

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.

City of Jackson, Ohio and
Certain Ohio Municipalities

Project No. 6939-122

ORDER ON REHEARING

(Issued February 15, 2007)

1. In 2003, Commission staff issued two annual charge bills to the City of Jackson, Ohio, and the other municipal co-licensees (City) for the 42-megawatt Belleville Hydroelectric Project No. 6939.¹ The bills assessed, among other things, charges for the project's use of a federal dam for the period April 1999 through September 2002. On June 30 and September 3, 2003, the City filed timely appeals of the bills. On September 28, 2006, Commission staff issued a letter that granted in part and denied in part the appeals, and on October 30, 2006, the City filed a timely request for rehearing of Commission staff's letter as it pertains to the charges for use of a federal dam. For the reasons stated below, we grant in part the rehearing request.

Background

2. In 1989, the Commission issued an original license for construction and operation of the Belleville Project.² The project began operation in April 1999. Pursuant to section

¹ The project is located at the United States Army Corps of Engineers' (Corps) Belleville Lock and Dam on the Ohio River, in Wood County, West Virginia.

² *City of Jackson, Ohio*, 48 FERC ¶ 61,355 (1989), *order on reh'g*, 51 FERC ¶ 61,268 (1990). In 1993, the license was partially transferred to include as co-licensees 41 other Ohio municipal entities. 63 FERC ¶ 62,191 (1993).

10(e) of the Federal Power Act (FPA),³ license Article 201(b) requires the licensee to pay annual charges to the United States “for utilization of surplus water or water power from a government dam.”⁴ These charges shall be a “reasonable amount as determined in accordance with the provisions of the Commission’s regulations in effect from time to time.”⁵

3. In addition, standard Article 24 of the Belleville Project license requires that the licensee “shall furnish power free of cost to the United States for the operation and maintenance of navigation facilities in the vicinity of the project....”⁶ Rather than providing power to the Corps directly, the City pays American Electric Power to supply power to the Corps.

4. Under our regulations, federal dam use charges are assessed using a graduated flat rate based on the project’s total annual generation minus the amount of energy that the licensee provides free of cost to the federal government.⁷ In addition, section 11.3(d) of

³ 16 U.S.C. § 803(e)(1) (2000). That section directs the Commission to fix a reasonable annual charge for a licensee’s use of a federal dam or other structures owned by the United States.

⁴ 48 FERC at 62,175.

⁵ *Id.*

⁶ *See* Form L-6 (October 1975), entitled “Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States,” published at 54 FPC 1842, 1849 (1975), and incorporated by reference in the Project No. 6939 license, 48 FERC ¶ 61,355 at 62,175, ordering paragraph D.

Section 11(c) of the FPA, 16 U.S.C. § 804(c) (2000), provides that the Commission may require the licensee to provide free power to the government to operate navigation facilities.

⁷ *See* 18 C.F.R. § 11.3(b) and (c) (2006). Section 9 of the Electric Consumers Protection Act of 1986, Pub. L. 99-495 (October 16, 1986), modified FPA section 10(e) by codifying the graduated flat rate formula adopted by the Commission in its 1984 rulemaking, which substantially lowered dam use charges in order to encourage non-federal entities to develop the hydropower potential available at federal dams. *See Annual Charges for Use of Government Dams and Other Structures Under Part I of the Federal Power Act, Order No. 379*, FERC Stats. & Regs. ¶ 30,569 at 30,954; *order on reh’g, Order No. 379-A*, FERC Stats. & Regs. ¶ 30,589 (1984).

the regulations allows a licensee to apply for a credit against the Commission's federal dam use charges for "contractual payments made for construction, operation, and maintenance of a Government dam...."⁸ Commission staff will grant the credit "only when the licensee demonstrates the credit is reasonably justified" and "shall consider, among other factors, the contractual arrangements between the licensee and the Federal agency which owns the dam and whether these arrangements reveal clearly that substantial payments are being made for power purposes...."⁹

5. The project became subject to federal dam charges in April 1999 when it began generating. The City filed annual generation information so staff could determine the amount of annual charges the City owed. With each annual generation report, the City also sought a credit for the payments it made to purchase power for the Corps in lieu of supplying free power directly.¹⁰

6. Between 2003 and 2006, Commission staff issued four federal dam use bills covering the period from April 1999 through FY 2004.¹¹ Shortly after the issuance of the first bill, the Director, Division of Hydropower Administration and Compliance, denied the City's requests for credit for payments reimbursing it for the cost of paying American Electric Power to deliver power to the Corps.¹²

⁸ 18 C.F.R. § 11.3(d) (2006).

⁹ *Id.*

¹⁰ *See* filings of May 16 and November 2, 2001; November 1, 2002.

¹¹ The first bill (issued in May 2003) addressed the period from April 1999 through Fiscal Year (FY) 2001; the second bill (July 2003) addressed FY 2002; the third (August 2004) addressed FY 2003; and the fourth bill (August 2005) addressed FY 2004.

¹² *See* June 25, 2003 letter from Joseph D. Morgan, Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, to Marc S. Gerken, President, American Municipal Power-Ohio, agent for the licensee. The Director of the Office of Energy Projects, or his designee, evaluates and rules on credit requests. *See* 18 C.F.R § 11.3(d).

7. The City made timely payments under protest and filed appeals of each bill.¹³ On September 28, 2006, Commission staff issued a letter responding to the City's first two appeals. The two latter two appeals remain pending before the Commission.

