

150 FERC ¶ 61,195  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
Norman C. Bay, and Colette D. Honorable.

Clark Canyon Hydro, LLC

Project No. 12429-013

ORDER TERMINATING LICENSE

(Issued March 19, 2015)

1. On June 27, 2014, Commission staff issued a notice finding that Clark Canyon Hydro, LLC, licensee for the proposed 4.7-megawatt (MW) Clark Canyon Dam Hydroelectric Project No. 12429, had failed to commence construction of the project by the statutory deadline and notifying Clark Canyon of the consequent probable termination of its license. On July 28, 2014, Clark Canyon responded, opposing the termination and contending that it had started construction within the time period prescribed by section 13 of the Federal Power Act (FPA). For the reasons set forth below, we find that, because project construction did not timely commence, section 13 of the FPA requires that the Commission terminate the license.

**Background**

2. This case involves the question of whether the licensee timely commenced construction of a licensed project. Section 13 of the FPA 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 or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission.[<sup>1</sup>]

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<sup>1</sup> 16 U.S.C. § 806 (2012).

3. The Clark Canyon Dam Project was licensed on August 26, 2009.<sup>2</sup> The project was to be located at the U.S. Department of the Interior, Bureau of Reclamation's (Reclamation) Clark Canyon Dam on the Beaverhead River in Beaverhead County, Montana, and would use Reclamation's dam, reservoir, and outlet works.<sup>3</sup>
4. The license authorized: (a) installation of a steel lining in the existing concrete outlet conduit with a 9-foot-diameter bifurcation to the new powerhouse; (b) construction of a 15-foot by 35-foot valve house at the end of the existing outlet conduit, with a 7-foot-diameter flow-through valve on the outlet conduit and a 9-foot-diameter isolation valve located on the penstock conduit; (c) installation of a 9-foot-diameter, 25-foot-long steel penstock bifurcated into an 8-foot-diameter, 40-foot-long steel penstock and a 6-foot-diameter, 30-foot-long steel penstock to direct flow to two turbines; (d) construction of a 30-foot by 50-foot concrete powerhouse, located at the toe of the dam adjacent to the spillway stilling basin, containing two vertical-shaft Francis turbines with individual installed capacities of 3.0 and 1.7 MW, for a combined installed capacity of 4.7 MW, a minimum hydraulic capacity of 87.5 cubic feet per second (cfs), and a maximum hydraulic capacity of 700 cfs; (e) construction of a 300-foot-long project access road, extending from an existing non-project access road, leading to a 30-foot by 30-foot concrete parking pad and transformer adjacent to the powerhouse; and (f) construction of a 7.9-mile-long, 69-kilovolt (kV) overhead transmission line connecting to Idaho Power Company's Peterson Flat substation.<sup>4</sup>
5. Article 301 of the license required the licensee to commence construction of the project works within two years of the issuance date of the license, i.e., by August 25, 2011.

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<sup>2</sup> *Clark Canyon Hydro, LLC*, 128 FERC ¶ 62,129 (2009) (2009 License Order).

<sup>3</sup> The Reclamation facilities consist of: (1) a 147.5-foot-high, 2,950-foot-long earth-filled dam that impounds a reservoir with a surface area of 257,152 acres; (2) a 147.4-foot-high, 67-foot-long, separate uncontrolled overflow spillway; (3) an intake structure with a concrete conduit and shaft house (in the reservoir); and (4) an outlet works (beneath the dam) that includes a structure gate chamber with four 3-foot by 6.5-foot-high pressure gates and an outlet conduit that carries water approximately 360 feet to a stilling basin (in Beaverhead River).

<sup>4</sup> The 2009 license order authorized a 0.3-mile-long buried transmission line. In March 2013, the license was amended to authorize a 7.9-mile-long overhead transmission line located along or within a state highway right-of-way. *Clark Canyon Hydro, LLC*, 142 FERC ¶ 62,192 (2013).

6. By letter of January 22, 2010, the Commission's Division of Dam Safety and Inspections (D2SI) – Portland Regional Office (Regional Engineer or Commission staff) identified the construction-related requirements of the license that must be met before construction could commence.<sup>5</sup> As pertinent here, Clark Canyon had to meet the following requirements of its license before it could commence project construction:

- *Reclamation Review and Approval of Project Design.* Article 2 (of Appendix B to license order) required Clark Canyon to submit its final detailed design drawings and specifications for project facilities to Reclamation for Reclamation's review and approval.<sup>6</sup> Article 7 (of Appendix B to license order) required Clark Canyon to file with the Commission copies of all correspondence between the licensee and Reclamation, and provided that the Commission could not "authorize construction of *any Project works* until Reclamation's written approval of construction plans and specifications [had] been received by the Commission's Regional Engineer" [emphasis added].<sup>7</sup>
- *Regional Engineer's Review and Approval of Project Design.* Article 302 required Clark Canyon to submit for Commission review and approval the project's final design drawings and specifications at least 60 days "prior to the start of *any construction*" [emphasis added].<sup>8</sup> Construction could not commence until the Regional Engineer had "reviewed and commented on the plans and specifications, determined that all preconstruction requirements [had] been satisfied, and authorized the start of construction."<sup>9</sup>
- *Project Financing Plan.* Article 305 provided:

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<sup>5</sup> See letter from Kathleen Clarkson (Commission staff) to Brent L. Smith (Northwest Power Services, Inc.).

