121 FERC 61,153
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Homestead Energy Resources, LLC. Project No. 7115-038

ORDER TERMINATING LICENSE

(Issued November 15, 2007)

1. On January 17, 2007, Commission staff issued a notice finding that Homestead Energy Resources, LLC. (Homestead), licensee for the George W. Andrews Project No. 7115, had failed to commence construction of the project by the statutory deadline, and notifying Homestead of the consequent probable termination of the license. Homestead filed comments opposing termination, stating that the start of construction had taken place. For the reasons set forth below, we find that, for purposes of section 13 of the Federal Power Act (FPA),[1] construction did not timely commence, and we terminate the license, as section 13 requires.

Background

2. The George W. Andrews Project was licensed in 1987.[2] It was to be located at the U.S. Army Corps of Engineers' George W. Andrews Lock and Dam on the Chattahoochee River in Houston County, Alabama, and Early County, Georgia. The license, as amended,[3] required construction of an integral headworks-powerhouse structure, 140 feet long and 300 feet wide, located on the Alabama side of the dam, containing six turbine-generator units having a total installed capacity of 24 megawatts; a tailrace channel; an 18-mile-long transmission line; and generator leads and power transformers.

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[1] 16 U.S.C. § 806 (2000).

[2] 39 FERC ¶ 62,197 (1987). The license was issued to the City of Dothan, Alabama, and the Municipal Electric Authority of Georgia. In 1989, the Commission approved the deletion of the City of Dothan as co-licensee and transferred the license to the Municipal Electric Authority, 46 FERC ¶ 62,093 (1989).

[3] 87 FERC ¶ 62,314 (1999).

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3. Article 308 of the license required project construction to commence within two years of license issuance, *i.e.*, by May 22, 1989. Section 13 of the FPA authorizes the Commission to grant one extension of the deadline, for no more than two additional years. The licensee requested and received a two-year extension, which moved the construction deadline to May 22, 1991.[4] The Commission stayed the construction deadline for over nine years pending a protracted competitive transfer proceeding, and a subsequent 1999 proceeding in which the license was transferred to Homestead, after which the construction commencement deadline was September 21, 2000.[5]

4. On May 26, 2000, Congress enacted Public Law No. 106-213, which authorized the Commission to extend for three consecutive two-year periods the time period during which the licensee is required to commence construction of the project. Homestead requested and received the three, two-year extensions, after which the construction commencement deadline was September 21, 2006.[6]

5. On January 17, 2007, Commission staff notified Homestead of the probable termination of its license for failure to commence construction by the deadline.

6. On February 16, 2007, Homestead responded that it had commenced construction of the project prior to the September 21, 2006 deadline by the purchase and remanufacturing of second-hand generators. It stated that the financial feasibility of the project required the use of second-hand equipment and that, because of the varying configurations of second-hand generators, it was impossible for it to perform site construction or to purchase turbines, until it found suitable second-hand generators to purchase; that after a world-wide search it found suitable generators (albeit ones that required remanufacturing for their installation) at an "abandoned nuclear project;"[7] and

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[4] Order Granting Extension of Time to Commence Project Construction, issued March 16, 1989 (unpublished).

[5] *See* 54 FERC ¶ 61,227 (1991) (start of construction stayed effective January 29, 1991); 80 FERC ¶ 61,268 (1997) (transfer of license to Southeastern Hydro Power, Inc.); 87 FERC ¶ 62,232 (transfer of license to Homestead); 88 FERC ¶ 61,071 (stay of start of construction deadline lifted, effective July 15, 1999); 88 FERC ¶ 61,256 (1999) (effective date of stay of start of construction deadline revised from January 29, 1991, to March 14, 1990, with the effect of giving the licensee additional time to commence construction once the stay was lifted).

[6] *See* the unpublished orders issued May 4, 2001, May 21, 2003, and September 28, 2004, extending the deadline to commence construction to September 21, 2002, September 21, 2004, and September 21, 2006, respectively.

[7] Homestead's February 16, 2007 filing at 4.

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that it purchased them before the September 21, 2006 deadline. It submitted a signed sales contract for the purchase of the generators, dated September 15, 2006.[8] It stated that immediately following its purchase of the generators, it began the remanufacture of the generators, which it claimed began construction of the project.

Discussion

7. Project construction generally will be regarded as having commenced with the start of work on machinery or facilities considered to be significant, permanent elements of the project. The acts that constitute the commencement of construction will vary from project to project, depending largely on the existing facilities, *i.e.*, whether the proposed project is at an existing dam and/or has an existing powerhouse. In cases such as this where a proposed project uses an existing dam and there is no existing powerhouse, the start of construction can be met by the manufacture of turbines or generators where the actual time for manufacture of new turbines and generators is equal to or greater than the period of physical construction at the site and the licensee can substantiate actual construction of turbines or generators in accordance with engineering specifications for the particular project and pursuant to an enforceable contract.[9]

8. However, it is well-settled that, since the estimated time for manufacture of equipment must be equal to or greater than the anticipated period of physical construction at the project site in order for the start of work done on such equipment to be considered as the commencement of construction, obtaining manufactured turbines or generators,

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[8] Homestead does not explain why it had to conduct a "world-wide search" when the generators appear to have been, relatively speaking, in its own back yard. *See* Exhibit C of Homestead's February 16, 2007 filing. The September 15, 2006 sales contract (which is apparently erroneously dated September 15, 2007) shows that the seller was The Clifton Corporation, and that the same person, Charles Mierek, signed the contract for both the seller and the purchaser. Homestead fails to show when or from whom The Clifton Corporation, a company obviously affiliated with Homestead, obtained the generators or why Homestead did not purchase the generators directly (and presumably earlier) from the entity that sold the generators to The Clifton Corporation.

