UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Crown Hydro LLC Project No. 11175-023

ORDER DENYING REHEARING AND REQUEST FOR ABEYANCE

(Issued June 1, 2005)

1. On April 4, 2002, as supplemented July 1, and December 13, 2002, Crown Hydro LLC (Crown), licensee for the unconstructed 3.4-megawatt (MW) Crown Mill Project No. 11175, filed an application to amend its license to relocate the project's proposed powerhouse. By order issued February 10, 2005,[1] staff dismissed Crown's amendment application. Crown has filed a timely request for rehearing of staff's order and a request to hold the amendment proceeding in abeyance.

2. As described below, Crown's requests for rehearing and for abeyance are denied. This order is in the public interest because it is consistent with Congress' intent to protect state and local public parks and recreation areas from condemnation by licensees.

Background

3. The license for the Crown Mill Project was issued on March 19, 1999.[2] The proposed project would be located at the Upper St. Anthony Falls Dam on the Mississippi River in the City of Minneapolis, Hennepin County, Minnesota. The entire project would lie within the boundaries of the Mississippi National River and Recreation Area, and

[1] 110 FERC ¶ 62,121 (2005).

[2] 86 FERC ¶ 62,209 (1999). The Commission issued the license to Crown Hydro Company. In 2001, the Commission approved the transfer of the license to Crown Hydro LLC. 95 FERC ¶ 62,254 (2001).

within the St. Anthony Falls National Register Historic District, an area that includes several sites of historic mill properties. The project would occupy 0.5 acre of United States lands under the jurisdiction of the U.S. Army Corps of Engineers (Corps). [3]

4. As licensed, the project's powerhouse was to be located in the basement of the Crown Roller Mill building on the west side of Minneapolis' West River Parkway near the center of the city. The project required reconstructing Crown Roller Mill's hydropower facilities, which had ceased hydropower operations in 1933.[4]

5. However, in its amendment application,[5] Crown explained that, because of its inability to reach an acceptable lease agreement with the owner of the Crown Roller Mill Building, the use of that building as a powerhouse became impractical. Therefore, Crown requested Commission approval to relocate the powerhouse to the east side of West River Parkway in the footprint of the remains of the Holly and Cataract Mill Foundation. The proposed new site lies within Minneapolis' Mill Ruins Park, owned by the City of Minneapolis Park and Recreation Board (Park Board).[6] As amended, the project would include a new, one-story, above-grade powerhouse structure containing two turbine generators.[7]

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[3] The Upper St. Anthony Falls Dam was constructed by the Corps but is now owned and operated by Northern States Power Company.

[4] The project, as licensed, also included a reconstructed upper headrace canal, a gated intake structure with a trashrack, an intake canal, a forebay, two steel penstocks leading from the forebay to the project's turbines, a proposed powerhouse room containing two turbine-generator units with a total capacity of 3.4 MW, an existing tailrace tunnel and reconstructed tailrace canal, and a proposed underground transmission line.

[5] *See* Crown's April 4, 2002 filing at 1.

[6] The Park Board was created in 1883 by an act of the Minnesota legislature to serve as a semi-autonomous body responsible for maintaining and developing the Minneapolis Park system. *See* the Park Board's letter, filed August 18, 2003, at 1.

[7] Excavation work in the forebay, rehabilitation of the historic gatehouse, and construction of a new intake structure would be essentially the same as in the licensed project. Flow to the turbines would be provided by two penstocks. The flows from the

(continued…)

6. The Commission issued public notice of the amendment application. The Park Board intervened in opposition.[8] It argued that the relocated powerhouse and water conveyance components of the project would cause irreparable damage to Mill Ruins Park and to the goals of the Park Board and the City of Minneapolis in their development of recreational facilities and historic preservation activities in the project area, and that Crown had failed to negotiate a lease for use of the Park Board's land, despite the Park Board's attempts to initiate negotiations with Crown. In addition, the Board asserted that Crown had been unable to meet license requirements and deadlines.[9]

7. On August 14, 2003, staff wrote to the Park Board, stating that section 21 of the FPA[10] barred a licensee's use of that section's eminent domain authority to obtain rights in public parks, recreation areas, or wildlife refuges established under state or local law prior to October 24, 1992. To determine whether the bar applied in the current situation,

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two turbines would discharge separately into separate tunnel systems and then join in discharging into the tailrace canal. The project would be essentially the same as licensed from the entrance to the tailrace canal to the river.