<sup>6</sup> 2009 License Order, Article 2 of Appendix B, 128 FERC ¶ 62,129 at 64,313-314.

<sup>7</sup> 2009 License Order, Article 7 of Appendix B, 128 FERC ¶ 62,129 at 64,314 (2009).

<sup>8</sup> Article 302 also required as part of the pre-construction requirements a Quality Control and Inspection Program (Quality Control Plan); a Temporary Construction Emergency Action Plan (Construction Emergency Action Plan); and a Soil Erosion and Sediment Control Plan (Sediment Control Plan).

<sup>9</sup> 128 FERC ¶ 62,129 at 64,302.

At least 90 days before starting construction, the licensee shall file with the Commission, for approval, a project financing plan. The plan must show that the licensee has acquired the funds, or commitment for funds, necessary to construct the project in accordance with this license. The licensee shall not start *any project construction* or ground-disturbing activities that are inseparably associated with the project, before the project financing plan is approved. [Emphasis added.]

The letter directed the licensee to submit a schedule for providing the required information and plans for Commission approval. Clark Canyon did not respond.<sup>10</sup>

7. On July 26, 2011, the licensee filed a request for a two-year extension of the start of construction deadline, i.e., to August 25, 2013. The licensee stated that it would need time to address issues raised by Reclamation prior to starting construction.

8. On July 27, 2011, Clark Canyon filed with the Commission an application to amend the license to incorporate what it identified as two proposed “major changes” to the project as licensed: (1) move the proposed powerhouse to another location, and (2) change the size of the project’s turbines from one 3.0-MW turbine and one 1.7-MW turbine to two 2.35-MW turbines.<sup>11</sup>

9. On August 4, 2011, Commission staff granted a two-year extension (the maximum permitted under section 13 of the FPA),<sup>12</sup> and the final deadline to start project construction became August 25, 2013.

10. On August 9, 2011, Clark Canyon withdrew its amendment application, noting that it and Reclamation had decided to leave the powerhouse in its original location.

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<sup>10</sup> On May 20, 2011, the Regional Engineer sent to the licensee its annual dam safety letter, which included a reminder that the licensee was responsible for being compliant with the terms and conditions of the license. On June 1, 2011, the licensee’s representative signed and returned an acknowledgement of receipt of the letter. See correspondence at eLibrary accession number 20110603-5137.

<sup>11</sup> Application for license amendment filed on July 27, 2011, at 1.

<sup>12</sup> See August 4, 2011 Commission staff order (unpublished), granting the licensee’s July 26, 2011 extension request. Section 13 allows the Commission to grant only one extension of the commencement of construction deadline, for a maximum of two years. See *supra* P 2.

11. On March 12, 2012, the Regional Engineer issued a letter reminding Clark Canyon of the license requirements that must be completed prior to starting project construction and stating that it would not authorize construction of *any* project works until it had received Reclamation's written approval of construction plans and specifications. The letter directed the licensee to submit a "plan and schedule for providing information required by the articles, regulations, and ordering paragraphs of the license."<sup>13</sup> Clark Canyon did not respond.

12. On August 3, 2012, Reclamation sent a letter to Clark Canyon expressing concern regarding "several schedule setbacks since late November 2011 when the project stopped due to issues with [Clark Canyon's] project financing."<sup>14</sup> Reclamation explained that Clark Canyon needed to develop a revised project schedule that included "realistic time requirements to resolve ongoing critical path design issues [and] dam safety issues... ." <sup>15</sup>

13. On October 1, 2012, the licensee submitted non-final design drawings for the project to the Regional Engineer for "review and approval."

14. On October 16, 2012, the Regional Engineer provided preliminary comments. The letter reminded the licensee that the Commission could not authorize construction of any project works until it received Reclamation's written approval of construction plans and specifications. The letter noted, among other things, that there was no indication that the drawings had been submitted to Reclamation or received Reclamation's approval. The letter also noted that portions of the submittal were unreadable or missing information, and that it did not include the information required by the Regional Engineer's letter of March 12, 2012, namely, the licensee's schedule for complying with the pre-construction requirements of the license, and copies of all correspondence between Reclamation and the licensee.

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<sup>13</sup> March 12, 2012 letter at 2. The letter (at 1) reminded the licensee that Article 7 of the license required the licensee to provide the Regional Engineer with copies of all correspondence between the licensee and Reclamation. The letter noted that the licensee had been corresponding with Reclamation for many months and directed the licensee to file copies of past correspondence as well as any future correspondence between the licensee and Reclamation.