[9] *See, e.g., Cascade Water Power Development Corporation*, 69 FERC ¶ 61,167 at 61,643 (1994) (*Cascade*)*; UAH-Braendly Hydro Associates*, 46 FERC ¶ 61,178 at 61,591 (1989) (*UAH-Braendly*); *Geoffrey Shadroui*, 70 FERC ¶ 61,237 at 61,279 (1995) *(Shadroui);* and *Atlantic Power Development Corp.*, 40 FERC ¶ 61,253 at 61,857 (1987) *(Atlantic).* This standard applies both to construction at an existing dam with an existing powerhouse (*see, e.g., Cascade* and *UAH-Braendly, supra*) and to construction at existing dams without an existing powerhouse *(see, e.g., Shadroui* and *Atlantic, supra).*

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even pursuant to an enforceable contract, cannot constitute the start of construction because the turbines or generators already exist. [10]

9. Homestead acknowledges that Commission precedent rejects the purchase of existing turbines or generators, such as the second-hand generators involved here, as constituting the start of project construction. However, it argues that the start of necessary remanufacturing of the second-hand generators for its project constitutes the start of construction, since the generators are significant permanent elements of the project; the remanufacturing work is substantial; and the remanufacturing process began immediately after signing the contract for their purchase, before the deadline for commencing project construction. It states that the remanufacturing process began with the manufacture of braces needed for stabilizing the rotating poles of the generators. It further states that the manufacture of the stabilizing braces is merely one step in the process needed to remanufacture the generators, which will also, it states, requires complete dismantling and modification to the rotating poles. Additionally, it states that, whereas it will take 16 months to complete site construction for the project, it will take 26 months for the acquisition of equipment for the project.

10. However, that the generators Homestead has purchased require some modifications for their installation at the project does not change the fact that they are in existence and, under well-settled Commission precedent, their purchase does not constitute the start of project construction. Moreover, even if we were to accept Homestead's assertion that the start of the remanufacturing of a significant permanent element of a project that is already in existence when acquired constitutes the start of project construction, Homestead has failed to meet the requirements for demonstrating the start of such "offsite" project construction. First, it has failed to show that the remanufacturing for the generators (through the manufacture of the stabilizing braces) began before the deadline for the start of project construction. It merely states that the manufacture of the braces began immediately after it executed the purchase contract for the generators, which was signed on September 15, 2006, just six days prior to the September 21, 2006 deadline for starting construction. It fails to provide any documentary evidence establishing the date of the start of the construction of the braces or any other remanufacturing measures.[11]

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[10] *See Hydro Matrix Limited Partnership*, 121 FERC ¶ 61,048 at P15 and n. 18 (2007), *citing Shadroui*, *supra*, and *Cascade*, *supra*.

[11] Despite Homestead's assertion that the remanufacturing of the project's generators is a process that includes not only manufacture of the pole-stabilizing braces but also complete dismantling and modification of the poles, the only remanufacturing step that appears to have been initiated during the five months between Homestead's September 15, 2006 purchase of the generators and the February 16, 2007 filing of its statement was the manufacturing of the braces.

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11. Additionally, Homestead erroneously claims that an asserted 26-month period for the acquisition of all project equipment should be compared with an asserted 16-month period for site construction in deciding whether project construction has begun. The relevant equipment-construction time period involved is the period of time needed for the construction (remanufacturing) of the generators, not the period of time required for the acquisition of all project equipment, as Homestead asserts. Homestead fails to show that the process of remanufacturing the project generators, the process it submits to show that it has started construction, will take as long or longer than the substantial site construction required for this project (including construction of the proposed 140-foot-long and 300-foot wide headworks-powerhouse structure and an 18-mile-long transmission line).[12] Moreover, Homestead does not claim to have started on-site construction, and Commission records fail to indicate that any has taken place.

12. Homestead has failed to commence construction by the deadline established by section 13 of the FPA, notwithstanding the additional six years that the deadline was extended after the license was transferred to it in 1999. Because we find that actual construction did not commence before September 21, 2006, we must terminate the license pursuant to section 13 of the FPA.

The Commission orders:

The license for the George W. Andrews Project No. 7115 is hereby terminated for failure to commence construction by the deadline in Article 308 of the license, as amended.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[12] *Compare Electric Plant Board of the City of Augusta, Kentucky*, 112 FERC ¶ 61,342 at PP 21-22 (2005), where the Commission found that a $6,300 purchase order to fabricate two sections of steel plate for the draft tube (conduit for water exiting the turbines) was not an enforceable contract to construct a $138 million project, or any significant, permanent element thereof, and licensee had failed to support its general statement that the manufacture of such equipment will be the most time-consuming part of project construction.