

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Boyce Hydro Power, LLC**

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**Project No. 10808-058**

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**MOTION OF BOYCE HYDRO POWER, LLC FOR WITHDRAWAL  
OF ORDER PROPOSING REVOCATION OF LICENSE**

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Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure,<sup>1</sup> Boyce Hydro Power, LLC (“BHPLLC”) respectfully files this Motion for Withdrawal of the Commission’s February 15, 2018, Order Proposing Revocation of License (“Proposed Revocation”).<sup>2</sup>

Revocation of the license for the Edenville Project No. 10808 (“Edenville Project” or “Project”) would not be in the public interest for several reasons. First, BHPLLC has obtained a commitment from the construction company that will build the Tobacco River Auxiliary Spillway (“Tobacco Spillway”) for that company to advance funds sufficient, with the money BHPLLC is putting into an escrow account for this purpose, to enable BHPLLC to construct the Tobacco Spillway. That will increase the spillway capacity of the Project by approximately 40 percent, after which BHPLLC can begin accumulating funds for future spillway gate capacity increases which will, in time, enable the Project to pass the full Probable Maximum Flood (“PMF”).

Second, BHPLLC has done everything it reasonably can do satisfy the requirements of the Commission’s June 15, 2017 order (“Compliance Order”)<sup>3</sup> given the

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<sup>1</sup> 18 C.F.R. § 385.212 (2017).

<sup>2</sup> *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,115 (2018) (“Proposed Revocation”).

<sup>3</sup> *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (“Compliance Order”).

serious financial constraints under which it operates. The Commission failed to give appropriate consideration to BHPLLC's offer to create an escrow account comprising half of the Edenville Project gross revenues to fund the Tobacco Spillway and the evidence regarding progress BHPLLC has made toward completing the Tobacco Spillway design package. BHPLLC has made additional progress toward completing a Tobacco Spillway design package since the Proposed Revocation was issued.

Third, revoking the license would be self-defeating. The Commission maintains<sup>4</sup> that its primary concern is the deficiency of spillway capacity needed for the Project to meet the Commission's requirement to pass the PMF, but license revocation would eliminate the source of funds to increase the Project dam's spillway capacity, ensuring that the dam *never* meets the Commission's standards. It is doubtful there would even be funds sufficient to maintain the dam in its current condition, let alone eventually remedy the spillway deficiencies. Finally, revoking the license would eliminate the public recreation facilities and access BHPLLC has developed since taking over the Project in 2006.

All of these factors support a determination that the public interest will best be served by withdrawal of the Proposed Revocation and continued forbearance by the Commission while BHPLLC continues to work diligently toward meeting dam safety standards and addressing other license compliance matters.

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<sup>4</sup> *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 at PP 3, 11 (2017).

## **I. BACKGROUND**

On June 15, 2017, the Commission's Director of the Division of Hydropower Administration and Compliance issued the Compliance Order asserting violations of the Project license and the Commission's regulations regarding dam and project safety, recreation facilities and public access thereto, acquisition of necessary property rights, and water quality monitoring. The Compliance Order established deadlines for BHPLLC to provide the Commission with specific plans, specifications, reports, and other information. BHPLLC engaged the services of Mr. Jerry Gomez, PE, of Gomez and Sullivan Engineers, PC ("GSE"), a well-recognized expert in matters concerning dams, dam safety, and hydroelectric projects,<sup>5</sup> to assist BHPLLC with completion of the design package for the Tobacco Spillway.

On November 20, 2017, the Commission issued an order requiring BHPLLC to cease generation ("Cease Generation Order").<sup>6</sup> On December 1, 2017, as supplemented on December 28, 2017, BHPLLC filed an Emergency Motion<sup>7</sup> for stay of the Cease Generation Order<sup>8</sup> pending Commission action on BHPLLC's request for rehearing of the Cease Generation Order.

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<sup>5</sup> Mr. Gomez's credentials are attached to BHPLLC's July 14, 2017, request for extensions of time to comply with the Compliance Order. Letter from Lee W. Mueller, BHPLLC, to Kimberly Bose, FERC, Att. A, Project Nos. 10808-044 et al. (filed July 14, 2017).

<sup>6</sup> *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017) ("Cease Generation Order").

<sup>7</sup> Emergency Motion for Stay Pending Rehearing, Request for Approval of Plan to Fund the Tobacco Auxiliary Spillway, and Request for Extensions of Time, Project No. 10808-057 (filed December 1, 2017) ("Emergency Motion").

<sup>8</sup> Supplement to Emergency Motion for Stay and to Request for Rehearing of Boyce Hydro Power, LLC, Project Nos. 10808-056 and 10808-057 (filed Dec. 28, 2017).

