

167 FERC ¶ 61,245
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ECOspensible, LLC

Project No. 9709-069

ORDER DENYING REHEARING

(Issued June 20, 2019)

1. On February 21, 2019, Commission staff issued an order denying ECOspensible, LLC's (ECOspensible) request to extend its 40-year license by 10 years for the Herkimer Project, located on West Canada Creek, in Herkimer County, New York.¹ On March 25, 2019, ECOspensible filed a timely request for rehearing of the February 21 Order. For the reasons discussed below, we deny ECOspensible's request for rehearing.

I. Background

2. On April 22, 1987, the Commission issued Trafalgar Power, Inc. a 40-year license for the construction, operation, and maintenance of the Herkimer Project, effective on April 1, 1987, and expiring on March 31, 2027.² On March 12, 2015, the Commission approved the transfer of the license to the current licensee, ECOspensible.³ The project has not been operational since 2006, after several floods damaged the project's generator units.⁴

¹ *ECOspensible, LLC*, 166 FERC ¶ 62,081 (2019) (February 21 Order).

² *Trafalgar Power, Inc.*, 39 FERC ¶ 62,077 (1987).

³ *Trafalgar Power, Inc. and ECOspensible*, 150 FERC ¶ 62,144 (2015).

⁴ The Commission approved the transfer of the license to ECOspensible in 2015 with the understanding that doing so would allow ECOspensible to return the project to operation. *Id.* P 5.

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3. On May 24, 2018, ECOsponsible requested a 14-year extension of the license term. Commission staff denied the extension request on July 31, 2018,⁵ because the request would have extended the license term beyond 50 years, which is the statutory limited for license terms.⁶ On August 1, 2018, ECOsponsible requested rehearing of the July 31 Order, proposing to revise the length of its extension request from 14 years to 10 years. Staff treated this filing as a new request to extend the expiration date of ECOsponsible's license by 10 years.

4. In the February 21 Order, Commission staff found unpersuasive the licensee's argument that a 10-year extension is necessary in order for the licensee to repair, modernize, and restore the project, at an estimated cost of up to two million dollars. In denying the licensee's request, staff explained that although the Commission has previously extended license terms for the purpose of amortizing significant capital investments, the Commission granted those extensions in conjunction with major amendments to add capacity or significant environmental measures at the projects, which is not the case here. Further, staff stated that the requested license term extension would push the expiration date of the Herkimer Project out of sync with the license terms of other Commission-licensed projects in the same river basin. As stated in the order, it is Commission policy to "coordinate the expiration dates of licenses to the maximum extent possible, to maximize future considerations of cumulative impacts ... in contemporaneous proceedings at relicensing."⁷ Moreover, the licensee's lack of due diligence in developing an acceptable plan for making repairs and restoring operation since it acquired the project weighs against a license term extension.⁸

5. On rehearing, ECOsponsible reiterates its argument that its significant investment of time and resources since acquiring the license demonstrate its commitment to restoring the project.⁹ ECOsponsible contends that the Commission should grant rehearing and

⁵ *ECOsponsible, LLC*, 164 FERC ¶ 62,053 (2018).

⁶ 16 U.S.C. § 799 (2012).

⁷ February 21 Order, 166 FERC ¶ 62,081 at P 8 (citing *Policy Statement on Use of Reserved Authority in Hydropower Relicenses to Ameliorate Cumulative Impacts*, 59 Fed. Reg. 66,714 (1994); 18 C.F.R. § 2.23 (2018)).

⁸ Commission staff's efforts to work with the licensee on developing an acceptable plan and cure deficiencies are outlined in the February 21 Order. *Id.* P 9.

⁹ We note that ECOsponsible's March 25, 2019, request for rehearing fails to state the alleged error in the February 21 Order, as is required under the Commission's regulations. 18 C.F.R. § 385.713(c)(1) (2018).

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approve its revised extension request because: (1) its proposed capital investments are similar to those for which the Commission has extended license terms in the past; (2) ECOsponsible has arranged for up to \$2 million in loans for the modernization and restarting of the project; and (3) based on the terms of ECOsponsible's proposed loan package, without a license extension, the project is uneconomical.¹⁰ The licensee also disputes the February 21 Order's finding that the licensee has been unresponsive in addressing deficiencies.