<sup>14</sup> August 3, 2012 letter from Reclamation to the licensee (filed August 8, 2012). The letter stated that, while financing issues apparently were resolved in May 2012, there still appeared to be residual funding and contract issues as demonstrated by delays in design work by the licensee's engineering contractor, Civil Science Infrastructure, Inc.

<sup>15</sup> *Id.*

15. On October 24, 2012, Clark Canyon sent to Reclamation, for “information only,” a copy of the design package that it had sent to the Regional Engineer.

16. By letter to the licensee dated October 26, 2012,<sup>16</sup> Reclamation expressed concern with the status of the project, and the multitude of outstanding issues that remained and would need to be resolved prior to Reclamation accepting final designs and allowing onsite construction to be initiated. Noting Clark Canyon’s position that the entire project would not be feasible unless project designs were acceptable and construction could commence by January 2013, the letter stated that there had been several substantial delays on the project since late 2011, that the licensee had not submitted a complete design package in over a year, and that the licensee had failed to meet the deadlines in several schedules to which the licensee and Reclamation had agreed. Reclamation explained that, under these circumstances, it considered initiation of onsite construction for January 2013 infeasible.<sup>17</sup>

17. On October 30, 2012, the licensee filed the project financing plan required by Article 305 of the license. On November 13, 2012, Commission staff contacted the licensee to say that the financing plan was deficient because it failed to demonstrate that the licensee had acquired the funds, or commitment for funds, necessary to construct the project in accordance with the license.<sup>18</sup> The licensee explained that it would file the supplemental documentation once the project design plans received the necessary approval from Reclamation, which it expected in January 2013.<sup>19</sup>

18. On April 8, 2013, the licensee filed with the Commission its final design package for the project.<sup>20</sup> The licensee noted that it was at the same time filing the package with Reclamation for its review and approval.

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<sup>16</sup> Letter from Reclamation to the licensee (filed November 2, 2012).

<sup>17</sup> *Id.*

<sup>18</sup> *See* memorandum of telephone conversation between Kim Carter, FERC, and Brent Smith (placed in record on December 13, 2012).

<sup>19</sup> *Id.*

<sup>20</sup> Letter from Brent L. Smith to Douglas Johnson, Regional Engineer, FERC (dated April 8, 2013). The package included final drawings and specifications, final design report, updated Quality Control Plan, copies of Reclamation correspondence, and updated Construction Emergency Action Plan.

19. On May 29, 2013, the Regional Engineer acknowledged receipt of the April 8 filing and provided comments,<sup>21</sup> focusing on discrepancies among the design report, specifications, and drawings, and concerns regarding geotechnical design assumptions.
20. On June 6, 2013, three months before the August 25, 2013 deadline to commence project construction, Reclamation informed the licensee that it had approved the April 8 final design drawings.<sup>22</sup> The letter acknowledged the Commission's May 29 comments and said that the licensee must use Reclamation's revision process to the extent the comments resulted in changes to the drawings or specifications.<sup>23</sup>
21. On June 25, 2013, the licensee responded to the Regional Engineer's May 29 comment letter, providing some of the required information. On August 5, 2013, the Regional Engineer responded to the licensee's June 25 filing, pointing out continued discrepancies among the design report, specifications, and drawings, and concerns regarding some geotechnical design assumptions. On August 23, 2013, two days before the deadline to commence project construction, the licensee provided its revised design package, which it termed "final," to the Regional Engineer.
22. On August 25, 2013, the deadline to commence project construction passed.
23. On August 27, 2013, the licensee emailed to Commission staff, for informal review, a draft of a revised project financing plan required by license Article 305.<sup>24</sup>
24. On August 28, 2013, just five days after submitting its "final" design package for Commission approval, the licensee filed a new design package that, for the first time, proposed changes to the project's design that the licensee was considering in order to reduce the cost of the project (i.e., value engineering options).<sup>25</sup> It stated that Reclamation had not yet approved the revised design, and that it would file the revised design package for Commission review and approval after Reclamation had reviewed and approved it. In fact, on August 19, 2013, Reclamation had advised the licensee that it had

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<sup>21</sup> Letter from Douglas Johnson, Regional Engineer, to Brent L. Smith.

<sup>22</sup> Letter from Reclamation to Clark Canyon (dated June 6, 2013).

<sup>23</sup> *Id.*

<sup>24</sup> *See* October 31, 2013 letter from Commission staff to the licensee.

