

157 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Brookfield White Pine Hydro LLC

Project No. 2142-038

ORDER ON REQUEST TO RAISE FEES AND AMEND RECREATION PLAN

(Issued October 20, 2016)

1. On March 11, 2015, Brookfield White Pine Hydro LLC (Brookfield), licensee for the Indian Pond Hydroelectric Project No. 2142, located on the Kennebec River in Somerset and Piscataquis Counties, Maine, filed a request to amend its Indian Pond Recreation Plan regarding recreational facility user fees. Two whitewater recreation organizations oppose the request. For the reasons discussed below, we deny the request to increase certain recreational facility user fees and grant, with modifications, the remainder of Brookfield's request.

Background

2. In July 2001, during the relicensing proceeding for the Indian Pond Project, Brookfield's predecessor, FPL Energy Maine Hydro, LLC, filed with the Commission an Offer of Settlement signed by 27 stakeholders.¹ The Settlement included provisions regarding recreation fees and the development of a recreation plan.

3. On January 14, 2004, Commission staff issued an Order on Offer of Settlement and Issuing New License (Relicensing Order).² The Relicensing Order omitted the content of the Settlement's Section 6.0, "Recreation Fees," noting that the Commission generally does not review and approve such fees,³ and required that the licensee file a

¹ The Offer of Settlement was filed July 6, 2001, under Project No. 2142-000.

² *FPL Energy Maine Hydro LLC*, 106 FERC ¶ 62,021 (2004) (Relicensing Order).

³ *Id.* at P 24.

revised Recreation Plan for the Indian Pond Project, to be prepared in consultation with the Settlement signatories.⁴

4. On July 14, 2004, the licensee submitted a revised Recreation Plan for Commission approval. Section 4.0 of the proposed plan established recreational facility user fees for the project's Commercial Campground and remote campsites, and for Commercial Boaters. The plan did not explain how the fees were determined or how the fees could be changed. On February 23, 2005, Commission staff approved the revised Recreation Plan with no discussion of the fees.⁵

5. On March 11, 2015, Brookfield filed a request to increase and restructure its recreational facility user fees for the Commercial Campground and to amend Section 4.0 of the Recreation Plan. On March 24, 2015, the Commission issued public notice of the application.⁶ American Whitewater and New England FLOW (Whitewater Groups) jointly filed a timely, unopposed motion to intervene and comments opposing the proposed fee increases.⁷ Brookfield filed a response to their comments.

Licensee's Proposal

6. Brookfield proposes to raise its Commercial Campground fees because of increased maintenance and operations costs. The existing Commercial Campground user fees include a daily rate of \$14 for up to two adults plus \$5 for each additional adult and \$3 for each child between the ages of 10 and 16. There are discounts for Weekly, Off-Season, and Group visitors. Brookfield proposes to instead apply a flat Commercial Campground user fee of \$14.00 per person per night with no fee for children under 15 years of age. The company proposes to eliminate the Weekly, Off-Season, and Group discounts to relieve administrative burdens.

7. In addition to seeking approval of immediate changes to the Commercial Campground fees, Brookfield seeks to revise Section 4.0 of its Recreation Plan to delete the fee provisions for the Commercial Campground and remote campsites and state instead that it "will charge a reasonable rate for use of the recreational facilities, in general accordance with Licensee's cost to operate and maintain the facilities."

⁴ *Id.* at ordering para. (E), art. 405.

⁵ *FPL Energy Maine Hydro LLC*, 110 FERC ¶ 62,166 (2005).

⁶ 80 Fed. Reg. 16,661 (Mar. 30, 2015).

⁷ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2016).

Discussion

8. Under section 10(a)(1) of the FPA, the Commission is required to ensure that any hydroelectric project with a Commission-issued license will be best adapted to a comprehensive plan for improving or developing the waterway for a variety of beneficial uses, including recreational uses.⁸ The Commission encourages recreational use of project property if such use is consistent with other project purposes. It is the Commission's policy as set forth in section 2.7 of the Commission's regulations regarding recreational development at licensed projects to "seek, within its authority, the ultimate development of [recreational] resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project."⁹ To this end, the Commission requires licensees to make reasonable expenditures to develop and maintain suitable recreational facilities and to provide for adequate public access to project facilities and waters.¹⁰

9. The Commission has also long recognized that the use of project property for recreational purposes will likely cause a licensee to incur expenses that it should be able to recover. Accordingly, under section 2.7 of the Commission's regulations we allow licensees "to charge reasonable user fees to defray the costs they incur in constructing, operating, and maintaining recreational facilities."¹¹ However, the Commission generally does not include in its licenses requirements for specific recreation user fees, and it thus does not review and approve the reasonableness of such fees (and subsequent increases or decreases) for each project, except in those rare instances where there is a dispute.¹²

⁸ 16 U.S.C. §§ 797(e), 803(a)(1) (2012); *see also Coalition for Fair and Equitable Regulation of Docks on Lake of the Ozarks v. FERC*, 297 F.3d 771, 778 (8th Cir. 2002) (*Lake of the Ozarks*).

