

134 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

AER NY-Gen, LLC
Eagle Creek Hydro Power, LLC
Eagle Creek Water Resources, LLC
Eagle Creek Land Resources, LLC

Project No. 10482-105

ORDER DENYING REHEARING

(Issued January 20, 2011)

1. AER NY-Gen, LLC (NY-Gen) and Eagle Creek Hydro Power, LLC, Eagle Creek Water Resources, LLC, and Eagle Creek Land Resources, LLC (Eagle Creek Companies) have filed requests for rehearing of a November 18, 2010 Commission order dismissing a request to transfer the license for the Swinging Bridge Project No. 10482 from NY-Gen to the Eagle Creek Companies.¹ Because the petitioners have shown no error in the November 18 Order, we deny rehearing.

Background

2. NY-Gen is the licensee for the 11.7-megawatt Swinging Bridge Project, located on the Mongaup River in Sullivan County, New York.

3. The Commission issued an original license for the Swinging Bridge Project, which was existing, but unlicensed, on April 12, 1992.² In order to provide public access to

¹ *AER NY-Gen, LLC, et al.*, 133 FERC ¶ 61,145 (2010) (November 18 Order).

² The license was issued to Orange and Rockland Utilities, Inc. *Orange and Rockland Utilities, Inc.*, 59 FERC ¶ 62,034 (1992). In June 1999, Orange and Rockland Utilities, Inc. transferred the Swinging Bridge Project license to Southern Energy NY-Gen L.L.C. *Orange and Rockland Utilities, Inc.*, 87 FERC ¶ 62,323, *reh'g denied*, 88 FERC ¶ 61,151 (1999). In 2004, Southern Energy NY-Gen L.L.C. changed its name to Mirant NY-Gen, LLC after being acquired by Mirant New York, LLC. In 2007,

(continued...)

project lands and waters, Article 405 of the license required the licensee to develop and maintain, among other facilities, a fifteen-car parking area and a boat launch on the southeast side of the project's Toronto Reservoir near Toronto Dam (the Toronto Dam Area).³ The license order noted that one of the benefits of the project as licensed would be "development of improved public access and safety facilities for expanded recreation uses at the project."⁴

4. The Toronto Dam Area was constructed consistent with license Article 405, but, as detailed in the November 18 Order, public access to that site has been denied for the last six years. Although the licensee has an easement over a private road that leads to the area, the road has been barred by a gate constructed by Woodstone Lakes Development, LLC (Woodstone), a residential developer that has built private residences along the road, adjacent to Toronto Reservoir.

5. Commission staff engaged in repeated attempts over several years – including repeated statements that the licensee was in non-compliance with its license and might be subject to enforcement action -- in what proved to be an unavailing attempt to get the licensee to take action to restore public access to the Toronto Dam Area.⁵

6. On April 30, 2010, NY-Gen and the Eagle Creek Companies filed an application seeking to transfer the project license to the Eagle Creek Companies.⁶

7. On June 11, 2010, Commission staff sent a request to the applicants regarding outstanding non-compliance issues, which, among other things, specifically directed NY-Gen to address its failure to provide public access to the Toronto Dam Area. NY-Gen filed a response on July 6, 2010, indicating that state court litigation regarding the matter was ongoing.

Mirant NY-Gen, LLC changed its name to AER NY-Gen, LLC, after being acquired by Alliance Energy Renewables, LLC.

³ See Article 405 of the license. *Orange and Rockland Utilities, Inc.*, 59 FERC at 63,089, as amended by, 65 FERC ¶ 62,175 (1993).

⁴ *Orange and Rockland Utilities, Inc.*, 59 FERC at 63,082.

⁵ See November 18 Order, 133 FERC ¶ 61,145 at P 6-15.

⁶ The two entities also sought authorization to transfer the licenses of two adjacent projects, the Mongaup Falls Project No. 10481, and the Rio Project No. 9690. On November 12, 2010, Commission staff issued an order approving those transfers. *AER NY-Gen, LLC, et al.*, 133 FERC ¶ 62,143 (2010). No party sought rehearing of those orders, which are therefore now final.

