

162 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Boyce Hydro Power, LLC

Project No. 10808-058

ORDER PROPOSING REVOCATION OF LICENSE

(Issued February 15, 2018)

1. Boyce Hydro Power, LLC (Boyce Hydro or licensee) is in violation of numerous provisions of its license for the Edenville Hydroelectric Project No. 10808 (Edenville Project), the Federal Power Act (FPA), and multiple Commission regulations and orders, including a Compliance Order issued pursuant to section 31(a) of the Federal Power Act.¹ As discussed below, the Commission proposes to revoke the license pursuant to section 31(b) of the FPA.

I. Background

2. On October 16, 1998, the Commission issued a license for the Edenville Project, a 4.8-megawatt (MW) hydroelectric project located in Gladwin and Midland counties, Michigan.² The Edenville Project consists of earthen embankments, known as the Edenville dam, totaling about 6,600 feet in length and having a maximum height of 54.5 feet. It spans both the Tittabawassee and Tobacco Rivers, creating a 2,600-acre reservoir known as Wixom Lake with a gross storage capacity of about 40,000 acre-feet and a 49-mile-long shoreline at full pool. There is a 50-foot-long intake leading to the powerhouse located at the dam on the eastern side of the project. The powerhouse contains two 2.4-MW Francis-type turbine generator units for a total installed capacity of 4.8 MW. The project creates a 0.4-mile-long bypassed reach on the Tobacco River that

¹ *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (Compliance Order).

² *Wolverine Power Corporation*, 85 FERC ¶ 61,063 (1998). The license was transferred from Wolverine Power Corporation to Synex Michigan, LLC on June 23, 2004. See *Wolverine Power Corporation and Synex Michigan, LLC*, 107 FERC ¶ 62,266 (2004). Synex Michigan, LLC changed its name to Boyce Hydro Power, LLC, and filed a statement with the Commission on July 12, 2007, to this effect. See Notice of Change in Licensee's Name (filed July 12, 2007).

extends from the dam to the point where the Tobacco River meets the Tittabawassee River. The project also includes two reinforced concrete multiple arch spillways. The 69-foot-wide, 39-foot-high Tittabawassee spillway (also referred to as the Edenville spillway) is located on the eastern side of the project and contains three Tainter gates and two low-level sluice gates. The Tobacco spillway is about 72 feet long and 72 feet wide with a crest height of about 40 feet, and contains three steel Tainter gates located on the western side of the project.

3. Boyce Hydro's license includes terms and conditions concerning dam safety, property rights, water quality, public recreation and safety, and other areas of public concern. Boyce Hydro has a long history of non-compliance with those terms and conditions and with related provisions in the FPA and Commission regulations and orders. The Compliance Order, which was issued pursuant to section 31 of the FPA on June 15, 2017, detailed this history and staff's multi-year effort to bring Boyce Hydro into compliance.³ In particular, the Compliance Order explained that Boyce Hydro: (1) failed to increase the capacity of spillways to enable them to pass the probable maximum flood (PMF) as required by Regional Engineer directives, license Article 4, and Part 12 of the Commission's regulations;⁴ (2) performed unauthorized dam repairs in violation of Regional Engineer directives and Part 12 of the Commission's regulations;⁵ (3) performed unauthorized earth-moving activities in violation of Standard Articles 19-21 of the license;⁶ (4) failed to file an adequate Public Safety Plan in violation of Regional Engineer directives and Part 12 of the Commission's regulations;⁷ (5) unduly restricted public access to project facilities and failed to construct approved recreation facilities in violation of Standard Article 18 and Article 410 of the license and the Commission's Orders Modifying and Approving Recreation Plan;⁸ (6) failed to acquire and document all necessary project property rights in violation of Standard Article 5 of the license;⁹ and (7) failed to comply with the Commission's 1999 Order approving

³ *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (Compliance Order).

⁴ *See* Compliance Order, at PP 5-26.

