

113 FERC ¶ 61,236
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Flambeau Hydro, L.L.C.

Project Nos. 2421-038 and 041
2395-039 and 042
2473-039 and 044

ORDER GRANTING LATE INTERVENTION, ON REHEARING, AND REQUIRING
REVISIONS TO PROJECT BOUNDARY

(Issued December 2, 2005)

1. On March 11, 2005, the Commission's Division of Hydropower Administration and Compliance issued an order approving shoreline buffer zone and management plans for the Crowley Hydroelectric Project No. 2473, the Pixley Hydroelectric Project No. 2395, and the Lower Hydroelectric Project No. 2421.¹ The projects, licensed to Flambeau Hydro, L.L.C. (Flambeau Hydro), are located on the Flambeau River in Price and Ashland Counties, Wisconsin. The plans were approved pursuant to the requirements of license Article 414 (Crowley and Pixley Projects) and license Article 415 (Lower Project).
2. On April 8, 2005, Wisconsin Department of Natural Resources (Wisconsin DNR) filed a timely request for rehearing of the order, but failed to file a notice of intervention or motion to intervene in order to become a party to the proceeding. Accordingly, by notice issued on June 27, 2005, Wisconsin DNR's rehearing request was rejected.
3. On July 25, 2005, Wisconsin DNR timely requested rehearing of the rejection notice and, as part of its submission, filed a notice of intervention in the proceeding concerning the plans.

¹ 110 FERC ¶ 62,246.

4. For the reasons set forth below, we: (1) grant rehearing of the June 27, 2005 rejection notice; (2) treat Wisconsin DNR's July 25, 2005 notice of intervention as a motion for late intervention in the post-license proceeding concerning the buffer zone and management plans, and grant late intervention in that proceeding; and (3) reinstate Wisconsin DNR's request for rehearing of the order on the plans, and grant rehearing in part. In addition, we are requiring the licensee to file revised project boundary maps (*i.e.*, revised Exhibit G drawings) to include within the project boundaries the three project reservoirs, and to submit shoreline buffer zone and management plans for the newly-added project lands and waters.

Late Intervention

5. Wisconsin DNR argues, alternatively, that: (1) the proceeding on the plans was not a post-licensing proceeding requiring intervention, but rather an extension of the relicensing proceedings for these projects; (2) to the extent the proceeding on the plans was a post-licensing proceeding, its interventions in the relicensing proceedings carried over to the shoreline plan proceeding; (3) its request for rehearing of the order on the plans constituted a timely notice of intervention in the proceeding; or (4) its notice of intervention, included in its request for rehearing of the rejection notice, is sufficient to accord it intervenor status with respect to its April 8 request for rehearing of the order approving the shoreline plans.

6. Under section 313(a) of the Federal Power Act (FPA),² only a party to the proceeding can file a request for rehearing. Although Wisconsin DNR was a party to the relicense proceeding, its party status terminated when that license was issued and became final.³ Each post-licensing proceeding is a distinct matter, requiring intervention (if allowed) by those who wish to participate.⁴ The Commission only entertains such motions to intervene where the filing entails a material change in the plan of project development or in the terms and conditions of the license, where the actions proposed in the filing could adversely affect the rights of a property holder in a manner not

² 16 U.S.C. § 8251.

³ See, *e.g.*, *Kings River Conservation District*, 36 FERC ¶ 61,365 at 61,881 (1986) (*Kings River*).

⁴ See, *e.g.*, *City of Tacoma, Washington*, 109 FERC ¶ 61,318 at P 9 (2004).

contemplated by the license, or where the action is being appealed by an agency or entity specifically given a consultation role with respect to the filing.⁵

7. Wisconsin DNR is named in license Articles 414 and 415 as an entity to be consulted regarding the shoreline plans, and under the Commission's regulations may become a party to a proceeding upon timely filing with the Commission a notice of intervention.⁶ Because the buffer zone plans were not material changes to the licenses and did not adversely affect the rights of any property holders in a manner not contemplated by the license, Commission staff did not issue public notice of, or provide an opportunity for comments or interventions on, the plans. In these situations, it is the Commission's policy to accept, as timely filed, a notice of intervention or motion to intervene⁷ submitted by a consulted entity within the 30-day period for seeking rehearing.⁸

