

UNITED STATES OF AMERICA 110 FERC ¶62,121
FEDERAL ENERGY REGULATORY COMMISSION

Crown Hydro LLC

Project No. 11175-016

ORDER DISMISSING AMENDMENT APPLICATION

(Issued February 10, 2005)

On April 4, 2002, and supplemented on July 1, and December 13, 2002, Crown Hydro LLC (Crown), licensee for the 3.4-megawatt Crown Mill Project, FERC No. 11175, filed an application to amend its license. Crown proposed to revise the project design and boundary so as to relocate the proposed powerhouse, and to make additional modifications to the project. When constructed, the project would be located at the Upper St. Anthony Falls Dam on the Mississippi River, (a navigable waterway of the United States),¹ in the City of Minneapolis, Hennepin County, Minnesota. The project would occupy 0.5 acre of United States lands under the jurisdiction of the U.S. Army Corps of Engineers (Corps).

BACKGROUND

The license for the Crown Mill Project was issued March 19, 1999,² and authorized the project works consisting of: (a) a 17-foot-deep, 50 to 100-foot-wide, 350-foot-long headrace canal; (b) a gated intake structure with a trash rack; (c) the intake tunnel; (d) the forebay; (e) two steel penstocks leading from the forebay to the turbines; (f) a powerhouse room to be constructed in the basement of the Crown Roller Mill Building containing two vertical Kaplan 1,700-kW generating units and having a hydraulic capacity of 500 cubic feet per second (cfs), for a total installed capacity of 3,400 kW; (g) the 19-foot-high, 15 to 30-foot-wide, 380-foot-long tailrace tunnel; (h) the 20 to 100-foot-wide, 700-foot-long tailrace canal; (i) an underground 13.8-kV transmission line; and (j) appurtenant facilities.

¹ 9 FPC 1323. (1950)

² See, 86 FERC ¶ 62,209, Order Issuing License (Major Project).

Project No. 11175-016

2

The project would use the reservoir and Upper St. Anthony Falls Dam, a horseshoe shaped dam with a concrete spillway about 50 feet high (also known as St. Anthony Falls).

PROPOSED AMENDMENT

In the April 4, 2002 filing, Crown explains that because of its inability to reach an acceptable lease agreement with the Crown Roller Mill Building owner, the use of the Crown Building as a powerhouse became impractical. Therefore, Crown requested Commission approval to revise the project design boundary so as to relocate the powerhouse from the west side to the east side of West River Parkway, and to be within the footprint of the remains of the Holly and Cataract Mill Foundation, known as Mill Ruins Park, owned by the City of Minneapolis Park and Recreation Board (Park Board). The entire project would lie within the boundaries of the Mississippi National River and Recreation Area, and within the St. Anthony Falls National Register Historic District.

In the April 4, 2002 filing, Crown indicates that, from the tailrace to the river, the project design would be essentially the same as originally licensed. The project would include an intake structure with a trash rack; two slide gates; forebay; two 8-foot-diameter steel penstocks, leading the flow from the forebay to the turbines; a powerhouse containing two identical generating units, a transmission line; and appurtenant facilities.

The powerhouse would be a one-story above-grade structure constructed on the east side of the West River Parkway, within the footprint of the remains of the Holly and Cataract Mill Foundation. The proposed facility would contain two 1,700-millimeter runner diameter axial flow adjustable blade turbines connected to two vertical synchronous generators each rated 1,750 kVA at 0.9 PF (1,575 kW equivalent), at 42 feet net head. The project would remain as a run-of- river plant with a minimum and maximum discharge at the plant of 250 cfs and 1,000 cfs, respectively. Each turbine would have a rated flow of 500 cfs. Discharge through the units would be controlled by adjustable wicket gates loaded just above the turbine blades. Efficiency would be optimized by adjustable runner blades. Wicket gates would provide the means for starting, adjusting, and stopping flow through the turbines.

The excavation work in the forebay, rehabilitation of the historic gatehouse, and construction of a new intake structure would be essentially the same as described in the license exhibits. Flow from Turbine No. 1 draft tube discharges into the Holly Tunnel, which subsequently flows into the City Tunnel, then into the tailrace. Flow from Turbine No. 2 draft tube discharges into the First Street Tunnel, then into the tailrace.