<sup>25</sup> Value engineering is a type of engineering that looks for opportunities to reduce cost while maintaining adequate safety and operational measures by, among other things, eliminating redundant design elements.

reviewed the licensee's value engineering proposals and noted that additional analysis would be required before Reclamation could agree to the changes. Reclamation stated that the proposals must be formally submitted for review and acceptance and all project drawings must be updated and accepted to reflect the changes prior to Reclamation's authorization for onsite work.<sup>26</sup>

25. On September 16, 2013, the licensee submitted to Reclamation a revised construction package incorporating its proposed value engineering changes.<sup>27</sup> Reclamation found the submittal to be deficient in numerous respects.<sup>28</sup>

26. Also on September 16, 2013, Clark Canyon filed a letter with the Commission purporting to "update the Commission on the activities associated with the development of the [project]." The letter stated that the "fabrication is complete for the turbines, generators, draft tubes, intakes and other associated components. The embedded parts have been delivered to the construction contractor's storage facility in Boise, Idaho." The letter attached a September 21, 2012 letter from the project engineer noting that Hydrotech Engineering and the licensee had entered into a written contract on May 9, 2011, and that the licensee issued a notice to proceed on December 20, 2011. The letter noted that the project includes the "construction of a powerhouse, installation of two vertical shaft Francis Type Generator and Turbine units (each 2.35 MW) and the lining of an existing concrete outlet conduit and related matters."<sup>29</sup> The letter also had attached seven photos that Clark Canyon asserted showed these manufactured components.

27. On October 31, 2013, Commission staff issued a letter to the licensee regarding the licensee's lack of compliance with the financing plan requirements of license Article 305. The letter described Commission staff efforts to obtain the licensee's compliance, noting that as "discussed on several occasions over the course of a year" both the financing plan previously filed in October 2012 and draft revised plan (submitted for informal review) in August 2013 lacked sufficient information to show that the licensee had acquired the funds, or commitment for funds, necessary to construct

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<sup>26</sup> Letter from Reclamation to the licensee (filed August 26, 2013).

<sup>27</sup> See October 28, 2013 letter from Reclamation to the licensee (filed November 4, 2013).

<sup>28</sup> *Id.*

<sup>29</sup> Letter dated September 21, 2012, addressed "To Whom it May Concern" from Edward M. Collins, Operating Officer, Civil Science Infrastructure, Inc., attached as Appendix A to September 16, 2013 filing.

the project in accordance with its license.<sup>30</sup> The letter explained that, since the plan was originally filed in October 2012, the licensee had informed staff that circumstances relating to the project had changed, including the potential source of funding. The letter requested that the licensee file additional information regarding the project financing plan within 15 days.

28. On November 15, 2013, Clark Canyon filed a letter purporting to “update the Commission on the status of the project financing plan pursuant to Article 305....”<sup>31</sup> The letter asserted that the licensee had arranged for project financing, but that the transfer of the funds could not occur until the project received a notice to proceed from Reclamation and the Regional Engineer. The licensee requested a 30-day extension (until December 15, 2013) to provide a revised project financing plan. No revised plan was filed.

29. On December 2, 2013, the licensee submitted to Reclamation another revised design package, which Reclamation found was deficient in numerous respects.<sup>32</sup>

30. On June 2 and 4, 2014, respectively, the licensee submitted to Reclamation and the Commission another revised “final” design package.

31. On June 27, 2014, Commission staff notified Clark Canyon of the probable termination of the license for failure to commence project construction by the August 25, 2013 deadline. The letter pointed out that the licensee had failed to fulfill the requirements of several articles for which it needed Commission approval prior to commencing construction of the project.

32. The letter further pointed out that, in those situations where manufacturing of turbines/generators of the project could constitute start of construction, the licensee would need to substantiate that the actual fabrication of turbines or generators had begun in accordance with engineering specifications for the particular project. To do so, the licensee would need to provide: (1) copies of a legally enforceable, signed contract to manufacture the turbines or generators; (2) affidavits from the equipment manufacturer attesting to (a) the start of fabrication of the turbines/generators and associated electrical equipment, and (b) the receipt of payment for work performed under the contract; and (3) a manufacturing and payment milestone schedule of the equipment.

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<sup>30</sup> Letter from Kelly Houff (Chief, Engineering Resources Branch, Division of Hydropower Administration and Compliance) to Brent L. Smith.

<sup>31</sup> Letter from Brent L. Smith to Kimberly Bose (Commission Secretary).

<sup>32</sup> See March 3, 2014 letter from Reclamation to the licensee (filed March 10, 2014).

33. The letter explained that Clark Canyon had failed to provide the required evidence of the fabrication of the turbine/generator units. Moreover, based on the information that Clark Canyon provided in its September 16, 2013 letter, it appeared as though any work started was on units that differ from what was authorized in the license. The license authorized two vertical shaft Francis Turbine/Generators, rated at 3.0 megawatts (MW) and 1.7 MW, but the September 16, 2013 filing discussed the fabrication of two same-sized units, each rated at 2.35 MW.<sup>33</sup>

34. Clark Canyon responded on July 28, 2014, arguing that it has met the standard for the commencement of project construction. It provides, as pertinent here: (1) a copy of a May 9, 2011 contract between it and the turbine manufacturer for the manufacture of turbine generating equipment; and (2) a letter from its turbine manufacturer dated May 16, 2012, certifying the start of physical work as of October 1, 2011.<sup>34</sup> In the alternative, Clark Canyon requests that the Commission retroactively stay the commencement of construction deadline. On August 22, 2014, Clark Canyon filed a letter from an auditor confirming payments from Clark Canyon to the turbine manufacturer.<sup>35</sup>

35. On October 30, 2014, Clark Canyon filed a request for expedited action and additional comments, arguing that its case is distinguishable from the Commission's recent order terminating a license for the licensee's failure to commence project construction in *AG Hydro, LLC*.<sup>36</sup>

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<sup>33</sup> As discussed above, Clark Canyon had filed an amendment application in 2011, seeking, among other things, to use two 2.35-megawatt turbines instead of those authorized in the license, but later withdrew that application. *See supra* P 7,9.

