

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Holyoke Gas and Electric Department

Project No. 2004-160

ORDER ON REHEARING AND DISMISSING APPLICATION

(Issued November 23, 2004)

1. The City of Holyoke Gas and Electric Department (HG&E) has filed an application for an amendment of Article 418 of the license for its Holyoke Hydroelectric Project No. 2004, or, in the alternative, a request for rehearing of the March 31, 2004, order by Commission staff modifying and approving a Comprehensive Recreation and Land Management Plan (Comprehensive Plan) for the project.¹ For the reasons discussed below, we dismiss the amendment application and grant rehearing, in part. In addition, we grant HG&E's request for clarification of Article 418. We also dismiss as moot motions to intervene. This order is in the public interest because it clarifies HG&E's obligations under its license.

Background

2. The 43.8-megawatt Holyoke Project is located on the Connecticut River in Hamden, Hampshire, and Franklin Counties, Massachusetts. The project, which was originally licensed in 1949, consists of a 30-foot-high, 985-foot-long dam that impounds a 2, 290-acre reservoir; a three-level canal system extending through the lower areas of the City of Holyoke and providing water for industrial and hydropower generation; six hydroelectric generating stations; and fish passage facilities at five locations.

¹ 106 FERC ¶ 62,243.

3. On August 20, 1999, the Commission issued a new license for the Holyoke Project to the then-licensee, Holyoke Water Power Company.² One of the issues during the proceeding was the extent to which Holyoke Water Power was to provide for conservation easements on, or restricted use of, several parcels of land, owned by its parent, along the shore of the project impoundment, including two tracts known as the Bachelor Brook and Stony Brook parcels.³

4. Article 418 of the project license required the licensee to file, for Commission approval and after consultation with a lengthy list of specified entities, a Comprehensive Plan, including a recreation plan, a land management plan, and a buffer zone management plan.⁴ The article provides that the land management plan

shall include, but not be limited to, the following: (1) conservation easements on, or restricted use of, the Bachelor Brook/Stony Brook natural area, Log Pond Cove, Rainbow Beach, Cove Island, Connecticut River Water Trail sites in Sunderland, Red Rock complex, Hadley Cove and Sandy Beach area, and Hockonum Flats”

5. In the licensing order, the Commission stated that the licensee would “be permitted to include in the required recreation and land management plan specific proposals for which portions of its Bachelor Brook and Stony Brook parcels should be included within the project boundary, subject to appropriate restrictions.”⁵

6. On June 16, 2000, Holyoke Water Power submitted a Comprehensive Plan. The company proposed to place conservation restrictions on certain lands, including portions

² See 88 FERC ¶ 61,186. A number of parties filed requests for rehearing of the 1999 license order. Those requests are still pending. On March 12, 2004, as supplemented on April 6, 2004, HG&E and the other parties that had requested rehearing of the license order filed a settlement agreement that would resolve all remaining issues. The settlement is pending before the Commission, awaiting the completion of Endangered Species Act consultation with the National Marine Fisheries Service. The instant matter is distinct from the licensing proceeding.

³ These easements, called “conservation restrictions,” are based on a Massachusetts procedure requiring review and approval by the Commonwealth.

⁴ *Id.* at 61,635-36.

⁵ *Id.* at 61,618.

of the Bachelor Brook and Stony parcels, to “maintain access for the public to those lands, and manage these land under cooperative agreements with resource agencies.”⁶ The company did not propose placing any of the land within the project boundary.

7. On July 17, 2001, Holyoke Water Power and HG&E, which had filed a competing license application that the Commission had denied when it issued a new license to Holyoke Water Power, filed a joint application asking the Commission to approve the transfer of the license to HG&E.

