

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Boyce Hydro Power, LLC

Project No. 10808-000

**ANSWER OF THE
SANFORD LAKE PRESERVATION ASSOCIATION
TO THE MOTION FOR RECONSIDERATION OF ORDER
REVOKING LICENSE AND APPLICATION FOR APPROVAL OF TRANSFER OF
LICENSE BY BOYCE HYDRO POWER, LLC**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ the Sanford Lake Preservation Association (“SLPA”),² by the undersigned counsel, respectfully answers the March 15, 2019 Motion for Reconsideration of Order Revoking License filed on behalf of Boyce Hydro Power, LLC (“Boyce Hydro”) related to the 4.8 MW Edenville (Michigan) Project No. 10808 (the “Edenville Project”) (the “Boyce Motion”).

The Boyce Motion was combined with an Application for Approval of Transfer of License (the “Application”) for the Project from Boyce Hydro to Wolverine Hydro, LLC (“Wolverine Hydro”), which was jointly submitted by Boyce Hydro and Wolverine Hydro.

¹ 18 C.F.R. § 385.213. Rule 213(d)(1) provides that an answer to a motion is typically due in fifteen days. Thus, answers to a motion filed on March 15 typically would be due on April 1. On March 27, 2019, SLPA filed a Motion of the Sanford Lake Preservation Association For an Extension of Time to Respond to the Motion for Reconsideration of Order Revoking License by Boyce Hydro Power, LLC, currently pending. Out of an abundance of caution, SLPA files this answer on April 1 to avoid having it deemed late, and withdraws its March 27 motion.

² As previously communicated to the Commission, SLPA is part of the Four Lakes Task Force, which includes representation of multiple lake associations that have an interest not only in the Edenville Project that is the subject of this proceeding, but also in other connected lakes with Commission-regulated dams and hydroelectric facilities. Those entities are referred to herein collectively as the “Lake Associations.”

Because the Federal Power Act (“FPA”) requires the Commission to issue public notice of a license transfer application before approving it,³ SLPA intends to intervene and protest the Application in accordance with any such public notice, assuming the Commission does not reject the Application outright. Nevertheless, SLPA uses this answer to the Boyce Motion to briefly oppose the Application in addition to opposing the Boyce Motion.

I. INTRODUCTION

The Boyce Motion should be denied in full. As the Commission has repeatedly found, Boyce Hydro has a lengthy history of non-compliance with the Commission requirements applicable to the Edenville Project. That non-compliance culminated in the Commission’s September 10, 2018 via an Order Revoking License (the “Revocation Order”).⁴ At this stage, if the Edenville Project is going to generate electricity in the future, the best course is to require application for a new Commission license through the Commission’s normal licensing procedure.

The path sketched out in the Boyce Motion has not been publicly presented, let alone properly vetted; that path serves neither the public interest or public safety; the Commission no longer possesses jurisdiction over the Edenville Project; and granting the relief sought in the Motion would undermine the good faith efforts that SLPA, the Lake Associations, and other affected community members have taken to conform to now-applicable Michigan law. Even if the Commission reactivates the license, the license should not be simultaneously transferred at this time.

³ See, e.g., *Joseph M. Keating*, 40 FERC ¶ 61,254 (1987).

⁴ *Boyce Hydropower, LLC*, 164 FERC ¶ 61,178 (2018).

Although SLPA previously opposed revocation of the Edenville Project license, circumstances have changed. Previously, SLPA and the counties opposed license revocation primarily to give the counties and communities time to develop a plan, with effective license continuing to impose lake level requirements on Boyce Hydro, with resumed power production providing a source of revenue to pay for necessary repairs. However, the counties have made significant progress towards addressing SLPA’s lake level concerns under Michigan’s jurisdictional authority, and without pursuing power production by the Edenville Project at this time. SLPA acknowledges that future power is an option it and the wider community may support or pursue in the future. Nevertheless, given the significance of the Probable Maximum Flood (“PMF”) design and investment, the limited amount of time that would have been remaining on the revoked license, and the need to study the potential economic impact on how it is implemented, SLPA now believes that – consistent with the conclusions the Commission reached in its orders revoking the license and denying rehearing – the best path forward is for the Edenville Project to submit, and the Commission approve, a new license application before recommencing power production. Such a process would be substantially more transparent than the approach Boyce Hydro attempts to take here.

II. ARGUMENT

A. SLPA Does Not Endorse And Was Not Aware Of The Boyce Hydro/Wolverine Hydro Proposal

To be clear, SLPA and the Lake Associations have not been part of any negotiations that apparently have occurred between Boyce Hydro and Wolverine Hydro. Indeed, SLPA and the Lake Associations were unaware that those negotiations had occurred, until SLPA received a copy of the Boyce Motion.

SLPA is also unaware that either Boyce Hydro or Wolverine Hydro has made any community consultations or engagement efforts in advance of filing the Boyce Motion and the Application. Thus, although the Motion makes a few self-serving, conclusory assertions about “public interest,” the fact is that there has been absolutely no transparency relating to the Boyce Hydro/Wolverine Hydro proposal and no community involvement. Having failed to engage with the affected community, Boyce Hydro and Wolverine Hydro actually have no idea whether the community itself believes their proposal is in the public interest.

