the design and construction of the licensed project).

¹³ *See, e.g., Joseph M. Keating*, 77 FERC ¶ 61,060, at 61,224-25 (1996) (granting licensee a stay of construction deadline when licensee sought to obtain a special use permit from the Forest Service, which was a prerequisite to any ground-disturbing activities).

construction deadline shall be stayed.¹⁴ At the end of this two-year period, the City may, if necessary, file for an extension of the stay conditioned upon obtaining a more definite completion date of the DSMS from the Corps.¹⁵

9. Consistent with Commission practice,¹⁶ we are making the stay effective on May 12, 2010, the date the City of Broken Bow, Oklahoma, filed its stay request.

The Commission orders:

(A) The motion for stay of license filed by the City of Broken Bow, Oklahoma, on May 12, 2010, is granted as set forth below.

(B) License Article 301 for Project No. 12646-001 is stayed, effective May 12, 2010, for two years.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴ It appears that the licensee has already complied with the majority of the license conditions. If it needs an extension of any remaining requirements, it may request one.

¹⁵ See generally *Pacific Gas and Electric Company*, 115 FERC ¶ 61,062 (2006) (granting extension of stay).

¹⁶ *City of Marion, Kentucky*, 85 FERC ¶ 61,401, at 62,537 (1998).