8. The Commission approved the transfer of the license on September 20, 2001.⁷ We noted that the U.S. Department of the Interior (Interior), the Commonwealth of Massachusetts, and the Town of South Hadley had requested either that the transfer be conditioned on protection in perpetuity of the Bachelor Brook and Stony Brook properties, or that the Commission issue a separate order requiring such protection. The Commission responded that

[t]he Comprehensive Recreation and Land Management Plan, . . . filed by [Holyoke Water Power] in compliance with Article 418 of the new license, is pending before the Commission. . . . The amount of acreage of the Bachelor Brook and Stony Brook properties to be included for protection under the license . . . are at issue in that proceeding. A transfer of license does not alter a project’s environmental impacts, or the determination of what mitigation measures are warranted. This is not the proper forum to address the scope of protection for the Bachelor Brook and Stony Brook properties . . . However, standard license Article 5 imposes an ongoing obligation that applies to changes in the scope of the project property. The transferee will be required to obtain sufficient interests in land that are or may become part of the project.[⁸]

9. On February 1, 2002, HG&E filed a request that the Commission stop processing the Comprehensive Plan. The company stated that the plan had generated significant

⁶ See Holyoke Water Power June 16, 2000, filing at 20-22.

⁷ See 96 FERC ¶ 62,283.

⁸ 96 FERC at 64,564-65 (footnotes omitted). Footnote 7 of the order reiterated that the new license provided that the licensee should be permitted to propose the portions of the Bachelor Brook and Stony Brook parcels that should be included within the project boundary.

opposition, and that it intended to consult with interested entities in an effort to reach consensus and then to file a new or revised plan.

10. On May 1, 2003, as supplemented on July 13, 2004, HG&E filed a new Comprehensive Plan. With respect to Bachelor Brook and Stony Brook, the company asserted that 101 acres in these parcels have currently been made the subject of a conservation restriction.⁹ HG&E asserted it had tried and failed to acquire the remaining part of the acreage from its owner, Northeast Utilities (Holyoke Water Power's parent), and that, because this acreage was outside of the project boundary, the Commission lacks jurisdiction over it. HG&E stated that it "can only look forward to protect the areas that are included in the project boundary and that are owned by HG&E."¹⁰

11. The Commission issued public notice of the plan, as a license amendment, on June 12, 2003, setting July 14, 2003, as the deadline for filing comments, protests, and motions to intervene. Two entities, Camp Laurier and Interior, filed motions to intervene and comments, both dealing with the issue of the grant of annual permits for camps on Cove Island, a 51.8-acre peninsula located within the project boundary. No comments were filed with respect to the Bachelor Brook and Stony Brook areas.

12. On March 31, 2004, Commission staff issued an order modifying and approving the Comprehensive Plan. Concerning the Bachelor Brook and Stony Brook parcels, staff stated:

While we recognize that the license transfer to HG&E did not include a provision to place a [conservation restriction] on the entire 270-acre parcel of Bachelor/Stony Brooks, nor to include it in the project boundary, no new information has been raised to indicate that a conservation restriction on this land is not needed to provide sufficient recreational opportunities to the public in the Holyoke area. Therefore, in order to ensure that the original Article 418 license conditions are satisfied . . . we will require the licensee

⁹ In its draft Conservation Plan, Holyoke Water Power had placed only 69 acres under a restriction. HG&E increased this to 101 acres. *See* 106 FERC at 64,480.

¹⁰ *See* HG&E's May 1, 2003, Comprehensive Plan at 65-68. HG&E also noted that the conversation restrictions are currently between itself and Holyoke Water Power, and that Massachusetts requires that one of parties designated on a conservation restriction be a state entity or a non-profit corporation. Thus, Holyoke envisions ultimately designating the Massachusetts Department of Environmental Management and the Town of South Hadley as co-holders of the restriction. *Id.* at 68.

to obtain a [conservation restriction] on all 270 acres of Bachelor/Stony Brooks within 1 year of issuance of this order. If the licensee is not able to obtain a [conservation restriction] on all 270 acres, the licensee should file an application with the Commission to revise Article 418 to change this requirement. Any such application should provide justification for why a [conservation restriction] on these lands is not necessary to meet the recreational needs now and in the future at the Holyoke Project.

13. On April 30, 2004, HG&E filed an application to amend Article 418, or, in the alternative, a timely request for rehearing of the March 31 Order. HG&E asks the Commission to amend Article 418 to confirm that a conservation restriction on 101 acres of the Bachelor Brook/Stony Brook area, as proposed in the Comprehensive Plan, is adequate to meet the requirements of the project license, and that the Commission approve the Comprehensive Plan as filed. In the alternative, HG&E requests rehearing of the March 31 Order to the extent that it requires the company to obtain a conservation restriction of all 270 acres of the Bachelor Brook/Stony Brook area.