⁹ 18 C.F.R. § 2.7 (2016) (promulgated by Order No. 313, 34 FPC. 1546 (1965)).

¹⁰ *Id.* § 2.7(b).

¹¹ *Lake of the Ozarks*, 297 F.3d at 778 (citing 18 C.F.R. § 2.7).

¹² *See, e.g., S.C. Elec. and Gas Co.*, 32 FERC ¶ 61,377 (1985), *reh'g denied*, 42 FERC ¶ 61,168 (1988) (modification of dock permitting fee); *Central Maine Power Co.*, 40 FERC ¶ 61,075, at 61,215 (1987) (increase of recreation fee for both project and substantial non-project facilities), *reh'g denied*, 42 FERC ¶ 61,387 (1988), *aff'd sub nom John Kokajko, d/b/a Voyagers Whitewater v. FERC*, 873 F.2d 419, 424 (1st Cir. 1989).

A. Proposed Changes to Recreational Facility User Fees

10. As noted above, because Brookfield's current recreation plan lists specific user fees, Brookfield may not change those fees without Commission approval. Any filing seeking changes in fees must set forth specific information to justify the request. Brookfield has not met this obligation.

11. In comments filed April 23, 2015, Whitewater Groups point out that Brookfield's Form 80 Recreation Report filed on March 30, 2015,¹³ indicated that revenues in 2014 from project-wide recreation yielded a profit of \$53,989 above recreation-related costs.¹⁴ The Groups argue that the Commission should reduce the recreational facility user fees to offset this reported profit.¹⁵

12. In Brookfield's May 29, 2015 response, the company explains that the March 30, 2015 Form 80 Report combined all project recreation facilities without separating the revenues and costs attributable to the Commercial Campground. Brookfield provides a separate accounting of revenue from fees at the Commercial Campground and contrasts this income with costs from labor, supplies and consumables, and maintenance. It separately calculates that in 2014 the Commercial Campground bore a net loss of \$26,189.¹⁶ Brookfield estimates that if its proposed fee increase had applied in 2014, the Commercial Campground would have borne a smaller net loss of \$2,407.¹⁷ Brookfield also responds that the calculated profit in the March 30, 2015 Form 80 Report inadvertently omitted certain operation and maintenance expenses. Brookfield filed a revised Form 80 Report on June 16, 2015, to incorporate the omitted expenses. The

¹³ Every six years, licensees are required to file a Form 80 Recreation Report with the Commission including information about the prior calendar year's recreation-related construction, operation, and maintenance costs and recreation-related revenues. 18 C.F.R. § 8.11(a)(2) (2016).

¹⁴ Whitewater Groups' April 23, 2015 Motion to Intervene and Comments at 3. The March 30 Form 80 Report lists 2014 recreation-related revenues of \$168,687 and recreation-related construction, operation, and maintenance costs of \$114,698.

¹⁵ Brookfield May 29, 2015 Response at 3-4.

¹⁶ Brookfield May 29, 2015 Response, Ex. A (stating revenues of \$18,008 and costs of \$44,198).

¹⁷ *Id.* (stating revenues would have increased by \$23,782 to \$41,790, contrasted with the costs of \$44,198 in 2014).

revised report calculates a project-wide recreation-related net loss of \$36,613, rather than a profit of \$53,989.¹⁸

13. On May 3, 2016, Commission staff requested additional information from Brookfield, including an itemized accounting of costs for Commercial Campground operations and maintenance in 2004, the year upon which the existing fee was based, and in 2015, the year of Brookfield's request to increase the fee. Brookfield states that it acquired the project in 2013, does not have access to previous financial records, and "cannot speak to the prior recreation expenditures and revenues."

14. Brookfield's filings do not contain sufficient information demonstrating a change in circumstances to justify its request to revise recreational facility user fees at the Indian Pond Project. Accordingly, we cannot determine whether Brookfield's proposed fees are "reasonable fee[s] . . . to help defray the cost of constructing, operating, and maintaining such facilities."¹⁹ For this reason, we deny Brookfield's request to increase its user fees for the Commercial Campground.²⁰

15. Similarly, the record does not contain sufficient information to justify Whitewater Groups' request that we reduce Brookfield's recreational facility user fees to offset the profit reported in Brookfield's March 30, 2015 Form 80 Report. The groups did not provide any information to contest Brookfield's statement that the March 30, 2015 Form Report is not accurate evidence of costs and revenues at the Commercial Campground both due to the report's aggregated structure and due to omitted costs. Accordingly, we conclude that the record does not contain sufficient information to justify a reduction in recreational facility user fees.

