

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Power Authority of the State of New York

Project No. 2000-051

Massachusetts Municipal Wholesale Electric
Company

v.

Docket No. EL03-224-001

Power Authority of the State of New York

ORDER DENYING REHEARING
AND DENYING LATE MOTION TO INTERVENE

(Issued October 28, 2004)

1. In this order, the Commission denies the request of the Massachusetts Municipal Wholesale Electric Company (MMWEC) for rehearing of the June 4, 2004 Order in this proceeding.¹ In that order, we deleted from the new license issued to the Power Authority of the State of New York (NYPA) for the St. Lawrence Project No. 2000² an article which would have required NYPA to allocate a portion of the project power to the state of Massachusetts. This order is in the public interest because it clarifies the Commission's practice with respect to the disposition of power from licensed projects.

I. Background

2. The new license for the 912-megawatt (MW) St. Lawrence Project was issued to NYPA on October 23, 2003. Article 420 required NYPA to allocate project power for sale to Massachusetts, as it was required to do under the original license, and dismissed a complaint by MMWEC seeking other relief related to allocation of project power. Timely requests for rehearing on the power allocation issues were filed by NYPA and MMWEC.

¹ 107 FERC ¶ 61,259.

² Article 420, 105 FERC at 61,604-05.

3. In the license order, we first determined that the Commission has authority under the public interest and comprehensive development standards of Federal Power Act (FPA) sections 4(e) and 10(a)(1)³ to require a licensee to allocate a portion of project power to another entity.⁴ It has, however, been the practice of this Commission and the predecessor Federal Power Commission (FPC) since the issuance of licenses began in 1920 to leave the disposition of project power in the hands of the licensee, which is responsible for the construction, operation, and maintenance of the project, unless Congress has made a legislative directive to the contrary.

4. Our decision to require an allocation to Massachusetts was based on our understanding of Congressional intent with respect to the St. Lawrence Project. The record includes many indicators of New York's commitment, prior to issuance of the original license, to share a portion of the project power with neighboring states.⁵ While we found that the cumulative weight of these expressions was insufficient to support a conclusion that Congress intended for the Commission to require a regional allocation, we did find a such an intent in Senate Joint Resolution 104, which addressed a proposed Executive Agreement between the United States and Canada regarding development of the St. Lawrence Seaway and the hydroelectric project.⁶

5. In the June 4 Order on rehearing, we noted that Joint Resolution 104 was in fact never approved by either house of Congress, but was merely a committee recommendation. We concluded that a committee recommendation and the other expressions of support for a regional power allocation are not a sufficient basis to conclude that Congress intended for the Commission to require a regional allocation. We therefore deleted Article 420.⁷ MMWEC timely requested rehearing.

6. On July 13, 2004, the Massachusetts Department of Telecommunications and Energy (MADTE) filed a late motion to intervene in the complaint proceeding in Docket No. EL03-224-001. MADTE subsequently refiled its motion to intervene, together with

³ 16 U.S.C. 797(e) and 803(a)(1).

⁴ 105 FERC at 61,579.

⁵ The expressions of support for a regional power allocation are found in speeches, congressional committee reports, testimony, and the like. *See* 105 FERC at 61,580 and n. 153.

⁶ 105 FERC at 61,579-80.

⁷ 107 FERC at 62,143-145 and ordering paragraph (B) at 62,149.

a request that it be amended to include intervention in the license proceeding. NYPA timely filed an answer opposing MADTE's motion for late intervention.

II. Discussion

A. MADTE Motion to Intervene

7. MADTE is designated by Massachusetts law as the bargaining agent for Massachusetts with respect to purchases from NYPA,⁸ and states that it has entered into an agreement with MMWEC to administer, coordinate, and monitor Massachusetts' share of any power purchased from NYPA.⁹ MADTE states that it wishes to intervene in order to preserve its right to appeal if the Commission does not restore an allocation of St. Lawrence power to Massachusetts, and to respond to any challenges by NYPA to the status of MMWEC as agent for Massachusetts.

8. NYPA opposes late intervention by MADTE on the grounds that MADTE has not shown good cause why the time limitation on interventions should be waived or otherwise addressed the requirements for a late motion to intervene, and that it would be improper to grant late intervention to MADTE solely for the purpose of allowing it to seek judicial review of an issue raised for the first time in its motion.

