

150 FERC ¶ 61,100
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Trafalgar Power, Inc.

Project No. 9821-104

ORDER DENYING REHEARING

(Issued February 19, 2015)

1. On October 22, 2014, Commission staff issued a letter denying U.S. Fish and Wildlife Service's (Service) September 11, 2014 request that the Commission open a proceeding to implement a fishway prescription at Trafalgar Power, Inc.'s Ogdensburg Project No. 9821. Commission staff declined to open a proceeding because the Ogdensburg Project license does not contain a fishway prescription or a reservation of authority to prescribe fishways pursuant to section 18 of the Federal Power Act (FPA).
2. On November 21, 2014, the United States Department of the Interior (Interior) and the New York State Department of Environmental Conservation (New York DEC) each filed a request for rehearing of Commission staff's October 22, 2014 Letter. As discussed below, we deny rehearing.

Background

3. On June 15, 1987, the Commission issued a 40-year license for the Ogdensburg Project to Trafalgar Power, Inc. (Trafalgar).¹ While Trafalgar is the licensee, Algonquin Power Corporation (Algonquin) currently manages and operates the Ogdensburg Project along with Trafalgar's other hydroelectric power projects. Algonquin took control when Trafalgar defaulted on its project financing in 1995. In 2001, Trafalgar filed for bankruptcy under Chapter 11 of the Bankruptcy Code and is currently undergoing reorganization.²

¹ *Trafalgar Power, Inc.*, 39 FERC ¶ 62,312 (1987).

² *See Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1194 (D.C. Cir. 2003).

4. The Ogdensburg Project is the lowermost hydroelectric development on the Oswegatchie River, located less than one mile upstream from the confluence of the Oswegatchie and St. Lawrence Rivers near the City of Ogdensburg in St Lawrence County, New York. Approximately 5 and 7 miles upstream of the project are two hydropower developments, the Eel Weir and Heuvelton dams of Erie Boulevard's (Erie) Oswegatchie River Project No. 2713, and roughly 60 miles upstream of the Ogdensburg Project is a natural dam that forms a natural barrier to further upstream passage.

5. On February 18, 2011, during the relicensing proceeding for the Oswegatchie River Project, Erie filed a settlement agreement requiring it to install fish passage at that project's Eel Weir and Heuvelton dams. Upon completion of those fish passage facilities, the Ogdensburg Project would be the sole blockage to upstream-migrating fish in the 60-mile reach of the Oswegatchie River between the St. Lawrence River and the natural dam. Fish passage at the Ogdensburg Project would open up roughly 60 miles of habitat on the Oswegatchie River, and over 40 miles of habitat on Indian River, a major tributary that enters the Oswegatchie River between the Eel Weir and Heuvelton dams.³ Additional habitat on numerous smaller tributaries would also open.

6. Anticipating that the new license for the Oswegatchie River Project would require fish passage, on November 21 and December 7, 2011, the Service and the New York DEC, respectively, filed letters recommending that the Commission use its authority pursuant to standard Article 15 of the Ogdensburg Project license⁴ to reopen the license

³ See Service September 11, 2014 Letter at 13; New York DEC November 30, 2012 Letter at 16.

⁴ See L-Form 4 (Oct. 1975), set forth at 54 FPC 1792 (1975) and incorporated by reference in the license, *Trafalger Power, Inc.*; 39 FERC at 63,687, at ordering para. (D). Standard article 15 provides:

The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

to require fish protection and passage measures at the project, specifically for American eel and lake sturgeon.⁵

7. On December 20, 2011, Commission staff issued a letter denying the Service's and New York DEC's recommendations. Commission staff stated that it was premature to reopen the Ogdensburg Project license based on proposed measures at the upstream Oswegatchie River Project that the Commission had not yet acted on. Commission staff recommended that the Service and New York DEC re-file their requests after issuance of the new license for the Oswegatchie River Project.

