

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Electric & Gas Corporation

Project No. 2835-012

ORDER ON REHEARING

(Issued December 22, 2004)

1. New York State Electric & Gas Corporation (NYSEG), licensee for the 2.64-megawatt (MW) Rainbow Falls Project No. 2835, located on the Ausable River in Clinton and Essex Counties, New York, and the Lake Champlain Chapter of Trout Unlimited (Trout Unlimited) have filed requests for rehearing of the August 18, 2004, Commission staff order issuing a new license for the project.¹ The pleadings seek modification or deletion of license Article 414, which requires NYSEG to file a plan for further evaluation of the potential for whitewater boating at the project. NYSEG also requests modification of other license articles and ordering paragraphs. As discussed below, we grant rehearing in part, deny rehearing in part, and amend the license in certain respects. This order is in the public interest because it clarifies various aspects of the project license and NYSEG's obligations thereunder.

Background

2. The Rainbow Falls Project is located approximately 5.5 miles upstream from Lake Champlain in the northeastern corner of Adirondack Park, immediately upstream of the point where the Ausable River flows into Ausable Chasm. The narrow, steep-walled

¹ 108 FERC ¶ 62,168 (2004).

chasm is between 20 and 50 feet wide, approximately 150 feet deep, and about two miles long. Immediately downstream from the project's powerhouse, the river flows over approximately a dozen falls or rapids within the upper portion of the chasm, providing a half-mile Class IV/V whitewater boating run. A road that crosses the river at the project leads to the nearby Ausable Chasm Company (Chasm Company), a seasonal (late May to November) recreation business that provides a walking tour through the chasm and Class II-III whitewater boating in the lower half-mile portion of the chasm that joins the upper half-mile chasm run. The project has never provided public access to Ausable Chasm.

3. During the relicensing proceeding, whether whitewater boating is feasible and whether access for such boating in upper Ausable Chasm should be permitted at the project was a point of contention. NYSEG's position, generally shared by the Chasm Company, the New York Department of Environmental Conservation (New York DEC), Trout Unlimited, the Essex County Fish & Game League, and the Clinton County Office of Emergency Services, was that the project site and river are unsafe and the area should continue to be closed to the public, and that whitewater boating might have negative effects on other river users. In contrast, the Adirondack Mountain Club and American Whitewater asserted that the reach in question, although relatively short, is a spectacular and untapped whitewater resource that would compliment other whitewater resources in the region, and that the points raised by other entities did not justify denying public boating access.

4. In the environmental assessment (EA) prepared in the relicensing proceeding, Commission staff concluded that providing an access point or put-in for whitewater boating at the Rainbow Falls Project is physically possible, and that access to the upper Chasm would supplement whitewater boating in the area by adding about 1 mile to the regional supply of whitewater boating resources.² The EA stated that, although there are safety, security, and liability concerns with respect to whitewater boating, these issues are

² See EA (issued April 2, 2004) at 30.

not uncommon at projects with similar resources. The EA also noted that an initial on-the-water evaluation at the project showed that whitewater boating is feasible, and could be accommodated without significant capital cost.³

5. However, the EA recommended against requiring access for whitewater boating in the upper Chasm, because of the reach's short length in a region where whitewater boating opportunities are abundant, and the fact that whitewater access there could conflict with other recreational uses, could affect the Chasm Company's business operation, and would add additional cost to NYSEG's operation of the project.⁴

6. In the August 18, 2004 Order, Commission staff concluded that, based on the information that had been collected to date, whitewater boating opportunities could be provided at the project. Staff stated that the fact that there is risk involved in whitewater boating has not precluded the Commission from requiring whitewater access in other instances. Staff also determined that the case was not unlike others where there was uncertainty regarding the amount of use a particular whitewater resource would attract or the effects that whitewater flows would have on other resources, and where the Commission required post-licensing evaluations in order to be in a better position to determine whether, or to what extent, whitewater boating would be provided.⁵

7. Based on its analysis, staff directed NYSEG, in license Article 414, to prepare for Commission approval a plan for further evaluation of the effects of, and demand for, whitewater boating access at the project. The plan, to be developed in consultation with New York DEC, the Adirondack Mountain Club, American Whitewater, and the Chasm Company, is to include provisions for on-the-water test flows and for collecting data to

³ *Id.*

⁴ *Id.* at 47.

