

125 FERC ¶ 61,195
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

James Lichoulas, Jr.

Project No. 9300-021

ORDER DENYING REHEARING

(Issued November 20, 2008)

1. This order denies the request for rehearing of James Lichoulas Jr. of our order, issued September 18, 2008, terminating by implied surrender his license for the Appleton Trust Project No. 9300.¹

Background

2. The background of this proceeding is described in detail in the September 18 Order.² The license for Project No. 9300 was issued in 1986.³ The project, which is located on the Pawtucket Canal system adjacent to the Merrimack River in the City of Lowell, Massachusetts, was housed in the basement of what was formerly a six-story mill building (part of the Appleton Mill Complex) between the Hamilton and Lower Pawtucket canals. The 346-kilowatt project does not include a dam, but rather has an intake off the Hamilton Canal.

3. The project has not operated regularly since November 1994. Indeed, except for some brief operations around July 2002 (which had to be halted because of a vibration

¹ *James Lichoulas, Jr.*, 124 FERC ¶ 61,255 (2008) (September 18 Order).

² *Id.* P 2-16.

³ *James Lichoulas*, 36 FERC ¶ 62,047 (1986).

problem with the turbine-generator), the project has not generated power since January 1996.⁴

4. The project needs major repairs to resume operation, and for more than 13 years, Commission staff tried to work with Mr. Lichoulas, repeatedly asking for schedules and plans to repair and restart the project.⁵ Mr. Lichoulas either failed to respond or responded by providing schedules for fixing the project that were never met. In addition, he neglected to keep the Commission abreast of the status of his project, only responding when required to do so.

5. On September 23, 2004, Commission staff notified Mr. Lichoulas that, given his failure to respond to Commission staff directives and to repair the project and resume operations, staff considered the project to be abandoned under standard Article 16 of the project license⁶ and section 6.4 of the Commission's regulations,⁷ and presumed that it

⁴ See the July 31, 2002 letter from the Commission's New York Regional Office to Mr. Lichoulas discussing the July 24, 2002 inspection of the project.

⁵ See the September 18 Order, 124 FERC ¶ 61,255 at P 6-13, describing seven letters staff mailed to Mr. Lichoulas, his response letters, and a conversation between representatives of the licensee and staff of the Commission's New York Regional Office at an inspection of the project, which occurred between March 11, 1997, and December 6, 2004.

⁶ Article 16 is set forth in Form L-15 (October 1975) [reported at 54 FPC 1883], entitled "Terms and Conditions of License for Unconstructed Minor Project Affecting the Interests of Interstate or Foreign Commerce," and is incorporated by reference in the license for Project No. 9300. 36 FERC ¶ 62,047 at 63,134. Standard Article 16 of the license for Project No. 9300 provides:

If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms or the license and the lawful orders of the Commission . . . , the Commission will deem it to be the intent of the Licensee to surrender the license. . . . [T]he Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

was Mr. Lichoulas' intent to surrender the license. The letter explained that, under these circumstances, the Commission could terminate the license through an implied surrender proceeding or Mr. Lichoulas could voluntarily surrender the license by filing a surrender application. Mr. Lichoulas took no action.

6. On July 26, 2006, the City of Lowell (the City) notified the Commission that it had acquired the parcel of land on which the Appleton Trust Project is located through eminent domain on April 25, 2006, and that the property is part of a 15-acre site that the City is marketing to developers for a major mixed-use project. Mr. Lichoulas did not respond.

7. On March 21, 2007, Commission staff issued notice of the termination of license by implied surrender. The City of Lowell, Massachusetts, and Boott Hydropower, Inc. (a co-licensee of the Lowell Project No. 2790, whose impoundment provides head for generating power at the Appleton Trust Project) filed timely motions to intervene, supporting termination of the license by implied surrender.⁸ Mr. Lichoulas argued against termination of his license.

8. Our September 18 Order rejected Mr. Lichoulas' arguments that he had diligently pursued rehabilitation and repair of his project in the face of events that blocked his efforts, i.e., a 1997 fire that damaged the project, selective demolition of the mill complex that resulted in an asbestos clean-up process lasting several years, and the City's taking of the project by eminent domain. We concluded that his efforts were too little too late, given that the project has not operated for almost 14 years, that Mr. Lichoulas had failed to respond substantively to Commission's staff efforts over a 10-year period to work with him, and that there was no evidence that the project was any closer to being able to resume operations than it was 14 years ago.⁹

⁷ 18 C.F.R. § 6.4 (2008). That section provides, among other things, that "if any licensee . . . shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be the intent of the licensee to surrender the license"

⁸ The City argues that the interests of both the residents of the City and the public at large are served by the surrender of the license and the urban redevelopment project being undertaken by the City's Department of Planning and Development.