<sup>34</sup> Letter from Alina Osorio (Manager of Clark Canyon Hydro, LLC) to Kimberly D. Bose . The filing also included various schematic drawings; photos of completed turbine inlet valves and penstock and turbine components; a progress report dated December 27, 2011; a July 24, 2013 contract between Clark Canyon and its construction company for onsite project construction; a May 30, 2014 energy sales agreement; and emails from Reclamation regarding the federal government shutdown from October 1 to October 16, 2013.

<sup>35</sup> Letter from Kimberly Ognisty, Winston & Strawn, to Kimberly D. Bose.

<sup>36</sup> The Commission issued an order terminating the license for the Applegate Project No. 11910 on October 16, 2014. *AG Hydro, LLC*, 149 FERC ¶ 61,040 (2014).

## Discussion

36. As noted above, section 13 of the FPA states 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 or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission.<sup>37]</sup>

Accordingly, the FPA does not grant the Commission discretion to extend the date by which construction must commence past four years from the date that a license is issued. If a licensee fails to commence construction by the applicable deadline, the FPA mandates that the Commission terminate the license.

37. Therefore, the critical determination in deciding whether the FPA mandates license termination in a given case is determining whether, and, if so, by what date, project construction commenced. Commencement of project construction under section 13 of the FPA occurs upon the start of work on facilities or machinery considered significant, permanent elements of the project.<sup>38</sup> Because construction requirements range from building new dams and powerhouses to refurbishing existing ones, the acts which constitute commencement of construction will vary from project to project.

38. As a general matter, construction commences with on-site work, such as building a powerhouse or other project works. In relatively rare cases where the actual time for the off-site manufacture of site-specific turbines or generators is equal to or greater than the period of physical construction at the site (as, for example, where a project will use an existing dam or existing powerhouse, such that there is relatively little on-site work to be done), the start of manufacture of turbines or generators can be considered the commencement of project construction,<sup>39</sup> provided that the manufacture is commenced

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<sup>37</sup> 16 U.S.C. § 806 (2012).

<sup>38</sup> See, e.g., *Marseilles Hydro Power, LLC*, 123 FERC ¶ 61,041 (2008).

<sup>39</sup> See, e.g., *Atlantic Power Development Corporation*, 37 FERC ¶ 61,131 (1986).

pursuant to an enforceable contract.<sup>40</sup> In order to be considered to have commenced construction in such a case, the licensee must (1) satisfy the pre-construction requirements in the license before manufacturing starts, and (2) show actual fabrication of turbines or generator in accordance with the engineering specifications for the turbines or generators specifically authorized in the license.<sup>41</sup>

39. In the case of the Clark Canyon Dam Project, the licensee demonstrated that off-site fabrication would take slightly longer than on-site activities.<sup>42</sup> However, Clark Canyon failed to satisfy the pre-construction requirements in the license and the turbine/generators that were built were not those authorized in the license. Accordingly, we find that Clark Canyon failed to commence construction by the deadline required by its license.

**A. Licensee Failed to Complete Pre-Construction Requirements**

40. We find, based on the lengthy record of this case, that Clark Canyon failed to satisfy the pre-construction requirements of its license that were prerequisites to its beginning manufacturing of components for its project.<sup>43</sup> As a result, and consistent with Commission precedent, we find that Clark Canyon did not commence construction by the deadline established by its license, as extended by Commission staff.

41. As explained in detail above, Clark Canyon failed to respond to the Regional Engineer's request for a plan and schedule providing information required by the license;<sup>44</sup> provided, on repeated occasions "final" design drawings that Commission staff and Reclamation could not approve;<sup>45</sup> filed deficient financing plans;<sup>46</sup> and failed to

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<sup>40</sup> See *UAH-Braendly Hydro Associates*, 46 FERC ¶ 61,178 (1989).

<sup>41</sup> See *Marseilles Hydro Power, LLC*, 123 FERC ¶ 61,041, *reh'g denied*, 124 FERC ¶ 61,036 (2008) (*Marseilles Hydro*).

<sup>42</sup> See letter from Alina Osorio to Kimberly D. Bose at 4 (filed July 28, 2014) (stating that the estimated time for equipment fabrication was 14 months and that the estimated time for on-construction would be less than one year).

<sup>43</sup> As discussed further below, we also find that Clark Canyon failed to adhere to the engineering specifications in its license for the turbines it did ultimately have manufactured. As a result, the manufacture of the turbines did not constitute the commencement of construction.

<sup>44</sup> See *supra* P 11.