8. Wisconsin DNR failed to intervene when it sought rehearing of the plan. After its rehearing request was rejected, Wisconsin DNR submitted (as part of its timely-filed request for rehearing of the rejection notice) a notice of intervention in the buffer plan proceeding. Wisconsin DNR contends that the regulations allow for the filing of a notice of intervention if the notice is filed by the deadline established in any public notice of the proceeding,⁹ and that, since the Commission did not issue public notice of the shoreline plan proceeding, there is no intervention deadline.

9. Wisconsin DNR's interpretation of our regulations is in error. As the Commission has recently explained, where public notice of a proceeding is not required, a motion or notice to intervene by a consulted agency will be considered timely if it is filed within the 30-day deadline for seeking rehearing of the order.¹⁰ If the agency wishes to intervene

⁵ *See id.* at P 6-7.

⁶ *See* 18 C.F.R. § 385.214(a)(2) (2005).

⁷ Section 385.214(a)(2) of the regulations, 18 C.F.R. § 385.214(a)(2) (2005), specifies the entities (including state fish and wildlife agencies) that may obtain party status by timely filing a notice of intervention. If these entities seek late intervention, they must file a motion to intervene under 18 C.F.R. § 385.214(b) and (d).

⁸ *See Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 at 61,099 (1987).

⁹ *See* 18 C.F.R. § 385.214(a)(2).

¹⁰ *See Virginia Electric Power Company*, 113 FERC ¶ 61,154 at P 7 (2005).

after this deadline, intervention will not be automatic. Rather, it must file a motion to intervene late under 18 C.F.R. § 385.214(b) and (d), and it must, among other things, demonstrate good cause why the time limit should be waived.¹¹ Wisconsin DNR did not file a motion to intervene and did not make a good cause showing. However, our recent order clarifying procedures regarding intervention by a state agency came after Wisconsin DNR filed its notice of intervention. In these circumstances, we will construe the notice of intervention as a motion for late intervention, waive to the extent necessary the regulations regarding the showings that must be made to justify late intervention, and grant late intervention to Wisconsin DNR.¹² Since Wisconsin DNR is now a party to the shoreline plan proceeding, we will grant rehearing of the rejection notice and entertain the agency's request for rehearing on the plan.

Order Approving Shoreline Buffer Zone And Management Plans

A. Background

10. In 1997, Commission staff issued subsequent licenses to Fraser Papers, Inc., (Flambeau Hydro's predecessor) for the Lower, Pixley, and Crowley Projects.¹³

11. The three projects occupy a twelve-mile reach of Flambeau River.¹⁴ All electricity generated at the run-of-river projects is used by the licensee's pulp and paper mill, which is located approximately two miles above the Lower Project, the most upstream project.

¹¹ See 18 C.F.R. § 385.214(b)(3).

¹² In granting late intervention, we reject Wisconsin DNR's contention that its request for rehearing on the shoreline plans constituted a timely notice of intervention. As we explained in *Virginia Electric Power Company*, 113 FERC ¶ 61,154 n. 9 (2005), treating the rehearing request as a notice of intervention would be tantamount to a grant of automatic intervention. The Commission's regulations however do not provide for automatic intervention, nor do we think it would be appropriate. See *Hydroelectric Licensing Under the Federal Power Act, Notice of Proposed Rulemaking*, 68 Fed. Reg. 13,988 (March 21, 2003), FERC Statutes and Regulations, Proposed Regulations ¶ 32,568 at 34,737 (2003). That notice proposed rules governing the Commission's integrated licensing process. See *Order No. 2002*, 68 Fed. Reg. 51,070 (August 23, 2003), FERC Statutes and Regulations ¶ 31,150 (2003).

¹³ 78 FERC ¶¶ 62,082, 62,083, and 62,084, respectively.

¹⁴ The Upper Hydroelectric Project No. 2640, also licensed to Flambeau Hydro, is located approximately two miles upstream from the Pixley Project.