8. Commission staff sent NY-Gen a second information request on July 23, 2010, asking for more specific information on NY-Gen's efforts to provide public access to the Toronto Dam Area. NY-Gen responded that its case against Woodstone was still in the discovery phase, depositions had not yet commenced, and, in light of settlement discussions, the case had not yet been scheduled for trial.⁷ In addition, NY-Gen stated that it had not initiated condemnation proceedings to gain the necessary rights to obtain public access for the Toronto Dam Area, because it believed that it already had the necessary rights.

9. On November 18, 2010, the Commission issued an order dismissing the transfer application. We explained that, under section 8 of the Federal Power Act (FPA), "no voluntary transfer of any license ... shall be made without the written approval of the commission"⁸ and approval by the Commission of a license transfer is contingent upon, among other things, a showing that the transfer is in the public interest.⁹ We explained that our transfer application regulations require that a licensee seeking approval to transfer its license "certifies that it has fully complied with the terms and conditions of its license, as amended, and that it has fully satisfied and discharged all of its liabilities and obligations thereunder"¹⁰

10. We concluded that it was clear from the record that NY-Gen has been in violation of its license from 2005 to the present due to its failure to provide public recreation access to the Toronto Dam Area, and that NY-Gen has made essentially no progress over the last five years in obtaining the rights necessary to provide the required access. In consequence, we said, the public has been denied access to project lands and waters, a right that the Commission required in the project license, and which Commission staff has made extensive efforts to vindicate.

11. We noted that, while NY-Gen had stated that it has put litigation of the easement on hold while it attempts to negotiate an agreement with Woodstone, there was no assurance when, if ever, these negotiations will bear fruit. Moreover, Woodstone had indicated that its acquiescence was conditioned on NY-Gen agreeing to modify the operating regime of Toronto Reservoir, in a manner that NY-Gen had stated could not be

⁷ See Licensee's August 23, 2010 Filing.

⁸ 16 U.S.C. § 801 (2006).

⁹ See 18 C.F.R. § 9.3(a) (2010).

¹⁰ See 18 C.F.R. § 131.20 (2010) (requirements for transfer applications regulations).

accomplished without a reduction of mandatory downstream releases needed for environmental protection and other non-power purposes.¹¹

12. We found that, given the stated positions of NY-Gen and Woodstone and the more than five years that the parties have had to negotiate an agreement, there appeared to be little, if any, hope that the matter can be resolved through negotiation, and that it would be inappropriate to condition public access to the Toronto Dam Area on the licensee's maintenance of certain reservoir levels deemed desirable by private developers and lakefront residents but likely damaging to downstream resources. We found that the licensee must obtain the property rights (e.g., easement or fee title) necessary to ensure public access to the recreation area.

13. In conclusion, we held that, as a result of the licensee's and Woodstone actions, the public has not had access to the Toronto Dam Area for more than five years, and it therefore would not be in the public interest to allow NY-Gen to divest itself of the Swinging Bridge Project until it has resolved the access issue by obtaining the necessary property rights. Accordingly, we dismissed the application to transfer the license for the Swinging Bridge Project, without prejudice, stating that NY-Gen could file a new transfer application at such time as the access issue is resolved.

14. NY-Gen and the Eagle Creek Companies thereafter filed timely requests for rehearing.

Discussion

15. FPA section 8 does not set forth any standard for the review of a proposed license transfer, thus leaving these matters to our sole discretion. Section 9.3 of our regulations¹² provides that approval of a license transfer is contingent on, among other things "a showing that such transfer is in the public interest." In addition, the regulations regarding transfer applications require that the transferor certify "that it has fully complied with the terms and conditions of its license . . . and that it has fully satisfied and discharged all of its responsibilities thereunder" ¹³

A. NY-Gen Request for Rehearing

16. NY-Gen contends that NY-Gen was only owned by its current parent, Alliance Energy, during the last three years of the period of non-compliance, and that the

¹¹ See NY-Gen's July 7, 2010 Filing at 8.

