

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Boyce Hydro Power, LLC

Project No. 10808-066

ORDER DENYING RECONSIDERATION AND DISMISSING APPLICATION

(Issued June 20, 2019)

1. On September 10, 2018, the Commission issued an order revoking Boyce Hydro Power, LLC's (Boyce Hydro) license for the 4.8-megawatt (MW) Edenville Project No. 10808 (Edenville Project).¹ On March 15, 2019, Boyce Hydro filed a motion requesting that the Commission reconsider the revocation of the license for the Edenville Project. Boyce Hydro's motion also included an application to transfer the license to Wolverine Hydro, LLC (Wolverine). For the reasons discussed below, we deny Boyce Hydro's motion for reconsideration and dismiss its transfer application as moot.

I. Background

2. On October 16, 1998, the Commission issued a license for the Edenville Project, located in Gladwin and Midland Counties, Michigan.² As detailed in multiple orders, throughout its ownership of the project Boyce Hydro repeatedly failed to comply with its license for the Edenville Project, the Commission's regulations, and Commission orders,³

¹ *Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018), *reh'g denied*, 166 FERC ¶ 61,029 (2019) (Rehearing Order).

² *See Wolverine Power Corporation*, 85 FERC ¶ 61,063, at 61,205 (1998). The Commission issued a 30-year license for the project. 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).

³ *See Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (2017 Compliance Order); *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017) (Cease Generation Order), *reh'g denied*, 162 FERC ¶ 61,116 (2018) (Cease Generation Rehearing Order); (continued ...)

and, on September 10, 2018, the Commission issued an order revoking Boyce Hydro's license for the project. Of particular concern has been the project's inability to pass the Probable Maximum Flood (PMF)⁴ due to inadequate spillway capacity. The revocation of the license became effective 15 days after the issuance of the order, i.e. on September 25, 2018.⁵

3. Boyce Hydro and the Sanford Lake Preservation Association (Sanford Lake Association) sought rehearing of the Revocation Order, which the Commission denied on January 17, 2019.⁶ Neither Boyce Hydro nor the Sanford Lake Association sought judicial review of the Revocation Order. It is therefore final.

4. On March 15, 2019, Boyce Hydro filed a motion requesting that the Commission reconsider the revocation of the license for the Edenville Project and approve the transfer of the license to Wolverine. Boyce Hydro argues that a new power purchase agreement with Consumers Energy Company (Consumers Energy) at a higher rate will enable Boyce Hydro to comply with all of the license requirements, and will enable the licensee to obtain a loan to fund construction of auxiliary spillway capacity sufficient to pass the entire PMF. Boyce Hydro further states that in order to assure the Commission that noncompliance will not continue into the future, it has agreed to transfer the project to Wolverine, an entity with several jurisdictional projects that Boyce Hydro describes as "substantially in compliance."⁷

Boyce Hydro Power, LLC, 162 FERC ¶ 61,115 (2018) (Order Proposing Revocation);
Boyce Hydro Power, LLC, 164 FERC ¶ 61,178 (2018) (Revocation Order).

⁴ The "PMF event" is the flood that may be expected from the most severe combination of critical meteorologic and hydrologic conditions that is reasonably possible in the drainage basin under study.

⁵ Revocation Order, 164 FERC ¶ 61,178, at ordering para. (A). Boyce Hydro was required to permanently disable the project's generating equipment, which it did. See Letter Order accepting Boyce Hydro Power, LLC's Disabling Generating Equipment (September 26, 2019). The Commission denied multiple motions to stay the Revocation Order as well as Boyce Hydro's Emergency Motion for Deferred Action and Interim Reinstatement of License. *Boyce Hydro Power, LLC*, 165 FERC ¶ 61,027 (2018) (Order Denying Stay), Rehearing Order, 166 FERC ¶ 61,029 at ordering para. (C).

⁶ Rehearing Order, 166 FERC ¶ 61,029.

⁷ Boyce Hydro Motion for Reconsideration at 6.

