

129 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PPL Maine, LLC, PPL Great Works, LLC, and Bangor Pacific Hydro Associates Docket No. HB131-08-1-000

ORDER DENYING MOTION FOR PARTIAL SUMMARY DISPOSITION AND
SETTING MATTER FOR HEARING

(Issued December 17, 2009)

1. By motion filed June 29, 2009, PPL Maine, LLC, PPL Great Works, LLC, and Bangor Pacific Hydro Associates (the PPL Parties), licensees of projects on the Penobscot River, seek a Commission determination that they are not liable to Great Lakes Hydro America (Great Lakes), licensee of upstream projects on that river, for headwater benefits payments prior to May 7, 1999. As explained below, we are not making such a finding here, but we are setting this matter for hearing before an administrative law judge to determine the intent of the previous licensees in respect to this liability issue.

Background

2. The circumstances underlying this motion were also the subject of a previous order, issued December 20, 2007.¹ While that order set out much of the background that applies to the present proceeding, we will restate it here as necessary to address the PPL Parties' motion.

3. Section 10(f) of the Federal Power Act (FPA)² provides that, whenever a licensee is directly benefited by the construction work of another licensee, a permittee, or the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The

¹ *Bangor Hydro-Electric Company*, 121 FERC ¶ 61,271 (2007).

² 16 U.S.C. § 803(f) (2006).

benefits received are in the form of increased energy production as a result of the regulation of river flows by the headwater projects. Section 11.15(a) of the Commission's regulations³ provides that the Commission will conduct an investigation to obtain information for establishing headwater benefits charges. However, section 11.14(a)(1) of the regulations⁴ allows owners of downstream and headwater projects to negotiate a settlement for headwater benefits charges and to file it for Commission approval in accordance with Rule 602 of the Commission's Rules of Practice and Procedure⁵ in lieu of an investigation conducted by the Commission. Moreover, section 11.15(a) of the regulations provides that, where the upstream storage project is a non-federal one, the Commission will investigate and determine charges for a downstream project only if the parties are unable to agree to a settlement and one of the parties requests the Commission to determine charges.

4. Prior to May 19, 2000, Great Northern Paper, Inc. (Great Northern), or affiliates owed or controlled by it, owned a system of several hydroelectric dams and reservoirs along the Penobscot River. These reservoirs stored water and generated power for Great Northern's paper mills. Downstream of the Great Northern projects were 12 hydropower projects, five of which were owned by Great Northern itself.⁶ Of the remaining seven, five were owned by Bangor Hydro-Electric Company (Bangor),⁷ one was owned in part by Bangor through its 50 percent ownership of Bangor Pacific Hydro Associates,⁸ and one was owned by Fort James Operating Company.⁹ All of these upstream and downstream projects have been licensed by the Commission.

5. On or about May 7, 1999, Great Northern and Bangor entered into a memorandum of understanding (MOU) in connection with the construction of a thermoelectric pulping facility and other improvements that GNP was considering within Bangor's service territory. Operation of this facility would have required Great Northern to have a larger

³ 18 C.F.R. § 11.15(a) (2009).

⁴ 18 C.F.R. § 11.14(a)(1) (2009).

⁵ 18 C.F.R. § 385.602 (2009). This rule governs the submission of settlement offers generally.

⁶ In their motion, the PPL Parties identify only four downstream projects owned by Great Northern.

⁷ These are the Medway Project No. 2666, Stillwater Project No. 2712, Orono Project No. 2710, Milford Project No. 2534, and Veazie Project No. 2403.

⁸ The West Enfield Project No. 2600.