On December 20, 2017, BHPLLC timely filed a request for rehearing of the Cease Generation Order.<sup>9</sup> Boyce concurrently filed with the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit”) an emergency motion to stay the Cease Generation Order.<sup>10</sup>

On January 5, 2018, the Commission issued the Order on Stay,<sup>11</sup> denying BHPLLC’s motion for a permanent stay but granting a temporary stay until March 1, 2018, to enable BHPLLC to pass flows through the generator in order to combat ice formation on the Project’s spillway gates. On February 2, 2018, BHPLLC filed a request for rehearing of the Order on Stay.<sup>12</sup>

On February 7, 2018, the D.C. Circuit granted BHPLLC’s motion for a stay, in part, staying the portion of the Cease Generation Order that required BHPLLC to cease generation.<sup>13</sup>

On February 15, 2018, the Commission issued a notice<sup>14</sup> dismissing as moot BHPLLC’s request for rehearing of the Order on Stay, an order denying rehearing of the Cease Generation Order,<sup>15</sup> and the Proposed Revocation.

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<sup>9</sup> Request for Rehearing of Boyce Hydro Power, LLC, Project No. 10808-056 (filed Dec. 20, 2017). The Commission issued a tolling order for BHPLLC’s rehearing request on January 19, 2018.

<sup>10</sup> *See In re: Boyce Hydro Power, LLC*, Emergency Motion for Stay, No. 17-1270 (D.C. Cir. Dec. 20, 2017).

<sup>11</sup> *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,007 (2018) (“Order on Stay”).

<sup>12</sup> Request for Rehearing of Boyce Hydro Power, LLC, Project No. 10808-059 (filed Feb. 2, 2018).

<sup>13</sup> *In re: Boyce Hydro Power, LLC*, Order, No. 17-1270 (D.C. Cir. Feb. 7, 2018) (per curiam).

<sup>14</sup> *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,130 (2018).

<sup>15</sup> *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,116 (2018).

## **II. THE COMMISSION SHOULD WITHDRAW THE PROPOSED REVOCATION ORDER.**

Federal Power Act (“FPA”) Section 31(b)<sup>16</sup> provides that the Commission may issue an order revoking a license based on a finding that the licensee knowingly violated a final compliance order and was given a reasonable time to comply with that order before the revocation proceeding was commenced. The Proposed Revocation sets forth the requirements of the Compliance Order and finds that BHPLLC has failed, with some exceptions, to satisfy those requirements despite being given multiple extensions of time. It further finds that BHPLLC has been afforded a reasonable time to comply considering the serious dam safety issues and alleges a “lack of demonstrated effort by BHPLLC to comply with the Compliance Order.”<sup>17</sup>

As discussed below, BHPLLC does not dispute that it has not yet completed all the requirements of the Compliance Order.<sup>18</sup> However, since the Proposed Revocation was issued, BHPLLC has secured a funding commitment from the construction company which will build the Tobacco Spillway to advance the funds which, when combined with the funds BHPLLC is placing into escrow, will enable BHPLLC to begin construction, possibly in 2018 and completed in 2019, thereby substantially improving the spillway capacity situation.

In addition, BHPLLC contends that it has made every reasonable effort to complete those requirements in light of the financial constraints under which it operates

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<sup>16</sup> 16 U.S.C. § 823b(b) (2012).

<sup>17</sup> Proposed Revocation at P 10.

<sup>18</sup> BHPLLC has completed the requirement of Ordering Paragraph (L) to install and connect to the SCADA system reliable water quality monitoring equipment and demonstrate that it is in good working order. BHPLLC has also filed documentation that it possesses the necessary property rights for the Tobacco and Tittabawassee Auxiliary Spillways as required by Ordering Paragraphs (C) and (E) of the Compliance Order.

and, for the same reason, the Commission has not afforded it a reasonable time to comply. Finally, license revocation would be self-defeating because it would ensure that the dam is *never* able to meet the Commission’s spillway capacity standards or continue providing the public recreation facilities and access it now provides under the license.

**A. Boyce Has Obtained a Financial Commitment that Provides a Path to Eventual Full Compliance.**

In its Emergency Motion, BHPLLC proposed a means by which it could, taking into account Project revenues in relation to the costs of meeting dam safety and other license requirements, and if given sufficient time to accumulate funds and extensions of time to complete or stay less pressing license requirements, increase the existing spillway capacity of the Project by over 40 percent. In brief, BHPLLC committed to place 50 percent of the gross revenues from the Edenville Project into escrow until sufficient money is accumulated to ensure that the Tobacco Spillway is constructed.<sup>19</sup> In the meantime, BHPLLC would continue to complete a Tobacco auxiliary design package for Commission review.

The Proposed Revocation faulted BHPLLC’s offer as unconvincing because BHPLLC has “not provided any estimate of when it will complete construction of the spillway.”<sup>20</sup> However, BHPLLC has obtained a commitment from Johnston Contracting, Inc. of Midland, Michigan (“Johnson Contracting”), for joint funding of the Tobacco Spillway, which could enable construction to be completed before the end of 2019,

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<sup>19</sup> See Emergency Motion at 10; *id.*, Att. A, Affidavit of Lee W. Mueller ¶¶ 6, 8 (“Mueller Aff.”).