[8] In addition to the Park Board, the City of Minneapolis, Standard Mill Limited Partnership, United States Department of the Interior, Minnesota Department of Natural Resources, Board of Hennepin County Commissioners, and Minnesotans for an Energy Efficient Economy filed comments and motions to intervene. All motions to intervene were timely, unopposed, and therefore automatically granted under 18 C.F.R. § 385.214(c)(1) (2004).

[9] The Park Board also stated that Crown had executed an agreement with it in August of 1998 in which Crown agreed to refrain from exercising any power of eminent domain authority to obtain the Park Board's land in exchange for the Park Board's promise to refrain from opposing Crown's original license application. *See* the Park Board's motion to intervene at 10. The Park Board stated that, in light of this agreement, Crown cannot develop the project without arriving at an agreement with the Park Board for use of the Park Board's property. Although this assertion does not affect our decision here, we note that private contractual disputes between licensees and third parties are matters to be decided by the courts. *See, e.g., Halecrest Company et al.*, 60 FERC ¶ 61,121 at p. 61,413 and n. 35 (1992).

[10] 16 U.S.C. § 814. *See* P 19, *infra.*

staff asked for details of the Park Board's acquisition, establishment, and uses of the Mill Ruins Park.

8. On August 18, 2003, the Park Board replied to staff's August 14, 2003 letter with a chronology of the Park Board's acquisition and use of the Mill Ruins Park land. The Park Board stated that construction of the downstream portion of the park had been completed in 2001. It also included details of the Board's pre-1992 condemnation of the so-called Fuji-Ya Restaurant property along the upstream portion of Mill Ruins Park, where Crown proposed to locate its generation facility, and the so-called J.L. Shiely gravel yard property in the downstream portion of Mill Ruins Park, where Crown proposed to channel tailrace water from the project.

9. On October 16, 2003, staff sent a letter to Crown stating that, based on the Park Board's August 18, 2003 letter, FPA section 21 barred Crown's use of that section's eminent domain authority to obtain the Park Board's property for the relocated powerhouse. In consequence, staff required Crown, within 30 days, to file evidence that the Park Board had conveyed the necessary property rights to Crown or to show cause why the Commission should not dismiss Crown's license amendment application.

10. On November 17, 2003, Crown requested that the Commission continue to process its amendment application, in light of Crown's progress in developing the project. It stated that it had secured financing for the project, including a state-awarded $5.1 million renewable-energy-project grant and state approval of a power purchase agreement with Xcel Energy for the project's output, and that it was pursuing negotiations for a lease with the Park Board and trying to allay the Park Board's concerns about the compatibility of the amended project with the Mill Ruins Park.[11]

11. On January 13, 2004, staff granted Crown a 90-day extension of the conveyance deadline, until April 12, 2004, to file an acceptable lease or other conveyance of the Park Board's land. Staff stated that no purpose would be served processing the amendment application unless the Park Board would agree to such a conveyance of its land and that

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[11] The Park Board filed a letter on November 17, 2003, clarifying some of the statements in Crown's November 17, 2003 letter but not objecting to the statement that Crown was negotiating a lease with the Park Board. Crown filed a letter on December 9, 2003, advising the Commission that the Park Board was convening a meeting of interested parties to discuss unresolved issues regarding the lease negotiations.

staff would not maintain the amendment application on the Commission's docket unless an acceptable conveyance was executed within a reasonable time.

