

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northumberland Hydro Partners, L.P.  
Adirondack Hydro Development Corporation

Project No. 4244-021  
Project No. 10648-009

ORDER DENYING MOTION FOR STAY OF LICENSE CONDITIONS

(Issued June 15, 2006)

1. In this order, we deny the motion of Adirondack Hydro Development Corporation (Adirondack) for a stay of the license conditions and request to refrain from issuing notices of termination of license for the Northumberland Project No. 4244 and the Waterford Project No. 10648.

**Background**

2. On January 17, 1992, the Commission issued an original license to Long Lake Energy Corporation for the 9.7 megawatt (MW) Northumberland Project, proposed to be located on the Hudson River in upstate New York at an existing dam owned by New York State.<sup>1</sup> In 1992, the license was transferred to Northumberland Hydro Partners, L.P., of which Adirondack is the General Partner. The original deadline for the commencement of project construction, January 16, 1994, was extended by the Commission to January 16, 1996. Congress thereafter enacted legislation,<sup>2</sup> authorizing the Commission to grant three additional two-year extensions, until January 16, 2002.

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<sup>1</sup> *Long Lake Energy Corp.*, 58 FERC ¶ 62,041 (1992).

<sup>2</sup> Pub. L. No. 104-242, 110 Stat. 3142 (Oct. 9, 1996).

The licensee requested, and was granted, the additional extensions,<sup>3</sup> but failed to commence construction.

3. On June 9, 1993, the Commission issued an original license to Adirondack and McGrath Industries, Inc. for the 10.2-MW Waterford Project No. 10648, proposed to be located at a different existing state-owned dam on the Hudson River in upstate New York. In 1999, McGrath was removed as a co-licensee. The original deadline for commencement of project construction, June 9, 1995, was extended by the Commission until June 9, 1997. Pub. L. No. 104-242 also authorized the Commission to grant three additional two-year extensions for the Waterford Project, until June 9, 2003. All of the available extensions were granted,<sup>4</sup> but the licensee failed to commence construction.

4. In 2003, a bill was introduced in Congress that would have permitted the Commission to extend the construction deadlines for both projects by an additional three consecutive two-year periods. Consistent with long-standing policy, the Commission's Chairman declined to support the bill because it would extend the commencement of construction deadline for a period longer than ten year.<sup>5</sup> The bill did not pass.<sup>6</sup>

5. A letter filed October 13, 2005 by Albany Engineering Corporation (Albany) states that, as of June 2, 2005, it acquired complete ownership of Adirondack, and that this acquisition "includes the license[s]."

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<sup>3</sup> See unpublished order of the Acting Director, Office of Hydropower Licensing, issued October 10, 1997 in Project No. 4244 (October 10, 1997 Order).

<sup>4</sup> See unpublished order signed by Peter J. McGovern, Division of Hydropower Administration and Compliance (DPCA), Office of Energy Projects in Project No. 10648 (June 20, 2001 Order).

<sup>5</sup> See May 22, 2003 letter from Chairman Pat Wood, III, to Hon. Joe Barton, Chairman, Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, United States House of Representatives.

<sup>6</sup> The bill, H.R. 1164, was introduced in the first session of the 108<sup>th</sup> Congress, but was not reported out of committee.

6. On May 23, 2006, Commission staff issued notices of probable termination of the two licenses.<sup>7</sup> That same day, Adirondack filed a motion for a stay of the license conditions and request that the Commission refrain from issuing notices of termination.

### **Discussion**

7. In acting on stay requests, the Commission applies the standard test set forth in the Administrative Procedures Act,<sup>8</sup> *i.e.*, the stay will be granted if “justice so requires.”<sup>9</sup> We have granted requests for stay of the commencement of construction deadline, or of the entire license, only in narrowly circumscribed circumstances.<sup>10</sup> We will not grant a request for a stay merely to relieve the licensee of the statutorily-prescribed commencement of construction deadline,<sup>11</sup> or to prevent mandatory termination where, because of the licensee’s own actions or inactions, construction was not commenced prior to the statutory deadline.<sup>12</sup> We have, however, granted requests for stay of the commencement of construction deadline, or the entire license, where commencement of construction cannot commence until necessary actions of other federal or state agencies are completed.<sup>13</sup>

8. Adirondack states that after acquiring the projects, Albany determined that the primary cause of delay in their development is their location within an area of the Hudson

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<sup>7</sup> Letters to James A. Bessa, P.E., Adirondack Hydro Development Corp., from Mohammed Fayyad, Engineering Team Lead, DPCA.

<sup>8</sup> 5 U.S.C. § 705 (2000).

<sup>9</sup> *See, e.g., Clifton Power Corp.*, 58 FERC ¶ 61,094 at 61,343 (1992).

<sup>10</sup> *See, e.g., East Bench Irrigation District*, 59 FERC ¶ 61,277 at 62,005-06 (1992) (*East Bench*).

<sup>11</sup> *See John C. Simmons*, 52 FERC ¶ 61,315 at 62,265 (1990).

<sup>12</sup> *See Utilities Commission and City of Vanceburg, KY*, 42 FERC ¶ 61,169 at 61,602-03 (1988).

<sup>13</sup> *See East Bench* (license for project at Reclamation dam required approval of project plans and specifications by Reclamation, which would not provide such approval pending completion of a study of the existing dam structure); *Western Hydro Electric, Inc.*, 67 FERC ¶ 61,201 (1994) and *E.R. Jacobson*, 68 FERC ¶ 61,054 (1994) (issuance of necessary federal permits delayed pending completion of ESA consultations).