12. The 1,500-kilowatt (kw) Crowley Project is the most downstream of the projects. The project's dam is located at River Mile (RM) 85, and the project's reservoir (also called flowage) extends upstream approximately five miles to the base of Pixley dam. The project's principal features include a dam about 513 feet long, a reservoir with a surface area of 422 acres, a powerhouse located at the dam, and a tailrace training wall extending about 150 feet downstream of the powerhouse.

13. The 960-kW Pixley Project is located on a 4.2-mile reach of the Flambeau River, from RM 90 to about RM 94 on the Flambeau River. Project facilities include a dam with a total length of 997.5 feet, a reservoir about 4 miles long with a surface area of 193 acres, a powerhouse at the dam, and a short tailrace training wall.

14. The 1,200-kW Lower Project, which is situated immediately upstream from the Pixley Project, is located between RM 95 and 97. The principal features of the project include a dam with a total length of 321.3 feet, a reservoir about 1.6 miles long with a surface area of 71 acres, a powerhouse integral to the dam, and a short tailrace training wall.

15. The prior licenses for the three projects contained no provisions for shoreline buffers. Whether, and to what extent, the licensee should be required to establish shoreline buffer zones was an issue throughout the relicensing proceedings. The licensee, Wisconsin DNR, and others recommended that the relicenses provide for aesthetic buffer zones on licensee-owned lands along the reservoirs of the three projects or downstream of the project dams.

16. In both the Draft and Final Environmental Impact Statements (EIS) for the proposed relicensings, Commission staff recommended that the licensee be required to establish and maintain a shoreline buffer zone on the undeveloped shorelands that the licensees already own around the project impoundments.¹⁵ The buffer zones would

¹⁵ See Final Environmental Impact Statement, Flambeau River Hydroelectric Projects, Wisconsin, September 1996, at 5-19, 5-27, 5-32, 5-39, and 6-13; and April 8, 2005 rehearing request at 2 (quoting Draft EIS). The Final EIS, at 5-19, stated that the "width of the shoreline buffer zone should be determined on a site-specific basis using specific criteria and objectives. Although no standard width for a buffer zone has been established by the Commission, 200 feet has been used as a rule-of-thumb."

“protect and enhance the aesthetic quality of the Flambeau River corridor”¹⁶ and protect riparian vegetation and wildlife habitat from uncontrolled development.¹⁷

17. The relicense orders adopted staff’s recommendations and accordingly included Article 414 in the Pixley and Crowley licenses,¹⁸ and Article 415 in the Lower Project license.¹⁹ These articles set forth identical requirements that, within one year of license issuance, the licensee must file, in consultation with Wisconsin DNR and others, a shoreline buffer zone and management plan “at its landholdings adjacent to [each] Project impoundment and along the Flambeau River in the project tailrace area,” and to include in the plan, among other things, a description of the location of all shoreland areas that the licensee owns in fee, including drawings, where a buffer zone would be established.²⁰ The relicense orders, while including the reservoirs as project facilities, inadvertently failed to include them in the project boundaries for the three projects.²¹

¹⁶ Final EIS at 5-19.

¹⁷ *Id.* at 6-13.

¹⁸ 78 FERC at 64,187-88 and 64,204, respectively.

¹⁹ 78 FERC at 64,171.

²⁰ The pertinent language in Articles 414 and 415 states:

Within one year from the date of issuance of this license, the licensee shall, in consultation with the Department of Natural Resources (Wisconsin DNR), the U.S. Fish and Wildlife Service (FWS), the City of Park Falls, and Price County, prepare and file for Commission approval, a plan to establish and maintain a shoreline buffer zone at its landholdings adjacent to the [Crowley, Pixley, and Lower] Project impoundment and along the Flambeau River in the project tailrace area. The plan shall include the following components: (1) a description of the location of all shoreland areas that the licensee owns in fee, including drawings, where a buffer zone would be established; (2) an explanation of the proposed width of the shoreline buffer in each area, based on resource-specific criteria (using 200 feet as a rule of thumb); and (3) an outline of the land management practices that would be implemented in these areas, including the land uses that would be allowed and prohibited.