⁵ 108 FERC at P 28-34.

estimate the level of demand for whitewater boating, the range of suitable flows, the effect of whitewater boating access on other recreational uses, and the carrying capacity of the Chasm as well as an existing downstream take-out area.⁶

8. NYSEG and Trout Unlimited filed timely requests for rehearing.

Discussion

A. Article 414 - Whitewater Boating Study

9. On rehearing, NYSEG requests that Article 414 be deleted from the license. It contends that the whitewater study is aimed simply at determining whether whitewater boating at the project is technically feasible, and not whether it should be allowed, and that the results of a pre-licensing whitewater study already provide sufficient data on the feasibility of the whitewater run in the upper chasm.⁷ NYSEG contends that the report of the results of the new study will be biased because the study participants are proponents of whitewater boating while none of the opponents will be afforded an opportunity to again express their opposition.

⁶ *Id.* at P 34 and Article 414.

⁷ NYSEG references findings in the prelicensing report that only five of 12 boater participants were able to successfully boat from the access point at the powerhouse to the takeout point downstream from the Chasm Company's property, and that the upper Chasm whitewater run is only a half-mile long, only for very skillful kayakers, difficult and dangerous for rescue operations, and impossible to scout and exit upstream from the takeout point without trespassing on the Chasm Company's property. *See* "Whitewater Boating Feasibility Study," at 22-23 (attachment to NYSEG's letter filed October 2, 2001).

10. The major premise of NYSEG's argument against Article 414 – that it would require a redundant study -- is incorrect. Article 414 requires a new analysis of whether to allow whitewater access at the project, based on a review of the anticipated level of demand for the resource and on such recreation's effect on other uses, matters not covered by the relicensing study, which focused solely on the feasibility of whitewater recreation in a particular reach. Moreover, opponents as well as proponents of whitewater at the project will participate in developing the Article 414 study and report. Of the four entities that Article 414 requires NYSEG to consult with in developing the study and report, two, New York DEC and the Chasm Company, oppose whitewater access at the project. Indeed, in this order, *infra*, we are adding another opponent, Trout Unlimited, as a consulting entity.

11. Contrary to NYSEG's contentions, the pre-licensing whitewater study results are insufficient to determine the feasibility of, and the overall public interest in allowing, whitewater access at the project. Only one test run, at a single flow of 750 cubic feet per second (cfs), was completed.⁸ Pursuant to Article 414, NYSEG will be required to conduct several whitewater runs over a range of flows, an important feature of the new study, since whitewater boating at the project would be done with natural flows (which are variable) instead of controlled dam releases.⁹

⁸ See EA at 31.

⁹ NYSEG correctly points out (rehearing at 4) that Article 414's requirement to conduct the whitewater study with a range of flow "releases" is contrary to the requirement of license Article 401 to operate the project in a run-of-river mode. We are modifying the first sentence in section (a) of Article 414 and requiring the study of "a range of naturally-occurring flows" instead of "a range of flow releases." We will also modify section (d) of the article by substituting "run dates" for "release dates."

12. Additional information is also required to analyze the impacts of whitewater access at the project on other recreational uses of the Chasm. Thus, Article 414 requires that at least one of the test whitewater runs take place while the Chasm Company's rafting business is in operation to determine if there are any significant conflicts and whether such conflicts can be mitigated. Article 414 also requires NYSEG to provide an evaluation of carrying capacity and the number of boaters the reach would attract, information about the potential use of whitewater at the project that the pre-licensing study did not adequately provide.

