

111 FERC ¶ 61,077  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Mirant NY-Gen LLC

Project No. 10482-065

ORDER DENYING RECREATION PLAN AMENDMENT

(Issued April 18, 2005)

1. Mirant NY-Gen LLC, (Mirant), licensee for the Swinging Bridge Project No. 10482, located on the Mongaup River in Sullivan and Orange Counties, New York, has filed an application to amend the project's recreation plan to close a boat launch and expand a recreation area. For the reasons discussed below, we deny the application. This order is in the public interest because it ensures appropriate public recreation at the project.

**Background**

2. In 1994, the Commission issued Mirant's predecessor a license to continue to operate and maintain the existing and then-unlicensed Swinging Bridge Project.<sup>1</sup> The Swinging Bridge Project has three reservoirs. Starting from the furthest upstream they are: Toronto, Cliff Lake, and Swinging Bridge. Toronto and Cliff Lake Reservoirs, which are connected by a concrete conduit, are operated for storage, and release flows through a 2,100-foot-long tunnel into the Swinging Bridge Reservoir, below which the two project powerhouses are located.<sup>2</sup>

3. Article 405 of the license required the licensee to construct public recreation facilities at the project, including a 10-car/trailer parking lot and a boat ramp at Moscoe Road, at the northern end of Toronto Reservoir, similar facilities on the southeast side of Toronto Reservoir near Toronto Dam (which impounds the reservoir), and a 5-car parking area near Black Lake Creek, also near Toronto Dam. Ultimately, the licensee

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<sup>1</sup> See *Orange and Rockland Utilities, Inc.*, 59 FERC ¶ 62,034 (1992).

<sup>2</sup> 59 FERC at 63,092.

combined the Black Lake Creek parking area and the southeast Toronto Reservoir parking lot and boat ramp into the single Toronto Dam 15-car parking area and boat launch, on the southeast side of Toronto Reservoir.<sup>3</sup> Access to the Toronto Dam site is via Pine Grove Road (also known as Town Road 62), which is owned by the Town of Bethel, Mirant, and Woodstone Companies, a developer of residential property along the shore of Toronto Lake.

4. On October 25, 2004, Mirant filed a request to amend the project's recreation plan. Mirant proposes to close the Toronto Dam site, and to expand the Moscoe Road area at the northern end of the reservoir from one boat launch to three boat launches and from 15 parking spaces to 35 spaces. Picnic and restroom facilities would also be added at that site. Mirant states that Woodstone would maintain the Moscoe Road area. It further states that when boats cannot be safely launched at Moscoe Road due to low reservoir elevations, the Toronto Dam site (which will otherwise not be used or maintained) will be used.

5. The Commission staff issued public notice of the application on November 6, 2004. The Civic Association of Smallwood, the Friends of Toronto Reservoir, the Moscoe Road Residents, Mr. Bob Barrett, Mr. Richard Hertz, and Mr. Harold Wiener filed motions to intervene, all in opposition to the amendment. They express concern that closing the Toronto Dam site will decrease public access to the lake, to the benefit of private owners; that the closure will eliminate walking access to the lake for Smallwood residents, and that the Moscoe Road site is relatively far away; and that the Toronto Dam site provides a different, more primitive, type of recreation than the more developed Moscoe Road area. In addition, several commenters opposed or protested the amendment, stating that the licensee should be required to maintain two access points along the Toronto Reservoir as required by the license, and that while the Toronto Dam area is remote, it provides access to the reservoir for recreationists who cannot drive to the Moscoe Road location. Some commenters who live along Moscoe Road expressed concerns about the increase in traffic, litter and sanitation problems resulting from the proposed expansion of the Moscoe Road area.

6. Some commenters support the licensee's proposal, stating that the Toronto Dam site is not used and that access to it is limited. Other commenters express concern that if the site remains open, the Town of Bethel will have to expend funds to improve Pine Grove Road.

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<sup>3</sup> The Commission approved this change, after the fact, with the concurrence of the New York State Department of Environmental Conservation. *See* 65 FERC ¶ 62,175.