9. In determining whether to grant late intervention, the Commission may consider such factors as whether the movant had good cause for filing late, whether the movant's interest is adequately represented by other parties to the proceeding, and whether granting the intervention might result in disruption to the proceeding or prejudice other parties. *See* 18 C.F.R. § 385.214(d) (2004). When intervention is sought after issuance of a dispositive order, as is the case here, the prejudice to other parties and the burden on the Commission of granting late intervention are substantial, and a movant bears a higher burden to show good cause to justify favorable action on its motion. *See International Paper Company and Turner Falls Hydro LLC*, 99 FERC ¶ 61,066 (2002).

10. While MADTE does explain why it is interested in the proceeding, it does not assert good cause for moving to intervene at this extremely late juncture, does not explain why its interests cannot be adequately represented by MMWEC, which appears to have identical concerns, and does not deal with the prejudice to other parties and the burden on the Commission of granting late intervention. We therefore deny MADTE's late motion to intervene

⁸ *See* 1955 Mass. Acts. C. 604, §1.

⁹ MADTE Motion at 1.

B. Regional Power Allocation

11. MMWEC first contends that the absence of legislation requiring a regional power allocation and the failure of Congress to pass Joint Resolution 104 are not a sufficient basis to conclude that Congress did not intend for the Commission to require a regional power allocation. On the contrary, it states, Joint Resolution 104 was never passed because it was determined that the United States and Canada could proceed with the international project under the auspices of a joint application to the International Joint Commission (IJC)¹⁰ and existing laws of each country for activities on their respective sides of the border.¹¹ MMWEC goes on to assert that because Congress' failure to pass Joint Resolution 104 was not pivotal to the FPC's thinking on the power allocation issue, it should not be pivotal today. Rather, it avers, the committee recommendation should be regarded as but one of many manifestations of congressional intent.¹²

12. The FPC did find that a project-specific treaty was not necessary to proceed with the international project,¹³ but that has no bearing on the question of whether the power from the generation facilities located in the United States and licensed under the Federal Power Act should be subject to a regional allocation requirement. Absent a Congressional directive for a power allocation, we must apply the public interest and comprehensive development standards of FPA sections 4(e) and 10(a). We turn now to MMWEC's arguments in that regard.

13. MMWEC first challenges the existence of a Commission policy against allocating project power in the absence of legislation on the basis that no such policy has been articulated in a Commission order or policy statement.¹⁴ The absence of a prior explicit

¹⁰ The IJC was created by the Boundary Waters Treaty of 1909, which requires any hydroelectric project with facilities, lands, or waters located on both sides of the international boundary to be authorized by the IJC.

¹¹ *Citing* 12 FPC 172, at 174-75 (1953).

¹² Rehearing request at 10-15.

¹³ *See* 12 FPC at 175-6.

¹⁴ Rehearing request at 26-27.

policy statement does not mean that a policy does not exist.¹⁵ Our actions in this proceeding with regard to power allocation are the routine application of the same practice this Commission and the FPC have followed for over 80 years. During this time over 1,200 licenses have been issued, yet MMWEC is able to cite only two instances in which a licensee was directed to allocate project power in the absence of legislation.

14. The first instance is the original St. Lawrence Project license order. The second is an order issued over 40 years ago in which the FPC, in the context of deciding between competing license applications for the same site, required the prevailing utility applicant to allocate project power as needed up to a specified amount to the competing utility applicant in whose service area the project was located.¹⁶ The FPC found it was in the public interest to do so because the competing applicant would not otherwise have access to low-cost power.¹⁷ As discussed below, the context in which we decide this case is quite different from either of those cases.

15. MMWEC next asserts that this Commission has departed from its practice in recent proceedings. This is simply incorrect. MMWEC first cites *Yakama Nation v. P.U.D. No. 2 of Grant County*.¹⁸ There, we required the removal of “no compete” clauses from power sales agreements between the licensee and prospective power purchasers in Washington and other states. That project, however, is licensed pursuant to project-specific legislation that requires the licensee to offer a “reasonable portion” of the project power for sale in neighboring states, and specifically authorizes the Commission

¹⁵ MMWEC, citing *Cooley v. FERC*, 843 F.2d 1464 (D.C. Cir. 1988), appears to suggest that an agency policy cannot be established without an explicit articulation of the policy. Rehearing request at 27. There, however, in the context of deciding whether the Commission has authority to issue a license to a volunteer applicant for a project that is not required to be licensed, the court merely stated that prior Commission orders denying license applications for certain projects did not squarely address that issue. *See* 843 F.2d at 1470.

