

No. 07-3291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAY 25 2007

METRO HYDROELECTRIC COMPANY, LLC,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 METRO PARKS, serving Summit County,)
)
 Defendant-Appellant.)

LEONARD GREEN, Clerk

ORDER

Before: MERRITT, MARTIN, and DAUGHTREY, Circuit Judges.

On April 23, 2007, the court granted a stay pending appeal of a preliminary injunction requiring the defendant to allow the plaintiff access to the Gorge Metro Park (the "Park") to conduct eight non-invasive tests required for the plaintiff to proceed with its license application before the Federal Energy Regulatory Commission ("FERC"). The plaintiff now seeks reconsideration of the order granting a stay, arguing that the court failed to consider the Amended Complaint in considering the issue of federal jurisdiction, erroneously concluded that the plaintiff would not be harmed by the stay, and improperly granted a stay without requiring the defendant to demonstrate irreparable harm.

We have now reviewed the Amended Complaint, which was not submitted to the court by the plaintiff in opposing the motion for a stay. The FERC licensing process cannot confer on the plaintiff any rights to develop a hydroelectric power plant in the Park that it does not possess under state property law. Although the complaint alleges actions undertaken by the defendant both as a governmental entity and as a property owner, the claims that the defendant is wrongfully interfering with the federal government's exclusive regulation of hydroelectric power projects on navigable

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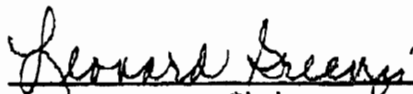
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waters are dependent on a finding that under state law the plaintiff has the right to assess and use the Park property for the purposes of developing a power plant. We cannot conclude at this time that the district court has subject matter jurisdiction to resolve this issue. Moreover, assuming the Amended Complaint asserts colorable federal claims, the defendant has raised serious questions with respect to the district court's resolution of the state property law issue.

Our April 23 order did not conclude that the plaintiff would not suffer any harm as a result of a stay. Rather, we noted that it was not clear that the plaintiff would suffer any significant irreparable injury. Under the circumstances of this case, the plaintiff has not shown that a delay in the FERC licensing process will cause significant irreparable harm. Because the balance of the harms in this case does not significantly favor one party over the other and the defendant has shown a likelihood of success on the merits, a stay of the preliminary injunction pending appeal is warranted. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (providing that the four stay "factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together"); *see also In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1992) (noting that the injunctive relief "factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements").

The motion for reconsideration is **DENIED**.

ENTERED BY ORDER OF THE COURT


Clerk