<sup>45</sup> See *supra* PP 13-16, 18-21, 24-25, 29-30.

make several filings.<sup>47</sup> Indeed, Clark Canyon has not to date received Reclamation's or the Commission's approval of its final design drawings and specifications, as required by Articles 2 and 302 of the license. Furthermore, Clark Canyon did not file, or receive Commission approval of, the project's financing plan required by Article 305, despite Commission staff's repeated attempts to obtain the necessary information. Commission staff reminded the licensee on several occasions that it could not authorize the start of construction until the pre-construction requirements of the license had been met. Yet Clark Canyon purported to commence construction of project works in October 2011 which, without the required approvals, was specifically prohibited by Article 7.

42. Clark Canyon's July 28, 2014 filing acknowledges that it did not satisfy these requirements of its license, but argues that at the time Commission staff issued the notice of probable termination it was working to obtain the required authorizations. It had submitted its final design package to the Commission and Reclamation in June 2014 (nine months after the start-of-construction deadline) and was awaiting Reclamation's approval, which it expected sometime after August 2014 (more than a year after the deadline). It intended to submit its final design package to the Commission as soon as it received Reclamation's approval.<sup>48</sup> With respect to the Article 305 project financing plan, Clark Canyon explains that it did not file the plan because it was considering revisions to it that might be necessitated by design changes it was evaluating.

43. It is not in dispute that Clark Canyon failed to satisfy numerous pre-construction requirements of its license, but Clark Canyon argues that its subsequent efforts must be taken into consideration in determining whether to terminate its license based on its failure to commence construction by August 25, 2013, the date required under section 13 of the FPA. However, given the strict requirements of that section, as well as the importance of the license's pre-construction requirements, we find that Clark Canyon cannot be deemed to have timely commenced construction by virtue of actions taken several months, or in some instances more than a year, after the governing statutory deadline of August 25, 2013. While Commission staff, as it did here, works with licensees to help them satisfy the requirements of their license, those efforts and flexibility are not boundless, particularly when the requirements at issue impact the licensee's ability to meet the statutory deadline to commence construction. Here, Clark Canyon had numerous opportunities, including the extra two year period authorized under

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<sup>46</sup> *See supra* PP 17, 28.

<sup>47</sup> *See supra* PP 11, 28.

<sup>48</sup> Letter from Alina Osorio to Kimberly D. Bose, Secretary, FERC, at 2 (filed October 30, 2014).

section 13 of the FPA and approved by Commission staff, to comply with the pre-construction requirements of its license, but failed to do so. Satisfaction of the pre-construction requirements of the license is important because, absent those requirements, a licensee could make significant changes to project components without adequate Commission review to confirm that those changes do not negatively impact either the environment or the reliable operation of the facility as designed, and then assert that beginning work on the unauthorized components constituted the start of construction. Ensuring compliance with those requirements is therefore critical to the Commission's ability to safely and responsibly implement its licensing authority under the FPA.<sup>49</sup>

44. We have similar concerns regarding the need for a licensee to obtain Commission approval of the project financing plan required by Article 305 before we will consider construction to have commenced. Allowing licensees to commence construction without first demonstrating that they have in place sufficient funds to fully develop the project poses the risk of partially constructed projects that cannot be completed. This could have significant financial and environmental impacts, and could make it difficult for us to free the project site for other uses or for development by other entities.

45. Here, the deadline for commencement of construction passed without the licensee having complied with any of the pre-construction requirements of Articles 2, 7, 302, and 305. Since fulfillment of these license requirements was a prerequisite to the start of construction, we find that Clark Canyon did not commence construction by the statutory deadline of August 25, 2013.

**B. Licensee Ordered Turbines Different from Those Authorized in the License**

46. Assuming that the licensee had met the pre-construction requirements of its license, it could have commenced project construction by the start of manufacture of turbines or generators pursuant to an enforceable contract, but only if the fabrication of the turbines or generator was done in accordance with the engineering specifications for those specifically authorized in the license. We find, however, that Clark Canyon failed to have manufactured the turbines it ordered consistent with the engineering specifications included in its license. Accordingly, we cannot find that Clark Canyon commenced construction by the required deadline.

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<sup>49</sup> See *Marseilles Hydro*, 123 FERC ¶ 61,041, at P 22 (2008).