⁵ *See id.* PP 35-46.

⁶ *See id.* PP 54-76.

⁷ *See id.* PP 84-86.

⁸ *See id.* PP 92-107 (identifying, among others, violations of *Wolverine Power Corporation*, 96 FERC ¶ 62,055 (2001) and *Synex Michigan, LLC*, (Dec. 5, 2006) (unpublished order)).

⁹ *See id.* PP 116-124.

Boyce Hydro's Water Quality Monitoring Plan in violation of that order and Article 402 of the license.¹⁰ The Commission's primary concern has been the licensee's longstanding failure to address the project's inadequate spillway capacity, which currently is designed to pass only approximately 50 percent of the PMF. Failure of the Edenville dam could result in the loss of human life and the destruction of property and infrastructure.

4. Ordering Paragraphs (A) through (M) of the Compliance Order required Boyce Hydro to provide specific plans, specifications, reports and other information to address the violations identified in that order and to come into compliance with the Commission's regulations and the terms of its license. On July 14, 2017, and July 27, 2017, the licensee filed two requests for more time to comply with certain requirements in the Compliance Order. By orders issued July 25, 2017, and August 15, 2017, the extensions that the licensee requested were granted, with the exception of one portion of the second requested extension, which the order determined could be completed in the time provided in the first extension without the need for a second.¹¹ Those extensions were granted based on representations made by the licensee and its counsel regarding steps that the licensee was taking to satisfy the requirements of the Compliance Order.

5. Boyce Hydro failed to comply with obligations set out in each of the ordering paragraphs in the Compliance Order, except for the obligations to acquire and document certain property rights (although the lack of designs for the new and revised spillways makes it difficult to determine if it has acquired all necessary property rights)¹² and to implement certain requirements in the project's approved Water Quality Monitoring Plan.

¹⁰ *See id.* PP 134-141.

¹¹ The first order granted an additional 30 days to comply with the requirements in ordering paragraphs (B), (C), (D), (E), (F), and (G) of the Compliance Order. The second order granted more time to comply with ordering paragraphs (B), (G), and (D), but denied more time for complying with ordering paragraph (F).

¹² In filings made with the Commission on July 26, 2017, August 22, 2017, and January 22, 2018, Boyce Hydro states that it possesses the necessary property rights over the land within the project boundary and that it has acquired rights to land (and has ability to acquire rights to additional land) that may be necessary to complete construction of the Tobacco River Auxiliary Spillway. However, because the licensee has not provided plans and specifications for the Tittabawassee Auxiliary Spillway or provided other documentation specific to where the Tittabawassee Auxiliary Spillway will be constructed, Commission staff is still uncertain if the licensee has, in fact, obtained rights to all land necessary for the construction of the Tittabawassee Auxiliary Spillway, as required by the Compliance Order.

6. Boyce Hydro violated the following ordering paragraphs in the Compliance Order and associated orders extending time:

- Ordering paragraph (B) directed:

For the Tobacco River Auxiliary Spillway: By July 15, 2017 (extended to September 18, 2017), the licensee was required to file a complete design package with the Commission's Division of Dam Safety and Inspection, Chicago Regional Engineer (Regional Engineer) for a Tobacco River Auxiliary Spillway. The design package must fully address all items noted in the Regional Engineer's letter to the licensee dated June 6, 2016.

- Ordering paragraph (D) directed:

For the Tittabawassee River Auxiliary Spillway: By August 14, 2017 (extended to November 14, 2017), the licensee was required to file with the Regional Engineer, plans, specifications, and a schedule to construct a Tittabawassee River Auxiliary Spillway.

- Ordering paragraph (F) directed:

By October 13, 2017 (extended to November 14, 2017), the licensee was required to file with the Regional Engineer, a plan and schedule for additional modifications to the project to meet the full (100%) Probable Maximum Flood.