²¹ *See* Ordering paragraphs (B) and (C), 78 FERC at 64,166-67 (Lower), 64,183 (Pixley), and 64,199-200 (Crowley). The Exhibit G (project boundary) maps show the

(continued)

18. The then licensee, Fraser Papers, owned parcels of land along the reservoirs of the three projects as well as land in the vicinity of the dams and on which the powerhouses and other project facilities are located. Fraser Papers' land holdings around the reservoirs totaled about four miles of shoreline.

19. In December 1999,²² before Fraser filed its shoreline buffer zone plans, the Commission approved the transfer of the three licenses from Fraser to Flambeau Hydro, conditioned upon "transfer of title of the properties under license and the delivery of all license instruments to Flambeau Hydro, which shall be subject to the terms and conditions of the license as though it were the original licensee...."²³ Apparently, Fraser transferred to Flambeau Hydro all its lands located within the project boundaries, but none of its lands around the reservoirs.

20. On May 1, 19, and 27, 2003, Flambeau Hydro, the successor licensee, filed shoreline buffer zone and management plans for the Crowley, Lower, and Pixley Projects, respectively. The plans addressed only those lands that are enclosed within each project boundary, and did not propose to establish any buffer zones around the reservoirs.

21. On March 11, 2005, the Commission staff approved the Article 414 and 415 plans for the three projects.²⁴ Wisconsin seeks rehearing of the March 11 Order.

entire project (including the reservoir), but draw the boundaries around the project structures located in the area of the dam and include only the portion of each reservoir that is immediately upstream of the dam.

²² 89 FERC ¶ 61,286. The transfer applications were filed in December 1996. In March 1997, Fraser sought, and received, a stay of the licenses pending Commission action on transfer applications. 78 FERC ¶ 61,346. The stay was lifted January 29, 2001. *See* January 29, 2001 letter from Commission staff.

²³ *Id.* at 61,897-98. *See* January 29, 2001 letter from Commission staff acknowledging receipt of copies of the instruments of conveyance.

²⁴ 110 FERC ¶ 62,246.

B. Discussion

22. On rehearing, Wisconsin DNR reiterates arguments that it raised in comments on the draft plans.²⁵ The agency opposes the plans on the grounds that they are limited to lands owned by Flambeau Hydro in the immediate vicinity of the dams and within the current project boundaries, and do not address the lands around the project reservoirs owned by Fraser Papers when the relicense orders were issued. Wisconsin DNR contends that the lands to which Articles 414 and 415 applied when the relicenses were issued should not be diminished by the subsequent transfer of the licenses to a new licensee. It requests that we direct Flambeau Hydro to acquire rights to all shorelands owned by the predecessor licensee, Fraser Papers, and establish a buffer zone on these lands. It further argues that Flambeau Hydro must modify its project boundaries as necessary to encompass all lands within the shoreline buffer zones.²⁶ We agree that the requirements of Articles 414 and 415 cannot be altered or diminished by dint of the subsequent transfer of the licenses to a new licensee.

23. Section 8 of the Federal Power Act (FPA)²⁷ provides, in pertinent part:

[N]o voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee ... shall be subject to all the conditions of the license ... to the same extent as though such successor or assign were the original licensee

Thus, as the Commission has explained, when a license is transferred, the new licensee steps into the shoes of the old licensee, and is subject to any and all requirements to which the old licensee was subject under the license. Moreover, the mere transfer of a

²⁵ The plans submitted by Flambeau Hydro for approval contained Wisconsin DNR's comments.

²⁶ Wisconsin DNR states that Price County records show that at the time of the license transfers, Fraser owned more than 23,000 feet, or about 4.4 miles, of frontage on the reservoirs and tailwaters of the three projects. Fraser transferred to Flambeau Hydro about 25 percent of this frontage, which essentially is located in the area of the dams and powerhouses. *See* April 8, 2005 rehearing request at 1-2.

²⁷ 16 U.S.C. § 801.

license does not alter a project's environmental impacts, or the determination of what mitigation measures are warranted.²⁸ Nor does it modify the scope of license conditions.