12. On April 15, 2004, Crown filed a second request for an extension of time, for 60 days, noting that it had submitted a draft lease to Park Board staff, who had submitted it to the Board with a recommendation to approve the lease. On May 3, 2004, staff granted the 60-day extension to June 11, 2004.[12]

13. On June 1, 2004, Crown filed a third request to extend the deadline for filing an acceptable conveyance of Park Board land, asking for a 90-day extension. Crown noted that the Park Board had rejected the lease on May 19, 2004, and that Crown was assessing its options for future development of the project, including any right it might have to condemn the property under section 21 of the FPA. In a letter issued July 15, 2004, staff granted the 90-day extension request. Staff advised Crown that the Commission would not continue to delay action on the amendment application without firm evidence supporting such a delay.

14. On September 10, 2004, Crown requested a fourth extension of the conveyance deadline. Crown stated that it still hoped to enter into a lease with the Park Board, but that it was also investigating the accuracy of the Park Board's August 18, 2003 letter with respect to the acquisition and designation of the Fuji-Ya and Shiely parcels as parklands. On September 17, 2004, staff granted a 45-day extension of the deadline, to October 26, 2004.

15. On October 18, 2004, the Park Board filed a letter asserting that Crown could not use eminent domain authority in this case, appending additional documentation about the acquisition of the lands and their designation as part of a public park.

16. On October 26, 2004, Crown filed a request for a fifth extension of the deadline. It stated that lease negotiations with the Park Board had ceased, and argued that the Mill Ruins Park, which included the relevant portions of the Fuji-Ya and Shiely parcels, was not established as a public park prior to 1992, such that use of eminent domain authority was not barred.

17. On November 9, 2004, the Park Board filed a letter opposing Crown's request for a further extension of time. The Board provided additional evidence, including dated

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[12] By letter dated April 27, 2004, and filed May 17, 2004, the Park Board filed a letter supporting Crown's extension request.

slides showing park improvements such as bicycle paths and interpretive signage, to support its contention that the land in question was part of a park prior to 1992.

18. In its February 10, 2005 order, staff dismissed the amendment application, finding that the Park Board owned the land in question, and that it had included the land within a pubic park or recreation area established under State or local laws prior to 1992, thus barring Crown's use of section 21's eminent domain authority to acquire the land. Staff therefore dismissed the application without prejudice to Crown re-filing it upon obtaining the requisite property rights. Crown's rehearing request followed.

Discussion

A. FPA Section 21 Bars Crown's Use of Eminent Domain Authority

19. The second proviso of FPA section 21, included in the 1992 Energy Policy Act amendment to section 21, states:

> Provided further, That no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992 [Oct. 24, 1992], 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.

20. In its February 10, 2005 order[13] staff made the following findings supporting its conclusion that the Park Board's property in question comes within the section 21 proviso:

> … 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:

[13] 110 FERC ¶ 62,121, *supra*, at p. 64,247.

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 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.

21. On rehearing, Crown contends that the February 10, 2005 Order erroneously equated the “designation, acquisition, and development” of the Fuji-Ya and Shiely parcels as parkland with their inclusion in a “public park” “established under State or local law,” as section 21 requires. It argues that section 21’s bar to a licensee’s use of eminent domain authority does not apply to all property acquired for park purposes, but only such property that was actually included in a public park established prior to

October 24, 1992 enactment of the 1992 Energy Policy Act, and that, contrary to the findings in staff's February 10, 2004 Order, the Park Board's evidence fails to show that the Fuji-Ya and Shiely parcels were included in a public park prior to their inclusion in the Mill Ruins Park in 2001.

22. Crown's arguments are unpersuasive. First, Crown does not dispute staff's finding, supported by the record, that the Park Board acquired title to the Fuji-Ya and Shiely parcels by condemnation proceedings in 1986 and 1990, respectively, prior to the enactment of the Energy Policy Act. Thus, the parcels "were owned by a State or political subdivision thereof," prior to the revision of section 21.