7. The New York State Department of Environmental Conservation (NYSDEC) filed a letter stating that it supports the amendment, and recommends that any modification of article 405 be conditioned on: (1) the completion of the proposed improvements to the Moscoe Road site; (2) the granting by Woodstone to NYSDEC of permanent public fishing rights easements to Black Lake Creek between Pine Grove Road crossing and the Toronto Dam);<sup>4</sup> (3) Mirant being required to fully maintain the currently-required access sites until the amendment modifications become fully effective; (4) improvements to the Moscoe Road area being made in accordance with plans attached to a September 9, 2004 letter from Steve Dubrovsky to the NYSDEC, including the extension of a fully-functional boat ramp to reservoir elevation 1206 feet; and (5) Mirant being required to allow and provide for trailered boat access to a fully- functional ramp and parking facility at the Toronto dam site whenever reservoir elevations fall below 1206 feet mean sea level (msl) and the Moscoe Road launch is not usable. The U.S. Fish and Wildlife Service filed a letter on November 16, 2004 stating that it would support the proposal provided the license is amended to incorporate the Moscoe Road recreational facility plans and that there is access to the Toronto Dam launch site when water levels fall below 1206 msl.

### **Discussion**

8. It is the Commission's policy with respect to recreational development at licensed projects to "seek, within its authority, the ultimate development of [recreational] resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project."<sup>5</sup> To this end, the Commission requires licensees to make reasonable expenditures to develop and maintain suitable recreational facilities and to provide for adequate public access to project facilities and

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<sup>4</sup> A proposal to provide additional parking in the vicinity of Black Lake Creek and enhanced public access for fishing on Black Lake Creek was put forth by Woodstone Companies; however this is not part of the proposal filed by the licensee. This land is outside the project boundary and not within the Commission's jurisdiction.

<sup>5</sup> 18 C.F.R. § 2.7 (2004). This statement of policy was promulgated by Order No. 313, 34 FPC 1546 (1965). Further, standard license Article 18, included in the license for the Swinging Bridge Project, states that "so far as is consistent with proper operation of the project, the licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting, provided that the licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property."

waters.<sup>6</sup> We have also explained that we will not allow the interests of private landowners to override the general public's right to enjoy the recreational resources associated with the licensed hydropower projects.<sup>7</sup>

9. In this instance, we determined in the 1994 licensing order that the public interest would be served by recreational sites at both the southeastern side of Toronto Lake (the Toronto Dam area) and the northern side of the lake (the Moscoe Road area). The order noted that one of the benefits of the project, as licensed, would be "development of improved public access and safety facilities for expanded recreational uses at the project."<sup>8</sup> To the extent that Mirant now seeks to eliminate recreation access in one of the areas where it is currently provided – the Toronto Dam area – it must demonstrate why this access is no longer needed or how the needs of recreationists can be met by the facilities proposed in the amendment application.

10. In reviewing the needs for recreational facilities at a project, we consider various factors, including the site locations, the availability of alternative recreation facilities in the area, and the State Comprehensive Outdoor Recreation Plan (SCORP).<sup>9</sup> This review occurs as part of the licensing process and continues during the term of the license. When a request is made to amend a recreation plan, Commission staff undertakes a thorough review of these factors.

11. The boating access sites on Toronto Reservoir provide two distinctively different types of recreational experiences. The Moscoe Road site is more developed and located closer to the Town of Bethel. The Toronto Dam Access is more remote and less developed. These areas serve different recreationists at the project and provide different experiences, all of which contribute to the overall development of the project.

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<sup>6</sup> See, e.g., *Upper Peninsula Power Company*, 102 FERC ¶ 61,114 (2003).

<sup>7</sup> See, e.g., *West Penn Power Company*, 81 FERC ¶ 61,362 at 62,736 (1997).

<sup>8</sup> 59 FERC at 63,082.