II. Discussion

6. Licensees that seek to extend existing licenses with terms of less than 50 years must justify such requests. The Commission has generally extended license terms only in very limited circumstances, primarily (1) to enable a licensee to amortize the cost of substantial new improvements to project facilities,¹¹ (2) to coordinate the license expiration date with the expiration dates of other licenses in the same river basin,¹² or

¹⁰ ECOsponsible also notes in its request for rehearing that the project recently executed a long-term revenue contract to acquire the electricity generated at the Herkimer Project, which ECOsponsible claims further emphasizes its need to obtain financing.

¹¹ See, e.g., *Idaho Power Co.*, 132 FERC ¶ 62,001 (2010) (10-year extension of the license term due to the \$75 million cost of raising the project's capacity from 11.87 MW to 60.875 MW and to coordinate license expiration with other projects); *PPL Holtwood, LLC*, 129 FERC ¶ 62,092 (2009) (16-year extension of license term due to costs associated increasing project capacity from 107.2 MW to 195.2 MW, implementing extensive environmental measures, and to coordinate license expiration with other projects); and *Wolf River Hydro Limited Partnership*, 116 FERC ¶ 62,166 (2006) (10-year extension of the license term due to costs associated with a number of new proposed environmental measures).

¹² See, e.g., *Northern States Power Company*, 149 FERC ¶ 62,090 (2014) (5-year extension of license term to combine relicensing activities with another project); *Black Bear Hydro Partners, LLC*, 140 FERC ¶ 62,194 (2012) and *Black Bear Hydro Partners, LLC*, 140 FERC ¶ 62,195 (2012) (3-year and 10-year extensions, respectively, of license terms for significant new construction and environmental measures and to coordinate expirations dates of the licenses); and *Wisconsin Public Service Corporation*, 127 FERC ¶ 62,219 (2009) (15-month extension of license term to combine relicensing activities with another project).

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(3) because of unique circumstances or circumstances beyond a licensee's control.¹³ As relevant here, justification for a longer license term to allow for cost amortization could include situations involving installation of new generating capacity, physical improvements to enhance the environment, or the imposition of additional requirements on the licensee.¹⁴ However, where actions are taken by the licensee pursuant to the requirements of the license as previously issued, an extension of the license term is not justified.¹⁵

7. We agree with staff's conclusion in the February 21 Order that an extension is not warranted under these circumstances. Unlike other instances in which we have granted a license term extension, ECOsponsible has not requested an extension as part of a major amendment to increase project capacity or add new environmental measures. Rather, ECOsponsible only proposes repairs and modernization in order to restore operation, which it is already required to do under its current license,¹⁶ and seeks the license term extension only to amortize these costs.¹⁷ Further, as staff explained in the February 21 Order and as discussed in more detail below, ECOsponsible has failed, despite four years of effort by Commission staff, to provide any specific details regarding its plan for

¹³ See, e.g., *South Carolina Electric & Gas Co.*, 105 FERC ¶ 61,226 (2003) (5-year extension to give the licensee adequate time to conduct studies needed to prepare its relicensing application, some of which were not possible to conduct because of a reservoir drawdown during the pendency of a \$ 200 million dam rebuild); *City of River Falls, Wisconsin*, 154 FERC ¶ 61,214 (2016) (5-year extension granted in light of unanimous stakeholder support for the extension, the fact that the municipality-licensee requested more time to determine whether it wanted to relicense the project, and the tying of the extension to the development of a comprehensive river plan).

¹⁴ *Id.*

¹⁵ *The Montana Power Co.*, 47 FERC ¶ 61,277, at 61,963 (1989).

¹⁶ Ordering Paragraph E of the license makes the licensee subject to standard conditions set forth in form L-14. *Trafalgar Power*, 39 FERC 62,077 at 63,222. Article 17 of form L-14 states if the licensee allows project property to become unfit for use, without adequate replacement, the Commission will deem it the licensee's intent to surrender the license. *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Issued Under Part I of the Fed. Power Act*, 54 F.P.C. 1792, 1876 (1975).

¹⁷ Indeed, the damage to the project occurred well before ECOsponsible became the licensee, so it should have aware of whatever measure were needed to restore the project to operation.