47. The license specifically authorized two vertical shaft Francis turbine/generators, one a 3-MW unit and the other a 1.7-MW unit.<sup>50</sup> At some point in 2011, however, Clark Canyon placed an order for the manufacture of two 2.35-MW turbines.<sup>51</sup>

48. The Commission has addressed this situation in prior orders, and has consistently held that ordering turbines that do not meet the specifications set forth in a license does not constitute the commencement of construction. In *AG Hydro*, the license authorized two 5-MW turbine/generator units, but the licensee instead contracted for the manufacture of one 7.18-MW unit and one 2.82-MW unit.<sup>52</sup> The Commission found that the turbines differed from those authorized, and the licensee's contracting for the construction of turbines differing from those authorized in the project license did not constitute the commencement of construction.<sup>53</sup> Similarly, in *Marseilles Hydro*, the licensee claimed that its construction of turbines that differed from those authorized in the license constituted the commencement of construction. The Commission rejected that contention, explaining that

Our concern about such unauthorized changes in project detail is far more than academic. We carefully analyze the safety and environmental impacts of proposed projects. Unreviewed changes in project works may have significant impacts. For example, a larger turbine may not be able to be safely supported by the same structure as a smaller one, or a difference in configuration or flows from an altered model of turbine may have greater adverse impacts on fish passing through a project. *We cannot allow substantial [changes] to project design without Commission approval, and we do not consider the manufacture of facilities other than those authorized to*

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<sup>50</sup> See Ordering Paragraphs (B) and (C) of license order, 128 FERC ¶ 62,129 at 64,300-01 (authorizing specific turbines, approving and making part of the license (1) portions of Exhibit A of license application that include turbine/generator description, and (2) Exhibit F general design drawings of the turbine/generators).

<sup>51</sup> See *supra* P 26. See also licensee's Project Status Update filed September 16, 2013, Appendix A. The license also authorized construction of an 8-foot-diameter steel penstock leading to the 3-MW turbine and a 6-foot-diameter steel penstock leading to the 1.7-MW turbine. The new 2.35-MW turbines also would have necessitated a change in the size of at least one of the penstocks leading to the units.

<sup>52</sup> *AG Hydro, LLC*, 149 FERC ¶ 61,040, at P 26 (2014) (*AG Hydro*).

<sup>53</sup> *Id.* PP 26-28.

*constitute the commencement of construction.* <sup>[54]</sup>

The Commission also confirmed this conclusion on rehearing, stating that

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 [the licensee] proposed to do here, and then claim that beginning work on unauthorized works constitutes the commencement of construction.<sup>[55]</sup>

49. Clark Canyon claims that its situation is different from *Marseilles Hydro*, because in that case the licensee changed the number, sizes, and types of turbines, and the changes resulted in a different total installed capacity.<sup>56</sup> Clark Canyon argues it merely changed the sizes of the turbines but not the number of turbines or the total installed capacity.<sup>57</sup> Therefore, it argues that the change in turbine size does not result in a “significant” or

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<sup>54</sup> *Marseilles Hydro*, 123 FERC ¶ 61,041 at P 18 (emphasis added). *See also Electric Plant Board of the City of Augusta, Kentucky*, 112 FERC ¶ 61,342, at P 23 (2005) (off-site construction activities for turbines not authorized by license cannot serve as commencement of construction); *CPS Products, Inc.*, 111 FERC ¶ 61,071, at P 13 (2005) (work on unauthorized equipment cannot be considered construction for start of construction purposes).

<sup>55</sup> *Marseilles Hydro Power LLC*, 124 FERC ¶ 61,036 at P 20.

<sup>56</sup> In *Marseilles Hydro*, the project licensee authorized an initial phase in which seven generating units were to be restored to operation and a second phase, in which six additional units would be purchased and installed. The project's initial authorized capacity was 4.745 MW. *See Marseilles Hydro Power, LLC*, 105 FERC ¶ 62,131, at P 9 (2003). The licensee subsequently ordered six turbine generating units, with a combined rating of 4.78 MW. *See Marseilles Hydro*, 123 FERC ¶ 61,041 at PP 17-18.

<sup>57</sup> Licensee filing of October 30, 2014, at 3.

“substantial” change to its license.<sup>58</sup> We disagree. While Clark Canyon’s changes to its turbines may have been to some extent different than those in *Marseilles Hydro*,<sup>59</sup> ( they were sufficient to have warranted an amendment application that would have been subject to Commission review and approval. The licensee itself acknowledges the need for an amendment application to effect such a change, and states that it had intended to submit one but had delayed while it evaluated another turbine configuration.<sup>60</sup> In fact, as discussed above, in July 2011 Clark Canyon filed an amendment application to change the turbine sizes and the location of the powerhouse, although it later withdrew the application.

50. We find that it is clear from the record that Clark Canyon contracted for the manufacture of turbines that were different from those authorized in the project license. As a result, consistent with Commission precedent, we find that that action cannot constitute the commencement of construction.

### **C. Clark Canyon has not Demonstrated Grounds for a Stay**

51. The mandatory language of section 13 requires the Commission to strictly enforce the deadline for commencement of construction of a licensed project.<sup>61</sup> Accordingly, the Commission will not grant a licensee’s request for a stay merely to relieve the licensee of the statutorily prescribed commencement of construction deadline,<sup>62</sup> and the Commission has not been willing to grant a stay to prevent mandatory termination where, because of the licensee’s own actions or inactions, construction was not commenced prior to the statutory deadline.<sup>63</sup>

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<sup>58</sup> Clark Canyon also notes that the project materials sent to Reclamation for its review (with copies sent to the Commission) included the two 2.35-MW turbines since 2011. However, submitting copies of material sent to another agency does not constitute a request that the Commission amend the license, a request the approval of which would be necessary to change the turbine specifications.