¹² 18 C.F.R. § 9.3. (2010).

¹³ 18 C.F.R. § 131.20(8) (2010).

Commission has not sent a formal notice of non-compliance during the three years that Alliance owned the company, making it unfair to blame Alliance for any non-compliance. NY-Gen cites the expense of litigation and contends that, if the Commission was dissatisfied with NY-Gen's efforts to resolve the access issue through negotiation, the Commission should have, as a matter of fairness, communicated that fact.¹⁴

17. NY-Gen is the licensee for the Swinging Bridge Project, and, accordingly, the Commission holds NY-Gen to the requirements of its license and the standards of our regulations. As outlined in detail in the November 18 Order, Commission staff made repeated efforts, over a period of years, to bring NY-Gen into compliance.¹⁵ Staff repeatedly told NY-Gen that it was not in compliance with its license, and attempted to convince the licensee to fulfill its responsibilities.¹⁶ NY-Gen points to the fact that Alliance has only owned it for three years as somehow making it unfair for Alliance to be faulted for non-compliance. However, when Alliance purchased NY-Gen, that change in ownership did not change NY-Gen's responsibilities to abide by the terms of the license and the standards of our regulations. Further, a cursory review of the history of the Swinging Bridge Project and the terms of the license would have revealed NY-Gen's non-compliance.

18. Any implication that NY-Gen or Alliance was surprised by the Commission's concern regarding this issue is not supported by the record. Staff raised the access issue in the course of the transfer proceeding. The two information requests from staff referencing the matter, as cited by NY-Gen,¹⁷ make clear that staff considered the failure

¹⁴ NY-Gen Request for Rehearing at 5-9.

¹⁵ See letter from John Estep (Commission staff) to Elliot Neri (dated November 30, 2004); letter from Joseph D. Morgan to Elliot Neri (dated April 26, 2005); letter from Joseph D. Morgan to Elliot Neri (April 29, 2005); letter from Joseph D. Morgan to Elliot Neri (dated July 12, 2005); letter from John E. Estep to Elliot Neri (dated July 27, 2005); letter from John E. Estep to Elliot Neri (dated August 24, 2005); letter from John E. Estep to Elliot Neri (dated March 1, 2006); see also *Mirant NY-Gen LLC*, 111 FERC ¶ 61,077 (2005) (denying licensee's request to amend license to remove requirement to maintain Toronto Dam Area).

¹⁶ In addition, with respect to the Swinging Bridge Project, our staff has had to focus in the recent past primarily on remediating dam safety issues at the project, a matter of grave, immediate concern.

¹⁷ See letter from William Guey-Lee (Commission staff) to Mr. Paul Ho (Eagle Creek Companies and Mr. Joseph Klimaszewski (NY-Gen) (dated June 11, 2010) and letter from William Guey-Lee to Mr. Paul Ho and Mr. Joseph Klimaszewski (dated July 23, 2010), cited in NY-Gen request for rehearing at 7.

to provide public access to the Toronto Dam Area to be an instance of non-compliance, and that staff was seeking information from the licensee regarding its resolution. NY-Gen states that staff “simply listed” the access issue “as one item in a series of non-compliance concerns.”¹⁸ It is unclear why including a matter in a list of non-compliance issues (particularly when that matter had been repeatedly raised with the company) minimizes its significance. While the other items on the list may have been resolved to our and our staff’s satisfaction, the remaining issue clearly has not.

19. NY-Gen argues that the November 18 Order causes it and Alliance “grave and substantial harm” because the Eagle Creek Companies can terminate the purchase and sales agreement between the two entities on or after January 5, 2011, thus effectively ending the transaction and depriving NY-Gen and Alliance of the “critical economic benefit” of the sale.¹⁹

20. NY-Gen’s assertions that it and its parent will suffer substantial economic harm are vague and unsupported, and thus provide no reason for us to alter our initial holding. Further, it is unclear whether the transaction will be terminated, given that the Eagle Creek Companies do not so suggest in their request for rehearing. More important, however, the purported economic harm does not justify ignoring long-term non-compliance and the impact that NY-Gen’s failure to provide access to project lands and waters has had on the public. As we note above, our regulations specifically require that a transferor certify that it has fully complied with the terms and conditions of its license, and that it has fully satisfied and discharged all of its liabilities and obligations thereunder. While NY-Gen made that certification, NY-Gen has in fact not fully met its license obligations.