<sup>20</sup> Proposed Revocation at P 10 n.19.

subject to a two-season construction schedule and receipt of regulatory approvals.<sup>21</sup>

Johnston Contracting is a solid enterprise that has been operating for over 60 years and employs approximately 20 people.<sup>22</sup> BHPLLC began to escrow funds effective February 10, 2018.<sup>23</sup>

When the Commission approves a final design for the project BHPLLC and Johnston Contracting will be able to accurately estimate the total cost, which will enable the parties to reach a financing arrangement. Documentation of Johnston Contracting's commitment to help fund the Tobacco Spillway is attached hereto as Attachment A.

As explained to the Commission staff in a meeting at Commission headquarters on February 23, 2018, BHPLLC is designing an auxiliary spillway at the Tobacco River side of Edenville dam that will have a capacity of 12,000 cubic feet per second ("cfs"). The enlarged capacity of the design<sup>24</sup> will obviate the need for a second auxiliary spillway on the Tittabawassee River side of the dam. Actions to complete the Tobacco Spillway design package are ongoing. A report from Gomez and Sullivan and summary table showing the additional progress made since the Emergency Motion was filed on December 1 is attached as Attachment B. When the Tobacco auxiliary spillway is complete the total discharge capacity of the Project will be increased to 35,600 cfs,<sup>25</sup> a 40

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<sup>21</sup> Because the Commission's policy is to require licensees to obtain state and local permits unless there is a clear conflict with its own permits (*see, e.g., Pub. Util. Dist. No. 2 of Grant Cty.*, 139 FERC ¶ 61,122 at PP 9-10 (2012); *PacifiCorp*, 115 FERC ¶ 61,194 at P 8 (2006)) before it can begin construction of the auxiliary spillways, BHPLLC will need to obtain construction permits from Michigan before proceeding.

<sup>22</sup> See Buzzfile, Johnston Contracting Inc., <http://www.buzzfile.com/business/Johnston-Contracting-Inc-989-631-9820> (last visited Mar. 16, 2018).

<sup>23</sup> Since February 1, 2018, BHPLLC has placed \$ 131,963.17 into escrow.

<sup>24</sup> Previous designs for the Tobacco Spillway were based on passage of 5,800 cfs.

<sup>25</sup> The most recent report by the Special BOC submitted in 2015 stated that constructing the Tobacco Spillway will increase the total discharge capacity of the Project spillways to 35,600 cfs,

percent increase over current spillway capacity, and which will exceed the state standard, and be 56 percent of the PMF. When Johnston Contracting has been repaid BHPLLC will be in a position to tackle the next increment of spillway capacity to ultimately meet the Commission's higher standards.

**B. BHPLLC Has Done Everything It Reasonably Can Do to Comply with the Compliance Order Consistent with Its Available Resources.**

The Proposed Revocation identifies several Compliance Order requirements that remain outstanding: (1) a complete design package for the Tobacco Spillway; (2) plans and specifications for the Tittabawassee auxiliary spillway; (3) a plan and schedule for additional modifications to pass the full PMF; (4) complete plans and specifications, a schedule, and associated documentation for permanent repairs to the left and right Tobacco River abutment spillway walls; (5) documentation of reasonable access to project lands and waters for public recreation; and (6) a complete design package for construction of all facilities required by the approved recreation plan.<sup>26</sup>

The design package for the Tobacco Spillway has been addressed above. Because it would be deprived of such a large portion of Edenville Project income—and indeed the sum total income of all four BHPLLC projects—BHPLLC requested in its Emergency Motion extensions of time to complete the above mentioned dam safety actions in addition to the Tobacco Spillway design and a stay of the recreation requirements.<sup>27</sup> In order to provide an orderly progression of completion dates for the dam safety

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which can accommodate a maximum flood with an apparent recurrence interval ranging from 500,000 to 1,000,000 years. Edenville Hydroelectric Project No. 10808, Report by the Special Board of Consultants at 6, submitted to Boyce Hydro, Meeting on April 20-21, 2015, submitted to the Chicago Regional Engineer on April 27, 2015.

<sup>26</sup> Proposed Revocation at P 6.

<sup>27</sup> See Emergency Motion at 10-16.



requirements, the timing of most of the requested extensions is based on the timing of receipt of underlying Commission approvals.<sup>28</sup> BHPLLC documented the financial considerations necessitating its proposal and the very substantial progress it has made toward submittal of a Tobacco Spillway design to the Commission.<sup>29</sup>

The Proposed Revocation brushed off BHPLLC's well-supported factual submission demonstrating the actions it has taken toward compliance and its financial situation as mere "claims."<sup>30</sup> It ignored the fact that BHPLLC's proposed action is supported with a sworn affidavit and financial statements.<sup>31</sup> BHPLLC submits that the public interest requires the Commission to consider BHPLLC's proposal in light of these facts and the additional information provided above. If it does, it should conclude the facts support acceptance of BHPLLC's proposal.

As to whether BHPLLC has had a reasonable time to comply with the Compliance Order, the Proposed Revocation merely states that it has.<sup>32</sup> But this summary conclusion ignores the critical facts in the record about BHPLLC's financial resources and how that affects the timing of its ability to comply. The Commission's refusal to acknowledge this reality and grant extensions of time or stays that reflect reality is completely unreasonable.

