

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Flambeau Hydro, LLC

Project No. 2064-012

ORDER DENYING REHEARING AND STAY

(Issued December 20, 2005)

1. On August 12, 2005, Commission staff issued to Flambeau Hydro, LLC (Flambeau)<sup>1</sup> a new license to continue operation of the 600-kilowatt Winter Project No. 2064, located on the East Fork of the Chippewa River in Sawyer County, Wisconsin, and occupying about 26 acres of land within the Chequamegon-Nicolet National Forest.<sup>2</sup> On August 23, 2005, Flambeau filed a timely request for rehearing, arguing that the order erred with regard to its treatment of license conditions imposed by the Wisconsin Department of Natural Resources (Wisconsin DNR) and the U.S. Forest Service. Flambeau also filed a request for a stay pending the resolution of its appeals of those conditions. As discussed below, we deny Flambeau's request for rehearing, because the conditions were properly included in the license. We also deny the request for stay, because the company has not provided sufficient justification to support the request.

**Background**

2. In the relicensing proceeding, Flambeau proposed to release into the project's 2,600-foot-long bypassed reach minimum flows (depending on the time of year) of 10 or 15 cubic feet per second (cfs) for 10.5 months of the year, and 20 or 30 cfs for the rest of the year. Flambeau proposed no specific fish passage measures.

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<sup>1</sup> The relicense application was filed by the then-licensee, North Central Power Company. The license was transferred to Flambeau in 2001, 94 FERC ¶ 62,060 (2001), and Flambeau became the relicense applicant.

<sup>2</sup> 112 FERC ¶ 62,130 (2005).

3. On June 21, 2005, under section 401 of the Clean Water Act (CWA),<sup>3</sup> Wisconsin DNR issued a water quality certification for the project, which included 26 conditions. As required by the Clean Water Act,<sup>4</sup> the Commission included the certification conditions in the license. Because of the project's occupancy of national forest lands, the license also included conditions submitted by the Forest Service pursuant to section 4(e) of the Federal Power Act (FPA).<sup>5</sup>

4. Flambeau filed separate appeals of the water quality certification and the Forest Service's 4(e) conditions. The water quality certification appeals -- both before Wisconsin DNR and in state court -- are still pending. The Forest Service appeal is not.<sup>6</sup>

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<sup>3</sup> 33 U.S.C. § 1341(a)(1) (2000).

<sup>4</sup> *See American Rivers v. FERC*, 129 F.3d 99 (D.C. Cir. 1997).

<sup>5</sup> 16 U.S.C. § 797(e) (2000). Where a project is located within a federal reservation, such as a national forest, FPA section 4(e) requires that Commission licenses include conditions that the Secretary of the department under whose supervision the reservation falls deems necessary for the protection and utilization of the reservation.

<sup>6</sup> After the Forest Service issued its mandatory conditions, Flambeau, on February 3, 2005, filed an appeal with the Forest Service. The Forest Service subsequently modified one of its conditions (Condition 12-Fish Passage). *See* letter from Randy Moore (Regional Forester) to Magalie R. Salas (Commission Secretary) (filed April 22, 2005). After Flambeau filed its rehearing request, which stated that it had an appeal pending before the Forest Service, the Forest Service informed the Commission that it has not entertained administrative appeals of section 4(e) conditions since May 13, 2003, and that there thus was no appeal pending before it. *See* letter from Joel D. Holtrop (Deputy Chief, National Forest System) to Magalie Roman Salas (filed September 28, 2005). Therefore, Flambeau's argument, *see* Flambeau request for rehearing at 10-12, that the Commission erred in including the Forest Service's conditions before the appeal was complete is based on a false premise. In any event, when the Forest Service did consider appeals, our policy was to issue licenses while those appeals were pending, in order to avoid delay, and to reserve authority to revise the licenses in accordance with the results of the appeals. *See Wisconsin Valley Improvement Company*, 89 FERC ¶ 61,057 (1999).