Project No. 11175-016

3

CONSULTATION

In the April 4, 2002 filing, Crown included comments from the following agencies: Minnesota Pollution Control Agency (December 27, 2002); U.S. Army Corps of Engineers (January 14, 2003); and the City of Minneapolis (February 21, 2003).

On January 17, 2003, the Commission issued public notice of the proposed amendment application. The notice set February 18, 2003, as the deadline for filing protests and motions to intervene. The notice was re-issued on February 26, 2003, because several state and federal agencies requested additional time to provide comments. The deadline for filing comments/motions to intervene was March 18, 2003. Table 1 provides a listing of the agencies that provided comments and the date comments were filed:

Table 1

Agency/Entity	Comment Filing Date
City of Minneapolis	02/21/03
Standard Mill Limited Partnership	03/17/03
United States Department of the Interior	03/17/03
Minnesota Department of Natural Resources	03/18/03
Minneapolis Park and Recreation Board	03/06/03
Board of Hennepin County Commissioners	04/18/03
Minnesotans for an Energy Efficient Economy	04/21/03

On February 21, 2003, the City of Minneapolis (City) filed a Motion to Intervene, stating that the City does not object to the proposed development of the project as long as it is reasonably feasible and includes adequate environmental mitigation. Crown responded to the City by letter filed on April 23, 2003.

Project No. 11175-016

4

On March 17, 2003, Standard Mill Limited Partnership filed a Motion to Intervene and stated its concern that the proposed location of the project could negatively affect its historic property, which is adjacent to the proposed location. Therefore, it requested that the Commission base its decision on an environmental assessment that reflects the proposed project. Crown responded by a letter filed on April 23, 2003, stating that it was engaged in the consultation process required under section 106 of the National Historic Preservation Act, and would continue to work with the interested parties to mitigate any potential adverse effects resulting from the project.

On March 17 and 18, 2003, respectively, the U.S. Department of the Interior (Interior) and the State of Minnesota Department of Natural Resources (MDNR) filed separate motions to intervene. In comments filed March 19, 2003, Interior described measures that should be taken during and following construction to minimize impacts to vegetation, wildlife, and fish. The measures should include restoring native vegetation in the project area, in addition to controlling erosion and sedimentation. Crown responded to the comments in a letter filed on May 5, 2003. The MDNR stated that hydropower operations should be monitored by the licensee, and data (flow and water levels) must be submitted to the MDNR on a monthly or quarterly basis. Crown responded to MDNR's comments by letter filed on April 18, 2003.

In addition, by letters filed April 18 and 21, 2003, respectively, the Board of Hennepin County Commissioners and the Minnesotans for an Energy-Efficient Economy stated their support for the proposed project.

On March 6, 2003, the Park Board filed a motion to intervene opposing the amendment proposal, and provided the following reasons:

1. The irreparable damage to Park Board's Mill Ruins Park that the relocated powerhouse and water conveyance components of the project could do to the goals of the Park Board and the City of Minneapolis in their ongoing development of recreational facilities and historic preservation activities in the project area;
2. The absence of a lease agreement between Crown and the Park Board for use of their land, despite the Park Board's attempts to initiate negotiations with Crown; and
3. Crown's demonstrated inability to meet license requirements and deadlines.

In a letter filed April 18, 2003, Crown responded to the Park Board's comments by stating that the issues raised by the Park Board can be resolved after a Power Purchase

Project No. 11175-016

5

Agreement (PPA) is finalized. On June 17, 2003, Crown filed with the Commission a letter indicating that the subject PPA was approved on June 5, 2003.

DISCUSSION

The Energy Policy Act of 1992 amended Federal Power Act (FPA) section 21 to include the following proviso: "That no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to [October 24, 1992, the 1992 Policy Act's enactment date], were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law."

In a letter issued January 13, 2004, Commission staff informed Crown that further processing of the amendment application awaits the timely resolution of the land rights issue; that the 1992 amendments to section 21 of the FPA bar Crown from using the right of eminent domain authority under that section to obtain rights in the Park Board's land; and that consequently, no purpose is served processing the amendment application, unless the Park Board will agree to a conveyance of rights in its land to the licensee that is acceptable under the requirements described in the letter. In the same letter, staff informed Crown that it will not maintain the amendment application on the Commission's docket unless an acceptable conveyance will be executed within a reasonable time, and that failure to do so will result in the dismissal of the licensee's amendment application.