Similarly, the Proposed Revocation states that BHPLLC has not provided any estimate of when it can complete and submit designs for the Tittabawassee Auxiliary

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

<sup>29</sup> *Id.* at 8-9; Mueller Aff., Ex. 7 – GSE Status Report.

<sup>30</sup> Proposed Revocation at P 7.

<sup>31</sup> *See* Mueller Aff. and Exhibits 1-6 thereto addressing project revenues and costs during the past five years and Exhibit 7 thereto, GSE Status Report.

<sup>32</sup> Proposed Revocation at P 10.

Spillway (no longer needed if the enlarged Tobacco Spillway is built) and satisfy the other obligations set out in the Compliance Order. However, BHPLLC did provide and justify estimated completion dates for auxiliary spillway design packages, plans for additional modifications to meet the full PMF, and plans and specifications for the left and right Tobacco River abutment spillways and associated documentation in the Emergency Motion.<sup>33</sup> However, the Proposed Revocation does not even acknowledge that submittal.

Once the 12,000 cfs Tobacco Spillway is constructed, BHPLLC will revise the previously submitted plan to modify the existing gated spillways over a six-year period by sequential, gate-by-gate construction which, when completed, will enable the project to pass the full PMF.

The Proposed Revocation also gives a misleading impression that reasonable public access and recreation facilities are not being provided. The following table compares the recreation facilities required by the approved plan and identified in the Proposed Revocation to the facilities installed by BHPLLC since it acquired the Project.

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<sup>33</sup> See Emergency Motion at 11-19.

Approved Plan	Facility Status
Tittabawassee Side	
Parking lot for 15 cars off of State Highway 30,	Existing since 2016; closed until June 2018 due to utility company substation construction work in progress
Two handicapped parking spaces	To be constructed in August 2018
Barrier-free restroom	Available since 2016 during summer recreation season
Railed handicapped-accessible fishing pier near the powerhouse	Fishing access available since 2006; railed pier to be constructed September 2018
Two canoe portages	One portage, available since 2006
Access paths	Available since 2006
Signs identifying the facilities	Existing, some upgrading needed
Tobacco Side	
Parking lot for 15 cars off State Hwy 30	Existing since June 2016
Access path	Existing since 2014
Stairs to railed fishing pier	Existing since 2014
Signs identifying the facilities	Existing since 2014

In sum, although BHPLLC has not fully met the requirements of the Compliance Order, it has certainly done everything it can reasonably do to meet those requirements given its limited resources and the lack of reasonable time to comply. Moreover, as discussed below, license revocation would be self-defeating since it would ensure that the dam's spillway capacity is *never* increased.

**C. License Revocation Would Ensure that the Commission's Spillway Capacity Requirements Are Never Met.**

Although FPA Section 31(b) does not specifically require the Commission to take into account the effect of its actions on public safety in determining whether to revoke a license, the Commission itself has stated that its "primary concern with the Edenville Project" is the Project's inadequate spillway capacity.<sup>34</sup> Revoking the license would do

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<sup>34</sup> Cease Generation Order at PP 3, 11.

nothing to improve spillway capacity because it would eliminate the source of income needed to maintain and upgrade the dam.

The catastrophic financial impact of eliminating Edenville Project revenues was clearly demonstrated in the Emergency Motion. BHPLLC's four small hydroelectric projects produce annual revenues of approximately \$2 million, of which Edenville contributes a little over half. BHPLLC has minimal cash reserves and relies on a steady stream of income from generation to satisfy the Commission's dam safety and all other requirements. Ceasing generation would destroy BHPLLC's financial capacity because, with gross revenues cut in half, BHPLLC would not have sufficient funds to continue operating the three licensed projects and one unlicensed dam, let alone upgrade the Edenville spillway.<sup>35</sup>

Notwithstanding, the Commission glibly asserts that revoking the license will not affect public safety because authority over the site will pass to the State of Michigan's regulatory authorities.<sup>36</sup> The Commission does not explain how handing off to the state responsibility for a dam when the owners has insufficient resources to maintain it, let alone improve it, provides assurance that the State will be able to protect public safety. That would be an outcome strongly at odds with the Commission's long standing position that license surrenders are conditioned, "at a minimum" on "measures to ensure public safety."<sup>37</sup> Similarly, it has stated that "[a] dam whose safety has not been verified is a

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<sup>35</sup> Emergency Motion at 6-7; Mueller Aff. ¶ 10.

<sup>36</sup> Proposed Revocation at P 10 n.20.

<sup>37</sup> *E.g., PacifiCorp*, 108 FERC ¶ 61,130 at P 18 (2004).

potentially dangerous dam, and FERC regards the existence of such a potential danger as a matter of the utmost concern and seriousness.”<sup>38</sup>

*Eastern Hydroelectric Corp.*,<sup>39</sup> cited by the Commission to support the notion that public safety is protected merely by turning over a dam to state regulators, presented facts not even remotely comparable to the situation posed by eliminating BHPLLC’s ability to maintain and upgrade Edenville dam. There, the Commission had issued a minor license for a project with a dam that impounds a 78-acre reservoir with a storage capacity of only 418 acre-feet<sup>40</sup> and a “low” potential hazard classification.<sup>41</sup> In stark contrast, the high hazard potential Edenville dam impounds a 2,600-acre lake with a gross storage capacity of about 40,000 acre-feet, nearly 100 times greater.<sup>42</sup>

In sum, revoking the license would guarantee that BHPLLC will *never* be able to meet the Commission’s spillway capacity standards for high hazard potential dams and make it unlikely BHPLLC will be able to maintain the dam in its present condition. Such a result cannot possibly be in the public interest.