5. On June 28, 2005, Flambeau Hydro asked the Commission to defer action on the relicense application until the company's appeals of the water quality certification and section 4(e) conditions were resolved.<sup>7</sup>

6. On August 12, 2005, Commission staff issued the relicense order. As mandated by both the state water quality certification (condition F) and the Forest Service's section 4(e) conditions (condition 14), the order requires minimum flows of 40 cfs on June 1, 30 cfs from June 2 through April 30, and 50 cfs from May 1 through May 31 (during sturgeon spawning season). The order also requires the filing of a fish passage plan within one year, as required by the water quality certification (the section 4(e) conditions also required a fish passage plan, but with a three-year deadline).<sup>8</sup>

### **Rehearing Request**

#### **A. Validity of the Water Quality Certification**

7. Flambeau argues that the Commission must rescind the license because it should not have acted before review of the water quality certification was complete. Flambeau first asserts that the certification is invalid under state law because Wisconsin DNR failed to act on the company's request within 120 days.<sup>9</sup> It then contends that the Commission's issuance of the license was premature while the certification appeals were pending.<sup>10</sup>

8. As we have explained previously, issues concerning the validity of state actions under section 401 are for state courts to decide, and federal courts and agencies are without authority to review these matters.<sup>11</sup> While we will look at whether a state has

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<sup>7</sup> See letter from Donald H. Clarke (counsel for Flambeau) to Magalie R. Salas.

<sup>8</sup> With respect to Flambeau's deferral request, the order noted only that no information had been filed with the Commission indicating that the water quality certification had been appealed. 112 FERC ¶ 62,130 at P 11, n. 8.

<sup>9</sup> See Flambeau's request for rehearing at 6-7, citing Wisconsin Administrative Code NR 299.05(1) to the effect that the state must act on a complete certification request within 120 days or waive certification.

<sup>10</sup> *Id.* at 7-10.

<sup>11</sup> *FPL Energy Maine LLC*, 111 FERC ¶ 61,104 at P 8 (2005), citing *Roosevelt Campobello Int'l Park Commission v. EPA*, 684 F.2d 1041, 1056 (1<sup>st</sup> Cir. 1982); *American Rivers v. FERC*, 129 F.3d 99, 106 (2<sup>nd</sup> Cir. 1997).

waived its certification authority under the terms of the Clean Water Act by failing to act on a certification request within a year,<sup>12</sup> a question such as that raised by Flambeau – whether a state agency has complied with its own regulations, rather than federal law – is one to be determined in the first instance by the state. Thus, we cannot conclude, as Flambeau would have us do, that the state’s certification is invalid as a matter of state law.<sup>13</sup>

9. Flambeau’s contention that we could not issue the license until the certification appeals were complete<sup>14</sup> is also unavailing. The Commission received a water quality certification from Wisconsin DNR. The agency asked the Commission to “include the conditions of this water quality certification as conditions of any license that the Commission may issue for Project No. 2064.”<sup>15</sup> Once the Commission had the certification in hand, it was able to issue the license.<sup>16</sup> While it is true that we could have waited until completion of the appeals before acting, we have no way of knowing how long that will take. In the absence of a compelling justification to the contrary, the public interest in the timely completion of licensing proceedings requires us to act when our record is complete. That having been the case here, it was appropriate to go forward with the license order.<sup>17</sup>

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<sup>12</sup> See *Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167 (2005).

<sup>13</sup> Flambeau does not suggest that the certification is procedurally invalid as a matter of federal law. We also note that our regulations give the certifying agency one year from date of receipt of a certification in which to act. See 18 C.F.R. § 4.34(b)(5)(iii) (2005). Flambeau does not contest that Wisconsin DNR met this deadline.

<sup>14</sup> Request for rehearing at 7-10.

<sup>15</sup> Letter from Jeffrey Scheirer (Wisconsin DNR FERC Project Manager) to Magalie R. Salas (filed June 21, 2005).

<sup>16</sup> Pursuant to the Clean Water Act, the Commission cannot issue a license until the state has either granted or waived certification. See 33 U.S.C. § 1341(a)(1) (2000).

<sup>17</sup> Flambeau correctly states, request for rehearing at 8, that under Wisconsin law, a certification becomes final 30 days after publication if no objection and hearing request is filed, and that because Flambeau filed a timely appeal of the certification, the certification will not become final until a decision is made on appeal. See Wisconsin Administrative Code section NR 299.05(7). This in and of itself is of no significance. Any certification that is under appeal is in a sense non-final since it is subject to change.

(continued)

10. Flambeau is not without remedy here. At the conclusion of the appeals, we will revise the license to take account of any change in the certification. As discussed below, we find that nothing required by the certification will result in irreparable harm to the company.

### **B. Reasonableness of the Mandatory Conditions**

11. Flambeau argues that the minimum flow and fish passage conditions imposed by the water quality certification and pursuant to 4(e) are not supported by the record. We are without authority to revise either of these conditions at this time, and therefore decline to address Flambeau's arguments. As noted above, if so warranted by the state appeals processes, we will revise the license accordingly.