Based on the information contained in the Boyce Motion, SLPA does not endorse or support the path that Boyce Hydro and Wolverine Hydro sketch out. That path is incomplete and at odds with many of the findings that led the Commission to revoke the Edenville Project license. That path does not appear to serve the public interest or the interest of public safety. And, that path undermines the efforts of SLPA and the community members to forge a solution within the context of the now-applicable laws and regulations of the State of Michigan.

Moreover, the path sketched out by Boyce Hydro and Wolverine Hydro has been formulated completely outside the public view and with zero transparency from the perspective of the affected community members, SLPA, the Lake Associations, and other potentially affected persons. Now, even as SLPA and the affected community have become aware of the Boyce Motion and Application, the community is effectively forced to proceed with one hand tied behind its collective back, since key proposal details were submitted under seal, without any offer from Boyce Hydro/Wolverine Hydro for the entry of a Protective Order or establishment of another mechanism to allow for appropriate access for interested parties.

Accordingly, the Boyce Motion should be denied.

**B. Commission Jurisdiction Over Both
The Edenville Project And The License Is Terminated**

The Commission issued the Revocation Order on September 10, 2018.⁵ On January 17, 2019, the Commission denied requests for rehearing of the Revocation Order filed by Boyce Hydro and SLPA.⁶

To SLPA's knowledge, neither Boyce Hydro nor any other party has appealed the Revocation Order or the order denying the rehearing requests. Thus, the Edenville Project license revocation is legally final, and as stated clearly in the Revocation Order, the Commission's jurisdiction over the Edenville Project has terminated:

“Following revocation of the license, the Commission's jurisdiction will end, and authority over the site will pass to Michigan DEQ [the Department of Environmental Quality] for dam safety regulatory purposes.”⁷

This means that even if the proposal made in the Boyce Motion and the Application were otherwise justified, in the public interest, and consistent with Federal law and the Commission's regulations, which it is not, the Commission has renounced its jurisdiction to evaluate that proposal. Recall that the Commission was previously presented with multiple requests to stay the effect of the Revocation Order precisely so that the Commission would retain jurisdiction over this matter while parties pursued arrangements that might convince the Commission to not permanently revoke the license.⁸ The Commission declined those offers.⁹

⁵ *Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018).

⁶ *Boyce Hydro Power, LLC*, 166 FERC ¶ 61,029 (2019).

⁷ See Revocation Order at ¶ 60.

⁸ See, e.g., January 16, 2019 Boyce Hydro Emergency Motion for Deferred Action and Interim Reinstatement of License; October 5, 2018 Boyce Hydro Request for Rehearing and Renewed Emergency

The Boyce Motion and the Application provide no convincing basis to now reverse course. Rather, the Boyce Motion and the Application operate on the legal fiction that the Commission’s jurisdiction over a revoked license is ongoing forever. But, that verges on nonsense; the Commission’s express language quoted above leaves no doubt that the Commission itself has consciously and intentionally terminated its jurisdiction over the Edenville Project.

Moreover, the Commission’s jurisdictional relinquishment in the Revocation Order aligns with the procedural directions of the FPA. “Under Section 313 of the [FPA], 16, U.S.C. § 825L, Commission proceedings terminate after denial of any rehearing once the time for seeking judicial review expires, and the party status of any intervenors in that proceeding also terminates at that point.”¹⁰ That is the case here. The Commission has decided that the Edenville Project license has been revoked. That revocation is now a final, non-appealable Commission conclusion that need not, and should not, be re-examined by the Commission yet again. Although the Commission has the discretion to reconsider its orders, the Commission has called the grant of reconsideration of an order denying rehearing an “unusual step,” such as to correct a Commission error.¹¹ The circumstances presented by Boyce Hydro hardly rise to that level.

Motion for Stay; September 18, 2018 SLPA/Wixom Lake Association/Gladwin County Board of Commissioners Emergency Motion to Stay Order Revoking License.

⁹ See, e.g., January 17, 2019 Order Denying Rehearing, 166 FERC ¶ 61,029; October 18, 2018 Order Denying Stay, 165 FERC ¶ 61,027.

¹⁰ *Kings River Conservation District*, 36 FERC ¶ 61,365 (1986).

¹¹ *Florida Power & Light Co.*, 122 FERC ¶ 61,159 (2008).

The Boyce Motion, jointly filed with the Application, is an inappropriate, attempted second bite at an apple that has already fallen from its tree. The Commission license has been revoked; Commission jurisdiction over the Edenville Project has terminated; Michigan law now applies; and as it stands neither the public interest nor public safety are served by approving an essentially secret proposal offered by Boyce Hydro and Wolverine Hydro without any consultation with the affected community. At this stage, if a Commission license is desired, it should be obtained through a new license application.

Accordingly, the Boyce Motion should be denied.