13. NYSEG argues that the Director failed to balance all stakeholder interests regarding whitewater access at the project and that his rationale for requiring the additional whitewater study "overwhelmingly reflects" the positions of parties favoring whitewater boating at the project and fails to address the concerns of the whitewater opponents. Specifically, NYSEG contends that the license order did not adequately address the Chasm Company's concerns about boaters trespassing on its property at the shoreline to scout the whitewater run or the concerns of various rescue agencies about the adverse impacts of whitewater access on the rescue workers.¹⁰

14. In fact, Commission staff analyzed all views on the whitewater issue before determining that an additional, post-licensing whitewater study was needed. For example, staff noted that the rescue agencies oppose whitewater at the project because of the difficulty of the run and the difficulty for rescue operations posed by the topography of the chasm.¹¹ However, as staff also noted, all whitewater boating poses risk, including the risk that rescue may be required. Similarly, the issue of boater access to the Chasm Company's property should be considered in the study. Commission's staff

¹⁰ See NYSEG request for rehearing at 3.

¹¹ See 108 FERC at P 28.

conclusions with respect to the unique beauty and challenging nature of the upper chasm whitewater run are sufficient to support further study of whitewater recreation at the project.¹²

15. NYSEG contends that requiring whitewater access at the project requires public access to the area near the project's powerhouse, which conflicts with prior staff directives to prohibit public access to potentially dangerous project facilities and the turbulent waters of the project's tailrace. However, as pointed out in the EA, potentially dangerous project facilities such as the power canal and rack house could be separately fenced, and railings and stairways could be provided near the powerhouse. NYSEG could also install and lock entrance fencing during times when site access is not advisable (such as high water flows, winter icing conditions), warning and directional signs could be installed, and debris clean-up could be periodically conducted to assure that access to the put-in area is not blocked.¹³

16. Based on the foregoing, we deny NYSEG's request to delete the Article 414 requirement to conduct the whitewater study.

17. Trout Unlimited requests that we amend Article 414(g) to authorize it to participate as an observer in the boating study, to help develop the study, and to provide comments and recommendations to NYSEG following the study. It argues that it has a legitimate interest in protecting the fishery associated with the project, and that the Ausable River, where the project is located, is one of the few rivers in New York State that has been observed to support natural spawning land-locked salmon (which is the subject of extensive restoration efforts in Lake Champlain where the Ausable empties).

¹² *Id.* at P 32 and n. 17.

¹³ *See* EA at 30.

Trout Unlimited is concerned that whitewater boating may have a negative impact on the Ausable's fishery; and that therefore Trout Unlimited's participation in the decision-making on whitewater boating is critical.

18. Since the project is and would continue to operate in a run-of-river mode, whitewater boating access at the powerhouse has no foreseeable, material impact on fisheries. Nevertheless, Trout Unlimited could provide useful information bearing on the issue of conflicts with other river users, such as downstream anglers. Accordingly, we will amend Article 414 as Trout Unlimited requests.

B. Article 405 – Transition Operations for Aesthetic Flows

19. To enhance aesthetics at the project, license Article 413 requires that NYSEG spill a minimum of a 30-cfs flow over the dam when inflows are less than plant capacity and in the range of 120-412 cfs.¹⁴ Article 405 requires NYSEG to ensure that, when transitioning from a condition of no spill to spilling aesthetic flows, project outflow must not be reduced by more than 10 cfs per hour at river inflows between 90 cfs and 110 cfs. NYSDEC recommended including this ramping provision in Article 405 to address situations of low river flow and when the impoundment level was below the top of the flashboards.¹⁵ In these situations, transitioning from powerhouse outflows to dam spill flows could delay downstream flows and deviations in run-of-river operation, as the reservoir fills for spilling flows.

20. In its request for rehearing, NYSEG contends that the 10-cfs-per-hour ramping requirements of Article 405 are overly restrictive. NYSEG states that controlling outflow at a 10-cfs-per-hour rate is beyond the existing mechanical capabilities of the project. NYSEG requests that we delete Article 405 and simply add a statement to Article 413

¹⁴ When flows exceed plant capacity, Article 413 requires that all excess flows pass over the dam.

¹⁵ See NYSDEC's letter filed March 6, 2002, at 8.

that, upon implementation of the aesthetic flow releases, the change in overall project outflow (over the dam and out of the powerhouse) shall be gradual and a minimum flow of 100 cfs, unless inflow is less, shall be maintained downstream of the project.