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5. On April 1, 2019, Sanford Lake Association filed an answer opposing Boyce Hydro's motion. Sanford Lake Association asserts that the Commission has no jurisdiction over the Edenville Project and Boyce Hydro's motion is an improper request for rehearing of the Revocation Order. Sanford Lake Association further notes that Boyce Hydro provided no information to the community about its proposal and argues that granting the motion will undermine the community's efforts to establish a lake level through the State of Michigan. Boyce Hydro filed an answer to Sanford Lake Association's answer on April 9, 2019.

II. Procedural Issues

6. As stated above, on April 9, 2019, Boyce Hydro filed an answer to Sanford Lake Association's answer. The Commission's Rules of Practice and Procedure generally do not permit answers to answers.⁸ Accordingly we reject Boyce Hydro's answer.⁹

III. Discussion

7. The Commission will consider entertaining a motion for reconsideration of a rehearing order only where a party asserts that the Commission may have erred by overlooking or misunderstanding facts or arguments set forth in the party's rehearing request (similar to those rare occasions when a court of appeals will grant rehearing or rehearing *en banc*).¹⁰ Here, Boyce Hydro does not claim that the Commission misunderstood or misinterpreted its prior arguments. Thus, its pleading is not a proper request for reconsideration and we will not consider it as such. To the extent that Boyce Hydro seeks to introduce new facts and arguments into the record, it is making an untimely, collateral attack on the now-final Revocation Order and the Rehearing Order.¹¹

⁸ 18 C.F.R. § 385.213(a)(2) (2018). *See, e.g., California Department of Water Resources*, 115 FERC ¶ 61,093 (2006).

⁹ While we may permit otherwise prohibited answers that are necessary to clarify the record or which assist the Commission in reaching a reasoned decision, *see, e.g., Erie Boulevard Hydropower, L.P.*, 134 FERC ¶ 61,205, at P 12 (2011), Boyce Hydro's answer satisfies neither criterion.

¹⁰ *Energie Group, LLC*, 117 FERC ¶ 61,124, at 61,648 (2006) (citing *Clifton Power Corp.*, 94 FERC ¶ 61,346, at 62,277 (2001)). *See also Great Northern Paper, Inc.*, 86 FERC ¶ 61,184, at 61,635 (1999) (“[t]he function of reconsideration is not for the consideration of information or arguments presented for the first time in the motion for reconsideration.”).

¹¹ This is not a situation where rehearing of the January 17, 2019 order denying rehearing of the Revocation Order would lie. *See, e.g., Duke Power*, 114 FERC ¶ 61,148, (continued ...)

The revocation proceeding has been concluded and we will not entertain an effort to continue it.

8. In any event, we have no ability to grant the relief that Boyce Hydro seeks. We have revoked the license for the Edenville Project, in orders that are now final. Accordingly, we currently have no jurisdiction over the Edenville project works. Should Boyce Hydro or any other entity wish to operate the project to generate electricity, they would need to seek a license to do so.

9. Even were we able to act affirmatively on Boyce Hydro's pleading, its arguments are unconvincing. Boyce Hydro argues that the Commission should reconsider the revocation of the project license because a new power purchase agreement will allow for adequate revenue to bring the project into compliance with the license requirements.¹² Boyce Hydro has previously alleged that it may be able to enter into a new agreement, but has never provided firm proof that this will occur, and the material it provides shows that any agreement is subject to significant contingencies, such as the settlement of state proceedings and future state regulatory action. In any event, while the agreement might increase revenue generated from the project and might allow Boyce Hydro/Wolverine to borrow funds to complete construction of additional spillway capacity, the agreement only requires reinstatement of the license by 2022, nearly three years from now.¹³ Such a timeframe provides interested entities, time to apply for, and receive, a new license, and would not justify reinstating the prior license. Further, subsequent to the various filings, a press report stated that an agreement has been reached in which a group representing community groups in the area of four projects owned by Boyce Hydro would purchase four projects owned by Boyce Hydro, including the Edenville Project.¹⁴ This adds additional uncertainty as to the future of the Edenville Project.

