108 FERC ¶ 61,261
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FPL Energy Maine Hydro LLC Project No. 2612-015

ORDER GRANTING REHEARING AND STAYING NEW LICENSE

(Issued September 21, 2004)

1. This order grants a request for rehearing of three management plans required by the new license issued to FPL Energy Maine Hydro LLC (FPL Energy) for the Flagstaff Storage Project No. 2612,[1] and stays the new license because the water quality certification issued for the project has been denied on appeal.

BACKGROUND

2. The Commission issued a new license for the Flagstaff Project on March 30, 2004. The Appalachian Mountain Club (AMC) filed a timely request for rehearing. While rehearing was pending, the Maine Board of Environmental Protection (Maine Board) issued a decision on appeal of the water quality certification for the project, denying certification without prejudice. In this order, we address both the pending rehearing request and the effect of the Maine Board's decision.

DISCUSSION

A. The Club's Request for Rehearing

3. The new license requires FPL Energy to prepare a whitewater boating plan (Article 401), lake management plan (Article 404) and comprehensive recreation and land management plan (Article 409), each after consulting with specified state and federal resource agencies. On rehearing, AMC, an intervenor and active participant in

[1] 106 FERC ¶ 62,232 (2004). No other rehearing requests were filed. The Flagstaff Project is located on the Dead River in Somerset and Franklin Counties, Maine.

the relicensing proceeding, asks that it be included as a consulted party in these three license articles. FPL Energy does not object to AMC's request,[2] which we grant herein.

B. Water Quality Certification

4. Under section 401(a)(1) of the Clean Water Act (CWA),[3] the Commission may not grant a license for a hydroelectric project unless the appropriate state agency either has issued water quality certification for the project or has waived certification. Section 401(a)(1) provides that certification is deemed waived if the state certifying agency fails to act on a certification request within a reasonable period of time, not to exceed one year, after receipt of such request. The Commission's regulations give the certifying agency the entire year.[4]

5. On November 14, 2003, the Maine Department of Environmental Protection (Maine DEP) issued water quality certification for the Flagstaff Project.[5] This certification was appealed jointly by AMC, Maine Rivers, Trout Unlimited, and the Natural Resources Council of Maine, and by the Town of Eustis, Maine. On July 15, 2004, the Maine Board of Environmental Protection (Maine Board) granted the appeals, finding that Maine DEP had used an unauthorized standard in reviewing FPL Energy's request, and denied the certification without prejudice. FPL Energy has filed a judicial appeal with the Kennebec County Superior Court.[6]

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[2] FPL Energy letter filed May 13, 2004.

[3] 33 U.S.C. § 1341(a)(1).

[4] 18 C.F.R. § 4.38(f)(7)(ii) (2004).

[5] The relicense application for the Flagstaff Project was filed in December 1995. In order to avoid the denial of a certification request on which Maine DEP was not yet ready to act, FPL Energy withdrew and refiled its request six times before obtaining certification.

[6] As a matter of policy, the Commission will dismiss an original license application after denial of a second certification request, unless an appeal of the first denial is pending, in order to free up the site for potential hydroelectric development or other purposes. *See* City of Harrisburg, Pa., 45 FERC ¶61,053 (1988). In contrast, because relicensing concerns an existing project that continues to operate under an annual license, relicense applicants are afforded greater flexibility to pursue appeals and resolve issues in connection with certification denials. *See* West Penn Power Co., 74 FERC ¶ 61,287 at 61,913 n. 14 (1996).

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6. In its July 30, 2004 letter to the Commission attaching the Maine Board's decision, however, FPL Energy asserts that Maine has waived certification, because the state failed to take *final* action – presumably referring to the Maine Board's certification reversal/denial – within the one-year waiver period. Alternatively, FPL Energy argues that because the reversal/denial occurred after the one-year period, the state waived its right to *alter* the certification.[7]

7. Section 401 requires a State certifying agency to act on a certification request within one year. In this case, the Maine DEP satisfied this requirement by granting certification within the statutory time period. There is nothing in the language of section 401 to suggest that a State must not only act on the certification request but also take action on any appeals that might subsequently be filed within one year. Accordingly, we cannot find that certification was waived.[8]

8. A separate issue is what effect should be given to the Maine Board's subsequent reversal of the Maine DEP's decision, which had the effect of denying certification without prejudice. FPL Energy argues that, if we find that the Maine DEP's initial grant of certification was sufficient under the CWA, the Maine Board's subsequent invalidation of it after the one-year deadline can be given no legal effect. In support, FPL Energy cites *Airport Communities Coalition v. Graves*, 208 F. Supp. 2d 1207 at 1217 (W.D. Wash. 2003). In that case, the court held that section 401 required the Army Corps of Engineers to incorporate in its section 404 permit only those State certification conditions issued within the one-year certification deadline. What FPL Energy fails to mention, however, is that the Corps had accepted some, but not all, of the new conditions, and the court concluded that whether to do so was solely in the Corps' discretion. *Id*. at 1217.[9] Thus, the case does not stand for the proposition that the Commission must ignore any State action regarding a certification that occurs outside the one-year deadline.

9. More importantly, however, the case did not purport to establish what action a Federal agency can or should take if a State certification in support of a Federal license or permit is subsequently invalidated. In a recent case involving similar facts, we stayed the new license for the Cowlitz Project in response to the Washington hearing board's stay of water quality certification for the project pending appeal of the certification. *City of*

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[7] FPL Energy's July 30, 2004 letter at 5.

