

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Wisconsin Power and Light Company

Project No. 11162-011

ORDER GRANTING STAY

(Issued July 29, 2003)

1. This order grants the licensee's request for a stay, pending judicial review, of a fishway prescription requiring plans and facility installations that, but for a stay, would to a substantial extent have to be completed before the court could act on the licensee's appeal thereof.

**BACKGROUND**

2. By order issued June 27, 2002, the Director, Office of Energy Projects, issued an original license to the Wisconsin Power and Light Company (Wisconsin Power) for the Prairie du Sac Hydroelectric Project No. 11162.<sup>1</sup> The license order concluded, based on the Environmental Assessment of the project, that construction of a conventional fishway would not be in the public interest because of the dubious chance for success and the high cost associated with its construction.<sup>2</sup> However, pursuant to the Interior Secretary's request, the license also reserved the Commission's authority to impose on the license "such fishways as may be prescribed by" the Secretary pursuant to Section 18 of the Federal Power Act.<sup>3</sup>

3. On rehearing of the license order, Interior invoked its reserved authority to impose a fishway prescription. Accordingly, on October 11, 2002, the Commission amended the

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<sup>1</sup>The project is located on the Wisconsin River in Sauk and Columbia Counties, about 90 miles upstream of the Mississippi River.

<sup>2</sup>99 FERC ¶ 62,225 at p. 64516 (2002).

<sup>3</sup>16 U.S.C. § 811.

license to make it subject to the conditions set forth in the prescription.<sup>4</sup> The Commission denied Wisconsin Power's request for rehearing of the amendment, noting that the Commission has no authority to amend or reject a Section 18 prescription that is timely filed before issuance of a license or, as in this proceeding, that is filed after license issuance pursuant to reserved authority, and that Wisconsin Power's only recourse is before a U.S. District Court of Appeals.<sup>5</sup>

4. On February 18, 2003, Wisconsin Power filed with the U.S. Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's October 11, 2002 amendment order.<sup>6</sup>

5. By motion filed May 23, 2003, Wisconsin Power seeks a stay of the fishway prescription until completion of the court proceedings. The prescription gives the licensee one year (i.e., by October 11, 2003) to develop a detailed engineering and biological evaluation of potential fishway alternatives and install agency-approved fish-protective devices, and three years to install agency-approved fishways. Wisconsin Power argues that, absent a stay, it will have to make significant expenditures and modifications to the project, entailing a material impairment of its economic benefits, before it can obtain a court decision on its appeal of these requirements.

## DISCUSSION

6. 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 Commission finds that "justice so requires."<sup>7</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.

7. We will grant Wisconsin Power's motion for stay of the fishway prescription pending judicial review of its terms. This is consistent with Commission practice in similar situations. See, e.g., Eugene Water and Electric Board, 83 FERC ¶ 61,165 (1998)

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<sup>4</sup>101 FERC ¶ 61,055 (2002). See Appendix B of the order, at 61,191.

<sup>5</sup>101 FERC ¶ 61,338 (2002).

<sup>6</sup>Wisconsin Power and Light Co. v. FERC, D.C. Cir. No. 03-1026 (filed Feb. 18, 2003).

<sup>7</sup>See e.g., Clifton Power Corp., 58 FERC ¶ 61,094 (1992).

(stay, pending judicial review, of requirement to construct fish passage, fish protection, and generating facilities); and Bangor Hydro-Electric Co., 70 FERC ¶ 61,216 (1995) (stay, pending judicial review, of requirement to construct fish passage facilities).

The Commission orders:

The requirements contained in Appendix B of the Commission's order on rehearing and amending license issued in this proceeding on October 11, 2002, 101 FERC ¶ 61,055, are stayed pending further order of the Commission after the completion of court proceedings thereon.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.