14. On June 1, 2004, South Hadley filed a motion to intervene and comments, urging the Commission to require that all 270 acres be protected. On June 4, 2004, the Connecticut River Watershed Council filed similar comments. On June 30, 2004, Massachusetts filed a motion to intervene and comments that echoed those of South Hadley.

Discussion

15. Given that the pleadings in these proceedings evince some confusion as to the scope of our authority and the need to include certain lands within a project boundary, we will briefly review these matters.

16. Part I of the Federal Power Act (FPA) directs the Commission, when issuing a license for a hydroelectric project, to require the licensee to undertake appropriate measures to promote both developmental and non-developmental uses of a waterway, including fish, wildlife, and recreation.¹¹ These requirements, as set forth in the project license, delineate the “project purposes.” Project boundaries are used to designate the geographic extent of the lands, waters, works, and facilities that comprise the licensed

¹¹ See FPA section 10(a)(1), 16 U.S.C. § 803(a)(1), and section 4(e), 16 U.S.C. § 797(e).

project and for which the licensee must hold the rights necessary to carry out the project purposes.¹²

17. Standard license Article 5 requires the licensee to acquire and retain all interests in non-federal lands and other property necessary to carry out project purposes.¹³ The licensee may obtain these property interests by contract or, if necessary, by means of federal eminent domain pursuant to FPA section 21.¹⁴ A licensee's property interests can range from fee simple to perpetual or renewable leases, easements, and rights-of-way. If the Commission requires additional control in order to accomplish project purposes, or amends the license to expand or add a project purpose, it can direct the licensee to obtain any additional property rights, whether inside or outside of the project boundary, and amend the boundary as appropriate.¹⁵

18. In consequence, HG&E is incorrect when it characterizes lands which it does not currently own as being outside the Commission's jurisdiction. If specific lands are necessary for HG&E to fulfill project purposes,¹⁶ we can require that the company obtain them and include them within the project boundary.

19. As far back as the 1999 license order, the Commission made clear that it had not decided which portions of the Bachelor Brook and Stony Brook areas were to be made subject to conservation restrictions and placed within the project boundary. We required

¹² See *Wisconsin Public Service Company*, 104 FERC ¶ 61,295 at 62,088-90 (2003), for a detailed discussion of project boundaries and necessary interests in lands.

¹³ Standard Article 5 appears in what are called "L-Forms," which are published at 54 F.P.C. 1792-1928 (1975), and are incorporated into licenses by an ordering paragraph. See 18 C.F.R. §2.9 (2004).

¹⁴ 16 U.S.C. § 814. Thus, HG&E's assertion that it has been unable to acquire the Bachelor Brook and Stony Brook areas by contract with Northeast Utilities, Holyoke Water Power's parent and the owner of the lands, is not relevant.

¹⁵ See, e.g., *FPL Energy Maine Hydro LLC*, 88 FERC ¶ 61,116 at 61,274 (1999); *Pacificorp*, 80 FERC ¶ 61,330 at 62,113-14 (1997); *Great Northern Paper, Inc.*, 77 FERC ¶ 61,066 at 61,247-48 (1996); *Niagara Mohawk Power Corp.*, 77 FERC ¶ 61,306 at 62,391 (1996); *Georgia Power Co.*, 32 FERC ¶ 61,237 (1985).

¹⁶ See, e.g., *Pacific Gas and Electric Company*, 105 FERC ¶ 61,133 at P 26 (2003).

that the licensee, in its comprehensive plan, make a proposal on the subject. In its Comprehensive Plan, HG&E does not make clear exactly which lands will and will not be within the conservation restrictions and within the project boundary. Moreover, while it asserts without much detail in its request for rehearing that the lands are not necessary for project purposes, it did not provide in the Comprehensive Plan a sufficient discussion of the characteristics of these lands, how they might satisfy project purposes, and whether those purposes are met through other portions of the project.