B. Proposed Revision to Section 4 of the Recreation Plan

16. In addition to establishing specific fees for the Commercial Campground and remote campsites, Section 4.0 of the Recreation Plan also contains a paragraph that Brookfield seeks to revise as follows (changes shown in underline and strikeout):

¹⁸ June 16, 2015 Form 80 Report at 1. The June 16, 2015 Form 80 Report increases total recreation-related revenues by \$7,681 to \$176,368 (up 5 percent) and increases total recreation-related costs by \$98,282 to \$212,980 (up 86 percent).

¹⁹ 18 C.F.R. § 2.7 (2016).

²⁰ Brookfield also proposes to reduce its fees for the remote campsites by changing the age, from 14 to 15 years of age, at which the company will begin charging users for the campsites. There is no opposition to this proposal, and it is approved.

Except for those recreational facilities uniquely specified in the Settlement Agreement (July 25, 2001), the Licensee will charge a reasonable rate for use of the recreational facilities, in general accordance with Licensee's cost to operate and maintain the facilities. In accordance with Section 6.1 and 6.2 of the Settlement Agreement (July 25, 2001) Licensee provides free public access with no charges or fees (except at developed recreation facilities as indicated above) to the waters of the Kennebec River and Indian Pond across lands under their ownership or control, including specifically facilities at Harris Station, Carry Brook, the Ballfield (as to when any rights therein are acquired by Licensee), and Crusher Hole.² Licensee will continue to charge a \$3.00 per person fee for commercial whitewater rafting customers.³

2/ Licensee previously charged a \$1 per person fee to non-commercial users of certain Project recreational facilities. In accordance with Section 6.1 of the Settlement, this fee was eliminated.

3/ In accordance with Section 6.2 of the Settlement, Licensee reduced the fee to \$3.00 per person. Fees may change pursuant to the Settlement Agreement upon agreeable negotiations with all parties.

The Whitewater Groups did not comment on Brookfield's proposed revisions to Section 4.0.

17. As noted above, the Commission's regulations establish that licensees may charge reasonable user fees. Typically, specific user fees are not established in a project's license (e.g., in a licensee's Commission-approved recreation plan), and the Commission generally does not review or approve such fees. Licensees may change their user fees without seeking Commission authorization to do so and these matters only come to the Commission's attention in those rare instances where someone challenges the reasonableness of the fees.

18. Brookfield's proposal to delete the specified fees for its Commercial Campground and remotes campsites from section 4.0 of its Recreation Plan and replace them with general language stating that the licensee could "charge a reasonable rate for use of the recreational facilities, in general accordance with Licensee's cost to operate and maintain the facilities" will align the plan with Commission practice regarding user fees, and is approved. However, we decline to approve Brookfield's proposal to further modify Section 4.0 of its Recreation Plan to create exceptions to this general policy for facilities (and rates) that are established in the 2001 Settlement and for the fee for commercial

whitewater rafting customers. It would not be consistent with our policy to retain certain fee requirements while deleting others.²¹ Accordingly, we approve Brookfield's proposal with the modifications discussed above. As modified, Section 4.0 of the Recreation Plan will provide that "[t]he Licensee may charge a reasonable rate for use of the recreational facilities, in general accordance with Licensee's cost to operate and maintain the facilities."

19. Pursuant to the amended Recreation Plan, in the future Brookfield may change its recreational user fees in general accordance with Brookfield's cost to operate and maintain the facilities, without the need to seek Commission authorization. An entity that believes a specific user fee does not comply with the license or the Commission's regulations may seek Commission review.²² In response, Commission staff will review the entity's filing along with any filing from the licensee justifying the user fee to determine whether the contested fee is reasonable.

The Commission orders:

(A) Brookfield White Pine Hydro LLC's request, filed on March 11, 2015, for authorization to increase recreational facility user fees at its Commercial Campground is denied.

(B) Brookfield White Pine Hydro LLC's request, filed on March 11, 2015, to raise the age at which it begins charging fees for users of the remote campsites is granted.

(C) Brookfield White Pine Hydro LLC's request, filed on March 11, 2015, to amend Section 4.0 of the approved Recreation Plan for the Indian Pond Hydroelectric Project No. 2142, is modified and granted, to read as follows:

4.0 RECREATION FACILITY USER FEES

The Licensee may charge a reasonable rate for use of the recreational facilities, in general accordance with Licensee's cost to operate and maintain the facilities.

²¹ Our removal of these exceptions from the Recreation Plan should have no effect on the licensee's implementation of the provisions in the 2001 Settlement.

²² See 18 C.F.R. §§ 385.2001–385.2005 (2016) (requirements for filings).

(D) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l* (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2016).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.