124 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

FPL Energy Maine Hydro, LLC — Project Nos. 2552-086 and 2552-087

ORDER REJECTING REQUESTS FOR STAY AND MOTION TO AMEND SURRENDER ORDER

(Issued July 17, 2008)

1. On June 30, 2008, Essex Hydro Associates, LLC (Essex) filed a request to stay the Commission's January 23, 2004 order[1] accepting the surrender by FPL Energy Maine Hydro, LLC (FPL Energy) of its license for the Fort Halifax Project No. 2552, along with a motion seeking amendment of the surrender order, with a view to Essex taking over the project. Essex filed a second motion for stay on July 14, 2008. As discussed below, because surrender of the Fort Halifax license and dam removal were approved by the Commission and affirmed by the courts several years ago, because those activities are part of a settlement related to a basin-wide plan for the restoration of anadromous fish that is supported by the licensee, federal and state resource agencies, and non-governmental agencies, and because Essex provides neither a convincing explanation of why it waited so long to seek to halt the ongoing surrender and dam removal process nor proof that there is any likelihood that it would succeed in taking over the project, we deny Essex's pleadings.

Background

2. The 1.5-megawatt Fort Halifax Project was constructed in 1907-08 and was first licensed in 1968, to Central Maine Power Company, FPL Energy's predecessor. The project is located on the Sebasticook River near its confluence with the Kennebec River and includes a 553-foot-long, 29-foot-high dam impounding a 5.2-mile-long reservoir. The Commission issued a subsequent license for the project in 1997.[2] In 1998, the license was amended to include fish passage requirements of a settlement agreement

[1] *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 61,038 (2004) (January 23 Order).

[2] *Central Maine Power Co.*, 81 FERC ¶ 61,249 (1997).

among Central Maine, other project owners, the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), the State of Maine, and the Kennebec Coalition, comprising a number of organizations. This settlement agreement, known as the Kennebec Hydro Developers Group (KHDG) Agreement, provided, as to the Fort Halifax Project, for the installation and operation of a temporary fish pump and trap and transport facility. However, it provided further that, unless the licensee had surrendered its license and the Commission had ordered the dam decommissioned by the summer of 2003, the licensee was to remove the fish pump and those other facilities and was to install and have fully operational a fish lift for passing shad and river herring upstream. Upon submission of the KHDG Agreement as a settlement agreement, the Commission amended the Fort Halifax Project license to include this fish passage requirement.[3]

3. In 1999, the project was transferred to FPL Energy, which installed the fish pump, which it continued to operate. However, in 2002, FPL filed an application to surrender the license on the ground that the economics of the project would not justify the investment necessary for the fish lift. Instead, in conjunction with the license surrender, FPL Energy would provide fish passage by removing several sections of the dam,[4] while the remaining sections of the dam and the powerhouse would remain intact, with the headgates to the generating units to be closed and the generating units to be disconnected from the electrical grid.

4. Numerous intervenors, including the U.S. Department of the Interior, the Maine State Planning Office, and the Kennebec Coalition, supported surrender and partial dam removal, because that action would provide fish passage in accordance with fish restoration goals and convert the reservoir environment to a riverine one. In conducting an environmental analysis of FPL Energy's proposal, Commission staff considered several alternatives: surrender of the license with partial dam breach using either controlled demolition or mechanical means, surrender with total dam removal, surrender with powerhouse decommissioning but no dam removal, denial of the surrender application with continued project operation using the fish lift prescribed by the KHDG agreement or an improved fish pump, and the no-action alternative, continued project operation using the existing temporary fish pump.

5. In the January 23 Order, the Commission accepted FPL Energy's proposal for surrender and partial dam removal, emphasizing the importance of providing fish passage to achieve the carefully-developed plan, agreed to by federal and state fisheries agencies,

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[3] *Edwards Manufacturing Co., Inc.*, 84 FERC ¶ 61,227 (1998).