⁹ The Great Works Project No. 2312.

interconnection with a Maine Electric Power Company (MEPCO) transmission line running through Bangor's service territory and an interconnection with a proposed Bangor transmission line. Under this MOU, Great Northern agreed to design and construct the interconnection facilities subject to Bangor's review and Bangor agreed to take certain measures to reduce Great Northern's costs relating to the facilities' construction and operation. Section 5(b) of the MOU provided, as pertinent:

Upon the execution of the Memorandum, GNP [Great Northern] relinquishes any right it may have to charge BHE [Bangor] any amounts for headwater benefits enjoyed by BHE prior to the effective date of this Memorandum due to the operation of GNP's hydro storage projects located on the West Branch of the Penobscot River.

Section 2 of the MOU provided that it would become effective as of the date of execution by the parties and would continue in effect for four years from the date of execution unless earlier modified or terminated by agreement of the parties.

6. Within weeks of the execution of the MOU, GNP cancelled its plans for the pulping facility and the interconnection. Less than three weeks after execution of the MOU, Bangor transferred its interests in its six downstream projects to PPL Global, which later transferred those interests to PPL Maine. In 2000, PPL Maine acquired the Great Works Project from Fort James Operating Company; ownership of that project is now held by PPL Great Works. On May 19, 2000, the Commission approved the transfer of the upstream Great Northern projects to GNE, LLC, now Great Lakes. In 2003, Great Northern filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. This petition was later converted to a Chapter 7 liquidation, and the U.S. Bankruptcy Court for the District of Maine appointed a trustee for Great Northern.

7. Following these developments, the interpretation and continuing applicability of section 5(b) of the MOU became an issue. On August 6, 2004, Bangor filed with the Commission an application in which it sought to have the MOU approved as a headwater benefits settlement agreement in which Great Northern released Bangor from all liability for headwater benefits received before May 7, 1999, without any preconditions, in exchange for Bangor's agreement to support Great Northern's interconnection. The trustee filed a motion to intervene in the proceeding in opposition to Bangor's application. It argued that any claims of Great Northern for headwater benefits payments were assets of the bankruptcy estate and that the MOU should not be approved as a settlement agreement because the undertakings set forth in the MOU, including the release of Bangor's headwater benefits liability, terminated shortly after Bangor and Great Northern executed the document.

8. Before any Commission action was taken on Bangor's application, the trustee initiated certain proceedings before the bankruptcy court that need not be discussed in detail here, except to note that, in June 2005, the bankruptcy judge, among other rulings,

declined to act on the trustee's request that he find the headwater benefits provision of the MOU to be void and of no effect. The judge stated that whether section 5(b) of the MOU had survived the subsequent developments could be addressed by the Commission if it chose to do so.¹⁰

9. On February 28, 2005, Great Lakes requested the Commission to commence an investigation to establish the headwater benefits charges due to the upstream Penobscot River projects from the downstream project owners, the PPL Parties. The PPL Parties responded by asking that any action on Bangor's offer of settlement be consolidated with Great Lakes' investigation request and by filing a motion for an initial determination limiting the scope of the investigation to the period after May 7, 1999. On May 24, 2005, the PPL Parties filed a motion for an initial determination that the scope of the investigation be limited to preclude claims against them for headwater benefits prior to their acquisition of the projects from Bangor, on the grounds that they had succeeded to Bangor's rights to the MOU's waiver of any of these earlier charges.

10. On September 19, 2007, Commission staff issued a letter order concluding that, because Bangor and Great Northern had transferred their interests in their respective projects well before Bangor filed the MOU as an offer of settlement, and because the Commission determines the rights and obligations of current, not former, licensees, it would not be appropriate to approve the MOU as a settlement agreement. Staff added that it intended to initiate a headwater benefits investigation in response to Great Lakes' request. In our December 20, 2007 Order, we denied Bangor's request for rehearing of staff's letter order, but we clarified that staff's disposition of Bangor's application did not address the merits or validity of the MOU and that the current licensees were not precluded from presenting arguments in the headwater benefits investigation proceeding about whether or not the MOU effected a waiver of headwater benefits charges incurred before the MOU was executed.¹¹

11. On February 15, 2008, staff issued a letter, addressed to Great Lakes and served on the downstream licensees, suggesting the following options in connection with Great Lakes' request for a headwater benefits investigation: a Commission-conducted study under contract with Oak Ridge National Laboratory (Oak Ridge), for which the upstream and downstream licensees would be required to provide the funds (estimated at \$300,000) in advance; a study conducted by a contractor selected by the upstream and downstream project owners; and a negotiated settlement among the project owners to be submitted for Commission approval. Staff requested Great Lakes to inform the Commission as to which option it and the downstream owners would prefer.

