

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gallia Hydro Partners
Rathgar Development Associates, LLC

Project Nos. 9042-036 and -062

ORDER APPROVING TRANSFER OF LICENSE AND LIFTING STAY

(Issued March 4, 2005)

1. By application filed August 10, 2004, Gallia Hydro Partners (Gallia) and Rathgar Development Associates, LLC (Rathgar) request Commission approval, pursuant to Section 8 of the Federal Power Act,¹ to transfer the license for the unconstructed Gallipolis Mill Hydroelectric Project No. 9042 from Gallia to Rathgar. As described below, this order approves the transfer and lifts a stay of the license that was issued until the U.S. Army Corps of Engineers (Corps) completed rehabilitation work on the dam where the project would be located. This order is in the public interest because it allows for construction and operation of the project.

Background

2. On September 27, 1989, the Commission issued the license for the proposed 48-megawatt Gallipolis Mill Project No. 9042,² along with 15 other licenses for projects to be located at Corps dams in the upper Ohio River Basin.³ The project would be located at the Corps' RC Byrd Lock and Dam, on the Ohio River in Gallia County, Ohio, and Mason County, West Virginia.

¹ 16 U.S.C. 801.

² 48 FERC ¶ 61,369 (1989).

³ See master order in *Allegheny Electric Cooperative*, 48 FERC ¶61,363 (1989), *order on reh'g*, 51 FERC ¶61,268 (1990), *aff'd*, *Department of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992).

3. On December 17, 1990, effective September 27, 1990, the Commission issued an order partially staying the licenses for 11 of the upper Ohio River Basin licenses, including the license Project No. 9042, pending judicial review of the licenses.⁴ The Commission excluded from the stay license articles requiring Gallia to: (1) monitor water quality (Article 402), (2) participate in the development of a Bioengineering Test Facility⁵ (Article 405); and (3) monitor the endangered pink mucket pearly mussel (Article 412). The Commission found that the need to continue, uninterrupted, the procedures mandated by these three articles outweighed the detriment to the involved licensees from complying with these articles while their licenses are being challenged in court.

4. In 1992, the Commission's licensing orders were affirmed,⁶ after which the Commission lifted the 1990 stay.⁷

5. Article 301 of the license for the Gallipolis Mill Project required Gallia to commence project construction by two years following the issuance of the license. At Gallia's request, on February 11, 1993, this deadline was extended for an additional two years.⁸

⁴ 53 FERC ¶ 61,387 (1990).

⁵ The Bioengineering Test Facility is an integral, pre-project component of a sequential process for mitigating fish entrainment impacts of the upper Ohio River Basin projects. The process includes: (1) monitoring of actual entrainment once project operations have begun; (2) compensation to the state resource agency for project-related losses unless and until site-specific mitigation is installed; (3) a basin-wide cooperative effort to develop prototype facilities for fish protection and guidance (*i.e.*, the Bioengineering Test Facility); and (4) reevaluation of mitigation options, based on the results of such testing. 53 FERC at 62,355, n. 9.

⁶ *See* n.3, *supra*.

⁷ *See* 59 FERC ¶ 61,274 (1992).

⁸ *See* unreported Commission staff order (February 11, 1993). Pursuant the Section 13, 16 U.S.C. §806, the Commission is required to terminate the license of a project where construction has not timely commenced. Section 13 states that a licensee must commence the construction of project works within the time fixed in the license, which shall be no more than two years from the date of the license, and authorizes the Commission to issue one extension of the deadline, for no more than two years.

6. On November 29, 1993, the Commission granted Gallia's request for a stay of most of the license, because the Corps was performing rehabilitation work that would conflict with project construction.⁹ As was the case in 1990, however, the Commission excluded from the stay Articles 402, 405 and 412. The order also required Gallia to file six-month progress reports.

DISCUSSION

A. Lifting the 1993 Stay

7. In a progress report filed November 26, 2003, Gallia stated that the Corps had informed it that the dam rehabilitation work had been completed.¹⁰ Because the predicate for the stay – the Corps' dam rehabilitation work – has been eliminated, we will lift the stay. Once the stay is lifted, the licensee will have one year, nine months, and four days to commence project construction.¹¹

B. The License Transfer

8. The purpose of the transfer is to authorize the sale of all of Gallia's rights to the license for the unconstructed project to Rathgar. The applicants state that Rathgar is a

⁹ 65 FERC ¶61,274 (1993).

¹⁰ The November 26, 2003 letter was filed by Gallia's contractor. On February 9, 2004, staff sent Gallia a reply letter stating in part that if staff did not receive a response, staff would assume that Gallia did not know of any reason why the stay should not be lifted. Gallia did not respond.

¹¹ The time remaining to commence construction is calculated as follows. As noted, the license was issued September 27, 1989 and initially stayed effective September 27, 1990 (and during the interim, the commencement-of-construction requirement was effective for one year). The September 27, 1990 stay was lifted on April 16, 1992. The license was stayed again effective July 12, 1993 (and during the interim, the commencement-of-construction requirement was effective for one year, two months, and 26 days). Thus, the requirement to commence construction has been in effect for a total of two years, two months, and 26 days. Consequently, the time remaining from the four-year period to commence project construction is one year, nine months, and four days.

limited liability company formed for the purpose of developing and operating hydroelectric projects, that Rathgar's managing member has more than twenty years of experience in the development and operation of hydroelectric projects, and that the proposed transfer would not result in any changes in the proposed scheme of development as licensed.

9. Public notice of the transfer application was issued September 21, 2004. No comments, protests, or motions to intervene were filed.