20. At the same time, we are not prepared to conclude at this point that the Bachelor Brook and Stony Brook areas in their entirety should be included in the project. While, as noted by Massachusetts and South Hadley, Commission staff in the environmental impact statement for the Holyoke project relicensing, recommended that all of the lands be protected and included within the project boundary,¹⁷ the Commission instead allowed HG&E to make a proposal on the subject.

21. In consequence, we will establish a process for supplementing the record on this limited issue. We will direct HG&E to file with us, within 120 days of the date of issuance of this order, a proposal regarding what portion of the Bachelor Brook and Stony Creek areas it recommends be included in the project boundary. This filing must include a description of the Bachelor Brook and Stony Creek areas and a discussion of their potential use with respect to project purposes, and, to the extent that HG&E proposes not to acquire and include in the project boundary any portion of those lands, a description of how the project purposes that could be served by those lands are adequately met by other project lands.

22. After HG&E makes its filing, we will issue public notice and give interested persons the opportunity to respond to it, including by providing any evidence they wish to supply.¹⁸ We will then decide the matter. Following our determination, Holyoke will be required to obtain the necessary property rights to comply with our order, and to file revised Exhibit G maps that accurately reflect the project boundary.

¹⁷ See, e.g., EIS at 5-79 to 5-80.

¹⁸ The Commission provided an opportunity for interested persons to intervene in the Comprehensive Plan (the deadline for interventions being July 14, 2003), which included discussion of the Bachelor Brook and Stony Brook areas. While we will receive comments regarding the filing we are requiring of HG&E, we will require any entity seeking to intervene to provide justification for intervention at this extremely late stage of the proceeding. See 18 C.F.R. § 385.214(d) (2004). We generally do not look with favor upon such requests.

23. It is unnecessary for HG&E to file an amendment to limit its obligation to protect portions of the areas in question. The existing license already gives the company the ability to make a proposal to include as much or as little of that acreage as it deems appropriate. We therefore dismiss its April 30, 2004, pleading to the extent that it is an amendment application. In consequence, we likewise dismiss the responsive pleadings by Massachusetts, South Hadley, and the Connecticut River Watershed Council.¹⁹ These entities will have the opportunity to respond to HG&E's filing.

24. As a separate matter, HG&E asks the Commission to clarify that the portion of the March 31, 2004, Order discussing a 200-foot buffer zone to be maintained along the Connecticut River is applicable only to lands within the project boundary owned by the company. We so clarify, with two caveats: (1) the buffer zone requirement will apply not only to lands held in fee by HG&E now or in the future, but also to any other lands in which the company has a sufficient interest (such as through lease) to maintain the buffer zone, and (2) to the extent that there are any shoreline lands that were included in the project by the 1999 licensing order, but are not now owned by HG&E, HG&E must either acquire a sufficient interest in those lands to maintain the buffer zone or make an appropriate filing seeking Commission authorization to deviate from the terms of the license.

The Commission orders:

(A) The amendment application filed on April 30, 2004, by the City of Holyoke Gas and Electric Department is denied.

(B) The request for rehearing filed on April 30, 2004, by the City of Holyoke Gas and Electric Department is granted to the extent discussed herein and is otherwise denied.

(C) Within 120 days of the date of issuance of this order, the City of Holyoke Gas and Electric Department shall file, for Commission approval, a report indicating what portion of the Bachelor Brook and Stony Brook areas it recommends be subject to a conservation restriction and included within the project boundary, including a description and maps of the Bachelor Brook and Stony Creek areas and a discussion of their potential use with respect to project purposes, and, to the extent that HG&E proposes not to acquire and include in the project boundary any portion of those lands, a description of

¹⁹ To the extent that these filings respond to HG&E's request for rehearing, they are barred by our regulations, which preclude answers to requests for rehearing. *See* 18 C.F.R. § 385.213(a)(2). To the extent that they are motions to intervene in HG&E's putative amendment application, which we are dismissing, they are moot.

how the project purposes that could be served by those lands are adequately met by other project lands.

(D) The motions to intervene and comments filed by the Town of South Hadley on June 1, 2004, by the Connecticut River Watershed Council on June 4, 2004, and by the Commonwealth of Massachusetts on June 30, 2004, are dismissed, without prejudice.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.