8. On November 26, 2012, the Commission issued Erie a new license for the Oswegatchie River Project, requiring Erie to, among other things, install upstream and downstream fish passage facilities at Eel Weir and Heuvelton dams.⁶ Immediately thereafter, on November 28 and November 30, 2012, the Service and New York DEC, respectively, re-filed their recommendations to reopen the license to require fish passage and protection measures at the Ogdensburg Project.

9. On January 7, 2013, Algonquin filed a letter opposing the recommendations to reopen the license. Algonquin argued that the recommended fish passage and protection measures would render the project uneconomic, and that such measures should be considered later, during project relicensing. Algonquin requested a meeting with Commission staff to discuss the recommendations. On January 10, 2013, Interior and the New York DEC filed letters opposing Algonquin's request to delay fish passage and protection measures until relicensing and requesting to participate in any proceeding or meetings.

10. On March 12, 2013, Commission staff held a public teleconference to discuss issues concerning the requests to reopen the Ogdensburg Project license. Teleconference participants included members of Commission staff, the Service, New York DEC, Trafalgar, and Algonquin. As a result of the teleconference, the Service, New York DEC, Trafalgar, and Algonquin agreed to discuss possible fish passage and protection measures.

11. These discussions, however, did not lead to agreement, and on April 16, 2013, Algonquin filed a letter opposing the recommendations to reopen the project license. On April 18, 2013, New York DEC requested that the Commission defer action on the recommendations to reopen the license until the New York DEC responded to

⁵ American eel and lake sturgeon are not listed, or candidates for listing, as endangered or threatened species under the Endangered Species Act of 1973.

⁶ *Erie Boulevard Hydropower, L.P.*, 141 FERC ¶ 62,125 (2012).

Algonquin's April 16 Letter. On June 7, 2013, the Service and New York DEC filed letters opposing Algonquin's April 16 Letter and supplementing their recommendations to reopen the license.

12. On August 19, 2014, Commission staff issued a letter denying the Service's and New York DEC's requests to reopen the license. Commission staff stated that it would be inadvisable to use Article 15 to reopen the license to require costly new fish passage and protection measures while the licensee is operating under the supervision of a bankruptcy court in a Chapter 11 reorganization proceeding.

13. On September 11, 2014, the Service again sought to require fish passage and protection requirements at the project, this time by filing a letter stating that it was invoking its section 18 authority. The Service stated that the Secretary of the Interior (Secretary) reserved this authority pursuant to section 18 of the FPA⁷ in a letter filed on December 1, 1986,⁸ and that Commission staff's Environmental Assessment (EA) recognized the reservation. In its September 11, 2014 letter, the Service enclosed Interior's preliminary prescription for fishways and invited parties to the fishway prescription proceeding to request Interior to hold a trial-type hearing on any issue of material fact, propose alternatives, and submit comments. The Service stated that it filed Interior's preliminary prescription in light of an upcoming bankruptcy sale of Trafalgar's assets, including the Ogdensburg Project, to put potential bidders on notice of pending environmental mitigation and enhancement requirements. On October 21, 2014, the New York DEC filed a letter in support of the Service's letter.

14. On October 22, 2014, Commission staff issued a letter denying Interior's request to reopen the license pursuant to section 18 of the FPA. Commission staff stated that because there is no section 18 reservation of authority included in the Ogdensburg Project license, there is no section 18 authority for the Service to invoke. On November 21,

⁷ 16 U.S.C. § 811 (2012). Section 18 of the FPA provides:

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate

⁸ The Commission staff's October 22 Letter and the Service's September 11 Letter stated that the Secretary filed its recommendation letter for fish passage on February 27, 1987; however, the correct filing date is December 1, 1986.

2014, Interior and New York DEC⁹ filed timely requests for rehearing of the October 22 Letter.