⁹ September 18 Order, 124 FERC ¶ 61,255 at P 20-21.

Preliminary Matters

9. On November 19, 2008, Mr. Lichoulas filed a motion to reopen the record and to hold this proceeding in abeyance for 30 days. He states that he has reached an oral agreement with the City of Lowell, Massachusetts, regarding disposition of a suit between them regarding ownership of project property, in consequence of which he asks the Commission to hold the matter in abeyance.

10. As Mr. Lichoulas notes,¹⁰ Rule 716 of the Commission's Rules of Practice and Procedure¹¹ provides that the Commission can "for good cause under paragraph (c) of this section, reopen the evidentiary record in a proceeding for the purpose of taking additional evidence."¹² Paragraph (c) of Rule 716 provides for reopening a record if it "has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or law or by the public interest. . . ."¹³ The test for determining good cause is "whether or not the party requesting reopening has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process" and that such circumstances "go to the very heart of the case."¹⁴

11. Mr. Lichoulas' motion fails to meet the standard for reopening the record and delaying a rehearing decision. Mr. Lichoulas argues that extraordinary circumstances are presented by the proposed settlement of his court challenge to the City's condemnation of the mill building housing, which, he says, would return ownership of the project to Mr. Lichoulas and allow him to restore and restart the project. However, as discussed below and in the September 18 Order, the basis for our finding of implied surrender was Mr. Lichoulas' failure to rehabilitate the project for some 12 years prior to the City's condemnation of the project, along with his continued inaction after the lawsuit began. The potential settlement of the lawsuit does not overcome Mr. Lichoulas' longstanding inaction and lack of compliance with Commission orders: it does not go to the heart of

¹⁰ Motion at 5-6.

¹¹ 18 C.F.R. § 385.716 (2008).

¹² 18 C.F.R. § 385.716(a).

¹³ 18 C.F.R. § 385.716(c).

¹⁴ See *Weaver's Cove Energy, LLC and Mill River Pipeline, LLC*, 115 FERC ¶ 61,058 P 10 (2006) and the order cited there.

this case, and does not present extraordinary circumstances. Accordingly, Mr. Lichoulas' motion is denied.¹⁵

Discussion

A. Mr. Lichoulas' actions support termination of the license by implied surrender

12. On rehearing, Mr. Lichoulas argues that the termination of his license by implied surrender was arbitrary and capricious because the Commission failed to apply the standard set forth in *Clark Fork and Blackfoot, LLC*¹⁶ and *Montana Power Company*¹⁷ or any other standard. Specifically, Mr. Lichoulas contends that *Clark Fork* requires a finding that "actions have occurred or events transpired that make it clear that the project will not be restored to operation or, if it is operating, cannot continue to operate" or, as stated in *Montana Power*, the licensee "has clearly indicated its intent to abandon the project, but has not filed a surrender application with the Commission."

13. Mr. Lichoulas contends that the facts of this case do not meet either standard, noting especially his demolition activities in the area following the 1997 fire, the asbestos clean-up that took place between 2001 and 2006, and the City's takeover of the project (which the licensee is challenging in court) in 2006, all of which were beyond his control and blocked his continuing attempts to repair the project.

14. Mr. Lichoulas' arguments are unpersuasive. The September 18 Order considered Mr. Lichoulas' alleged impediments to resuming project operations, and the order's conclusions are consistent with the quoted language from the *Clark Fork* and *Montana Power* orders. The order acknowledged the 1997 fire, asbestos clean-up, and the City-takeover, but concluded that notwithstanding any interest he later expressed in resuming operations, Mr. Lichoulas' actions over more than 14 years, when taken as a whole, supported the finding pursuant to the standard set forth in standard Article 16 that he had "abandon[ed] or discontinue[d] good faith operation of the project or refuse[d] or

¹⁵ The last-minute nature of Mr. Lichoulas' filing, given that the settlement appears to have been reached almost three weeks ago, also counsels against granting extraordinary relief. See *The Electric Plant Board of the City of Paducah, Kentucky*, 121 FERC ¶ 61,091 (2007) (explaining that Commission does not favor filings made after issuance of Commission's Sunshine Notification of matters to be considered at open meeting).