<sup>9</sup> The New York SCORP, published in 2003, is prepared by the New York State Parks, Recreation and Historic Preservation to provide statewide policy direction and to fulfill the agency's recreation and preservation mandate. The 2003 SCORP serves an overall guideline for recreation resource preservation, planning and development for the state of New York through the year 2007. See SCORP at pages 2-45, showing a relative index of needs indicating the degree to which additional facilities are need to meet future demand. A higher number on a scale of 1-10 shows that most facilities are heavily used. An intermediate value indicates a range of crowding at recreation resources. In Orange County, the index for boating is 7 and for fishing is 6. In Sullivan County, the index for boating is 4 and fishing is 4.

12. In addition, we have reviewed the Licensed Hydropower Development Recreation Reports (Form 80s) for the project 1997 and 2003. Both of these reports indicate that the licensee maintains two boat launches on the Toronto Reservoir, each with a facility capacity of 10 percent.<sup>10</sup> Based on the Form 80 data and comments from users, it appears that both sites are used with equal frequency. While the improvements to the Moscoe Road site would provide additional recreation benefits to the public, there is no evidence that they are needed now.<sup>11</sup> Moreover, we are not persuaded that the two sites provide equivalent recreational access to the same users. Thus, expanding the Moscoe Road site will not compensate for the loss of a different type of recreation to different recreationists who now use the Toronto Dam area. Finally, we note with concern the statements by some commenters that if the Toronto Dam area is closed, that portion of the reservoir would then become easily accessible only to private owners, and not the public.

13. Mirant's proposal also raises practical difficulties. The company states that when the Moscoe Road site is unusable due to low water conditions, the Toronto Dam site will be available to the public. Maximum and Minimum Water surface elevations for the past 11 years are listed below:

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<sup>10</sup> Facility capacity indicates a facility's ability to handle use and indicates over use, under use, or ideal use. A facility capacity of 10 percent indicates that the facilities are not used beyond their capacity. The 2003 Form 80 may not accurately reflect typical recreational use at the project because the facilities were closed for a portion of the 2002 recreational season due to security concerns; however there is no data to show that either facility is overused on a regular basis.

<sup>11</sup> Should the licensee wish to expand the Moscoe Road site to provide additional benefits, the Commission would review this request.

WATER ELEVATION FOR TORONTO RESERVOIR AT USGS  
GAGE 01433100

Period	Max Reservoir Elevation (ft msl)	Date	Min. Reservoir Elevation (ft msl)	Date
October 2002-September 2003	1,220.5	14,16-Apr,23-Jun	1,206.4	11-Oct
October 2001-September 2002	1,215.8	1,3,5-Jul.	1,195.6	30-Nov
October 2000-September 2001	1,212.1	16-Jul	1,192.7	24,26,29-Jan.
October 1999-September 2000	1,216.0	4-Aug	1,170.6	1-Oct
October 1998-September 1999	1,196.0	4-Jun	1,167.4	13-Sep
October 1997-September 1998	1,216.4	15-Jul	1,174.9	24-Nov
October 1996-September 1997	1,220.4	8-Jan	1,183.9	30-Sep
October 1995-September 1996	1,220.9	13-May	1,194.6	19-Jan
October 1994-September 1995	1,209.6	5, 7, 12-Jun	1,187.2	14, 16, 23-Nov.
October 1993-September 1994	1,221.0	15-Apr	1,198.0	15-Oct

This data shows that the water levels regularly drop below 1206 feet and the boat launch at the Toronto Dam access thus would need to be maintained and kept open with some frequency. This also counsels against closing the Toronto Dam area.<sup>12</sup>

### **Conclusion**

14. Based on the foregoing, we conclude that Mirant has not demonstrated that its proposal will meet the public's need for adequate public access to the lands and waters of the Swinging Bridge Project. The two recreational sites at the project appear necessary to meet the needs of the public in distinct but equally important ways. Closing the Toronto dam access site would make it more difficult for some recreationists to access Toronto

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<sup>12</sup> We note that Mirant does not state how, and by whom, the unavailability of the Moscoe Road site would be determined, nor does it explain who would be responsible for maintaining and operating the Toronto Dam site.

Lake and would preclude the general public using the remote area. We therefore deny the amendment application.

The Commission orders:

(A) The amendment application filed by Mirant NY-Gen LLC on October 25, 2004, is denied.

(B) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 CFR 385.713 (2004).

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.