15. On December 9, 2014, Ampersand Trafalgar Acquisitions LLC (Ampersand) filed a late motion to intervene stating that it planned to offer an initial bid in the sale of Trafalgar's assets, and, thereafter, to execute an asset purchase agreement to acquire the Ogdensburg Project upon the bankruptcy court's approval. The Commission denied Ampersand's late motion on January 21, 2015.¹⁰

16. Meanwhile, on December 19, 2014, the Service filed a letter submitting Interior's fishway prescription for the Ogdensburg Project. The Service stated that it received no requests for a trial-type hearing, comments, or proposed alternatives to Interior's preliminary prescription, and reiterated its assertion that the Commission must now open a proceeding to implement the fishway prescription.

17. On January 9, 2015, Ampersand filed comments opposing Interior's fishway prescription for the Ogdensburg Project.¹¹ In its comments, Ampersand stated that it has executed an asset purchase agreement for the Ogdensburg Project that has been approved by the bankruptcy court.

Discussion

18. On rehearing, Interior and New York DEC argue that Commission staff's October 22 Letter exceeds the bounds of the Commission's authority. They reiterate their assertions that during the licensing of the project, Interior reserved its section 18 authority in a letter filed on December 1, 1986, and that Commission staff's EA recognized the reservation. Interior and New York DEC state that federal courts have consistently held

⁹ New York DEC included with its rehearing request a timely motion to intervene, which was granted by operation of Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (2014).

¹⁰ The notice explained that no purpose would be served by granting Ampersand's late intervention, given that the purpose of seeking to intervene in a Commission proceeding is to obtain party status and the right to seek rehearing and judicial review of any final order, and Ampersand had not filed a request for rehearing of the October 22 letter.

¹¹ That same day, Ampersand filed a motion for leave to file an answer and an answer to Interior's and New York DEC's rehearing requests. Our regulations generally prohibit answers to requests for rehearing. *See* 18 C.F.R. § 385.213(a)(2) (2014). Accordingly, we reject Ampersand's answer.

the Secretary's section 18 authority is independent of the Commission's authority to issue licenses and that the Commission may not reject or modify the Secretary's prescription.¹² Therefore, they argue that any substantive or procedural questions concerning the validity of the prescription, such as whether a section 18 reservation is effective only if it is expressly written into a license, are not within the Commission's authority to decide, but are properly addressed by the Court of Appeals.

19. In this case, Commission staff correctly declined to open a proceeding to implement the Secretary's fishway prescription because, as Interior and New York DEC acknowledge, the project license does not expressly include either a section 18 reservation or a fishway prescription. Section 6 of the FPA requires that all terms or conditions of a project license be accepted by the licensee, and that the conditions and the licensee's acceptance of those conditions be expressed in the license. Section 6 also requires that amendments to licenses be mutually agreed upon by the licensee and the Commission. Specifically, section 6 of the FPA provides:

. . . . Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof *shall* be expressed in said license. Licenses may be . . . altered . . . *only upon mutual agreement* between the licensee and the Commission after thirty days' public notice.¹³

20. The Commission cannot read into a license a condition that was not expressly included in it, or otherwise unilaterally amend a license, as Interior and New York DEC

¹² In support, the Service and New York DEC cite *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (*Escondido*) (Commission must include FPA section 4(e) conditions without modification); *Wisconsin Electric Power & Light Co. v. FERC*, 363 F.3d 453 (D.C. Cir. 2004) (*Wisconsin Electric*) (denying petition for review of FPA section 18 prescriptions that the Commission included without modification); *American Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999) (Commission must include section 18 prescriptions without modification); *American Rivers Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997) (Commission must include conditions of state's water quality certification without modification); and *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996) (*Bangor Hydro*) (Interior must provide substantial evidence to support section 18 prescriptions that the Commission included without modification).