- Ordering paragraph (G) directed:

By July 30, 2017 (extended to September 30, 2017), the licensee was required to file with the Regional Engineer, complete plans and specifications for permanent repairs to both left and right Tobacco River abutment spillway walls, a complete work schedule, detailed drawings, a water management plan, an erosion control plan, a Temporary Construction Emergency Action Plan, and a Quality Control Inspection Program as originally specified in the Regional Engineer's letter to the licensee issued December 8, 2016.

- Ordering paragraph (J) directed:

By September 13, 2017, the licensee was required to provide reasonable access to project lands and waters for the public and to file documentation that such access has been provided. The licensee's documentation must include photographs showing that gates restricting access to parking and fishing areas are open, that fencing blocking access to recreation features has been removed, and that reasonable access to the water is allowed. The licensee's documentation must also

include a statement from the licensee affirming its compliance with the access provisions of Article 18.

- Ordering paragraph (K) directed:

By September 13, 2017, the licensee was required to file with the Regional Engineer, a complete design package for construction of all recreation facilities required by the project's approved Recreation Plan. The approved recreation facilities for the Tittabawassee side include: a parking lot for 15 cars off of State Highway 30, a parking lot with two handicapped spaces, a barrier-free restroom, a railed handicapped-accessible fishing pier next to the powerhouse, two canoe portages, access paths, and signs that identify the recreation facilities. The approved recreation facilities for the Tobacco side include: a parking lot for 15 cars off of State Highway 30, an access path, stairs to a railed fishing pier, and signs that identify the recreation facilities. Within 90 days of completing this work, the licensee must file documentation including as-built drawings and photographs demonstrating that the recreation facilities in the approved Recreation Plan have been constructed.

7. Boyce Hydro failed to make the filings required by ordering paragraphs (B), (D), (F), (G), (J), and (K) of the Compliance Order. It claims to have started the process of preparing the design package for the Tobacco River Auxiliary Spillway that was required by Ordering Paragraph (B), but it requested an additional four to five-month extension to complete that design package.¹³ And that is only the design of the Tobacco River Auxiliary Spillway – Boyce Hydro claims that it lacks the funds to actually construct the spillway and will need to save money over some unspecified period of time (and resolve outstanding state permitting issues) before it can start construction.¹⁴ Of course, this addresses just one of the two auxiliary spillways it must design and construct and does not include the other modifications that it will need to make to satisfy PMF requirements and/or to satisfy its obligations under the Compliance Order.

¹³ See, e.g., *Boyce Hydro Power, LLC*, Docket Nos. P-10808-047 & -053, at 8-9 (Dec. 1, 2017).

¹⁴ See *id.* at 9-10.

8. Boyce Hydro did not seek rehearing of the Compliance Order, and it has admitted that it failed to meet the obligations imposed by that order.¹⁵ It remains in violation of its license, the FPA, and Commission regulations and orders.¹⁶

II. Discussion

9. Under section 31(b) of the FPA,¹⁷ after providing notice and an opportunity for an evidentiary hearing, we may issue an order revoking a license if we find 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.¹⁸ In addition, section 31(b) provides that the Compliance Order shall be subject to *de novo* review and that the Commission shall consider the nature and seriousness of the violation and the licensee's efforts to remedy the violation.

10. This order provides notice that we propose to revoke the license for the Edenville Project No. 10808 under section 31(b). As explained in the Compliance Order, Boyce Hydro has failed for many years to comply with significant license and safety requirements, notwithstanding having been given opportunities to come into compliance. The Compliance Order set out specific parameters for Boyce Hydro to achieve compliance with its license. The licensee failed to meet nearly all the obligations in the

¹⁵ See *id.* at 8-15 (admitting, among other things, Boyce Hydro's failure to comply with Ordering Paragraphs (B), (D), (F), (G), (J), and (K) of the Compliance Order and requesting further extensions and/or a stay of those obligations).