C. Granting the Boyce Motion Would Yet Again Undermine Community Efforts To Proceed Under Now-applicable Michigan Law

As SLPA reported to the Commission in several previous filings, over approximately the past year, SLPA, working together with the Lake Associations, Gladwin County, Midland County, and other parties in the affected community, has been engaged in a good faith effort to find a long-term, sustainable solution to the operational, financial, and public safety issues at the Edenville Project that gave rise to the Revocation Order.¹² Those community efforts have attempted to address, in a serious and holistic manner, the current ownership, condition, maintenance, and operation not only of the Edenville Project, but also of three related dam projects (FERC Project Nos. 10809, 10810, and 2785) that support an interconnected lake system in Gladwin and Midland Counties, Michigan.

¹² See, e.g., April 12, 2018 Letter on behalf of SLPA, the Wixom Lake Association, and the Sanford Lake Association; July 30, 2018 Letter on behalf of SLPA, the Wixom Lake Association, and the Sanford Lake Association; October 23, 2018 Supplemental Filing in Further Support of Request for Rehearing of SLPA; December 28, 2018 Second Supplemental Filing in Further Support of Request for Rehearing of SLPA.

At the time of its issuance, the Revocation Order materially and substantially disrupted the community efforts in which SLPA was taking part. Accordingly, SLPA sought rehearing of the Revocation Order. However, when rehearing was denied, SLPA respectfully accepted that decision and shifted its efforts and resources to formulate a solution to the Edenville Project's problems that could be implemented without a Commission license and ongoing Commission jurisdiction, but could work under the new State of Michigan jurisdictional authority over the Edenville Project.

Those efforts are progressing and include:

- Pending consolidated state court cases to set the lake levels in accordance with Michigan's applicable statutory scheme. A hearing for substantive evidentiary proceedings is now set for May 3, 2019 before the Midland County Circuit Court, and individual written notices of that hearing will be sent in the coming days to over 8,000 potentially affected landowners.¹³
- Meeting and Discussions with the Michigan DEQ, County and Township Governments and six town hall meetings with approximately 2,000 attendees.¹⁴
- Meetings and negotiations between Boyce Hydro and SLPA continue under a Letter of Intent to advance an arrangement that can address Lake Level issues

¹³ As previously reported to the Commission, SLPA has been appointed as the "Designated Authority" by both Midland County and Gladwin County for purposes of the consolidated lake level court cases. *See* October 23, 2018 Supplemental Filing in Further Support of Request for Rehearing of SLPA at Attachment 1 at p. 2-3, and Attachment 2 at 2-3.

¹⁴ The meetings involved two for Wixom Lake on February 19 and 20 at the Albright Shores Eagles F.O.E.; two for Sanford Lake on February 21 and 28 at the Meridian Early College High School; and two for Smallwood and Secord Lake on February 24 and 26 at the Secord Lake F.O.E.

with the Edenville Project under the now-applicable Michigan legal and regulatory construct.

SLPA has stated in filings and in public, that electric power from the Edenville Project may yield benefit to the community, but SLPA favors a transparent review of the alternatives for compliance that is accepted by all the stakeholders. At this stage, if the Edenville Project is going to be used to generate electricity in the future, the most appropriate path is a new application for a new Commission License.

Granting the Boyce Motion under these circumstances at this late date would create additional public confusion and destabilize the efforts that have progressed to achieve a workable solution to the issues that gave rise to the Revocation Order in a manner that conforms with now-applicable Michigan law.

**D. Even If The License Is Reactivated,
The License Transfer Request Should Be Denied At This Time¹⁵**

If the Commission decides to reactive the Edenville Project license, which it should not, the request to transfer the license should be denied at this time. The presentation of a combined request to reactivate a terminated license for a facility over which the Commission has expressly disclaimed jurisdiction and simultaneously to transfer that license is unusual and procedurally questionable.

Under typical Commission procedure, a request to transfer a license would be handled separately from any dispute over whether a license should be revoked (or more precisely in this case, whether the license even exists after having been revoked). The Commission would

¹⁵ SLPA reserves the right to intervene and protest the Application in greater detail, should the Commission issue a public notice. Nevertheless, SLPA takes this opportunity to briefly explain its opposition to the Application.

normally publicly notice the license transfer request for comments, allowing for an orderly examination of whether the proposed transfer is in the public interest and otherwise meets the transfer requirements of Federal law and regulations. In this instance, including the Application with the Boyce Motion conflates those two normally separate processes into one. There is no need to deal with a transfer request in this manner, and interested parties would be prejudiced by such treatment.

If the Commission chooses to reactivate the license and notice the license transfer request for comments per its usual process, SLPA reserves its right to submit additional comments regarding the transfer request at that time.

III. CONCLUSION

For the reasons stated herein, SLPA respectfully requests that the Commission deny the Boyce Motion in full, and grant such other relief as the Commission deems just and reasonable. Also, to the extent necessary here, SLPA protests the Application to transfer the license from Boyce Hydro to Wolverine Hydro.

Respectfully submitted:

THE SANFORD LAKE PRESERVATION ASSOCIATION

/s/ Kenneth von Schaumburg

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Dated: April 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 1st day of April, 2019.

/s/ Daniel R. Simon

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