23. Moreover, the above-quoted findings in staff's February 10, 2005 order and further evidence in the record show that the parcels involved were included in Minneapolis' Central Riverfront Regional Park and improved with several park and recreation amenities prior to October 24, 1992. The Park Board's letters filed August 18, 2003, and November 9, 2004, show that in 1982, the Park Board prepared a master plan for the Central Riverfront Regional Park and the Metropolitan Council adopted it;[14] that the master plan included descriptions of the development of the Central Riverfront Regional Park in an area that includes the site of today's Mill Ruins Park and the Fuji-Ya and Shiely parcels;[15] that by 1987, construction was completed on the West River Parkway on the former Fuji-Ya property, which included bicycle and pedestrian trails, ornamental lighting and river-edge railings, site furnishings, landscaping, parking areas, and interpretive signage between the parkway and the river adjacent to and within the parcel;[16] and that in 1990, as an interim step until funding for full development of the Shiely tract to become part of the Mill Ruins Park, the gravel operations on that tract were removed and the site was made available to the public as passive green space.[17]

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[14] *See* the Park Board's November 9, 2004 letter, pp. 2-3 and Exhibit A, in the section entitled "West Bank Milling and Lower Locks."

[15] *Id.*

[16] *Id.* at 3 and Exhibits C (in particular C-4) and E.

[17] *See* the Park Board's August 18, 2003 letter, p. 4.

24. By the foregoing local government actions, the Fuji-Ya and Shiely parcels were included in the city's Central Riverfront Regional Park prior to the enactment of the 1992 Energy Policy Act. The fact that further improvements were made in the development of the Central Riverfront Regional Park and that the Fuji-Ya and Shiely parcels were later included in the Mill Ruins Park in 2001 (which itself is now part of the Central Riverfront Regional Park) does not detract from the steps Minneapolis and the Park Board took prior to 1992 that included the parcels involved as part of the Central Riverfront Regional Park and consequently as part of a "public park" or "recreation area" "established under state or local law," within the plain meaning of those phrases as used in section 21.

25. Citing various state court decisions, Crown contends that, under state law, courts will look beyond the "parkland" purpose ascribed to the acquisition of the parcels involved to the actual use made of the parcels. It argues that the mere statements in state and local planning documents referring to the Fuji-Ya and Shiely parcels as parkland and what it asserts to be the meager development of the parcels did not make the parcels part of a public park established under state or local law. Crown argues that, prior to the 1992 enactment of the Energy Policy Act, the only improvements to the Fuji-Ya parcel made were a "roadway and sidewalks/pathways," and the Shiely parcel was merely claimed as "passive open space," making each of those parcels only buffer lands or passive open space between the river and the roadways and pathways and not part of a public park.[18]

26. It is not clear to us that the state court decisions Crown cites are relevant to, much less determinative of, the issues here since none involve an interpretation of section 21 of the FPA.[19] In any event, assuming that the state court decisions apply here, the above-

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[18] *See* Crown's rehearing request, pp. 4-5.

[19] Crown cites *Mareck v. Hoffman,* 275 Minn. 222; 100 N.W. 2d 758 (1960) (a Village's minimal upkeep and lack of park improvements for a parcel of land failed to support a finding that the Village's title to the land included a public trust for maintaining the land for park purposes); *Pearlman v. Anderson,* 62 Misc. 2d 24, 307 NYS.2D 1014 (S.Ct. 1970) (Village that acquired land for general municipal purposes with moneys from a general fund could not be enjoined to use the land only for park purposes, notwithstanding the fact that the Village cleaned up the property, put in a few shrubs and trees, walkways with four or five benches, and used the land to a small degree as a park); *Independent School District of Virginia v. State of Minnesota,* 124 Minn. 271, 144 N.W. 960 (1914) (upheld a School District's statutory right to condemn property for educational purposes); and *Schneider v. Town of West New York,* 84 N.J.Super.77, 82-

(continued…)

described actions of Minneapolis and the Park Board show that the parcels involved were not only acquired and developed and designated for inclusion in a public park but also were actually open to the public and used for park and recreation purposes prior to 1992. Crown's assertions that the Fuji-Ya and Shiely parcels were merely developed as buffer zones or passive green space, and thereby not used as a part of a park, ignore not only the parcels' inclusion in the Central Riverfront Regional Park but also the described improvements to a portion of the Fuji-Ya parcel and the significant refurbishing efforts required to remove the remnants of a sand and gravel operation from the Shiely parcel.