24. The record of the relicensing proceedings, coupled with a plain reading of Articles 414 and 415, clearly tie the requirement for a buffer zone to Fraser Papers' ownership of land around the reservoirs at the time the Crowley, Pixley and Lower Projects were licensed. Had Fraser Papers remained as licensee, it would have been required to establish a buffer zone, not only on the limited lands around the powerhouse, but also on the shoreline lands it owned along the reservoirs. Flambeau Hydro, as the successor licensee, steps into the shoes of Fraser Papers and is thus subject to the same requirement.

25. That the lands in question are not within the project boundaries for these projects does not obviate the requirements of Articles 414 and 415 of the licenses. The Commission requires project boundaries as an administrative matter. The establishment of a project boundary does not change property rights, but rather makes it easier for the Commission, the licensee, and other interested entities to understand the geographic scope of a project. While all facilities, lands, and waters needed to carry out project purposes should be within the project boundary, the fact they may not be does not alter the licensee's obligations under the license.²⁹

26. For the above reasons, we direct Flambeau Hydro to file supplements to its buffer zone plans. The supplemental plans shall address the shoreline lands owned by Fraser

²⁸ See *Menominee Company and N.E.W. Hydro, Inc.*, 74 FERC ¶ 61,023 at 61,067.

²⁹ It is the licensee's responsibility to acquire the rights necessary to carry out project purposes, including the protection of aesthetic qualities, riparian vegetation, and wildlife habitat. See standard Article 5 of the licenses, incorporated by reference by Ordering paragraphs (C) of the license orders and found at 54 FPC 1817 (1975).

In its buffer zone plans, Flambeau Hydro contends that the Commission approved the extent of the lands Fraser Papers conveyed to it pursuant to the transfers. In fact, Flambeau Hydro did not provide information sufficient to identify the precise locations of the lands that were transferred, so Commission staff's letter of January 29, 2001, acknowledging receipt of the copies of the conveyance instruments cannot be read as suggested by Flambeau Hydro. In any event, Flambeau Hydro was on notice that these shoreline lands should have been considered in the shoreline buffer zone plans, because, as noted earlier, Flambeau Hydro agreed to accept and be bound by all of the terms and conditions of the license as though it were the original licensee.

Papers at the time the relicenses were issued in 1997, and evaluate those lands in accordance with the requirements of Articles 414 and 415 of the project licenses. In addition, Flambeau Hydro must file revised Exhibit G (project boundary) drawings to bring within the project boundaries the reservoirs for the three projects. The reservoirs are integral parts of the projects and therefore must be included within the project boundaries. The project boundaries proposed in the drawings shall be consistent with the projects' buffer zone plans.³⁰

The Commission orders:

(A) Wisconsin Department of Natural Resources' request for rehearing of the Commission's June 27, 2005 notice (rejecting its request for rehearing) is granted.

(B) Wisconsin Department of Natural Resources is granted late intervention in the buffer zone and land management plan proceedings.

(C) Wisconsin Department of Natural Resources' April 8, 2005 request for rehearing of Commission staff's order of March 11, 2005, approving the buffer zone and land management plans for Project Nos. 2421, 2395, and 2473 is granted to the extent set forth in this order, and is denied in all other respects.

(D) Within 120 days of the date of issuance of this order, Flambeau Hydro shall file for Commission approval revised Exhibit G drawings that include in the project boundaries for Crowley, Pixley, and Lower Hydroelectric Projects the project reservoirs and proposed buffer zones. The revised drawings must be prepared in accordance with sections 4.39 and 4.41 of the Commission's regulations.

(E) Within 120 days of the date of issuance of this order, Flambeau Hydro shall file, for Commission approval, supplemental shoreline buffer zone and management plans pursuant to Article 414 of the licenses for the Crowley Hydroelectric Project No. 2473 and the Pixley Hydroelectric Project No. 2395, and Article 415 of the license

³⁰ We will not at this time require Flambeau Hydro to acquire rights to these lands, because the width of the buffer zone for each parcel will be determined in the proceedings to consider the supplemental plans.

for the Lower Hydroelectric Project No. 2421. The plans shall include lands along the reservoirs that were owned by Fraser Papers (the prior licensee) at the time the three licenses were issued in February 1997.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.