

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Power Authority

Project No. 2000-053

Massachusetts Municipal Wholesale  
Electric Company

Docket No. EL03-224-003

v.

New York Power Authority

ORDER DENYING MOTION FOR STAY

(Issued September 21, 2004)

1. This order denies the motion filed by the Massachusetts Municipal Wholesale Electric Company (MMWEC) for a stay of the Commission's June 4, 2004 Order on rehearing of the October 23, 2003 Order<sup>1</sup> issuing a new license to the New York Power Authority (NYPA) for the St. Lawrence Project No. 2000.<sup>2</sup>

**Background**

2. Article 28 of the original license for the St. Lawrence Project required NYPA to allocate a share of project power to neighboring states in the Northeast.<sup>3</sup> When the original license expired, NYPA was selling to Massachusetts, Vermont, Rhode Island, Connecticut, New Jersey, Pennsylvania, and Ohio (the Out-of-State Allottees, or OSAs) at cost-based rates about 68 MW of power, representing about 8.5 percent of project power.

---

<sup>1</sup> Power Authority of the State of New York, *et al.*, 107 FERC ¶ 61,259 (2004).

<sup>2</sup> Power Authority of the State of New York, *et al.*, 105 FERC ¶ 61,102 (2004).

<sup>3</sup> 12 FPC 172 at 192-93 (1953).

3. In the relicense proceeding, NYPA proposed to exclude the Article 28 requirement from a new license, thereby eliminating its obligation to offer power to the OSAs. The OSAs objected. Ultimately, all of the OSAs except Massachusetts settled their differences with NYPA and submitted a settlement agreement under which they will receive about half the power and energy they were receiving when the original license expired.<sup>4</sup>

4. The new license order found that the Commission has authority under Federal Power Act (FPA) section 10(a)(1)<sup>5</sup> to require NYPA to allocate power to neighboring states.<sup>6</sup> It also concluded that Congress intended that NYPA be required to make such an allocation. Accordingly, the license order directed NYPA, in Article 420, to allocate 0.6 percent of the project's firm power (and associated energy) and a corresponding share of non-firm power to Massachusetts in the same proportion and under the same rate terms and conditions as agreed to by the other OSAs (*i.e.*, half the previously received power, to be sold at cost-based rates).<sup>7</sup>

5. In the June 4 Order on rehearing, we found that the linchpin of our conclusion regarding Congressional intent, Senate Joint Resolution 104, had been reported out of committee to the full Senate for approval, but was never approved by either house of Congress. In light of this, we concluded that the resolution was an insufficient basis on which to conclude that Congress intended the Commission to use its license conditioning authority to require an allocation of power to the other northeastern states. We therefore modified the license to remove Article 420.<sup>8</sup> On June 30, NYPA terminated deliveries of St. Lawrence power to Massachusetts.

6. On June 18, 2004, MMWEC filed its motion for a stay of this aspect of the June 4 Order pending rehearing and judicial review. It also requested the Commission to shorten the response time and act on its request prior to July 1, 2004.<sup>9</sup>

---

<sup>4</sup> See 105 FERC at 61,578 and 61,604 (Article 419).

<sup>5</sup> 16 U.S.C. § 803(a)(1).

<sup>6</sup> 105 FERC at 61,578-80.

<sup>7</sup> *Id.* at 61,582-83; 61,604-05 (Article 420).

<sup>8</sup> See 107 FERC at 62,149 (ordering paragraph (B)).

<sup>9</sup> See MMWEC Motion at 2, n. 1

We granted neither request, in order to afford NYPA a reasonable opportunity to respond to MMWEC's stay request. On July 6, 2004, NYPA filed an answer opposing MMWEC's stay request.

7. Also on July 6, 2004, MMWEC filed a request for rehearing of the June 4 Order. We will deal with the merits of MMWEC's rehearing request in a separate order.

### **Discussion**

8. In acting on stay requests, the Commission applies the standard test set forth in the Administrative Procedure Act,<sup>10</sup> *i.e.*, the stay will be granted if "justice so requires."<sup>11</sup> This entails such things as whether the movant will suffer irreparable injury in the absence of a stay; whether the issuance of a stay would substantially harm other parties; and where the public interest lies.<sup>12</sup>

9. MMWEC alleges that Massachusetts customers will likely suffer irreparable economic harm absent a stay, because they will have to replace St. Lawrence Project power purchased at cost-based rates with power purchased at market-based rates, which are some \$800,000 per year higher.<sup>13</sup> In contrast, it asserts, a stay would be only a minor limitation on NYPA's ability to allocate the power to in-state customers, because a stay would maintain a status quo in place only since November 1, 2003 (the effective date of the new license).<sup>14</sup>

10. MMWEC asserts that the public interest is best served by preserving the status quo prior to the order on rehearing, because that would protect the interest of Massachusetts customers in continuing to receive low-cost project power on non-discriminatory terms and conditions.<sup>15</sup> MMWEC adds that a stay would be consistent with NYPA's regulations, which it states require more notice of termination of service

---

<sup>10</sup> See 5 U.S.C. § 705.