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restoring operation at the project, so we would have no assurance that a license extension would lead to any certain results.¹⁸

8. The other circumstances under which the Commission has granted license term extensions are similarly absent here. As explained in the February 21 Order, granting an extension in this case would not aid in any effort to coordinate the license expiration date with the expiration dates of other licenses in the same river basin. In fact, doing so would frustrate this purpose and push the expiration date of the Herkimer Project out of sync with the license terms of other Commission-licensed projects both upstream and downstream of the project.¹⁹

9. Further, unlike previous cases in which the Commission has granted a license term extension, there is no evidence of stakeholder support for ECOsponsible's proposal.²⁰ Rather, as discussed in the February 21 Order, both the U.S. Department of the Interior (Interior) and the New York State Department of Environmental Conservation (New York DEC) filed comments opposing ECOsponsible's extension request. In their comments, both agencies voiced concerns regarding the adequacy of protection for aquatic species and other environmental resources at the project. The agencies also emphasized that extending the license term would frustrate efforts to coordinate basin-wide reviews during relicensing and noted the lack of unique circumstances to justify a license term extension. Interior further commented that while ECOsponsible states that it intends to modernize and increase project capacity, the licensee has neither consulted with Interior nor submitted an amendment application for Interior's review.²¹

10. With regard to ECOsponsible's efforts in addressing deficiencies, the record indicates that despite repeated attempts by the Commission's New York Regional Office (NYRO) to get the licensee to file an acceptable plan and schedule to repair the Herkimer Project and restore it to operation, ECOsponsible has yet to do so, and the project remains

¹⁸ February 21, Order, 166 FERC ¶ 62,081 at P 9.

¹⁹ The Herkimer license is currently set to expire within five years of a grouping of five proximate Commission-license projects, two upstream and three downstream. *Id.* P 8.

²⁰ For example, in *City of River Falls, Wisconsin*, the City's proposal had unanimous support from all resource agencies and stakeholders, which—among other factors—lead the Commission to find that a five-year license extension was in the public interest. *City of River Falls, Wisconsin*, 154 FERC ¶ 61,214, at P 8 (2016).

²¹ See 18 C.F.R. §§ 4.38 and 4.201 (2018) (describing the Commission's pre-filing consultation and amendment application requirements).

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inoperable.²² In a plan and schedule for restoring project operation submitted on February 26, 2018, the licensee provided a vague outline indicating that all necessary repair work would be completed and all four generating units would be returned to service by October 2018.²³ ECOsponsible filed an updated plan and schedule on October 12, 2018, in which it claimed that its planned restoration schedule was delayed pending a decision from the Commission regarding ECOsponsible's requested license term extension.²⁴ In the most recent plan and schedule filed by ECOsponsible on February 27, 2019, the licensee again offered a vague description of the items it proposes to address before the end of the year, but failed to provide a specific plan for achieving its stated goals.²⁵ As evidenced by the record, the licensee has consistently demonstrated a lack of due diligence in meeting its license requirements, and there is no convincing evidence as to when, if ever, project repairs will take place.

11. For the above reasons, we deny ECOsponsible's request for rehearing.

²² Commission staff from the NYRO have inspected the project twice (on June 10, 2015, and most recently on September 20, 2018), and have subsequently sent letters asking ECOsponsible, LLC requesting specific plans and a schedule for completing needed repairs. Most recently, NYRO staff sent the licensee a dam safety inspection follow-up letter on December 31, 2018, requiring the licensee to take several actions to maintain the project in a safe condition, as well as directing the licensee to submit an updated Public Safety Plan, Dam Safety Surveillance and Monitoring plan, and plan and schedule for restoring project operation. The letter also noted the unmaintained condition of the facilities and the fact that no repairs or restoration work to get the project back on-line has been accomplished since ECOsponsible acquired the project in 2015. *See* letters from NYRO to the licensee dated June 29, 2015 and December 31, 2018.

²³ ECOsponsible, LLC, February 26, 2018 Filing at 5-6.

²⁴ ECOsponsible, LLC, October 12, 2018 Filing at 1-2.

²⁵ For example, the licensee proposes to restart at least three of the generating units by the end of 2019, but offers no further details, including how and when it will make necessary repairs, beyond indicating its intention to "Restart G1 first." ECOsponsible, LLC, February 27, 2019 Filing at 2.

The Commission orders:

The rehearing request filed by ECOsponsible, LLC on March 25, 2019 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.