

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Wellesley Rosewood Maynard Mills, L.P.

Project No. 5018-011

ORDER DENYING MOTION REQUESTING RESCISSION OF ORDER ACCEPTING  
SURRENDER OF EXEMPTION

(Issued October 19, 2006)

1. On July 13, 2004, the Commission issued an order accepting surrender of Wellesley Rosewood Maynard Mills, L.P.'s (Wellesley Rosewood) exemption for the Clock Tower Place Hydroelectric Project No. 5018, located on the Assabet River in Maynard, Massachusetts. On August 28, 2006, the exemptee filed a motion requesting that the Commission rescind the surrender order and permit it to retain its exemption and resume hydropower generation. The Organization for the Assabet River (OAR), the United States Department of the Interior (Interior), and the Massachusetts Division of Fisheries and Wildlife (Mass DFW) have filed responses opposing the motion. For the reasons discussed below, the motion requesting rescission is denied.

**Background**

2. On October 3, 1983, the Commission issued an exemption for the project (then called the Mill Pond Project),<sup>1</sup> pursuant to sections 405(d) and 408 of the Public Utility Regulatory Policies Act of 1978(PURPA).<sup>2</sup> The project includes a 170-foot-long, 9.5-

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<sup>1</sup> 25 FERC ¶ 62,001 (1983).

<sup>2</sup> 16 U.S.C. §§ 2705(d), 2708 (2000). PURPA authorizes the issuance of an exemption from the licensing provisions of Part I of the Federal Power Act (FPA) for a project that will add generation to an existing dam, and have a total installed capacity of no more than 5 megawatts.

foot-high granite-block dam (Ben Smith Dam); an 18.75-acre reservoir (Ben Smith impoundment); a 1,600-foot-long power canal and culvert leading from the reservoir to a gatehouse with two manually controlled gates; and, downstream of the gatehouse, an 18.3-acre upper and lower millpond system (mill ponds). When the project was operated for power production, the water was diverted from the impoundment created by the Ben Smith Dam on the Assabet River into the power canal, through the gatehouse and ponds, into an intake/trashrack structure and through a 49-foot-long, 7-foot-diameter steel penstock to a powerhouse. After leaving the powerhouse, the water passed through twin 300-foot-long tailrace tunnels to rejoin the Assabet River about 5,400 feet downstream of the Ben Smith Dam. The project's total installed capacity was 125 kilowatts.

3. Initially, the exemption was issued to Digital Equipment Corporation, which used the project to produce hydroelectric power for a 45-acre commercial office complex (originally called Maynard Mill, now called Clock Tower Place). The office complex, of which the project is a part, was purchased by Franklin Lifecare Corporation in January 1995, and subsequently by Wellesley Rosewood in January 1998.<sup>3</sup>

4. PURPA section 405(d) requires an exemptee to comply with mandatory terms and conditions submitted by the relevant state and federal fish and wildlife agencies, and standard article 2 of the exemption issued for the project reflects this requirement.<sup>4</sup> Conditions filed by the U.S. Fish and Wildlife Service (FWS) included the requirement that the exemptee provide an instantaneous flow release into the Assabet River from the project dam of the lesser of 39 cubic feet per second (cfs) or inflow to the project area, for the purpose of maintaining downstream aquatic habitat.

5. The project has not been operated since the early 1990s and, when Wellesley Rosewood acquired the project in 1998, it made no effort to rehabilitate and operate it. Furthermore, because of the deteriorated condition of the facilities, it would have been difficult, if not impossible, to comply consistently with the exemption's condition that 39 cfs or inflow be maintained in the Assabet River.

6. On March 8, 2002, as a result of Commission staff efforts to get Wellesley Rosewood to commit to some action (whether rehabilitation and operation, transfer, or

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<sup>3</sup> The transfer of an exemption from licensing requires notification to, but not approval of the Commission. *See* 18 C.F.R. § 4.106(i) (2006).

<sup>4</sup> Exemptions are subject to standard conditions that are set forth in the Commission's regulations. The standard conditions included for this project exemption were set forth at 18 C.F.R. § 4.106 (1983).

surrender), Wellesley Rosewood filed a request to surrender the exemption, stating that it wished neither to generate power nor to sell the project and its exemption to anyone else.