<sup>11</sup> See, *e.g.*, Clifton Power Corp., 58 FERC ¶ 61,094 (1992).

<sup>12</sup> Trinity River Authority of Texas, 41 FERC ¶ 61,300 (1987).

<sup>13</sup> MMWEC motion at 10 and Attachment I, affidavit of Bruce W. McKinnon.

<sup>14</sup> MMWEC motion at 12-16.

<sup>15</sup> *Id.* at 16-18.

than MMWEC received, and that it would be unduly disruptive to NYPA's in-state customers, were they later to lose the additional increment of St. Lawrence power as a result of Massachusetts prevailing on rehearing or judicial review.<sup>16</sup>

11. Finally, MMWEC asserts that justice requires a stay in order to punish NYPA for violating Article 420 by failing to offer MMWEC the specified reduced allocation on the same terms as power is made available to the settling OSAs. It states that NYPA failed to offer it a contract proposal until the end of February 2004, almost four months after the new license became effective, and that the offered contract was different than the contract offered to the other OSAs. Had NYPA not violated this article, MMWEC asserts, MMWEC would have executed a contract that would have enabled it to continue receiving St. Lawrence power at cost-based rates at least until the conclusion of any judicial review.

12. NYPA denies all of these assertions. It argues that mere unrecoverable economic injury does not constitute irreparable harm unless it constitutes a threat to the existence of the movant's business; that MMWEC has not shown that a stay would not substantially harm other parties; and that no public interest would be served by favoring the private economic interest of MMWEC's customers in low-cost power over the interest of NYPA's customers in the same.<sup>17</sup> Lastly, NYPA disputes MMWEC's arguments regarding compliance with Article 420, and states that it provided until June 30 a continuous supply of the specified amount of power to MMWEC at the same price charged to the settling OSAs, and according to the same schedule and allocation rules.<sup>18</sup>

13. We will deny MMWEC's request for a stay. Uncompensated economic loss is not generally found to constitute irreparable harm,<sup>19</sup> Here, even if MMWEC's estimate of the cost differential between St. Lawrence power and replacement power obtained in the market is accurate, the burden would be spread among MMWEC's 40 member municipal utilities<sup>20</sup> and approximately 350,000 customers.

---

<sup>16</sup> *Id.* at 18-19.

<sup>17</sup> NYPA answer at 2-9.

<sup>18</sup> *Id.* at 10-12.

<sup>19</sup> *See, e.g.,* Christine Falls Corp., 51 FERC ¶ 61,066 at 61,142 (1990); Puget Sound Energy, Inc., 83 FERC ¶ 61,022 (1998), *citing* City of Centralia, WA, 20 FERC ¶ 61,311 (1982).

<sup>20</sup> MMWEC states that 40 of its members receive allocations of St. Lawrence Power. Motion at 2. Its website states that it serves approximately 350,000

14. Since MMWEC has not established irreparable harm in the absence of a stay, we need not examine other factors.<sup>21</sup> We observe however that while MMWEC appears to be correct that granting a stay would not substantially harm NYPA or its customers, neither would MMWEC's customers be substantially harmed in the absence of a stay. MMWEC also offers no cogent reason why the public interest would be served by an outcome that serves the economic interest of Massachusetts customers over that of New York customers.

15. Finally, there is no need to delve further into MMWEC's allegations that NYPA violated Article 420. The record shows that NYPA continued to allocate St. Lawrence power to Massachusetts at cost-based rates and on the same terms and conditions applicable to the settling OSAs until the June 4 Order terminated that requirement. That this power was provided to MMWEC in the absence of a contract is immaterial.

16. In conclusion, MMWEC has not demonstrated that justice requires us to stay the removal of Article 420 from the St. Lawrence Project license. We will therefore deny its motion.

The Commission orders:

The motion for stay pending rehearing and judicial review filed by Massachusetts Municipal Wholesale Electric Company on June 18, 2004, is denied.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

---

customers. See <http://www.mmwec.org/pubower.html>.

<sup>21</sup> CMS Midland, Inc., 56 FERC ¶61,177 at 61,631 (1991), *aff'd sub nom.* Mich. Mun. Coop. Group v. FERC, 990 F.2d 1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993).