10. A transfer application may be approved on a showing that the proposed transferee is qualified to hold the license and operate the project, and that the transfer is in the public interest.¹² The record shows that Rathgar is qualified to hold the license and to operate the property under the license, and it has agreed to accept all of the terms and conditions of the license and to be bound by the license as if it were the original licensee. The public interest is served by transferring the license to an entity that will construct and operate the project.

11. As noted, the requirements for water quality monitoring, Bioengineering Test Facility development, and endangered mussel monitoring in Articles 402, 405, and 412, respectively, were excluded from the stays of the license and have thus been in effect since the license was issued in 1989.¹³ By order issued January 21, 1998,¹⁴ staff granted Gallia's request to suspend the water quality and mussel monitoring activities pending the Corps' completion of the dam rehabilitation work and the Commission's lifting of the 1993 stay, but denied Gallia's similar request to suspend Gallia's collaborative efforts to develop the Bioengineering Test Facility with other upper Ohio River Basin licensees.

¹² 18 C.F.R. Part 9 (2004). Section 8 of the FPA, 16 U.S.C. §801, which governs license transfers, does not articulate a standard for approving a transfer application. *See Potosi Generating Station, Inc. and Willow Creek Hydro, LLC*, 100 FERC ¶61,115 (2002).

¹³ The water quality monitoring plan was approved by order issued April 23, 1993, 63 FERC ¶ 62,072, and subsequently amended by orders issued August 18, 1994, 68 FERC ¶ 62,163, and August 25, 1995, 72 FERC ¶ 62,176. The Bioengineering Test Facility plan was approved by order issued August 10, 1993, 64 FERC ¶ 62,094. The mussel monitoring plan was approved by order issued July 25, 1990, 52 FERC ¶ 62,068.

¹⁴ 82 FERC ¶ 62,031 (1998).

12. In the January 1998 order, Staff found that Gallia should resume mussel and water quality monitoring following the lifting of the 1993 stay, and must collect two years of water quality and mussel monitoring data immediately prior to commencing project construction. However, as noted, project construction must be commenced not by two years but rather by one year and nine months following the lifting of the 1993 stay. Nevertheless, because water quality monitoring under Article 402 is required to be performed from June 15 through October 31 of each year,¹⁵ the approximately 21 months remaining to begin construction following the lifting of the 1993 stay in this order will be sufficient to collect the “two years” of pre-construction data required.

13. Mussel monitoring is required to be performed every other year, meaning that it might take longer than two years to obtain two years of pre-construction data once the 1993 stay is lifted. Therefore, in order to fulfill the requirement for two years of mussel monitoring (typically conducted in non-winter months)¹⁶ prior to construction of the project and within the time remaining to commence project construction, we will require the two annual periods of mussel monitoring conducted immediately following the lifting of the 1993 stay to be performed in two consecutive years within the time remaining to start project construction. Thereafter the monitoring will revert to the biennial period.

14. As noted, staff’s January 21, 1998, order found that Gallia should continue its collaborative efforts with other upper Ohio River Basin licensees to develop the Bioengineering Test Facility. The order approving the Bioengineering Test Facility plan required the participating licensees to jointly file annual reports on the status of the development of the facility. The record is unclear as to Gallia’s efforts, and those of the group of collaborating licensees, in developing that facility.¹⁷ Therefore this order

¹⁵ See order modifying water quality monitoring plan, 72 FERC ¶ 62,176, at 64,329, ordering paragraph (B).

¹⁶ The order approving the mussel monitoring plan does not specify when during the year that monitoring is to be conducted. However, as noted, such monitoring typically occurs in non-winter months.

¹⁷ See unpublished staff order, issued October 21, 1999 in Project No. 6939, which granted the licensees for Project No. 6939 an extension of time to July 1, 2001 to file the annual status report. The extension was granted to give licensees “time to assess and determine the extent of its BETF requirement in light of recent surrenders of license by the licensees comprising the Upper Ohio River Basin Hydro Association and to formulate a modified proposal.” It does not appear that the report was ever filed.

requires the licensee to file, by 30 days following the issuance of this order, a report detailing Gallia's participation in the development of the Bioengineering Test Facility and the status of the development of that facility.

The Commission orders:

(A) Transfer of the license for the Gallipolis Mill Hydroelectric Project No. 9042 from Gallia to Rathgar is approved.

(B) Gallia Hydro Partners shall pay all annual charges that accrue up to the effective date of the transfer.

(C) Approval of the transfer of license is contingent upon: (1) transfer of title of the properties under license and delivery of all license instruments to Rathgar, which shall be subject to the terms and conditions of the license as though it were the original licensee; and (2) Rathgar acknowledging acceptance of this order and its terms and conditions by signing and returning the attached acceptance sheet. Within 60 days from the date of this order, Rathgar shall submit certified copies of all instruments of conveyance and the signed acceptance sheet.

(D) The stay of the license for Project No. 9042, issued November 29, 1993, effective July 12, 1993, in 65 FERC ¶ 61,274, is lifted, effective as of the date of this order.

(E) Monitoring of the pink mucket pearly mussel (*Lampsilis abrupta*) under Article 412 of the license for Project No. 9042 shall be performed during the two consecutive years following the issuance of this order. Thereafter, the monitoring shall be done biennially, as required by Article 412 and the July 25, 1990, order¹⁸ approving the mussel monitoring plan.

¹⁸ 52 FERC ¶ 62,068.

(F) Within 30 days of the date of issuance of this order, the licensee shall file a report detailing its participation in the development of the Bioengineering Test Facility under Article 405 of the license for Project No. 9042, and the status of the development of that facility.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.