¹³ 16 U.S.C. § 799 (2012) (emphasis added).

request.¹⁴ The fact that Interior and New York DEC recommended that the Commission include in the license a condition requiring the licensee to comply with a future fishway prescription and the EA recognized that recommendation did not create a license obligation. As we have explained, the Commission has no authority to require a licensee to take actions that are not expressly required in the license.¹⁵ The EA, a staff-prepared document, and any agency recommendations are merely part of the record. Only the license terms govern, and in this case, the license did not reserve to Interior the right to require a fishway prescription.

21. The cases Interior and New York DEC cite in support of their argument that the Commission exceeded its authority are not on point. Each cited case concerns a fishway prescription or other mandatory condition that was proffered during a licensing proceeding. Two concerned a licensee's challenge to a fishway prescription that the Commission included without modification; the others involved the Commission's failure to include all elements of an agency's fishway prescription or other mandatory condition as written. These cases do not concern whether the Commission must reopen a license, post-licensing, to impose a fishway or other mandatory condition when the authority to do so is not expressly reserved in the license. At issue in *Escondido* was the Commission's ruling that it was not required to accept, without modification, conditions imposed, during licensing by the Secretary of Interior under section 4(e) of the FPA.¹⁶ At issue in the 1997 *American Rivers* case was the Commission's rejection of several state-imposed conditions pursuant to the state's water quality certification authorized by the Clean Water Act.¹⁷ And at issue in the 1999 *American Rivers* case was the Commission's rejection and reclassification of some measures included with the

¹⁴ See *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1261-62 (D.C. Cir. 1996). See also *Albany Engineering Corp. v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174, at PP 31-32 (2009). Interior and New York DEC incorrectly argue that these two cited cases are inapposite. In fact, these cases are directly applicable, because they both concern the Commission's lack of authority to enforce conditions in the absence of an expressed license requirement. In *Clifton Power Corp.*, the court denied the Commission's attempt to enforce a run-of-river operation requirement that was not expressly included in the license. In *Albany Engineering Corp.*, the Commission stated that it could not infer headwater benefit requirements that the license did not expressly provide.

¹⁵ See *Upper Peninsula Power Co.*, 79 FERC ¶ 61,138, at 61,582 (1997) (citing *Wisconsin Electric Power Co.*, 76 FERC ¶ 61,183, at 62,018-19 (1996)).

¹⁶ See *Escondido*, 466 U.S. 765 (1984).

¹⁷ See *American Rivers v. FERC*, 129 F.3d 99 (2d. Cir. 1997).

Secretaries of Commerce and Interior's fishway prescriptions, which again were made during licensing.¹⁸

22. The appropriate forum for Interior's and New York DEC's arguments was a rehearing of the 1987 License Order, which both parties failed to request. It is a statutory requirement for parties aggrieved by an order to request rehearing,¹⁹ not a Commission policy decision or "administrative hurdle" as Interior and New York DEC assert.²⁰ Interior constructively knew how the Commission reserved section 18 authority; multiple license orders issued before the Ogdensburg Project license order included the Secretary of Interior's section 18 reservation.²¹ Interior and New York DEC cannot now challenge the Commission's 1987 License Order nearly 30 years later. Indeed, even assuming that the Commission committed legal error by not including a reservation of authority to prescribe fishways in the license, once the license was final, the Commission could not unilaterally amend the license to include one.²²

23. The Commission recognizes that, if a license includes a reservation of authority to prescribe fishways, a fishway may be prescribed at any time during the license term. Reviewing courts have affirmed the Commission's interpretation that when a reservation of authority to reopen and amend a license is included at the time of license issuance, the

¹⁸ See *American Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999). As stated, the other two cases, *Wisconsin Electric* and *Bangor Hydro*, both involved a licensee's challenge to a fishway prescription that the Commission included without modification. See note 12, *supra*.

¹⁹ 16 U.S.C. § 825l(a) (2012).

²⁰ Interior Rehearing Request at 8-9; New York DEC Rehearing Request at 15-17.

²¹ See, e.g., *Lynchburg Hydro Associates*, 39 FERC ¶ 61,079, at 61,225, Article 406 (1987); *Watson Associates*, 39 FERC ¶ 62,165, at 63,405, Article 401 (1987).