10. Boyce Hydro contends reconsideration is justified because it intends to transfer the project license to Wolverine; however, Boyce Hydro also states that Wolverine will rely

at 61,496 (2006) (“[r]ehearing of an order on rehearing lies when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.”).

¹² Boyce Hydro Motion for Reconsideration at 2.

¹³ *Id.* at 4.

¹⁴ Tereasa Nims, *Wixom Water: Tentative Deal Reached on Purchase of Four Dams*, Midland Daily News, Apr. 24, 2019, <https://www.ourmidland.com/news/article/Tentative-nbsp-deal-reached-on-purchase-of-four-13792418.php>.

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on the services of Boyce Hydro, LLC (Boyce LLC)¹⁵ to manage the daily operations of the project.¹⁶ Boyce Hydro states that Wolverine will lease the project properties and that there will be an operating agreement and revenue sharing between Wolverine and Boyce LLC.¹⁷ Additionally, Boyce Hydro would continue to own the power purchase agreement and electrical generating equipment for the Edenville Project.¹⁸ Again, even if such an action were possible, Boyce Hydro's arrangement with Wolverine does not justify reinstatement of the license.¹⁹ We have previously concluded that "Boyce Hydro has, for more than a decade, knowingly and willfully refused to comply with major aspects of its license and the Commission's regulatory regime, with the result that public safety has been put at risk and the public has been denied the benefits, particularly project recreation, to which it is entitled" and that "[t]he record demonstrates that there is no reason to believe that Boyce Hydro will come into compliance; rather, the licensee has displayed a history of obfuscation and outright disregard of its obligations."²⁰ An arrangement where Boyce Hydro, either itself or through Boyce LLC, retains control over the operations and a portion of the assets of the project is not in the public interest and would not justify reinstatement of the license.²¹

¹⁵ Boyce LLC is an existing limited liability corporation that is contracted by Boyce Hydro to operate Boyce Hydro's licensed projects.

¹⁶ Boyce Hydro Motion for Reconsideration at 12.

¹⁷ *Id.* at 13 n.31. Boyce Hydro states that the agreements will include *Linweave* clauses to ensure that it is clear Wolverine, as the licensee, is legally responsible for license compliance and does not require Boyce Hydro approval to carry out any license requirements imposed by the Commission. *Id.* at 12-13.

¹⁸ *Id.* at Attachment G.

¹⁹ See *Aer Ny-Gen, LLC & Eagle Creek Hydro Power, LLC, et al.*, 133 FERC ¶ 61,145, at P 30 (2010) (examining facts beyond the basic elements of a transfer based on the usual facts of the case).

²⁰ Revocation Order, 164 FERC ¶ 61,178 at P 58.

²¹ See *Carl E. Hitchcock, Elaine Hitchcock, and Energie Development Company, Inc. and Carl E. Hitchcock*, 69 FERC ¶ 61,382 (1994) (denying license application based on the compliance record of one of the applicants with respect to other projects under her control and direction); *Energie Group, LLC*, 109 FERC ¶ 62,225 (2004), *reh'g denied*, 111 FERC ¶ 61,072 (2005) (denying a preliminary permit application filed by a corporation on the same grounds), *aff'd by, Energie Group, LLC v. FERC*, 511 F.3d 161, 164 (D.C. Cir. 2007) ("By no means did we suggest FERC may not, in its discretion, base
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IV. Transfer Application

11. As we have explained, we cannot reinstate Boyce Hydro's license, which has been terminated by final Commission order. Accordingly, the request to transfer the license is moot.

The Commission orders:

(A) Boyce Hydro's March 15, 2019 Motion for Reconsideration is denied.

(B) Boyce Hydro's application to transfer the project license is dismissed as moot.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

a decision on a new license on such an important factor as who will actually be running the project.”).