21. Article 405 requires ramping of aesthetic flows when inflows are between 90 cfs and 110 cfs, while Article 413 specifies a range of inflows for release of aesthetic flows between 120 cfs and 412 cfs. We believe that revising Article 413 as NYSEG suggests will allow achievement of the mitigation requirements currently contained in Article 405. Accordingly, we will make the proposed change to Article 413, specifying that, upon implementation of aesthetic flow releases, changes in outflow shall be gradual, and we will delete Article 405 from the license. We will also modify Articles 404 (minimum flow plan) and 406 (operation and flow compliance monitoring plan) to delete references to Article 405.

C. Article 402 - Impoundment Operating Levels

22. Article 402 requires NYSEG to maintain the Rainbow Falls impoundment level within 1.5 inches of the top of the flashboards (or top of the dam crest when the flashboards are not in place) during normal operation and within 4 inches of the top of the flashboards (or top of the dam crest when the flashboards are not in place) for purposes of restoring run-of-river operation should the turbines “trip” off-line. NYSEG contends that, while it will attempt to maintain the target level of 1.5 inches, only a 4-inch compliance level should be specified in the license article. NYSEG states that there are situations other than the turbines tripping off-line that are outside of its control and that could result in impoundment levels outside of the normal operating range specified in Article 402.

23. Article 402 provides for temporary modifications to reservoir-level operating limits for circumstances beyond the control of the licensee, and for short periods upon mutual agreement among the licensee and the NYSDEC and U.S. Fish and Wildlife Service. These provisions provide sufficient flexibility to address circumstances beyond NYSEG’s control. Therefore, we deny rehearing of Article 402.

D. Miscellaneous Corrections

24. License Article 202 requires the filing of approved Exhibits A (narrative description of the project) and F (general design drawings of principal project works). NYSEG requests that we revise Article 202 to require the filing of approved Exhibits F and G (project maps) and delete the reference to Exhibit A. While NYSEG is correct that Article 202 erroneously included the reference to Exhibit A, Exhibit G was not approved in the license and consequently it should not be included in Article 202. (The license

includes a separate ordering paragraph, paragraph (D), that requires the licensee to file a revised Exhibit G.) Therefore, we will delete the reference to Exhibit A in Article 202 but not add a reference to Exhibit G. We are also modifying the reference to Exhibit A in ordering paragraph (B)(2) to include, as NYSEG points out, orders modifying that exhibit, and we are modifying ordering paragraph (D) to substitute a reference to Article 202 for the erroneous reference to Article 203.

The Commission orders:

(A) The rehearing requests filed by New York State Electric & Gas Corporation and the Lake Champlain Chapter of Trout Unlimited are granted to the extent discussed above and set forth below, and in all other respects are denied.

(B) The reference to Exhibit A in ordering paragraph (B)(2) of the license issued for Project No. 2835 on August 18, 2004, is modified to read as follows: “Exhibit A: Pages A1-A2 filed on October 27, 2000 and as amended by filings on May 6, 2002 and May 28, 2003,” as approved by orders issued November 8, 2002, and December 4, 2003, respectively.

(C) The first sentence of ordering paragraph (D) of the license is modified to delete “Article 203” and to insert “Article 202.”

(D) Article 202 of the license is modified by deleting its reference to Exhibit A.

(E) Article 405 of the license is deleted.

(F) Articles 404 and 406 of the license are modified by deleting their references to Article 405.

(G) Article 413 of the license is modified by adding the following as the new third sentence: “Upon implementation of aesthetic flow releases, the change in outflow shall be gradual and the licensee shall maintain a minimum flow of 100 cfs, or inflow, whichever is less, downstream of the project as specified in Article 404.”

(H) Article 414 of the license is modified as follows:

(1) The first sentence in section (a) is modified by deleting “a range of flow releases” and inserting “a range of naturally-occurring flows.”

(2) In section (d) “release dates” is changed to “run dates.”

(3) The first sentence of the next-to-last paragraph is modified by adding the Lake Champlain Chapter of Trout Unlimited to the list of consulting entities.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.