Staff has granted Crown's requests for several extensions of time to file an acceptable conveyance of Park Board land in letters issued January 13, 2004, May 3, 2004, July 15, 2004, and September 17, 2004. In its September 17, 2004 letter, staff granted Crown a 45-day extension of time, until October 26, 2004 to file an acceptable conveyance of Park Board land. In the letter, staff stated that "any further requests for extension of time must also include documentation of Crown attorney's investigations regarding Crown's right to use eminent domain authority [under FPA section 21], and any concrete evidence (such as exchanges of letters and summaries of meetings) of negotiations with the Park Board."

In an October 26, 2004 letter, Crown requested an additional extension of time. In the letter, p. 1, Crown admits that there are no longer any ongoing lease negotiations between Crown and the Park Board and that therefore Crown has no option but to investigate the use of eminent domain authority under FPA section 21.

Project No. 11175-016

6

In a November 9, 2004 letter, the Park Board states that eminent domain is not available to Crown and refers to its August 18, 2003 letter, outlining the acquisition and development of the land involved to show that Crown cannot use FPA section 21 eminent domain to acquire the Park Board's land.

Crown argues that, while the Park Board may have acquired the land in question prior to 1992, it did not include it in a public park established under State or local law until Mill Ruins Park was established in the Fall of 2001. It attaches to its October 26 letter various publications from the Park Board's Web site and various Park Board resolutions to support this argument.

However, the record shows that not only did the Park Board own the land in question but also that the land was included within what can only reasonably be described as a "public park" or "recreation area" "established under State or local law" prior to October 24, 1992, as required by the proviso. The record shows that:

1. In 1977 through 1984, the Riverfront Development Coordination Board (a Minneapolis joint-powers agency (no longer in existence)), the Metropolitan Council (the regional planning organization for the seven-county Twin Cities metropolitan area), and the Park Board, pursuant to various development reports and government actions, including the Minneapolis City Council's adoption of a land-use map, designated the land in question as "parkland";
2. In 1986 and 1990, respectively, the Park Board, through court-ordered condemnation, acquired for "park, parkway and roadway purposes" the portions of the land in question known as the Fuji-Ya property (which includes lands where Crown proposes to locate its hydropower generating facility) and the Shiely property (through which Crown proposes to channel tailrace water); and
3. In 1987 and 1990, respectively, the Park Board developed the portion of the land that Crown proposes to use for its generating facilities with "bicycle and pedestrian trails, ornamental lighting, and river-edge railings, site furnishings, landscaping, parking areas, interpretive signage, and other park features," and the Park Board developed the area where Crown intends to channel tailrace water as "passive green space." See the Park Board's August 18, 2003 letter, pp. 2-4, and its November 9, 2004 letter, pp. 2-4.

Consequently, notwithstanding Crown's new evidence indicating that the Park Board may not have established Mill Ruins Park as a state park until after 1992, the pre-1992

Project No. 11175-016

7

designation, acquisition, and development of the land involved here as “parkland” with various park improvements for use and enjoyment by the public include that land within the phrases “public park” or “recreation area” in the proviso of FPA section 21.

Crown has failed to show that it can obtain the necessary property rights in the Park Board’s land, either by an agreement with the Park Board or by eminent domain authority under FPA section 21. Therefore, for the reasons set forth above, Crown's latest request, filed October 26, for an extension of time to file an acceptable conveyance of the Park Board's land in Minneapolis' Mill Ruins Park needed for Crown's license amendment is denied by this order. In addition, Crown’s application for amendment of license to revise the project design and boundary so as to relocate the powerhouse is dismissed by this order. The dismissal is without prejudice to Crown re-filing the application if it ever obtains the requisite property rights.

The Director orders:

(A) The licensee's amendment application to change project design and to relocate the powerhouse filed on April 4, 2002, and supplemented on July 1 and December 13, 2002, is dismissed.

(B) The licensee’s request for an additional extension of time to file an acceptable conveyance of Park Board land, or evidence regarding the right to use eminent domain authority under FPA Section 21, is denied.

(C) This order constitutes final agency action. Requests for a rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

Joseph D. Morgan
Director
Division of Hydropower
Administration and Compliance

Project No. 11175-016

8