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<sup>38</sup> *Flambeau Paper Corp.*, 53 FERC ¶ 61,063 at p. 61,203 (1990), *aff’d in Bluestone Energy Design, Inc.*, 64 FERC ¶ 61,003 at p. 61,022, *reh’g denied*, 65 FERC ¶ 61,042 (1993), *remanded on other grounds*, *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288 (D.C. Cir. 1996). *See also Bluestone Energy Design, Inc.*, 83 FERC ¶ 61,207 at p. 61,916 (1998) (in the context of establishing a civil penalty for various dam safety violations, the Commission stated “We will not compromise in any way our determination to take whatever measures are necessary to protect the public health, safety, and the environment.”).

<sup>39</sup> 148 FERC ¶ 61,028 (2014).

<sup>40</sup> *Id.* at P 2.

<sup>41</sup> *See Eastern Hydroelectric Corporation, Environmental and Public Use Inspection Report at 5, Project No. 7019* (issued Aug. 3, 2000).

<sup>42</sup> *Wolverine Power Corp.*, 85 FERC ¶ 61,063 at Ordering Paragraph (B) (1998).

**D. Revoking the License Would Eliminate the Public Recreation Benefits.**

In its motion to intervene, the Wixom Lake Association (“WLA”) asks that if the license is revoked or surrendered, the Commission ensure that the transfer to state authority over the dam “does not compromise preexisting recreational opportunities, and corrects current recreational and/or access deficiencies.”<sup>43</sup> However, if the license is revoked, the Commission will be unable to meet WLA’s request because it has no continuing authority over former licensed project property, including lands and waters, once the revocation becomes effective.<sup>44</sup> BHPLLC, with no income from the formerly licensed project, will have no alternative but to close all existing recreation facilities and access points in order to prevent damage to the property and minimize potential litigation risk from trespassing recreationists or others.<sup>45</sup>

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<sup>43</sup> Motion to Intervene of Wixom Lake Association, Inc., Project No. 10808-000 (filed Mar. 9, 2018).

<sup>44</sup> See e.g., *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069 at PP 31-32 (2008), *aff’d*, *Jackson Cty. v. FERC*, 589 F.3d 1284, 1291 (D.C. Cir. 2009) (rejecting request for fish passages measures since FERC cannot require post-license maintenance and monitoring); *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 61,038 at P 52 (“we will impose no requirement on FPL Energy to undertake recreational use measures after surrender. As we have stated in other proceedings, it is not appropriate for us to place encumbrances on a licensee’s ownership of project lands after our jurisdiction has ended.” (citation omitted)), *reh’g denied*, 107 FERC ¶ 61,120 (2004), *aff’d on other grounds*, *Save our Sebasticook v. FERC*, 431 F.3d 379 (D.C. Cir. 2005); *Niagara Mohawk Power Corp.*, 98 FERC ¶ 61,227 at p. 61,902 (“[the licensee] is certainly free to undertake such long-term measures [rehabilitation of project facilities for post-license historic preservation display], but these would occur beyond the effective date of license surrender, and the Commission has no authority over project works once it has accepted a surrender.”), *reh’g denied*, 100 FERC 61,185 (2002), *reconsideration granted in part*, 102 FERC ¶ 61,324 (2003); *Rochester Gas & Elec. Corp.*, 99 FERC ¶ 61,012 at p. 61,041, *reh’g denied*, 100 FERC ¶ 61,113 (2002) (rejecting proposal requirements for continued maintenance and operation of project dam for water quality and fish passage).

<sup>45</sup> As BHPLLC has previously notified the Commission, there is a continuing problem with vandalism of Project facilities, including the boat barrier intended to prevent access to the tailrace immediately below the existing spillway, and at the Project powerhouse.

### III. CONCLUSION

As discussed above, revocation of the Project license would make an unfortunate, but not unresolvable, situation far worse by eliminating the ability of BHPLLC to maintain or upgrade a high hazard potential dam. Handing off the problem to the State of Michigan would not be in the public interest, particularly when BHPLLC is in a position to begin significant remedial action. Thus, BHPLLC requests that the Commission:

- 1) Withdraw the Proposed Revocation Order;
- 2) issue an order approving BHPLLC's proposal to place into escrow and expend for no other purpose funds sufficient in concert with the advancement of funds by Johnson Contracting to construct the Tobacco Spillway;
- 3) grant the extensions of time requested in the Emergency Motion as modified in Attachment C; and
- 4) stay the requirements of the Ordering Paragraphs (J) and (K) of the Compliance Order pending a final order on an application to amend the recreation plan.