¹⁶ On November 20, 2017, Commission staff issued an order requiring Boyce Hydro to cease generating at the Edenville Project, and Boyce Hydro filed a timely request for rehearing of that order. Concurrent with this Order Proposing Revocation, we are issuing an order denying rehearing of the Cease Generation Order.

¹⁷ See 16 U.S.C. § 823b(b) (2012). Section 31(b) provides that after notice and an opportunity for an evidentiary hearing, the Commission may issue an order revoking a license, where the licensee is found by the Commission to have knowingly violated a final order and has been given reasonable time to comply fully with that order.

¹⁸ See *e.g. Eastern Hydroelectric Corp.*, 149 FERC ¶ 61,036 (2014), *reh'g denied*, 150 FERC ¶ 61,099 (2015) (revoking license for failure to construct a required fish passage); *Virginia Hydrogeneration and Historical Society, L.C.*, 104 FERC ¶ 61,282 (2003) (proposing revocation of license for failure to comply with environmental conditions); *Energy Alternatives of North America, Inc.*, 68 FERC ¶ 61,196 (1994) (proposing revocation of the license for failure to comply with public safety requirements).

Compliance Order, even after Commission staff granted multiple extensions.¹⁹ Thus, based on the record, there is no reason to believe that the licensee intends to come into compliance. We conclude that it has been given a reasonable time to comply with the Compliance Order and considering the serious dam safety issues²⁰ and lack of demonstrated effort by Boyce Hydro to comply with the Compliance Order, we propose revocation of the project license.²¹

11. The licensee may request an evidentiary hearing before an Administrative Law Judge within 30 days of this issuance date of this order.²² If, within 30 days, the licensee requests a hearing, the Commission will set the matter for hearing. If the licensee does not request a hearing, the Commission will decide this matter based on the written record. Any interested person may file a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214). A person

¹⁹ Boyce Hydro's offer to place 50 percent of gross revenues from the Edenville Project into escrow until it has saved enough money to construct the Tobacco River Auxiliary Spillway does not convince us that it will satisfy its obligations under the Compliance Order if we grant another extension. Boyce Hydro has not provided any estimate of when it will complete construction of that spillway, let alone when it can complete and submit the designs for the other auxiliary spillway and satisfy the other obligations set out in the Compliance Order.

²⁰ Public safety would not be affected by revoking the license. Should the Commission ultimately revoke Boyce Hydro's license, the Commission's jurisdiction will end, and authority over the site will pass to the State of Michigan's dam regulatory authorities. *See Mich. Comp. Laws § 324.31506* (giving the Michigan Department of Environmental Quality regulatory authority over dams and impoundments in the state); *see also Eastern Hydroelectric Corp.*, 149 FERC ¶ 61,036 at P 35 (noting that upon revocation the authority to regulate dam safety and other issues related to the dam and impoundment would transfer to the state).

²¹ Revocation of the Edenville Project license does not mandate removal or any modification of the dam. While, the Commission has broad authority to fashion appropriate remedies to further the goals of the FPA in a manner that is "necessary and appropriate to carry out" the revocation of this license, "as a general rule, we do not condition the effectiveness of a license revocation by imposing additional requirements on a licensee that has shown its unwillingness to comply with other Commission orders." *Eastern Hydroelectric Corp.*, 149 FERC ¶ 61,036 at P 33 (declining request to order removal of all project facilities including the dam and instead only requiring licensee to disable all of the project's generating equipment to prevent operation of the project).

²² *See* 16 U.S.C. § 823b(b) (2012).

does not have to intervene in order to have comments considered. Any person may file with the Secretary of the Commission, comments in support of or in opposition to the proposed revocation. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding.

The Commission orders:

(A) Pursuant to section 31(b) of the FPA, 16 U.S.C. § 823b(b) (2012), the Commission proposes to revoke the license for the Edenville Project No. 10808.

(B) Boyce Hydro may request an evidentiary hearing within 30 days of the issuance date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.