¹⁰ See *Bangor Hydro-Electric Company*, 121 FERC ¶ 61,271 at P 10-11 and 14 and n.17 for a more detailed discussion of these proceedings.

¹¹ *Id.* at P 29.

12. By letter filed May 5, 2008, Great Lakes informed the Commission that it had been in contact with the PPL Parties and would attempt to reach a negotiated settlement with them, but it noted that, while the PPL Parties were amenable to any of the options, they were amenable only as long as the headwater benefits in question would not relate to the period before they acquired ownership of the projects in 1999. Subsequently, by letter filed March 25, 2009, Great Lakes informed the Commission that it and the PPL Parties were unable to reach a settlement and requested that Commission staff initiate a headwater benefits study. Great Lakes requested that the Commission assess charges for headwater benefits received by the downstream projects for a period of 25 years prior to the date of the Commission's assessment of benefits.¹²

13. By letter of June 25, 2009, Commission staff notified Great Lakes and the PPL Parties that it was initiating a headwater benefits study and that representatives would be contacting them for the necessary data.¹³ Staff has subsequently received some of the data from the licensees, and its investigation is in progress.

The Motion and Responses

14. In their June 29, 2009 motion, the PPL Parties assert that the impediment to the negotiation of a settlement has been the claims for headwater benefits payments for the period before May 1999, when PPL Maine obtained most of its projects from Bangor. The PPL Parties reason that disposition of the motion will resolve the legal issue at the outset and simplify the proceeding so that it can be settled.

15. The PPL Parties set out two bases for their position that they are not liable for headwater benefits payments prior to May 7, 1999. They reiterate their previous position that Great Northern waived all right to the collection of headwater benefits payments for their projects prior to May 7, 1999, as of the execution of the MOU, that this release was not dependent on the actual construction of the interconnection facilities, and that the MOU contained no provision that the release would be nullified or rescinded upon the occurrence of any specific events. The PPL Parties contend that the headwater benefits waiver was the consideration given to Bangor in exchange for its agreement to cooperate in the construction and agreements for the interconnection facilities. They argue that,

¹² This request reflects the Commission's policy in *Louisville Gas & Electric Company*, 58 FERC ¶ 61,338 (1992), *order denying reh'g*, 59 FERC ¶ 61,231 (1992), which established a maximum 25-year period for the retroactive assessment of headwater benefits charges.

¹³ Staff's letter was issued under Docket No. HB131-04-1-000. To avoid future confusion, we wish to clarify that the correct docket number for the current headwater benefits investigation proceeding and all matters relating to it, such as the present one, is HB131-08-1-000.

when they purchased Bangor's interests, they succeeded to Bangor's rights in the projects, including the right to the waiver of headwater benefits, and Great Lakes, as the successor to Great Northern, is bound by Great Northern's waiver.¹⁴

16. In addition, the PPL Parties claim that, apart from section 5(b) of the MOU, Great Lakes should not be permitted retroactive headwater benefits because it and Great Northern failed to assert their rights to them in a timely manner. The PPL parties state that Great Northern knew since at least 1967, when it received the first of its storage project licenses, that headwater benefits claims could be asserted against downstream projects. If Great Northern had asserted its rights at any time prior to Bangor's 1999 conveyance of its interest to the PPL Parties, more detailed records would have been available as to the issues relating to headwater benefits, and there would have been no question of the PPL Parties being on notice as to the magnitude of the headwater benefits claims before they acquired the projects. Therefore, they argue, Great Lakes should be precluded from recovery under the equitable doctrine of laches, which bars a party from acting belatedly to assert long-dormant claims when such an assertion would prejudice the ability of the person against whom the claims are being asserted to defend its interests.¹⁵