River designated by the United States Environmental Protection Agency (EPA) for remediation of contamination by polychlorinated biphenyls (Hudson River PCBs Site) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980<sup>14</sup> (Superfund Act). The Hudson River PCBs Site is a 40-mile stretch of the Hudson River between Mechanicville in the north and Fort Edward, in the south.<sup>15</sup> The state dams at which the Northumberland and Waterford projects would be constructed are between these two endpoints.

9. Adirondack further explains that EPA initially decided in 1984 to leave the contaminated sediments in place, but, in February 2002, decided to remediate the site by dredging and disposing of the contaminated sediments. It states that remediation is to take place in two phases. Phase 1 would begin in 2007 and take about one year to complete, followed by Phase 2, which would take about five additional years to complete. Both projects are located in the Phase 2 dredging area. Adirondack states that Northumberland is in an area likely to be the first to receive remediation under Phase 2.<sup>16</sup> A consent decree, which, if approved by the federal district court, will enable the proposed remediation to proceed, was lodged with the court on October 6, 2005.<sup>17</sup> Consideration by the court is pending.

10. Adirondack states that the Superfund remediation activities will affect its ability to construct and operate the projects because: (1) construction of the projects will require removal and disposal of potentially contaminated excavated material from the river bed; and (2) operation of the projects will change the river's velocity, which could contribute to scouring and migration of contaminated sediments. It adds that construction of both projects will require dredge and fill permits from the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act,<sup>18</sup> and that the Corps has rarely issued such permits for the affected area of the Hudson River pending resolution of the

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<sup>14</sup> 42 U.S.C. § 9601, *et seq.* (2000).

<sup>15</sup> See [www.epa.gov/superfund/sites/npl/nar196.htm](http://www.epa.gov/superfund/sites/npl/nar196.htm).

<sup>16</sup> Motion for Stay at 4-6.

<sup>17</sup> See *U.S. v. General Electric Co.*, Civil Action No. 05-cv-1270, U.S. Dist. Ct. for the N. Dist. of N.Y., "Notice of Lodging of Consent Decree Pursuant to Oil Pollution Act," 70 Fed. Reg. 59,771 (Oct. 13, 2005).

<sup>18</sup> 33 U.S.C. § 1344 (2000).

PCB issue.<sup>19</sup> In sum, Adirondack contends, it is the PCB situation which has kept it from developing the projects, and will prevent it from doing so for an indeterminate time, which it estimates will not exceed another six years.

11. We will deny Adirondack's requests. First and foremost, we cannot grant the requested relief. The statutorily mandated deadlines to commence construction passed on January 16, 2002 (Northumberland) and June 9, 2003 (Waterford). Section 13 of the FPA requires us to terminate licenses for projects, such as those at issue, on which construction has not timely commenced. To be effective, a stay would have had to be requested and made effective before the deadlines expired.<sup>20</sup> Here, the stay requests were made approximately three years and five years after the deadlines passed. That being the case, we cannot as a matter of law stay the licenses.

12. Even if we could grant the requested relief, we would not do so. Once a license is issued, it is appropriate for the Commission to take reasonable steps to support the licensee's efforts to commence construction, and we have done so by affording the licensee multiple extensions of the commencement of construction deadline. That said, we act in the context of our authorities and responsibilities under the FPA, which include the provisions of section 13,<sup>21</sup> the purpose of which is to require prompt development of a licensed project.

13. We cannot change the fact that the licensees did not commence construction during the ten years afforded for each project. Moreover, Adirondack's suggestion that remediation of the PCB sites is only a matter of few years away and is the only significant impediment to commencement of construction rings hollow. We note in the this regard that the PCB problem was well-understood many years before the licenses were issued, but neither licensee cited uncertainty in that regard as a reason for seeking

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<sup>19</sup> Motion for Stay at 5-6.

<sup>20</sup> We have backdated the effective date of stays in order to afford the licensee a realistic opportunity following the lifting of the stay to commence construction but, in each such case, the request for stay was filed prior to the statutory deadline. *See, e.g., Willam B. Ruger*, 71 FERC ¶ 61,320 (1995) and *Cogeneration, Inc.*, 71 FERC ¶61,382 (1995).

<sup>21</sup> 16 U.S.C. § 806 (2000).

its numerous extensions of time until its motion for a stay was filed.<sup>22</sup> Also, nothing in the record for either project indicates that either licensee made any effort to apply to the Corps for a dredge and fill permit.

14. For the reasons set forth above, Adirondack's request for stay of license conditions and of issuance of notices of termination of the licenses will be denied.

The Commission orders:

The requests of Adirondack Hydro Development Corporation for stay of the conditions of the licenses for the Northumberland Project No. 4244 and of the Waterford Project No. 10648 and for the Commission to refrain from issuing notices of termination of the project licenses are denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>22</sup> See *Northumberland Hydro Partners, L.P.*, 95 FERC ¶ 61,013 at 61,021-22 (2001) (extension request for Northumberland based on need to resolve dispute over then-existing power sales contract and to study potential alternative markets for project power, and new studies of project technical, economic, and environmental factors and preparation and agency consultation on amendment application for reconfigured project), January 15, 1997 Order of the Director, Division of Licensing and Compliance, Office of Hydropower Licensing (OHL) (unreported), and October 10, 1997 Order. *Also*, June 20, 2001 Order (extension request for Waterford based on power sale contract dispute and pursuit of various potential power marketing alternatives), November 6, 1997 Order of the Acting Director, OHL (unreported), and June 10, 1999 Order of the Director, DPCA (unreported) (requests based on need to negotiate site access agreement with state, obtain power purchase contract).