<sup>59</sup> We note, however, that the change in capacity in *Marseilles Hydro*, from 4.745 MW to 4.78 MW, is not so significant as to meaningfully distinguish the two cases.

<sup>60</sup> Licensee filing of October 30, 2014, at 5.

<sup>61</sup> *East Bench Irrigation District*, 59 FERC ¶ 61,277 (1992).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

52. The Commission has granted requests for stay of the commencement of construction deadline, or the entire license, in narrowly circumscribed circumstances.<sup>64</sup> 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 time frame.<sup>65</sup>

53. Clark Canyon requests that the Commission retroactively stay the commencement of construction deadline, claiming that delays associated with Reclamation's reviews and approvals have been outside of the licensee's control and have delayed onsite construction of the project by Clark Canyon.<sup>66</sup> However, the cases which Clark Canyon cites in support of its request are not on point. Rather, they address situations where the performance of safety studies by the agency having oversight of the dam where a project will be constructed affected the ability of the licensee to perform required work on its project. Here, there has been no delay due to completion of any dam safety studies by a federal agency on the underlying dam, as in *City of Broken Bow, Oklahoma*<sup>67</sup> or *Borough of Leighton, Pennsylvania*,<sup>68</sup> nor has there been a delay while the applicant undertook a study of the safety of the underlying dam, as was the case in *East Bench Irrigation Dist.*<sup>69</sup> To the contrary, as explained in this order, delays in development of the Clark Canyon Dam Project have been due to late, inadequate, or incomplete design packages the licensee submitted to Reclamation, or to schedules (agreed to by the licensee and Reclamation) that have slipped because the licensee missed deadlines.<sup>70</sup> These circumstances do not warrant a retroactive stay of the deadline to commence project construction, and we therefore deny the request.<sup>71</sup>

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<sup>64</sup> *City of Broken Bow, Oklahoma*, 142 FERC ¶ 61,118 (2013).

<sup>65</sup> *Id.*

<sup>66</sup> Licensee filing of July 28, 2014, at 7.

<sup>67</sup> 142 FERC ¶ 61,118 (2013).

<sup>68</sup> 140 FERC ¶ 61,211 (2012).

<sup>69</sup> 59 FERC ¶ 61,277 (1992).

<sup>70</sup> Licensee filing of July 28, 2014, at 8-9.

<sup>71</sup> The licensee states that it has spent around \$10 million on various aspects of project development. While we acknowledge this financial commitment, the expenditure of funds does not relieve a licensee of its obligations under its license, nor can it obviate the FPA's commencement of construction deadline. *See, e.g. Arizona Power Authority,*

(continued ...)

## **Discussion**

54. For the reasons discussed above, we find that Clark Canyon failed to commence project construction by the deadline established pursuant to section 13 of the FPA. We therefore must terminate the license. The result we reach in this case is compelled by the law and supported by Commission policy and precedent designed to ensure that licensees adhere to the requirements of their licenses.

55. However, we also recognize that Clark Canyon has, in recent months, renewed its efforts to develop the project, and, while the licensee has not yet corrected the deficiencies that compelled our holding here, it may be that its future efforts will prove more successful. Although we are required to terminate the license, we are sympathetic to efforts to develop the project – indeed, the Commission previously issued Clark Canyon a license because the Commission concluded that the Clark Canyon project was in the public interest – and those efforts need not end with our holding here. In a number of instances, Congress has, at the request of developers of projects that failed to timely commence construction, enacted legislation authorizing us to reinstate terminated licenses and grant additional extensions of the time to commence construction.<sup>72</sup> In the alternative, Clark Canyon could file a new license application which the Commission could address on an expedited basis if Clark Canyon obtains concurrence from affected federal and state agencies and other interested stakeholders and makes a filing that includes all necessary information. Given that the project license was issued in the last few years, we anticipate that Clark Canyon would most likely not have to perform much additional work to prepare an application. We also expect that our staff would work with Clark Canyon to determine to what extent portions of our licensing regulations could be waived and other steps taken to develop an expedited process.

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18 FERC ¶ 61,207 (1982) (finding that termination of licensee required by law notwithstanding licensee's expenditure of \$4.25 million). In fact, compliance with the pre-construction requirement is a way of ensuring that a licensee does not expend construction funds before it is ready to move ahead with its project.

<sup>72</sup> See, e.g., Collinsville Renewable Energy Production Act, Pub. L. No. 113-122 (authorizing Commission to reinstate terminated licenses and grant extensions of commencement of construction deadlines).

The Commission orders:

(A) The license for the Clark Canyon Dam Hydroelectric Project No. 12429 is terminated for failure to commence construction by the statutory deadline. The license will remain in effect until the close of business, April 20, 2015. But, if the Commission is closed on this day, then the license will remain in effect until the close of business on the next day in which the Commission is open. New applications for this site may not be submitted until after the license termination is effective.

(B) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825*l* (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2014). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.