Respectfully submitted,

/s/ Michael A. Swiger

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Dated: March 16, 2018

Attachments

## **Attachment A**

Johnston Contracting Inc. Letter of Intent



# JOHNSTON CONTRACTING, INC.

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624 Poseyville Road • Midland, Michigan 48640  
Phone (989) 631-9820 • Fax (989) 631-5884

March 15, 2018

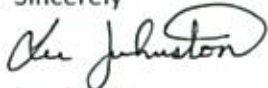
## Tobacco River Auxiliary Spillway

Mr. Lee W. Mueller  
Boyce Hydro, LLC  
6000 S. M-30  
Edenville, Mi.

Johnston Contracting Inc. is willing to finance and construct a portion of the above referenced project subject to the completion of engineering, permitting and mutual agreement of terms and conditions.

Thank you for the opportunity to assist with the construction, I look forward working with the Boyce Hydro team on this project.

Sincerely



Lee Johnston  
President  
Johnston Contracting Inc.  
624 Poseyville Rd.  
Midland, Mi. 48640

## **Attachment B**

Gomez and Sullivan Project Status Report (March 16, 2018)



**GOMEZ AND SULLIVAN**  
**ENGINEERS**

288 Genesee Street  
Utica, NY 13502  
T. (315) 724 - 4860  
F. (315) 724 - 4862

March 16, 2018

Mr. Lee Mueller, Co-Member Manager  
Boyce Hydro, LLC  
6000 South M-30 (P.O. Box 15)  
Edenville, MI 48620

Re: Edenville Hydro Project [FERC Project #10808] Tobacco Auxiliary Spillway Project Status  
Report, March 16, 2018  
GSE Project #1920

Dear Mr. Mueller:

Gomez and Sullivan Engineers, D.P.C. respectfully submits the attached Edenville Hydro Project [FERC Project #10808] Tobacco Auxiliary Spillway Project Status Report, dated March 16, 2018.

This status report summarizes work activities completed by Gomez and Sullivan through March 15, 2018 on the Edenville Hydro, Tobacco Auxiliary Spillway, FERC Project #10808. It provides an estimate of the progress completed to date as compared to the final product envisioned, the estimated schedule to complete the design of this project once the requested geotechnical investigation data is obtained, and a summary total of the hours expended on this design to date.

Also attached to this letter is a Verification Form attesting to the fact that I believe that this status report is a reasonable estimate of the current project status.

If you have any questions on this letter, please do not hesitate to contact me at (315) 724-4860 or [jgomez@gomezandsullivan.com](mailto:jgomez@gomezandsullivan.com).

Very Truly Yours,

Jerry A. Gomez, P.E.

Principal

(315) 724-4860

Email: [jgomez@gomezandsullivan.com](mailto:jgomez@gomezandsullivan.com)

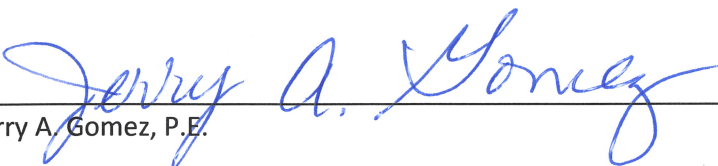
Tobacco Auxiliary Spillway Status Report  
March 2018

**§ 12.13 Verification form.**

State of [New York],

County of [Oneida], ss:

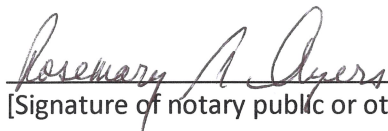
The undersigned, being first duly sworn, states that he has read the above document (Edenville Hydro Project [FERC Project # 10808] Tobacco Auxiliary Spillway Project Status Report, March 16, 2018) and knows the contents of it, and that all of the statements contained in that document are true and correct, to the best of his knowledge and belief.

  
\_\_\_\_\_  
Jerry A. Gomez, P.E.

Sworn to and subscribed before me this 16<sup>th</sup> of March 2018.

[Seal]

ROSEMARY AYERS  
Notary Public, State of New York  
Qualified in Oneida County  
No. 01AY6084230  
My Commission Expires Dec. 02, 20 18

  
\_\_\_\_\_  
[Signature of notary public or other state or local official authorized by law to notarize documents.]



**GOMEZ AND SULLIVAN**  
ENGINEERS

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# **Edenville Hydro Project FERC Project # 10808 Tobacco Auxiliary Spillway**

## **Project Status Report**

**March 16, 2018**

Prepared by:



**GOMEZ AND SULLIVAN**  
ENGINEERS

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## **Executive Summary**

This report summarizes work activities completed by Gomez and Sullivan through March 15, 2018 on the Edenville Hydro, Tobacco Auxiliary Spillway, FERC Project #10808.