²² See *International Paper Company v. FERC*, 737 F.2d 1159 (D.C. Cir. 1984) (Commission could not vacate an exemption that had become final, even though Commission had failed to follow its own regulations in issuing it); *Hirschey v. FERC*, 701 F.2d 215 (D.C. Cir. 1983) (same as *International Paper Company*). See also *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (where license did not contain reopener provision, Commission must seek licensee's cooperation in imposing new measures to protect threatened and endangered species).

reservation of authority is lawful and does not violate section 6 of the FPA.²³ However, the Commission's longstanding policy and practice has been that section 18 authority must be exercised or reserved at the time of licensing, relicensing, or a licensing amendment authorizing new project works.²⁴

24. While section 18 of the FPA mandates that the Commission require a licensee to construct, operate, and maintain fishways that the Secretary of Interior or the Secretary of Commerce may prescribe,²⁵ section 18 of the FPA does not specify when the Secretary of Interior or the Secretary of Commerce may exercise section 18 authority. As the Commission is the agency charged with interpreting and implementing the FPA, it is within our authority to decide when section 18 authority is exercised or reserved so long as our interpretation is a "permissible construction of the statute."²⁶ Given that it is generally assumed that Congress uses the ordinary meaning of words,²⁷ it is reasonable to conclude that Congress intended for the mandatory language in section 18 of the FPA to be harmonized with that of section 6, which our policy does to the fullest extent possible.

25. In addition, our policy requiring section 18 authority to be exercised or reserved at the time of licensing is consistent with the statutory language in section 18 of the FPA. As amended by the Energy Policy Act of 2005,²⁸ section 18 of the FPA uses the term "license applicant" when discussing the availability of a trial-type hearing on disputed issues of material fact regarding fishway prescriptions, and provides that the hearing must

²³ See *California v. FPC*, 345 F.2d 917, 924-25 (9th Cir. 1965) (reservation of authority to revise minimum flows for fishery resources); *Wisconsin Public Service Corp. v. FERC*, 32 F.3d 1165 (7th Cir. 1994) (reservation of section 18 authority to require fishways).

²⁴ See *NYSD Ltd. Partnership*, 74 FERC ¶ 61,303, at 61,971-72 (1996) (citing *Lynchburg Hydro Associates*, 39 FERC ¶ 61,079) (original licensing); *Wisconsin Public Service Corp.*, 62 FERC ¶ 61,095, at 61,684-86 (1993), *aff'd*, *Wisconsin Public Service Corp. v. FERC*, 32 F.3d 1165 (7th Cir. 1994) (relicensing); *Enerco Corp.*, 48 FERC ¶ 61,009, at 61,039-40 (1989) (license amendment adding project works).

²⁵ See, e.g., *Public Utility District No. 1 of Pend Oreille County, Washington*, 117 FERC ¶ 61,205, at P 30 (2006).

²⁶ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

²⁷ See *Escondido*, 466 U.S. at 772.

²⁸ Sec. 241(b), Pub. L. 109-58, 119 Stat. 594 (Aug. 8, 2005).

be held within the Commission-established time frame for the “licensing proceeding,” thus indicating that fishways are prescribed at the licensing stage. Specifically, section 18 provides, in relevant part:

The *license applicant* . . . shall be entitled to a determination on the record, after opportunity for any agency trial-type hearing . . . , on any disputed issues of material fact with respect to such fishways. All disputed issues of material fact . . . shall be determined in a single trial-type hearing to be conducted by the relevant resource agency . . . within the time frame established by the Commission for each *license proceeding*.²⁹

26. Moreover, the court in *Bangor Hydro*,³⁰ recognized that Congress intended fishways to be prescribed at the licensing stage, stating “[i]f Congress had intended Interior to have authority to require prescriptions independent of the Commission’s licensing process, it could easily have so specified.”³¹ Interior cites the *Bangor Hydro* decision³² to argue that “it is not the Commission’s role to judge the validity of Interior’s position – substantially or procedurally.”³³ That case, however, involved whether Interior had provided sufficient support for a prescription made in the context of a licensing proceeding, and the court was responding to the licensee’s argument that the Commission should have inquired into Interior’s process for deciding to require a fishway. Thus, the case provides no support for the proposition that the Commission must accept a fishway prescription post-licensing when the license does not include a reservation of section 18 authority.

