

174 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee, Richard Glick,
Allison Clements, and Mark C. Christie.

Wisconsin Electric Power Company

Project No. P-2486-088

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued January 19, 2021)

1. On November 19, 2020, the Commission granted Wisconsin Electric Power Company's (Wisconsin Electric) request to extend the license term of its Pine Project No. 2486 by approximately 15 years, to July 31, 2040, to align its license expiration date with the expiration dates of 12 other projects on the upper Menominee River Basin¹ so that the cumulative impacts of these projects may be assessed at the same time.² On December 17, 2020, the River Alliance of Wisconsin (River Alliance) and the Michigan Hydro Relicensing Coalition (Michigan Hydro) filed requests for rehearing of the Extension Order. On December 18, 2020, the Wisconsin Department of Natural Resources (Wisconsin DNR) and the Michigan Department of Natural Resources (Michigan DNR) also filed requests for rehearing.

2. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by

¹ Those twelve projects are: the Lower Paint Project No. 2072, the Crystal Falls Project No. 11402, the Way Dam and Michigamme Project No. 1759, Hemlock Falls Project No. 2074, Peavy Falls Project No. 11830, and Michigamme Falls Project No. 2073, the Brule Project No. 2431, the Kingsford Project No. 2131, Big Quinnesec Falls Project No. 1980, Little Quinnesec Falls Project No. 2536, Twin Falls Project No. 11831, and Sturgeon Falls Project No. 2720.

² *Wis. Elec. Power Co.*, 173 FERC ¶ 61,162, at P 14 (2020) (Extension Order) (it is Commission policy to “align the license expiration dates of projects located on the same river basin”).

³ 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

section 313(a) of the Federal Power Act (FPA),⁴ we are modifying the discussion in the Extension Order and continue to reach the same result in this proceeding, as discussed below.⁵

Discussion

3. River Alliance, Michigan Hydro, Wisconsin DNR, and Michigan DNR (collectively, Petitioners) raise numerous arguments on rehearing, including whether: (1) the Michigan DNR and the Wisconsin DNR support Wisconsin Electric's request;⁶ (2) granting the extension would negatively impact mitigation;⁷ (3) Wisconsin Electric's dam safety improvements were mandatory or voluntary;⁸ (4) aligning the Pine Project's expiration date with the dates of other projects on the Upper Menominee River Basin is beneficial;⁹ and (5) the Commission should have required Wisconsin Electric to continue to negotiate an agreed upon term of extension.¹⁰

4. For the reasons discussed in the Extension Order,¹¹ we continue to find Petitioners' arguments unpersuasive. Notwithstanding the dissent's assertion that the Commission is allowing Wisconsin Electric to escape the bargain it made in a settlement agreement with

⁴ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁵ *Allegheny*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Extension Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁶ River Alliance Rehearing Request at 1; Michigan Hydro Rehearing Request at 2; Wisconsin DNR Rehearing Request at 1-2.

⁷ River Alliance Rehearing Request at 2; Michigan Hydro Rehearing Request at 2.

⁸ River Alliance Rehearing Request at 2; Michigan DNR Rehearing Request at 3-4.

⁹ River Alliance Rehearing Request at 2; Michigan Hydro Rehearing Request at 3; Michigan DNR Rehearing Request at 1-3; Wisconsin DNR Rehearing Request at 1-2.

¹⁰ River Alliance Rehearing Request at 2; Michigan Hydro Rehearing Request at 3; Michigan DNR Rehearing Request at 4-5; Wisconsin DNR Rehearing Request at 3.

¹¹ See Extension Order, 173 FERC ¶ 61,162 at PP 14-15.

other stakeholders regarding the fate of the Pine Project,¹² as we explained in the November 19, 2020 order, the parties to the settlement retain the ability to seek to enforce the terms of the agreement in court, as provided for in that document, and Wisconsin Electric can file an application to surrender its license should it be determined that it is required to do so.¹³ In addition to the arguments discussed above, Michigan Hydro also asserts that the Commission violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental assessment to examine the potential impacts of extending the license term for the Pine Project.¹⁴ We note that per the Commission's regulations, such actions are categorically excluded from NEPA review since the request does not require ground disturbing activity or changes to project works or operation.¹⁵

The Commission orders:

In response to Petitioners' requests for rehearing, the Extension Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioners Glick and Clements are dissenting with a joint separate statement attached.
Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² We note that the Commission is not a party to the settlement, the Commission did not approve the settlement, and the settlement is not part of the license.