### **Stay Request**

12. Flambeau asks for a stay until its appeals of the project's water quality certification are exhausted. Flambeau asserts that it will suffer irreparable harm if a stay is not granted, and that a "stay is necessary in order to prevent the unnecessary and wasteful expenditure of funds and resources in implementing the conditions pending appeal before [Wisconsin] DNR, the Wisconsin state courts and the [Forest] Service." Further, it states that the conditions are "crippling and, at a minimum, call into question whether or not Flambeau will accept the new license."<sup>18</sup>

13. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 705, *i.e.*, the stay will be granted if the

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That does not invalidate the certification or prevent us from acting while an appeal is pending.

<sup>18</sup> Request for rehearing and stay at 15. Given that the Winter Project is required to be licensed, due to its occupancy of federal lands, see FPA section 23(b), 16 U.S.C. § 816 (2000), if Flambeau wishes to continue operating the project, it must comply with the provisions of the new license. Such operation will not be construed as acceptance of the new license pending rehearing and judicial review. Flambeau may defer its decision on whether to accept or reject the new license until those processes have been completed. However, until that time, Flambeau must either operate the project in accordance with the provisions of the new license or stop generating electricity at the project. *See City of Tacoma, Washington*, 85 FERC ¶ 61,130 (1998).

Commission finds that “justice so requires.”<sup>19</sup> Under this standard, the Commission considers a number of factors related to the public interest, such as whether the movant will suffer irreparable injury in the absence of a stay and whether the issuance of a stay would substantially harm other parties.

14. Flambeau makes no convincing arguments on this score. Rather, it asserts generally that it should not be required to comply with measures that may be reversed on appeal, that fish passage implementation would require a “substantial” (but unspecified) expenditure of funds and a “significant” (but again unspecified) loss of generation revenues, and that certain measures designed for lake sturgeon allegedly will degrade habitat for other species.<sup>20</sup> This does not amount to a showing that justice requires a stay. Indeed, Flambeau’s arguments, vague as they are, focus on financial harm, and it is clear that pecuniary loss, without more, is not considered irreparable harm or the basis for a stay.<sup>21</sup>

15. We have explained that, to the extent a licensee seeks a stay in order to defer deadlines for compliance with the requirements of license articles, the appropriate remedy is for it to seek extensions of those deadlines.<sup>22</sup> Indeed, only a few articles in the new license for Project No. 2064 will require compliance activities during the next several months,<sup>23</sup> and Flambeau does not explain why compliance with any of them will

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<sup>19</sup> See, e.g., *FPL Maine Energy Hydro, LLC*, 107 FERC ¶ 61,120 (2004); *Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992).

<sup>20</sup> Request for rehearing at 14-15.

<sup>21</sup> See, e.g., *Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166 (2005). See also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Puget Sound Energy, Inc.*, 82 FERC ¶ 61,142 (1998); *Pennsylvania Power and Light Co.*, 84 FERC ¶ 61,060 (1998).

<sup>22</sup> See, e.g., *Lind and Associates*, 66 FERC ¶ 61,352 (1994); *Mahoning Hydro Associates*, 56 FERC ¶ 61,138 (1991).

<sup>23</sup> These include the following. Article 401 requires an outage response plan within six months; a fish passage plan, a run-of-river operation plan, and a hazardous substance plan within one year; and a drawdown management plan 60 days prior to all non-emergency reservoir drawdowns. Article 403 requires a reservoir drawdown plan within six months. Article 404 requires a land and wildlife management plan within six months. Article 405 requires a woody debris management plan within six months.

work undue hardship. In light of these circumstances, we deny Flambeau's request for stay.<sup>24</sup>

The Commission orders:

(A) The request for rehearing filed on August 23, 2005, by Flambeau Hydro, LLC, is denied.

(B) The request for stay filed on August 23, 2005, by Flambeau Hydro, LLC, is denied.

(C) The Commission reserves the authority to modify the license for Project No. 2064 consistent with the outcome of the appeals of the water quality certification issued by the Wisconsin Department of Natural Resources.

By the Commission. Chairman Kelliher dissenting in part with a separate statement attached.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>24</sup> Flambeau cites *OMYA, Inc.*, 65 FERC ¶ 61,376 (1993) and *City of Tacoma*, 99 FERC ¶ 61,067 (2002), in support of its stay request. Those cases are distinguishable. In *OMYA*, the state administrative appeal board voided the water quality certification and in *Tacoma*, the water quality certification was stayed pending appeal. Here, the certification remains in place while the state considers Flambeau's appeal.