17. On July 13 and 14, 2009, the trustee for the bankruptcy estate of Great Northern and Bangor, respectively, filed motions to intervene in the proceeding.¹⁶ The trustee states that Great Northern's claims for headwater benefits, including those incurred before May 7, 1999, are assets of the estate,¹⁷ that the MOU did not operate as a waiver of those claims because the undertakings in the MOU terminated shortly after it was executed, and that the doctrine of laches should not be applied. Bangor's motion to intervene was accompanied by an answer in support of the PPL Parties' motion.

¹⁴ The PPL Parties note that these points were made in comments filed by Bangor on July 21, 2005, in the proceeding to consider the MOU as a settlement agreement, and they request that we take administrative notice of those comments, which they include as Attachment B to their motion.

¹⁵ The PPL Parties state that, while the laches claim should apply to all seven projects, they are not asserting that the section 5(b) MOU waiver applies to the Great Works Project, which was acquired from Fort James Corporation and not from Bangor.

¹⁶ We construe these motions as ones to intervene in the headwater benefits investigation proceeding, to which the PPL Parties' motion for summary partial disposition itself relates.

¹⁷ The trustee adds that the claims for headwater benefits incurred before May 7, 1999, have been estimated at over \$6 million.

18. On August 3, 2009, Great Lakes and the trustee filed an answer to the PPL Parties' motion. They argue that, under Maine law, which the MOU provided would govern its terms, the MOU is not an enforceable waiver of Great Lakes' claims for pre-May 7, 1999 benefits. Great Lakes and the trustee assert that the MOU contained two conditions precedent to the incurring of any obligation under the MOU, neither of which was fulfilled: receipt by Great Northern of a letter from MEPCO accepting GNP's interconnection application and assurance from its counsel that Great Northern would not become subject to the Public Utility Holding Company Act of 1935.¹⁸ In addition, the MOU provided that the signatories would cooperate "to obtain on the most expedited basis reasonably possible . . . any governmental declarations" under the FPA required by the signatories. Great Lakes and the trustee claim that this condition was not met because the signatories failed to obtain the Commission's declaration that the release of Great Northern's headwater benefits claims was in the public interest. Great Lakes and the trustee contend that the MOU was meant to terminate in its entirety upon cancellation of plans for the pulping facility, that the MOU did not contain a severability clause that would have provided for the survival of the headwater benefits release upon termination of the rest of the MOU, and that Bangor provided no separate consideration to Great Northern in exchange for the release. Further, Great Lakes and the trustee argue that enforcement of the release provision of the MOU would ratify an unlawful preference under section 205 of the FPA,¹⁹ because Bangor, as a then-part owner of MEPCO, would have been prohibited from demanding such consideration for a connection under an open-access transmission tariff.

19. Great Lakes and the trustee claim that the PPL Parties have not met their burden of proof as to the doctrine of laches, namely a showing of a lack of due diligence on the part of the upstream project owners and a showing of prejudice to the PPL Parties if the claims were entertained. Great Lakes and the trustee state that Great Northern had notified Bangor of its headwater benefits claims at least as early as February 1999, that the PPL Parties were on notice by the terms of their licenses that they might be responsible for retroactive headwater benefits, and that the PPL Parties have failed to identify any relevant records the unavailability of which would be prejudicial to them in an assessment of headwater benefits for the period that Bangor was the licensee. Great Lakes and the trustee argue that the Commission should decline to apply the doctrine of laches, or, in the alternative, should set the matter for hearing to resolve any disputes regarding the due diligence and prejudice issues, but not until staff has issued its draft investigation study for comment.