21. Finally, NY-Gen states that it has now begun condemnation proceedings in order to ensure public access, and suggests that the Commission condition the license transfer on acceptance by the transferee of the obligation to continue the litigation.²⁰ Had the compliance matter arisen recently, we might consider such an option. However, given the length of time that the public has been denied access to the Toronto Dam Area while NY-Gen was the licensee, we conclude that is appropriate for NY-Gen to resolve the matter before it is allowed to transfer the project license, rather than passing the issue on to a new licensee. In fact, NY-Gen’s desire to complete the transfer may provide it incentive to resolve the issue quickly.

¹⁸ *Id.*

¹⁹ NY-Gen Request for Rehearing at 4-5.

²⁰ *Id.* at 9-11.

B. The Eagle Creek Companies Request for Rehearing

22. The Eagle Creek Companies assert that the Commission erred in dismissing the transfer application because they have shown themselves to be qualified to hold the project license.²¹ While our regulations do require transfer applications to set forth the qualifications of the transferee,²² the Eagle Creek Companies' fitness as a licensee is not at issue here. In fact, our staff found the companies to be fit to be licensees in their orders approving the transfers of the adjacent projects,²³ and no entity has disputed that conclusion. The reason that we dismissed the transfer application was not because of any question about the *bona fides* of the Eagle Creek Companies, but rather because of our determination that the public interest will be best served by requiring NY-Gen to come into compliance with its license before the Swinging Bridge Project is transferred. We remain convinced that such is the case.

23. The companies also assert that there is no requirement in FPA section 8 that a licensee be in full compliance with its license prior to a transfer.²⁴ This is true, but, as the companies concede (and as we discuss above), our regulations require that a transferor certify that it is in compliance and NY-Gen cannot satisfy this requirement. It is also correct, as the companies state, that the Commission can waive its regulations. However, given the long-term nature of the non-compliance at issue, we do not find good cause for waiver, and, as explained previously, we find it more appropriate that NY-Gen resolve its non-compliance than that the matter be passed on the Eagle Creek Companies.

24. Similarly to NY-Gen, the Eagle Creek Companies assert that, by failing to waive its regulations, the Commission has substantially harmed the companies by the depriving them of the benefit of their bargain with NY-Gen.²⁵ As was the case with NY-Gen, the companies do not in any way quantify the alleged harm, and we cannot conclude that it outweighs the harm to the public of the continued lack of access to project lands and waters and the need for our licensees to take license compliance seriously. Indeed, if both NY-Gen and the companies feel strongly enough about the transaction, they will work together to resolve the access issue, so that NY-Gen can refile its application.

²¹ Eagle Creek Companies Request for Rehearing at 5-6.

²² See 18 C.F.R. § 9.2 (2010).

²³ See *infra* n.6.

²⁴ Eagle Creek Companies Request for Rehearing at 6-7.

²⁵ *Id.* at 7-8.

25. NY-Gen has been out of compliance with its license requirements since 2005, despite repeated efforts by our staff to convince the company to come into compliance. It has long been our policy that we seek “the ultimate development” of the recreational resources of licensed hydropower projects,²⁶ in order to promote public access to project lands and waters. Under these circumstances, and in the absence of any substantial considerations to the contrary, we continue to find that dismissing the transfer application until issues regarding public access to the Toronto Dam Area are resolved is in the public interest. Accordingly, we deny rehearing.

The Commission orders:

The requests for rehearing filed on December 9, 2010, by AER NY-Gen, LLC, and on December 16, 2010, by Eagle Creek Hydro Power, LLC, Eagle Creek Water Resources, LLC, and Eagle Creek Land Resources, LLC, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ See 18 C.F.R. § 2.7 (2010).