¹³ Extension Order, 173 FERC ¶ 61,162 at P 15.

¹⁴ See Michigan Hydro Rehearing Request at 1-2.

¹⁵ 18 C.F.R. § 380.4(a)(11) (2020) (stating that an environmental assessment will not be prepared for actions including "amendments to water power licenses and exemptions that do not require ground disturbing activity or changes to project works or operation").

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Wisconsin Electric Power Company

Project No. 2486-088

(Issued January 19, 2021)

GLICK, Commissioner, and CLEMENTS, Commissioner, *dissenting*:

1. We dissent on today's order because we disagree with the Commission's underlying decision to grant a 15-year license extension to Wisconsin Electric Power Company (Wisconsin Electric) for its Pine Project No. 2486 (Pine Project).¹ That extension effectively overrides a comprehensive settlement between Wisconsin Electric and numerous federal and state resource agencies and non-governmental organizations—many of which protested this extension request. We do not believe that Wisconsin Electric has shown that the license extension is in the public interest and would, therefore, grant rehearing to restore the 2025 license expiration date.

2. On February 10, 1997, Wisconsin Electric reached a comprehensive settlement agreement to protect and improve resource management in the Upper Menominee River Basin with numerous parties, including the U.S. Fish and Wildlife Service, the National Park Service, the Michigan Department of Natural Resources, the Michigan Department of Environment, Great Lakes and Energy, the Wisconsin Department of Natural Resources, the Michigan Hydro Relicensing Coalition, and the River Alliance of Wisconsin. One of the key provisions in the Wilderness Shores Settlement Agreement (WSSA) provides “Wisconsin Electric agrees to remove the Pine Project upon *the end of the current license term period* provided that the Resource Agencies continue to support removal.”² Further, the WSSA directs Wisconsin Electric to initiate consultation in 2020 to affirm or modify the agreement to surrender the Pine Project in 2025.³

3. Nevertheless, in this proceeding, Wisconsin Electric has sought to extend the license of the Pine Project by 15 years, effectively delaying its commitments under the WSSA. Unsurprisingly, numerous federal and state resource agencies objected to the license extension on the grounds that it permitted Wisconsin Electric to execute an end run around the WSSA. We agree. In granting Wisconsin Electric's request, the Commission allowed Wisconsin Electric to wiggle out from under its decades-old

¹ *Wis. Elec. Power Co.*, 173 FERC ¶ 61,162 (2020) (Glick, Comm'r, dissenting).

² Wisconsin Electric July 16, 2019 Application at B-2 (emphasis added).

³ *Id.*

commitments—negotiated in good faith amongst the parties—regarding the Upper Menominee River Basin.

4. Because Wisconsin Electric has not shown that a 15-year license extension for the Pine Project is consistent with the public interest, we would grant rehearing and reinstate the 2025 license expiration date.

For these reasons, we respectfully dissent.

Richard Glick
Commissioner

Allison Clements
Commissioner

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CHRISTIE, Commissioner, *concurring*:

1. While I have reviewed closely the filed comments of the Michigan Department of Natural Resources and Wisconsin Department of Natural Resources, according to the record, the civil agreement that they and other parties entered into with Wisconsin Electric was neither filed with the Commission for its approval nor was the language in section 8.3 of that agreement incorporated into the project license.¹ Given that the Commission does not have jurisdiction over the conditions set forth in that agreement, that the conditions are not enforceable by the Commission,² and that there is an apparent dispute as to how to construe the relevant provisions, I am not comfortable concluding that consideration of the settlement should lead us to deny the extension request.
2. For this reason and those stated in the order I concur.

Mark C. Christie
Commissioner

¹ *Wisc. Elec. Power Co.*, 173 FERC ¶ 61,162, at PP 3-4, 15 (2020) (Extension Order).

² The Commission found that if the parties to the agreement “believe that Wisconsin Electric’s request to extend the Pine Project’s license term violates that agreement, they may seek relief in a court of appropriate jurisdiction, as provided in section 2.3.4 of the WSSA.” *Id.* P 15.