7. On July 13, 2004, the Commission issued an order accepting the surrender, subject to a number of conditions, including requirements that, within nine months from the date the surrender order was issued (that is, by April 11, 2005), Wellesley Rosewood, in consultation with resource agencies, prepare and file for Commission approval: (1) a plan for the installation of a fixed weir at the project's gatehouse; and (2) a site-specific erosion and sedimentation control plan for construction of the fixed weir.<sup>5</sup>

8. As of the April 11, 2005 deadline, Wellesley Rosewood had not even initiated required consultation with resource agencies. Subsequently, Commission staff issued four separate letters to inform Wellesley Rosewood that it was out of compliance with the surrender order and reiterate what needed to be done to comply.<sup>6</sup> It was not until July 7, 2006 -- over a year after the compliance deadline -- that Wellesley Rosewood finally filed the required plans. However, instead of the fixed weir required by the surrender order, it proposed installation of new gates at the same location, and an erosion and sedimentation control plan for installation of the new gates. In addition, although the new gates can be operated in the same manner as a fixed weir, Wellesley Rosewood also proposed a flow management plan which would make continued project operation possible.<sup>7</sup>

9. On August 28, 2006, Wellesley Rosewood filed this motion requesting that the Commission rescind the surrender order and affirm that Wellesley Rosewood may: (1) construct the new gates after the plans filed July 7, 2006, are approved by the Commission; (2) file documentation of the completed actions with the Commission; and (3) proceed with the filing of an application to amend the exemption.

10. On August 31, 2006, Commission staff issued an order that modified and approved the implementation plan and approved the erosion and sediment control plan that had been filed to comply with the surrender order. The flow management plan was not adopted since it proposed operations that would require ongoing oversight after surrender becomes effective, a period when the Commission will no longer have jurisdiction over the project.

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<sup>5</sup> See ordering paragraphs (B) and (C), 108 FERC at 61,264.

<sup>6</sup> See letters dated April 15 and May 4, 2005, and January 11 and March 22, 2006.

<sup>7</sup> A fixed weir would not have allowed for hydropower generation at the site.

## **Discussion**

11. In support of its motion to rescind the surrender order, Wellesley Rosewood argues only that: (1) surrender of the exemption is not final because it will not become effective until the exemptee has filed documentation of required construction and the Commission has issued a notice or order stating that the approved actions have been satisfactorily completed;<sup>8</sup> and (2) it is taking steps towards amendment of its exemption pursuant to sections 4.104 and 4.107 of the Commission's regulations.<sup>9</sup>

12. First, while the effective date of a surrender is conditioned upon completion of certain actions required by the order accepting surrender, the order itself becomes final when it is issued, unless a request for rehearing is filed within 30 days.<sup>10</sup> Effectiveness of the surrender is made dependent upon a further Commission notice or order only to retain the Commission's jurisdiction to ensure that the actions required by the surrender order have been satisfactorily completed. In this instance, no rehearing request was filed, the order became final, and it has been final for over two years. The recently filed request for rescission is, in effect, a request for rehearing filed long after the statutory deadline has passed.

13. Furthermore, we do not believe that the extraordinary measure of reinstating the exemption is in the public interest. The project has not been operated for approximately 14 years. During the eight years that Wellesley Rosewood has been the exemptee, it has done nothing to rehabilitate and operate the project. Once the surrender order was issued, Wellesley Rosewood delayed compliance with the requirement to file plans to implement the surrender until more than a year after the deadline.

14. Furthermore, although Wellesley Rosewood maintains it is prepared to amend the exemption, it has not completed the kind of preparation (pre-filing consultation with agencies, preparation of an Exhibit E, etc.) required for such a submission – nor, apparently, does it intend to do so. Notably, it has not consulted with agencies as required by section 4.104 of the Commission's regulations, 18 C.F.R. § 4.104 (2006); nor does it plan to prepare an Exhibit E, as required by section 4.107 of the Commission's regulations, 18 C.F.R. § 4.107(e) (2006). Instead, Wellesley Rosewood argues that it should not have to provide an Exhibit E -- that its proposed changes to the project are

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<sup>8</sup> See ordering paragraph (F), 108 FERC at 61, 265.

<sup>9</sup> 18 C.F.R. §§ 4.104 and 4.107 (2006).

<sup>10</sup> See section 313(a) of the Federal Power Act, 16 U.S.C. § 825(1).

minor and, therefore, that the environmental assessment developed in the surrender proceeding should suffice for its proposed amendment. However, Wellesley Rosewood is proposing a larger intake structure, different turbines and generating equipment, a new draft tube, relined penstocks, alterations to the powerhouse, and possible alterations to the tailrace. While the current intake structure allows only 70 cfs to flow through the project's system, Wellesley Rosewood is proposing to modify the structure to permit use of an installed capacity of 200 cfs. Finally, the operating range of the turbine approved under the original exemption was only 64-128 cfs, but the amendment would allow 200 cfs to be diverted to the project for power generation. There is no doubt that this proposal would constitute a material change to the existing project.

15. At this time, finally, the surrender process is well underway. When, in accordance with the surrender order, Wellesley Rosewood completes that process, the site will once again be open to development. At that time, any entity, including Wellesley Rosewood, will be free, in accordance with the FPA and the Commission's regulations, to apply for a license or an exemption for the site.

The Commission orders:

(A) The motion for rescission of the order issued July 13, 2004, in this proceeding is denied.

(B) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in section 313(a) of the FPA and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2006).

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.