20. Finally, Great Lakes and the trustee state that, in January 2009, licenses for two of the downstream projects, the Veazie Project No. 2403 and the Great Works Project

¹⁸ 15 U.S.C. § 79 *et seq.*

¹⁹ 16 U.S.C. § 824(d) (2006).

No. 2312, were transferred by PPL Maine and PPL Great Works, respectively, to the Penobscot River Preservation Trust,²⁰ calling into question the standing of the PPL Parties to pursue headwater benefits matters with regard to those projects.

21. The answer of Great Lakes and the trustee includes as attachments affidavits of the trustee and the trustee's attorney. These affidavits, in turn, are accompanied by attachments providing details about, among other things, attempts by Great Northern or its trustee to initiate an assessment of headwater benefits following the signing of the MOU and material relating to the interpretation of the MOU.

22. The answer of Great Lakes and the trustee prompted the filing of answers by both Bangor and the PPL Parties, on August 17 and 18, 2009, respectively, as well as requests for leave to file these answers. As both Bangor and the PPL Parties acknowledge, the Commission's regulations, at 18 C.F.R. § 385.213(a)(2) (2009), do not permit an answer to an answer unless otherwise ordered by the decisional authority. They argue that good cause exists to permit their answers here, in the interest of developing a more complete and accurate record and of responding to arguments and mischaracterizations of fact and law in the answer of Great Lakes and the trustee. In light of our disposition of the PPL Parties' motion for partial summary judgment, as discussed below, we do not find good cause to permit these answers.

Discussion

23. In our December 20, 2007 Order, we declined to treat the MOU as a settlement agreement because, at the time it was submitted to us for approval, it did not represent an agreement between the present upstream and downstream licensees. Nevertheless, Bangor, as the previous licensee of most of the downstream projects, and the trustee of Great Northern, as representing interests of the previous licensee of the upstream projects, have an interest in the disposition of the headwater benefits proceeding and of the PPL Parties' motion. The record indicates that, as part of the sale of the Great Northern projects, Great Lakes promised to remit to Great Northern any headwater benefits payments that it recovered for any period prior to January 31, 2002, and for six years thereafter, while Great Northern would bear the cost of recovering those benefits.²¹ Similarly, the record indicates that, in selling its projects to the PPL Parties, Bangor

²⁰ *PPL Maine, LLC and Penobscot River Restoration Trust*, 126 FERC ¶ 62,005 (2009) and *PPL Great Works, LLC and Penobscot River Restoration Trust*, 126 FERC ¶ 62,004 (2009).

²¹ *See, e.g.*, August 3, 2009 answer of Great Lakes and trustee at 17.

promised to indemnify them for any headwater benefits charges that might be assessed for the period before it sold the projects.²²

24. As previously noted, in our December 20, 2007 Order, we stated that, even if the MOU could not be treated as a settlement agreement, project owners could present arguments in the headwater benefits investigation proceeding about whether or not it effected a waiver of headwater benefits charges incurred before it was executed. We noted that the ability of Great Lakes and the downstream licensees to reach a negotiated headwater benefits settlement might be affected by their significantly different views of the extent to which past assessments could be collected, based on their conflicting views of the validity of section 5(b) of the MOU, and that, therefore, determining the validity of that provision early in the proceeding would have some value. However, we also noted that staff generally does not determine the extent to which it will assess charges retroactively until it issues a draft headwater benefits study for comment, and that such a staff determination would, in any case, be subject to Commission review after issuance of the final headwater benefits study, when staff actually would determine the charges owed. In any event, we considered this a matter for the headwater benefits investigation proceeding, not a matter to be disposed of in that order.²³

25. The PPL Parties acknowledge that we do not generally determine the extent to which retroactive charges will be assessed at this stage of a proceeding. However, citing our December 20, 2007 Order, they argue that this case presents unique circumstances, in that a determination would remove the only obstacle to a settlement, thus enabling all of the project owners to avoid a protracted and costly investigation.