¹⁶ 111 FERC ¶ 61,160, at P 24 (2005) (*Clark Fork*).

¹⁷ 62 FERC ¶ 61,166, at 62,143 (1993) (*Montana Power*).

neglect[ed] to comply with the terms or the license and the lawful orders of the Commission.” Nor does Mr. Lichoulas’ stated intention to resume project operation warrant a different conclusion.¹⁸ As the September 18 Order found, after 14 years of inoperability: “Today, there is no evidence that the project is any closer to being able to resume operation than it was 14 years ago.”¹⁹

15. Mr. Lichoulas argues that, following the 1997 fire, he engaged in the “selective demolition” of the fire-damaged mill complex (with the help of the City) in which he spent \$1.2 million, which assertedly shows that he “undertook efforts at considerable expense to restore the property, and he secured financing to rebuild the Project.”²⁰ However, the \$1.2 million dollar restoration efforts for the surrounding mill property did not include efforts to restore project operations, as the continued degraded condition of the project’s property demonstrates. In short, the alleged impediments to project restoration caused by the 1997 fire and the discovery of asbestos in the mill buildings, and Mr. Lichoulas’ ensuing selective demolition of mill buildings and asbestos clean-up fail to negate the conclusion that Mr. Lichoulas’ inaction demonstrated a clear intent to abandon the project.

¹⁸ 124 FERC ¶ 61,255 at P 19-21. Also, see *John C. Jones*, 122 FERC ¶ 61,053 P 13 (2008), citing *Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corporation*, 89 FERC ¶ 61,194, at 61,597-98 (1999) and cases cited therein, *reh’g denied*, 90 FERC ¶ 61,250 (2000), where the Commission terminated licenses by implied surrender, including where, as here, “the licensee expressed an interest in continuing to operate the project.”

¹⁹ September 18 Order, 124 FERC ¶ 61,255 at P 21. In the face of the numerous exchanges of letters between Commission staff requiring scheduling of project restoration and Mr. Lichoulas’ responding with numerous restoration schedules, none of which were ever attempted, much less met, Mr. Lichoulas (rehearing at 17) shrugs off his unresponsive actions as “irrelevant given the more pressing need to ensure the safety of the [surrounding] property.” However, as noted, the requirements of standard Article 16 include, as part of the factors demonstrating an implied surrender, evidence that the licensee “... neglect[s] to comply with the terms of the license and the lawful orders of the Commission ...,” which is in part demonstrated by the licensee’s failure in any way to meet the restoration schedules required by his exchanges of correspondence with Commission staff, and is relevant and material evidence of his clear intent to abandon the project.

²⁰ Rehearing at 16-17.

B. The Commission properly denied the Mr. Lichoulas' request for a trial-type evidentiary hearing

16. Mr. Lichoulas argues that the Commission erred by denying the licensee's request for a trial-type evidentiary hearing. Mr. Lichoulas argues that such a hearing is necessary because there are material facts in dispute. Specifically, Mr. Lichoulas contends that the Commission must resolve at least two factual issues to support a valid conclusion that the Mr. Lichoulas' license may be terminated by implied surrender: (1) whether the evidence supports a conclusion that Mr. Lichoulas intends to abandon the project; and (2) whether the evidence supports a conclusion that the project cannot be restored to operations. Mr. Lichoulas contends that the record shows that he does intend to restore the project operations; that the generating plant can be restored to operating condition; and that he has taken significant steps at the expenditure of considerable sums of money to achieve that goal.²¹ According to Mr. Lichoulas, if the Commission believes that there is any question about these facts demonstrating his intent to repair and restart the project, then it must hold an evidentiary, trial-type hearing to resolve such questions.

17. It is well-settled that the Commission exercises broad discretion in deciding whether to conduct a trial-type hearing.²² We believe that the extensive written record in this proceeding contains sufficient information regarding Mr. Lichoulas' actions with respect to the project and the surrounding area and that there is no need for a trial-type evidentiary hearing. Mr. Lichoulas' dispute is not with the factual record, but rather with our interpretation of that record, an interpretation that we believe is supported by the facts of this case. Accordingly, we deny rehearing on this issue.

C. Termination of the license is in the public interest

18. Mr. Lichoulas argues²³ that termination of his license by implied surrender is inconsistent with the need for generating capacity in New England and with the national

²¹ Rehearing at 22. Mr. Lichoulas reiterates (rehearing at 22) his arrangements with two individuals, William Fay and Ken Smith, to jointly undertake rehabilitation and operation of the project, and arrangements he has made to finance restoration of the project. Mr. Lichoulas also contends (rehearing at 14) that his court suit challenging the City's takeover of project property shows his intent to "hold on to his license." However, these actions cannot overcome the clear evidence of some 14 years of inactivity.