## **Task 1 – Data Collection and Review**

### **Task 1.1 – Data Review**

- Available information has been reviewed and evaluated as follows:
  - ✓ Geotechnical exploration files and data including:
    - Original design data presented on 1934 drawings
    - Soils and Materials Engineers, Inc. Geotechnical Investigation, April 1987
    - McDowell & Associates exploration program, July 2005
    - McDowell & Associates Subsurface Investigations, August 2015
  - ✓ Ayers Associates, hydrologic/hydraulic calculations of peak spillway discharges, reservoir inflows, and flood frequency curve
  - ✓ Board of Consultants Reports; 2009 to 2015
  - ✓ FERC correspondence and filings; August 1993 to November 2017
  - ✓ FERC correspondence and filings: November 2017 to March 2018

### **Task 1.2 – Site Visits**

- Jerry Gomez, Gomez and Sullivan Engineers, visited the project site July 1, 2017 to observe conditions at the project. Representative photos were taken.
- Jerry Gomez visited the project site February 13 and 14, 2018 to observe conditions at the project, and to participate in meetings with Boyce representatives and Richard Tucker, P.E., Edenville Hydro Board of Consultants member.
- William Friers, Gomez and Sullivan Engineers, visited the project site February 19 and 20, 2018 to observe conditions, and to document all drilling activities and pertinent soil data as well as monitor the conditions of the dam and appurtenant structures during drilling of two test borings.

## **Task 2 – Design**

### **Task 2.1 – Draft Design (60% Design)**

- Drawings have been reviewed; comments provided to Boyce; and revisions have either been completed or are in progress. The following drawings are assessed to be approximately 75-percent complete, or stated otherwise, drawings for the draft design phase are nearly complete.
  - ✓ Cover Sheet, Overall Site Plan, Vicinity Map
  - ✓ Enlarged Site Plan
  - ✓ Enlarged Site Plan, West End
  - ✓ Spillway Grading Plan
  - ✓ Spillway Plan and Sections
  - ✓ Spillway Sections
  - ✓ Spillway Elevations
  - ✓ Spillway Structural Details, Sheets 1, 2, and 3
  - ✓ Site Drainage Plan
  - ✓ Toe Drain Site Plan & Erosion Control Plan

- Site Design – Grading plans prepared by Boyce have been reviewed and comments provided. Boyce subsequently revised the drawings, addressing Gomez and Sullivan's comments. Enhancements have been made to the drawings, including introduction of a labyrinth spillway to increase the auxiliary spillway discharge capacity, and the addition of seven (7) 24-foot by 8-foot box culverts to better control spillway discharge from the spillway channel to the Tobacco River.
- Hydraulic Analysis - Gomez and Sullivan evaluated the hydraulic capacity for the proposed Tobacco Auxiliary Spillway to establish the ability of the area to withstand erosional forces from a potential discharge event. Results of the initial hydraulic model demonstrate that the flow velocities were excessive on the steep (3H:1V) slopes with values exceeding 27-fps. Based on the flows and the slopes, riprap with a D50 of 2-feet will be required to mitigate potential erosion.  
GSE developed a combined 1D/2D model, using the HEC-RAS computer program (Version 5.0.3) to further assess expected velocities in the vicinity of the new construction works as necessary for the design of slope protection measures.
- Geotechnical - Previous subsurface investigations have been performed in the general vicinity of the proposed spillway, however information on subsurface soils was found to be lacking. Gomez and Sullivan determined that further test borings and associated laboratory testing needs to be accomplished to obtain additional subsurface data required for the design of the proposed new structures.
  - ✓ Gomez and Sullivan proposed to have two (2) test borings drilled on the upstream side of the dam, extending approximately 5 feet into a layer of hardpan - to a depth of not more than 30 feet below ground surface or as otherwise directed by an on-site geotechnical engineer. The purpose of the borings was to collect additional geotechnical information at the proposed spillway site needed for design of the reinforced concrete retaining walls and sheet pile wall.
  - ✓ Gomez and Sullivan submitted a Work Plan for the proposed subsurface exploration program to FERC on November 22, 2017 and a revised Work Plan was submitted to FERC on January 15, 2018 that addressed FERC comments of December 22, 2017. FERC approved the revised Work Plan February 8, 2018.
  - ✓ Borings were drilled February 19 and 20, 2018 using drive and wash drilling methods using casing and a 4-inch roller bit. Drilling fluids consisted of water and commercially available drilling additives. William Friers, P.E. of Gomez and Sullivan was onsite for the duration of the drilling activities serving as engineering inspector.
  - ✓ Soil samples were selected for Laboratory testing on February 22, 2018.  
Laboratory test results are pending.
- Structural - Design of reinforced concrete retaining walls, based on preliminary soil properties from existing test data, is complete. These designs will be reviewed and revised based on test data obtained from the proposed geotechnical investigation program.
- Sheet pile design was performed using estimated soil properties based on available data from previous field and lab tests. Upon receipt of test data from the recent investigation program, designs will be revised accordingly.

### **Task 3 – Specifications**

- Specification Divisions 1 - 5 have been prepared. Individual sections may be subject to change, depending on final design and detailing.

### **Task 4 –Supporting Design Report**

- The Supporting Design Report is underway and is approximately 75-percent complete.

### **Task 5 – Temporary Construction E.A.P. (TCEAP)**

- The Draft Temporary Construction Emergency Action Plan has been developed for the Tobacco Auxiliary Spillway project to help safeguard construction workers and the public in the event of an emergency. The TCEAP is approximately 85-percent complete.

### **Task 6 – Quality Control and Inspection Program (QICP)**

- A preliminary draft of the QICP has been prepared. The QICP is approximately 60-percent complete.