8. On October 30, 2006, the City filed a timely request for rehearing, arguing that Commission staff erred in denying it a credit against its federal dam charges for payments it made to provide power for the Corps' project, and in making retroactive adjustments to the first bill.

Discussion

A. Federal Dam Charges

9. The City contends that, pursuant to section 11.3(d) of the Commission's regulations, it should receive a credit against the federal dam use charges equal to the amount it spent (i.e., dollar for dollar) to purchase power for the Corps' project alleging that those payments were made for the "operation and maintenance" of the federal dam.¹⁴

10. We disagree. The City's payments do not meet the requirements of section 11.3(d) of the regulations. The purpose of that section is to provide a mechanism to account for unusual costs associated with use of federal dams. In promulgating section 11.3(d)(3), the Commission stated:

[S]ituations may arise in which a prospective licensee agrees with a Government agency to share in certain costs of construction other than those costs directly related to electric power production. In some of these situations it may be reasonable to adjust the annual charges imposed by the Commission in this rule to account for these other payments by the licensee.¹⁵

¹³ Appeals filed June 30, 2003, of the first bill; September 3, 2003, the second bill; September 20, 2004, the third bill; and September 19, 2005, the fourth bill.

¹⁴ The City seeks a credit of \$179,281, the price it paid for approximately 4,168,500 kilowatthours of power delivered to the Corps from April 1999 through FY 2002. Rehearing at 6, and Attachment to September 3, 2003 appeal.

¹⁵ *Order No. 379*, FERC Stats. & Regs. ¶ 30,569 at 30,950.

In addition, to qualify for a credit, such payments must be related to the power purposes of the federal project. Payments for the federal project's irrigation or flood control purposes, for example, would not qualify.¹⁶

11. Here, we have a situation where the City is obligated by Article 24 of its license to provide power at no cost to the Corps to support the Corps' navigation operations. As noted above, we assess federal dam use charges using a graduated flat rate based on the project's total annual generation minus the amount of energy provided free to the government.¹⁷ It is irrelevant for federal dam use charges whether the City provides project power to the Corps or pays for the Corps to buy power from another entity.¹⁸ The project's total annual generation will be reduced by the amount of power that the Corps receives.

12. For the above reasons, we will direct the Commission's Division of Financial Services to issue a revised bill for the period from 1999 through FY 2002 that takes into account the amount of power the City supplied to the Corps.¹⁹

B. Increase in Federal Dam Use Charge for 2000 and 2001

13. The City notes that the September 28 letter has an unexplained increase in the federal dam use charges assessed in the first bill.²⁰ The City is correct. The letter included an adjustment upward, but omitted the explanation for the change.

¹⁶ *Order No. 379-A*, FERC Stats. & Regs. ¶ 30,589 at 31,103.

¹⁷ 18 C.F.R. § 11.3(b) (2006).

¹⁸ When a licensee provides project power to the Corps, the licensee loses the ability to sell (or use) that power for itself. When it purchases someone else's power for the Corps, it can sell or use its own power. To allow a credit for the money spent on power for the Corps would result in a windfall for the licensee because there would be no offset to reflect the value of the power saved by the licensee.

¹⁹ The Division of Financial Services has reviewed the data submitted for April 1999 through FY 2001 and subtracted the amount of generation purchased for the Corps from the total generation for that period. The bills for the period from April 1999 through FY 2001 will accordingly be reduced by \$4,227.78. The bill for FY 2002 has not yet been adjusted because the pro-rated generation amount for the last month is missing from the City's submittal. Once the City files that information, the Division of Financial Services will adjust that bill.

14. As noted above, federal dam charges are determined by taking the project's gross energy production less the energy provided free of charge to the Government. A graduated flat rate is then applied to the remaining figure.

15. The bill used the incorrect energy production figure in calculating the annual charge. Instead of using the project's gross energy production for the years in question, the bill incorrectly used the gross energy production minus the amount of generation that is used for municipal purposes.²¹ In processing the City's appeal, staff found the error and corrected it.²² However, as discussed above, these revised generation numbers will be reduced to reflect an adjustment for the amount of power purchased by the City for the Corps.²³

²⁰ The charges for FY 2000 and 2001 were adjusted upward.

²¹ This lower figure is used to calculate administrative annual charges for projects where the licensee is a municipality: the amount of generation that is used for municipal purposes is not subject to an annual administrative charge. See 18 C.F.R. § 11.1(d)(3) (2006).

²² The courts have recognized the Commission's broad discretion to modify its prior orders to correct errors in proceedings that are subject to administrative or judicial review. See *Henwood Associates*, 50 FERC ¶ 61,183 (1990).

²³ On rehearing, Jackson also cites to *City of Tacoma, Washington v. FERC*, 331 F.3d 106 (D.C. Cir. 2003), and argues that staff erred by not "seeking to avoid increasing the price to consumers of power by such charges" as required by section 10(e) of the FPA.

However, when promulgating the regulations establishing the graduated flat rates as the means to assess federal dam charges, the Commission specifically noted that it considered the goal of seeking to avoid increased power prices and found that, in most cases, the charges assessed under the graduated rate method would be less than under the commission's proposed rule and that where costs would be higher it would be the result of greater energy being produced at the project. The rule purposely set the rates at levels that minimized "to a reasonable degree" the costs that consumers might ultimately bear. See Order No. 379, FERC Stats. & Regs. ¶ 30,569 at 30,949.

The Commission orders:

The request for rehearing filed by the City of Jackson, Ohio and Certain Ohio Municipalities, on October 30, 2006, is granted in part and denied in part, as indicated in this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.