26. At present, staff's investigation is in its initial stages and significant expenses have not been incurred. Therefore, there could still be an opportunity for negotiations that might avoid such expenditures. A resolution of the controversy about the meaning and effect of section 5(b) of the MOU would further that goal. Moreover, even if such a resolution were not to produce a settlement, the issue of pre-May 1999 headwater benefits liability would need to be resolved before staff, in its final study report, could determine the past headwater benefits charges owed by the downstream licensees.

27. However, we will not make a determination of the previous licensees' intentions as to section 5(b) of the MOU in this order. The present and previous licensees have submitted a number of arguments and considerable supporting information in both this proceeding and the previous proceeding in which we considered the status of the MOU as a settlement agreement. In order to ensure the compilation and development of a complete record on this issue in a single proceeding, we will direct the Chief

²² See, e.g., July 14, 2009 motion of Bangor to intervene.

²³ See *Bangor Hydro-Electric Company*, 121 FERC ¶ 61,271 at P 29-31.

Administrative Law Judge to appoint a presiding administrative law judge to conduct a hearing on this matter. The presiding judge will be instructed to consider the headwater benefits provision of section 5(b) of the 1999 MOU and issues related to it, in particular, what the parties intended the provision to mean and whether they intended any release of headwater benefits obligations to survive the circumstances that have been outlined in this order. The judge shall consider all of the evidence that has been submitted in the motion and subsequent pleadings, any other information that the parties may wish to provide, and any further arguments that the parties may wish to make in an oral presentation. The judge is instructed to consider only those issues relating to the meaning and continuing applicability of section 5(b). Great Lakes and all present downstream licensees, as well as the trustee of Great Northern and Bangor, shall be permitted to participate in these proceedings.

28. The judge shall convene a conference no later than 30 days from the date of this order and shall conduct such proceedings as are necessary to compile a record that will enable resolution of this issue. At the end of these proceedings, but no later than 180 days from the date of this order, the judge shall issue a decision on the meaning and effectiveness of section 5(b) of the MOU.

29. Commission staff will continue to conduct its headwater benefits investigation unless and until a headwater benefits settlement agreement is submitted for Commission approval.

The Commission orders:

(A) Pursuant to the Commission's Rules of Practice and Procedure, a hearing shall be held for the purpose of determining the meaning and effectiveness of section 5(b) of the May 7, 1999 MOU entered into by Great Northern Paper, Inc., and Bangor Hydro-Electric Company, in respect to the liability of Bangor and its successor licensees for payments for headwater benefits received prior to that date.

(B) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304, shall within 30 days of the date of this order, convene a prehearing conference in these proceedings in a hearing of conference room of the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The prehearing conference shall be held for the purpose of clarification of the positions of the participants and consideration by the presiding judge of any procedural issues necessary for the ensuing hearing. The Presiding Administrative Law Judge is authorized to conduct further proceedings in accordance with this order and the Rules of Practice and Procedure. The Presiding Administrative Law Judge is directed to issue a decision on the meaning and effectiveness of the MOU within 180 days of the date of this order.

(C) The motion for partial summary disposition filed June 29, 2009, by PPL Maine, LLC, PPL Great Works, LLC, and Bangor Hydro Pacific Associates is denied.

(D) The motions filed August 17 and 18, 2009, by Bangor Hydro Electric Company and jointly by PPL Maine, LLC, PPL Great Works, LLC, and Bangor Hydro Pacific Associates, respectively, for leave to file an answer to answer are denied.

By the Commission. Commissioner Moeller dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PPL Maine, LLC, PPL Great Works, LLC,
and Bangor Pacific Hydro Associates

Docket No. HB131-08-1-000

(December 17, 2009)

MOELLER, Commissioner *dissenting*:

The Commission should not insert itself in a matter of state law. The more appropriate forum would be the state court. Therefore, I respectfully dissent.

Philip D. Moeller
Commissioner