

142 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

City of Broken Bow, Oklahoma

Project No. 12646-013

ORDER GRANTING FURTHER STAY

(Issued February 21, 2013)

1. On August 21, 2012, the City of Broken Bow, Oklahoma (City), licensee for the Pine Creek Lake Hydroelectric Project (Pine Creek Project) No. 12646, filed a request for a three-year stay of the start of construction deadline pending completion of a dam safety modification study (DSMS) and any repairs determined to be necessary by the U.S. Army Corps of Engineers (Corps). The project will be located at the Corps Pine Creek Lake Dam on the Little River, near the City of Broken Bow, McCurtain County, Oklahoma. As discussed below, we will grant the request.

Background

2. The 6.4-megawatt (MW) Pine Creek Project was licensed on April 8, 2009.¹ The project involves installing a steel liner in the existing 13-foot-diameter conduit at the Corps' Pine Creek Lake Dam 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.

3. Article 305 of the license states that the licensee's design and construction of its project facilities affecting the structural integrity of the existing Pine Creek Lake Dam must be conducted subject to the review and approval of the Corps. Article 310 requires written approval by the Corps prior to any project construction.

4. Article 301 of the license required the City to commence construction of the project within two years from the issuance date of the license (i.e., by April 7, 2011). The Commission stayed the construction for two years pending the Corps' completion of

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

its risk assessment and DSMS, which were prerequisites for its approval of the licensee's modifications to the existing 13-foot-diameter conduit.² The stay expired May 11, 2012.³

5. On August 21, 2012, the City requested the Commission to further stay the start-of-construction deadline for the Pine Creek Project for three additional years. The City attaches a July 24, 2012 Press Release from the Corps indicating that the Corps will complete its DSMS in roughly two years and any necessary permanent dam safety modifications within five years.⁴ Based on discussions with the Corps, the City does not expect a final resolution "until at least 2015 due to [Corps] funding constraints."⁵

6. On January 17, 2013, the City submitted a letter from the Corps notifying the City that the DSMS is scheduled for completion in June 2013 and stating that funding approval for the selected dam safety modifications can take three to five years depending upon available funds.⁶

Discussion

7. Section 13 of the Federal Power Act (FPA) 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.⁷

² *City of Broken Bow, Okla.*, 132 FERC ¶ 61,225, at 62,262 (2010).

³ The stay was effective May 12, 2010, the filing date of the stay request. As of that date, the City had almost 11 months to start project construction. Thus, when the stay expired, the City still had almost 11 months to begin construction.

⁴ U.S. Army Corps of Engineers, July 24, 2012 Press Release at 2, Question 5.

⁵ City of Broken Bow's August 21, 2012 Letter at 2.

⁶ U.S. Army Corps of Engineers, January 17, 2013 Letter at 1.

⁷ 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 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

(continued...)

8. 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.⁸ 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.⁹

9. In acting on stay requests, such as the City's, that 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.¹⁰ In this case, the City has presented evidence that the Corps will complete its DSMS within two years and complete any needed modifications to the dam within five years. We find that this is sufficient proof that the City, for reasons beyond its control, will not be able to timely commence project construction.

10. For the above reasons, we will stay the start-of-construction deadline for an additional three years. Consistent with Commission practice,¹¹ we are making the stay effective on August 21, 2012, the date the City of Broken Bow, Oklahoma, filed its stay request. Upon expiration of the stay on August 20, 2015, the licensee will have until

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.

⁸ *Gull Indus., Inc.*, 70 FERC ¶ 61,253, at 61,784 (1995).

⁹ *Gallia Hydro Partners*, 65 FERC ¶ 61,274, at 62,260 (1993) (*Gallia*).

¹⁰ *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 E. Bench Irrigation Dist.*, 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).

¹¹ *City of Marion, Ky.*, 85 FERC ¶ 61,401, at 62,537 (1998).

April 7, 2016,¹² to begin project construction. When the stay is lifted, the City may request, pursuant to section 13 of the FPA, that this deadline be extended once, for an additional two years (i.e., to April 7, 2018).

The Commission orders:

(A) The motion for stay of license filed by the City of Broken Bow, Oklahoma, on August 21, 2012, is granted as set forth below.

(B) License Article 301 for Project No. 12646 is stayed, effective August 21, 2012, for three years. Upon expiration of the stay on August 20, 2015, the licensee will have until April 7, 2016, to begin project construction.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² While Article 301 of the license set the start-of-construction deadline as April 7, 2011, the Commission's previously issued two-year stay of the deadline extended the deadline to April 7, 2013. The additional three-year stay that we are issuing here extends the deadline to April 7, 2016.