²² See, e.g., *Friends of Cowlitz, et al. v. FERC*, 282 F.3d 609 (9th Cir. 2000) and the decisions cited therein.

²³ Rehearing at 18-21.

goal, as expressed in section 203 of the Energy Policy Act of 2005, of the increasing energy consumption from renewable resources, including hydroelectric generation.

19. Our termination of the license for the Appleton Project is not inconsistent with this goal. To the contrary, where, as here, a project has fallen into disrepair and has not operated for many years, and we see no evidence that it will be restored to operation in the near future, we believe that the public interest requires us to terminate the license, and thus open the site to the possibility of future hydropower development by another entity.

D. There have been no improper ex parte communications in this proceeding

20. Mr. Lichoulas requests that the Commission disclose the substance of an alleged off-the-record communication between staff in the Commission's Office of External Affairs and the office of Congresswoman Niki Tsongas. The Commission earlier disclosed, and placed in the non-decisional file, written communications between its staff and Congresswoman Tsongas' office, including an e-mail and attached memorandum to Commission staff that was dated August 6, 2008. Mr. Lichoulas states that the e-mail indicated that it and the attached memorandum were being sent pursuant to a phone call, which implies that there was also oral communication between Commission staff and the Congresswoman's office.²⁴ He requests that the Commission, pursuant to Rule 2201(f)(2) of its Rules of Practice and Procedure, place the substance of any such call in the record and permit him an opportunity to respond.²⁵ Mr. Lichoulas further argues that the improper communications may have improperly influenced the decision to terminate the license, and that they have tainted the record such that Mr. Lichoulas has not been given a fair adjudication of the issues involved. Mr. Lichoulas requests that we vacate the September 18 Order and assign this proceeding to an administrative law judge for development of an evidentiary record and initial decision.

²⁴ Rehearing at 23-28. *See also* licensee's filing of September 5, 2008, entitled "James R. Lichoulas, Jr.'s Response to Off-The-Record Communications and Request for Disclosure of Oral Off-The-Record Communications."

²⁵ 18 C.F.R. § 385.2201(f)(2) (2008). Rule 2201(f)(2) requires that:

Any decisional employee who makes or receives a prohibited off-the-record communication will promptly submit to the Secretary that communication, if written, or a summary of the substance of that communication, if oral. The Secretary will place the communication or the summary in the public file associated with, but not part of, the decisional record of the proceeding.

21. Mr. Lichoulas' request is denied. Contrary to his allegations, no improper oral communications took place. The Commission's Acting Director of External Affairs did receive a phone call from Congresswoman Tsongas on August 6, 2008. During that phone call, the Congresswoman asked for a status update on the proceeding (which the Acting Director provided) and stated that her office would send further information, which turned out to be the e-mail and memorandum that have been placed in the Commission's non-decisional record.²⁶ All discussions in this call were procedural in nature. In addition, a staff member in the Office of External Affairs received an e-mail from Congresswoman Tsongas' staff on August 18, 2008, asking about the status of the case. Status information was provided in response. Again, the only discussion involved procedural status reports. The Commission's rule on off-the-record communications excludes from prohibited communications that affect the outcome of a proceeding "[p]rocedural inquiries, such as a request for information relating solely to the status of a proceeding."²⁷ The contacts at issue therefore were not improper off-the-record communications within the meaning of Rule 2201. Furthermore, the Commission has placed a summary of the contacts described above in the non-decisional file to clarify the nature of those contacts.

The Commission orders:

(A) The request for rehearing, filed October 17, 2008, by James T. Lichoulas, Jr., is denied.

²⁶ While the memorandum attached to the email does indicate that the purpose of a future call was to pressure the Commission to reach a particular result, no second phone call took place. Moreover, we fully complied with the requirements of our ex parte rule by placing the email in the non-decisional part of the record, so that it could not be relied on in acting on this matter. In fact, none of the members of the Commission reviewed this material prior to approving the September 18 Order, so we could not have been influenced by it.

²⁷ See Rule 2201(c)(5)(i), 18 C.F.R. § 385.2201(c)(5)(i) (2008).

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(B) The November 19, 2008 motion by James T. Lichoulas, Jr. to reopen the record and hold proceeding in abeyance is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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