### **Task 7 – Water Management Plan**

- The Water Management Report, previously prepared by Boyce Hydro Power, LLC, dated January 2016, has been reviewed. Sections have been identified that require revisions addressing comments from FERC and the Board of Consultants. The Water Management Plan is approximately 80-percent complete.

### **Schedule**

- Gomez and Sullivan will work on finalizing the project deliverables for Tasks 4 through 7. We plan on submitting the final drafts of these documents for your review and comment March 30, 2018. Within 30 days of the completion of the geotechnical investigation program we will finalize design calculations and provide Boyce with mark-ups of plans, sections and details. It is anticipated that Boyce will need one-to-two weeks to incorporate mark-ups in the drawings. Final review and comments by Gomez and Sullivan is expected to take about 3 days. Consequently, the final set of Tobacco Auxiliary Spillway contract documents is expected to be complete 8 weeks after receipt of geotechnical test data.
- Board of Consultants are tentatively scheduled to meet the week of April 23, 2018 to review revised drawings, specifications, TCEAP, SDR, QCIP and Water Management Report.

Attachment A: Progress on Completion of Tobacco Auxiliary Spillway Design December 1, 2017 to March 15, 2018



**ATTACHMENT A**  
**Progress on Completion of Tobacco Auxiliary Spillway Design**  
**December 1, 2017 to March 15, 2018**

<b>Progress as of December 1, 2017</b>	<b>Additional Progress as of March 15, 2018</b>
Design drawings are complete to the 60 percent design level	Design drawings are complete to the 75 percent design level;
Site design plans have been reviewed and revised based on GSE comments	Enhancements have been made to the design plans. Changes include introduction of a labyrinth spillway design to increase the auxiliary spillway discharge capacity, and seven (7) 24-foot by 8-foot box culverts to better control spillway discharge from the spillway channel to the Tobacco River;
GSE has completed a hydraulic capacity evaluation of the proposed spillway and identified appropriate mitigation measures;	GSE developed a combined 1D/2D model, using the HEC-RAS computer program (Version 5.0.3) to assess expected velocities in the vicinity of the new construction works as necessary for the design of slope protection measures. The model provides five days of simulation to ensure the peak PMF inflows have passed through the Project;
GSE has determined that additional geotechnical information on subsurface soils is needed and is developing a soil boring work plan anticipated to be submitted to the Commission no later than November 28, 2017;	Work Plan for Subsurface Investigations approved by FERC on February 8, 2017. Borings executed on February 19 and 20 2018. Soil samples selected for Laboratory testing on February 22, 2018. Laboratory test results are pending;
Design of the reinforced concrete retaining walls is complete, but is subject to change based on the test data to be obtained by the soil borings;	Review and revision of design pending laboratory test data;
Design of sheet pile retaining walls is pending additional data from the soil borings;	Sheet pile designs performed based on estimated soil properties using available previous data from field and lab tests. Upon receipt of test data from recent investigation program designs will be revised accordingly;
Specification Divisions 1-5 have been prepared;	No Change;
The Supporting Design Report is 60 percent complete;	The Supporting Design Report is approximately 75 percent complete;
The draft Temporary Construction Emergency Action Plan is 75 percent complete;	The draft Temporary Construction Emergency Action Plan is 85 percent complete;
The Quality Control and Inspection Program is approximately 60 percent complete;	No change;
The Water Management Report is approximately 50 percent complete and is being revised to address comments from the Commission and the Board of Consultants (BOC)	The Water Management Report is approximately 80 percent complete;
	Board of Consultants are tentatively scheduled to meet the week of April 23, 2018 to review revised drawings, specifications, TCEAP, SDR, QCIP and Water Management Report.

## **Attachment C**

Updated Proposed Dates for Compliance Order Submittals

ATTACHMENT C  
UPDATED PROPOSED DATES FOR COMPLIANCE ORDER SUBMITTALS

<b>Compliance Ordering Paragraph or CRO Letter</b>	<b>Requirement</b>	<b>Current Date</b>	<b>Proposed Date</b>
(B)	Tobacco Auxiliary Spillway Design Package	9/18/17	150 days from FERC approval of the boring plan.
(D)	Tittabawassee Auxiliary Spillway plans and specifications	11/14/17	150 days from FERC approval of Tobacco Auxiliary Spillway Design Package
(F)	Plan and schedule for modifications to meet PMF	11/14/17	180 days from FERC approval of Tittabawassee Auxiliary Spillway plans and specs.
(G)	Plans and specifications for permanent repairs to Left and Right Tobacco Abutment Spillway Walls	9/30/17	90 days from FERC approval of Tobacco Auxiliary Spillway Design Package
CRO 8/31/17 letter	File plan and schedule to design and carry out corrective measures recommended in Independent Consultant's Part 12D report.	10/31/17	June 1, 2018
CRO 9/18/17 letter	File plan and schedule to perform a Focused Spillway Assessment per CRO directive issued 4/28/17.	10/03/17	Submitted to CRO March 6, 2018.

**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 16th day of March, 2018.

/s/ Mealear Tauch  
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