²⁹ 16 U.S.C. § 811 (2012) (emphasis added). In addition, Interior’s regulations promulgated pursuant to the 2005 amendments to FPA section 18 specifically provide that a party must file its request for a trial-type hearing on the prescription with Interior “within 30 days after the deadline for the Departments to file preliminary conditions or prescriptions with FERC.” 43 C.F.R. § 45.21 (2014). This deadline occurs during the Commission’s licensing process. See 18 C.F.R. § 5.23(a) (2014).

³⁰ 78 F.3d 659 (D.C. Cir. 1996).

³¹ *Id.* 662.

³² *Supra* P 18 & note 12.

³³ *Bangor Hydro*, 78 F.3d at 663.

27. In any event, even if the license had reserved section 18 authority requiring the Commission to reopen the license, the Commission would retain some discretion to decide when to begin the fishway prescription proceeding, which is after all a Commission action.³⁴ In this case, the licensee is undergoing reorganization in an ongoing Chapter 11 bankruptcy proceeding and fish passage is anticipated to be costly. The licensee estimates, and Interior acknowledges, that installing upstream and downstream fish passage facilities could cost more than \$1 million.³⁵ In its environmental assessment for the relicensing of the Oswegatchie Project, Commission staff estimated the cost for similar facilities at that project to be \$2.5 million.³⁶ The Commission has recognized that if a licensee of an already marginal project is confronted with significant costs for new measures that render the project uneconomic, the licensee may determine that it would be preferable to cease generating and surrender its license.³⁷ To prevent a possible license surrender and ensure that the Commission could enforce a fishway prescription, it would be appropriate for the Commission to defer beginning a fishway prescription proceeding until the conclusion of the licensee's bankruptcy.

28. As noted, Ampersand has executed an asset purchase agreement for the Ogdensburg Project that has been approved by the bankruptcy court. On January 27, 2015, Trafalgar and Ampersand filed an application for Trafalgar to transfer its license for the Ogdensburg Project to Ampersand. If the transfer is approved, the licensee's bankruptcy will no longer be an issue and the Commission may revisit the issue of whether standard Article 15 should be used to reopen the project license and require new fish passage and protection measures at the project.

³⁴ See *id.* 662 (stating the Commission, in accordance with the FPA, holds an administrative proceeding to establish the record for the submitted fishway prescription). The court in *Bangor Hydro* also held that, "the Commission retains the authority to issue the underlying license," further supporting the proposition that the Commission controls its licensing process. *Id.* 663.

³⁵ See Algonquin April 16, 2013 Letter at 11; Service June 17, 2013 Letter at 11.

³⁶ See Oswegatchie River Project No. 2713 October 18, 2011 Environmental Assessment at 86.

³⁷ See *Project Decommissioning at Relicensing; Policy Statement*, FERC Stats. & Regs., Regulations Preambles (1991-1996), ¶ 31,011, at 31,222 (1994). In a surrender proceeding, the Commission would consider what conditions might be necessary to protect the public interest, and could consider retaining, breaching, or removing the dam in appropriate cases. *Id.* 31,229-30. The Commission, however, has stated that it would not require a licensee to install new facilities, such as fish ladders, as a condition of the surrender and decommissioning. *Id.* 31,234.

The Commission orders:

(A) The United States Department of the Interior's November 22, 2014 request for rehearing is denied.

(B) The New York State Department of Environmental Conservation's November 22, 2014 request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.