¹⁶ *City of Seattle and P.U.D. No. 1 of Pend Oreille County, WA*, 26 FPC 463, 464 (1961), *aff'd sub nom. P.U.D. No. 1 of Pend Oreille County v. FPC*, 308 F.2d 318 (D.C. Cir. 1962).

¹⁷ 26 FPC at 464.

¹⁸ 101 FERC ¶61,197 (2002), *reh'g denied*, 103 FERC ¶61,075 (2003), *petitions for review docketed sub nom. Yakama Nation v. FERC*, No. 03-71085 (9th Cir. April 28, 2003). This case concerns the Priest Rapids Project No. 2114, licensed to P.U.D. No. 2 of Grant County, Washington.

to establish the allocation and the rates.¹⁹ The order does not require any specific allocation of power and, unlike MMWEC's demands for cost-based rates, requires that the allocation be made on market-pricing principles.

16. In *Western Massachusetts Electric Company*²⁰ the Commission merely required the four investor-owned utility licensees for a project to make any project capacity in excess of their system needs available for sale on a non-discriminatory basis. Nothing in the order requires the licensees to allocate any of the surplus power to any particular entity.

17. MMWEC continues that if even there is a policy in this regard, it cannot be blindly applied. Rather, where a non-licensee requests an allocation of project power, the public interest requires us to consider whether the circumstances of the case require us to depart from the policy. We agree, subject to the observation that a non-licensee requesting a departure from our long-standing practice bears the burden of going forward with supporting evidence.

18. MMWEC contends that equity and the comprehensive development standard require that Massachusetts receive cost-based project power. In this connection, it states that: (1) the FPC concluded that the project's economic benefits should be shared regionally and the record contains no basis on which to "reverse" that determination; (2) New York promised a regional allocation before the project was originally licensed; and (3) St. Lawrence Project power continues to be some of the lowest-cost power in the northeast.²¹

¹⁹ See *Yakama*, 101 FERC at 61,793, citing P.L. 83-544, 68 Stat. 573.

²⁰ 39 FPC 723, 739 (1968), modified, 40 FPC 296, 300-301 (1968), *aff'd sub nom. Municipal Electric Association of Massachusetts v. FPC*, 414 F.2d 1206 (D. C. Cir. 1969).

²¹ Rehearing request at 33-39. MMWEC also complains that market pricing of St. Lawrence power would result in "profits [for NYPA] that cannot be squared with a 'major purpose [of the FPA]. . . to protect power consumers against excessive prices.'" Rehearing request at 36. Nothing in the FPA or traditional cost-based ratemaking suggests that wholesale power sales should be made on a non-profit basis. MMWEC's assertion also conflicts with its assertion that NYPA intends to promote economic development in New York by selling power formerly allocated to other states to New York customers at low rates. Rehearing request at 37. In any event, as discussed herein, we believe competitive markets are the best means of ensuring against excessive prices.

19. A relicense proceeding requires a new application of the comprehensive development/public interest standard in light of today's facts.²² To reach a conclusion different than the FPC's decision of 50 years ago would therefore not constitute a "reversal" of its decision. The heart of the public interest determination with respect to this issue is whether there is any longer a reason to treat the disposition of power from this project differently than from any other project. We think not.

20. The original license order was issued in the context of an electric industry with a dramatically different structure than exists today. At that time, the industry was characterized by mostly self-sufficient, vertically-integrated electric utilities, in which generation, transmission, and distribution facilities were owned by a single entity and sold as part of a bundled service to wholesale and retail customers. Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales to municipal, cooperative, and other investor-owned utilities connected to each utility's transmission system. Each system covered limited service areas. This structure of separate systems arose naturally due primarily to the cost and technological limitations on the distance over which electricity could be transmitted.

21. Today, the wholesale electric industry in the Northeast in general and New England in particular is characterized by tightly-integrated, multi-party regional transmission systems, such as Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs), which we require to provide non-discriminatory transmission access. This is exemplified by ISO-New England and the New England Power Pool (which are in negotiations to become an RTO), the New York ISO, and the Pennsylvania-New Jersey-Maryland RTO. This enables wholesale customers to buy power in competitive markets from a variety of sellers, which best ensures that power is available on a non-discriminatory basis at the lowest possible cost. We further note that the lack of natural gas pipeline capacity into New England that existed when the original

²² *Confederated Tribes and Bands of the Yakama Indian Nation v. FERC*, 746 F.2d 466, 470-471 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

license was issued and which limited regional options for low-cost power has greatly diminished, and most of the increased demand for power is being served by merchant generators from gas-fired power plants.²³

22. MMWEC's equitable argument boils down to the proposition that NYPA should be bound for relicensing purposes by the assurances it gave of regional power sharing when the international project was under consideration because the project continues to be a source of low-cost power in the region. As explained above, this is incompatible with the fresh look at the public interest required during relicensing and our policy of relying on competitive markets to allocate power supplies.