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Flambeau Hydro, LLC

Project No. 2064-012

(Issued December 20, 2005)

Joseph T. KELLIHER, Chairman, *dissenting in part*:

I again dissent in part from an order, not because of what it says, but because of what it does not say.<sup>1</sup>

As I noted previously, the Commission does not have the discretion to reject mandatory conditions even if they are unsupported by the record or are otherwise inappropriate in the context of the broader licensing action taken by the Commission. Where I depart from my colleagues is that I believe our lack of authority to reject mandatory conditions makes it all the more important that our orders provide the Commission's views on the validity of such conditions.

Unfortunately, the instant order does not contain that discussion. In response to the licensee's argument that minimum flow and fish passage conditions imposed by the water quality certification, and pursuant to Federal Power Act section 4(e), are not supported by the record, the Commission's order states in paragraph 11 only that "[w]e are without authority to revise either of these conditions at this time, and therefore decline to address Flambeau's arguments."

When an agency with mandatory conditioning authority attaches a condition to a license that is unsupported, the primary recourse a licensee has is to seek judicial review. By not making plain any disagreements we may have with such conditions, we make it more difficult for the licensee to mount an effective challenge, and we make it more difficult for the court system to assess the validity of such a challenge. This case illustrates that problem.

Here, the licensee is concerned about the requirement for fish passage at the project. The review of such matters by the relevant agencies typically takes place in the Commission staff's environmental analysis of a project. In this case, the environmental assessment (EA) prepared by the Commission staff did not recommend upstream or downstream fish passage because it found no indication that the lack of passage was

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<sup>1</sup> I previously dissented on the same issue in *Public Utility District No. 1 of Pend Oreille County*, 112 FERC ¶ 61,055 (2005).

having a significant effect on the fishery. The EA concluded that the resident fish communities above and below the project are very similar and both appear to be healthy and diverse. The EA also noted that it is not known whether the measure in question is effective at providing fish passage. The EA thus concluded that “we believe it is unwarranted to require fish passage that appears to be unnecessary and may also be ineffective.”<sup>2</sup>

The requirement for fish passage is not an empty dispute. The mandatory conditions unquestionably impose significant additional costs on the project.<sup>3</sup> The licensee has stated that these conditions are crippling and call into question whether it will accept the new license.

The harm that results from the Commission’s failure to discuss such conditions becomes apparent when one considers what happens after we issue our order. Once the Commission issues its final order, the licensee’s primary legal recourse is to file an appeal in federal circuit court. While the Commission does not have the authority to change or reject mandatory conditions in its orders, the Commission may question the appropriateness of mandatory conditions on appeal.<sup>4</sup> In fact, FERC is the named respondent in such appeals and is required to file a brief. At oral argument, the Commission is sometimes asked to address the Commission’s view on the mandatory condition being challenged. This presents a problem if our order is silent. This is because an EA or environmental impact statement (EIS) is a Commission staff document. As a consequence, the information contained in an EA or EIS has little value if that information has not been endorsed by the Commission by discussion in an order. If our order is silent, the value of that discussion is foregone to the Commission. Perhaps more importantly, that information is similarly foregone to the parties, and ultimately to the court. Thus, those with a vital interest in these matters, and those with the responsibility to inquire into them further on appeal, are left with an incomplete record. This strikes me as unwise and fundamentally unfair to other participants in the licensing process and to the courts.

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<sup>2</sup> Final Environmental Assessment for New Hydropower License, Winter Hydroelectric Project, FERC Project No. 2064-004, at 58 (November 2004).

<sup>3</sup> *Flambeau Hydro LLC*, 112 FERC ¶ 62,130, at PP 58-60 (2005).

<sup>4</sup> *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 778 & n. 20 (1984) (holding that the Commission is “free to express its disagreement with [conditions] if it objects to them, not only in connection with the issuance of the license but also on review.”); *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 (D.C. Cir. 1996).

Regardless of whether the Commission actively participates in an appeal of a mandatory condition, I believe it is important that the Commission establish a meaningful record on the issue. Without it, we deprive litigants and the courts of a resource that is often central to the issue. The failure to include that information in this order compels me to dissent from that portion of this order.

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Joseph T. Kelliher