27. Crown contends that, even if we conclude that any improved areas of the Shiely and Fuji-Ya parcels have been included in a public park, it is inappropriate to find that the parcels in their entirety constitute part of an established public park or recreation area. It argues that the mere improvements are insufficient to find an entire parcel to be a "public park" under section 21. To support its argument for excluding portions of the parcels in question, Crown submits November 3 and 17, 2004 Park Board meeting agendas that include entries indicating that the Park Board is contemplating the sale of a portion of the Fuji-Ya site.[20]

28. There is no basis for concluding that the FPA section 21 proviso does not apply to portions of public parks or recreation areas simply because they do not contain specific improvements or because they may be subject to future sale. The legislative history of the proviso shows that Congress revised section 21 to remedy the "unnecessary and unwise intrusion into the sovereignty of the States and their subdivisions" created by developers' acquisition of state or local park lands through the use of section 21 eminent domain authority.[21] Our decision here is consistent with the Congressional intent.

83, 201 A.2d 63 (1964) (Town not barred from selling land originally purchased for a public park where the town never dedicated the land as a public park).

[20] *See* Appendices G and H of Crown's rehearing request. We are accepting these newly-proffered Park Board agendas, even though they could have been submitted prior to the staff order, in order to create a full record.

[21] *See* H.R. Report No. 102-474 (VIII) at 99-100 (1992), reprinted in 1992 U.S.C.C.A.N. at 2317-18.

B. Maintaining the Amendment Application Would Serve No Purpose

29. Crown argues that it is inappropriate to dismiss its amendment application, in light of Crown's commitment to the project, public support for the project, the Park Board's actions in allegedly inducing and then opposing the amendment application, and the lack of prejudice to any party by maintaining the application on the Commission's docket. Crown states that it negotiated a lease with the Park Board in good faith (albeit unsuccessfully) and consequently failed to pursue the investigation of its use of eminent domain authority for several months. It states that it intends to conduct further research into this matter, and again requests an extension of time and a deferral of a decision on its amendment application for it to file an acceptable conveyance.

30. As discussed above, we have resolved the section 21 issue, after full consideration of Crown's arguments. Crown's amendment application was pending for nearly three years before staff dismissed it, during which time staff granted Crown four extensions of time, for a total of eleven and one-half months, to submit an acceptable conveyance of Park Board land, all to no avail. Nothing in the record indicates that a grant of additional time will enable Crown to reach agreement with the Park Board. We therefore see no purpose in continuing to retain the amendment application.[22] As staff's order states, Crown may refile the application if it is able to resolve land issues. Crown may also pursue an acceptable conveyance or eminent domain authority to obtain appropriate rights in the original site of the powerhouse to develop its project as licensed.[23]

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[22] *Compare Symbiotics, LLC*, 110 FERC ¶ 61,235 at P 12 and n.10 (2005) (Commission policy against holding hydroelectric applications in abeyance pending the outcome of future determinations).

[23] Standard Article 5 of Crown's license (Form L-6 entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States," 54 FPC 1808 (1975)), incorporated by reference in ordering paragraph D of the license, 86 FERC ¶ 62,209, *supra*, at p. 64,289) requires Crown to obtain appropriate rights to operate and maintain the project as licensed by five years following the issuance of the license, and that deadline has expired. Crown must act diligently to obtain rights to construct, operate, and maintain its licensed project.

The Commission orders:

(A) The rehearing request filed by Crown Hydro LLC on March 14, 2005, is denied.

(B) Crown Hydro LLC's request, as described in this order, to hold this proceeding in abeyance is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.