23. MMWEC also argues that a regional allocation is needed to prevent NYPA from discriminating against Massachusetts.²⁴ In this regard, MMWEC cites various Commission orders dealing with, among other things, NYPA's compliance with the preference provisions of the Niagara Redevelopment Act (NRA)²⁵ and NYPA's related license for the Niagara Project No. 2216.²⁶ Those issues, however, are not relevant to whether the public interest requires a regional allocation of St. Lawrence power.

²³ Since 1980, the amount of installed electric generation capacity in NEPOOL has increased from about 22,000 MW to about 33,000 MW. The great majority of this increase is new, gas-fired generation. Platt's PowerDat, September 2004. There are also pending before the Commission several applications for certification of additional pipeline capacity into the region and of liquefied natural gas terminals.

The relative significance of the St. Lawrence power allocation has also diminished over the years. As we noted in the license order, electricity consumption in Massachusetts has increased 318 percent since 1960. 105 FERC at 61,583, n. 179. Also, MMWEC's web site states that it has generating plant ownership interests or power purchase agreements exceeding 715 MW. www.mmwec.org/project/html. The 4.8 MW allocation in the license order is only about 0.67 percent of this amount.

²⁴ Rehearing request at 38-39.

²⁵ 16 U.S.C. 836 *et seq.*

²⁶ *Vermont Pub. Serv. Board v. Power Auth. of New York*, 55 FPC 1109 (1976) (determining eligibility of neighboring state entities for power and determining what constitutes "project power" under the NRA); Opinion No. 229 (requiring NYPA to sell ten percent of Niagara Project power and energy to preference customers in neighboring states); and Opinion No. 329, 48 FERC ¶ 61,124 (1989) (finding that NYPA sold preference power to entities that are not "public bodies" in violation of the NRA).

24. MMWEC also suggests that it is unduly discriminatory for NYPA to sell St. Lawrence power to the other neighboring states, but not to Massachusetts, or to sell power to in-state, entities but not to Massachusetts. MMWEC cites no statutory provision or Commission precedent for the proposition that a licensee that sells a portion of project power to one entity is obligated to offer project power to any other entity. Instead, it appears to rest its allegation of discrimination on its contention that a regional allocation is required by Congressional intent, NYPA's promises of 50 years ago, and the continuing efficacy of the rationale for the original license order. We have already rejected those arguments. In any event, NYPA offered to sell power to Massachusetts on the same terms and conditions that it offered to the other neighboring states, but MMWEC declined to accept those terms.

25. MMWEC also asserts that NYPA's opposition to a continued power allocation itself constitutes undue discrimination.²⁷ We do not agree. NYPA has the same right as any other party to a Commission proceeding to assert its interests.

26. Finally, we need not address MMWEC's accusations that NYPA's arguments on rehearing with respect to the applicability of FPA section 20 and the Commission's ratemaking authority to this proceeding constitute "bad faith" and "unreasonable resistance to Commission jurisdiction."²⁸ Our denial of MMWEC's request for rehearing is based on the considerations set forth above, not NYPA's arguments on rehearing in this regard.

27. In sum, it is the long-term, consistent practice of this Commission and the FPC to allow licensees to determine how best to dispose of the power from licensed projects in the absence of a legislative directive to do otherwise. Exceptions to this practice are exceedingly rare, and the last one was over forty years ago. Our practice is entirely consistent with our policy, developed in the context of exercising our regulatory authority under FPA Part II, to rely on market forces wherever possible to ensure that all customers have access to the electric power at the lowest cost possible. MMWEC has not shown that the public interest requires us to single out one licensee for disparate treatment with respect to the disposition of project power for the benefit any particular purchaser or group of purchasers. We will therefore deny rehearing.

²⁷ Rehearing request at 51-53.

²⁸ *Id.* at 40-51.

The Commission orders:

(A) The late motion to intervene, filed by the Massachusetts Department of Telecommunications and Energy on July 13, 2004, is denied.

(B) The request for rehearing of the Massachusetts Municipal Wholesale Electric Company is denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.