[8] A State may alter a water quality certification if it has reserved authority to do so in the certification. *See* American Rivers, Inc. v. FERC, 129 F.3d 99 (2nd Cir. 1997).

[9] *See also* Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 79 (1st Cir. 1993) (EPA can in its discretion adopt conditions in a final State certification issued outside the one-year time frame).

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Tacoma, Washington, 99 FERC ¶ 61,067 (2002).[10] We think the same approach is called for here. In this case, the Maine Board invalidated the certification for the Flagstaff Project, thus calling into question not only the Project's compliance with applicable water quality standards but the validity of the new license as well. In these circumstances, we conclude that the better course of action is to stay the new license to allow sufficient time for resolution of these issues.

10. FPL Energy asserts that, because it has accepted the new license and no rehearing requests were filed on the issue of water quality certification, the license is now final and the Commission therefore does not have the authority to alter it without FPL Energy's consent.[11] This is incorrect. Although FPL Energy has indicated its acceptance of the new license by not seeking rehearing of it, another party filed a request for rehearing and the license is therefore not final. As long as the license is not final, for whatever reason, the Commission has the authority to amend it unilaterally.[12]

11. Finally, FPL Energy suggests, without citations or elaboration,[13] that relicensing the Flagstaff Project does not in fact require water quality certification, because no discharge of a pollutant is involved. Section 401 requires a State certification for "any activity . . . which may result in a discharge," as distinguished from a "discharge of a pollutant." As defined in the CWA, the term "discharge" includes a "discharge of a pollutant," and thus the former term comprises a broader class of activities than the latter. *See* 33 U.S.C. § 1362(16). Thus, we find nothing in FPL Energy's argument to suggest

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[10] FPL Energy maintains that the Cowlitz case is inapplicable, because we issued our stay within the statutory period for rehearing of the new license and parties in that case had filed a request for rehearing on the certification issue. We disagree. In both cases, the state hearings board took action affecting the validity of the certification after the one year deadline, but while requests for rehearing of the license were pending before the Commission.

[11] Section 6 of the Federal Power Act, 16 U.S.C. § 799, provides that licenses "may be altered . . . only upon mutual agreement between the licensee and the Commission." FPL Energy states that it has accepted the new license. July 30, 2004 letter at 2 n. 8.

[12] *See* Henwood Associates, Inc., 51 FERC ¶ 61,196 at 61,550 (1990), *aff'd*, California v. FERC, 966 F.2d 1541(9th Cir. 1992); Appalachian Power Co. v. United States, 607 F.2d 935 (Ct. Cl. 1979).

[13] FPL Energy's July 30, 2004 letter at 3 n. 9.

that operation of its project is not an activity which may result in a discharge for which certification is required under section 401.[14]

12. In light of the Maine Board's action, we will stay the new license, effective July 15, 2004, pending the outcome of any appeal of the certification denial,[15] and reserve our authority to modify the new license as necessary to incorporate the conditions to any new certification that is issued.

The Commission orders:

(A) Article 401, first paragraph, of the new license issued on March 30, 2004, for the Flagstaff Storage Project No. 2612, is modified to read as follows:

> Article 401. *Whitewater Boating Plan*. Within six months of the date of issuance of this license, the licensee shall, as required by Condition No. 2 of Appendix A, file for Commission approval a whitewater boating plan for providing and monitoring whitewater boating flows and reporting the results of the monitoring. The plan shall be developed after consultation with the U.S. Fish and Wildlife Service (FWS), National Park Service (NPS), Appalachian Mountain Club, and entities specified in Condition No. 2 of Appendix A.

(B) Article 404, second paragraph, is modified to read as follows:

> Article 404. *Lake Management Plan.* * * *
>
> The licensee shall prepare the plan in consultation with the Maine Department of Environmental Protection, U.S. Fish and Wildlife Service, Maine State Planning Office, Maine Department of Inland Fish and Wildlife, and Appalachian Mountain Club. The licensee shall include with

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[14] *See* Public Utility District No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 711 (1994) (need for certification of project discharges not in dispute); Alabama Rivers Alliance v. FERC, 325 F.3d 290 (2002) (increase in volume of water passing through dam's replacement turbines was an activity that may result in a discharge and therefore required certification). *See also* National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1992) (dam-induced changes in water quality are not a discharge of pollutants from a point source under section 402 of CWA).

[15] If certification is restored, we will lift the stay. If the certification denial is upheld, we will determine the appropriate course of action with respect to the new license.

the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the consulted agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on site-specific conditions.

(C) Article 409, first paragraph, is modified to read as follows:

Article 409. *Comprehensive Recreation and Land Management Plan*. Within one year of the date of license issuance, the licensee shall file for Commission approval, after consultation with the U.S. Fish and Wildlife Service (FWS), Maine Department of Inland Fisheries and Wildlife (Maine DIFW), Maine Department of Environmental Protection (Maine DEP), Maine Department of Conservation (Maine DOC), National Park Service (NPS), the Maine State Historic Preservation Office, and the Appalachian Mountain Club, a Comprehensive Recreation and Land Management Plan to protect and enhance terrestrial resources, including the federally-listed bald eagle (*Haliaeetus leucocephalus*), and to enhance recreation resources.

(D) The new license issued on March 30, 2004, to FPL Energy Maine Hydro LLC to operate and maintain the Flagstaff Project No. 2612 is stayed, effective July 15, 2004, until further order of the Commission.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.