[4] FPL Energy initially proposed removing 75 feet of the dam but later modified its proposal to expand the dam breach to 87 feet, to satisfy concerns that a smaller breach would not be adequate for fish passage under all flow conditions.

conservation groups, and hydropower project owners including FPL, for restoring anadromous fish to the Sebasticook and Lower Kennebec Rivers. The Commission ordered FPL Energy to partially remove the project dam in accordance with its proposal.[5] On judicial review, the order was affirmed.[6]

6. FPL proceeded to develop plans for removing the dam. On May 19, 2004, Commission staff approved FPL Energy's dam removal plan.

7. On April 17, 2008, FPL Energy filed a request to amend the dam removal plan to completely, rather than partially, remove the dam. The company attached to its pleading copies of concurrences with the new modified plan that it had obtained from the U.S. Army Corps of Engineers (Corps), FWS, NMFS, the Maine State Historic Preservation Officer (SHPO), and the Maine Departments of Environmental Protection (Maine DEP), Inland Fisheries and Wildlife (Maine DIFW), and Marine Resources (Maine DMR). By letter of April 29, 2008, FPL Energy forwarded an order of Maine DEP approving full dam removal. FPL Energy proposed to begin the initial drawdown on about July 1, 2008, and the initial breach on about July 15, 2008.

8. By order dated July 1, 2008, Commission staff approved the amendment, thereby authorizing full dam removal.[7]

9. On June 30, 2008, Essex filed a request for stay of the January 23 Order, along with a motion to amend that order to ultimately allow Essex to take over and operate the Fort Halifax Project.

10. On July 2, 2008, the Maine Department of Marine Resources filed a response, urging the Commission to deny Essex's requests. On July 3, 2008, the Kennebec Coalition filed a similar response.

11. By pleading dated July 12 (filed July 14), Essex filed a second request for stay, asserting that the imminent breach of the Fort Halifax Dam would cause irreparable harm.

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[5] By letter of May 19, 2004, the New York Regional Office of the Division of Dam Safety and Inspections, Office of Energy Projects, approved FPL Energy's March 19, 2004 retirement plan for partial removal of the dam, in which use of mechanical demolition alone was substituted for a combination of mechanical demolition and explosives, as had been initially proposed.

[6] *Save Our Sebasticook v. FERC*, 431 F.3d 379 (D.C. Cir. 2005).

[7] *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 62,007 (2008).

12. On July 14, FPL Energy filed a letter stating that "[w]ith no basis for [Essex] to obtain intervenor status, the timing, [the] appropriateness and merit of [Essex's] tardy and last minute June 30 and July 11, 2008 filing seeking to revisit a 2004 Commission order need not be addressed by FPL Energy in the form of a formal answer, or considered further by the Commission." FPL Energy also stated that it could not agree to transfer the project license because Essex had not obtained the requisite approval of the signatories to the basin-wide settlement agreement, and cited Commission precedent to the effect that the Commission cannot require a licensee to transfer a license.

Discussion

A. Procedural Matters

13. We reject both Essex's motions for stay and motion to amend the January 23 Order, because Essex has no standing to raise either matter.

14. The January 23 Order became final in 2005, when it was affirmed by the court of appeals. After that point, there was no proceeding in which Essex could intervene or seek a stay. To the extent that the Commission and FPL Energy were engaged in perfecting plans for dam removal, that activity is analogous to situations where licensees are engaged in post-license activities following the issuance of a hydropower license. In such cases, we have made clear that we only entertain motions to intervene where a post-license filing entails a material change in plan of project development or in the terms or conditions of the license, could adversely affect the rights of a property holder in a manner not contemplated by the license, or where the entity seeking to intervene has been specifically given a consultation role with respect to the filing at issue.[8] In this case, FPL Energy is simply engaged in complying with the terms of the final surrender order, and there is thus no reason to permit intervention by any party, let alone by Essex, which has no direct interest in the proceedings.[9]

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[8] *See Puget Sound Energy, Inc.*, 112 FERC ¶ 61,116 (2005). *See also Puget Sound Energy, Inc.*, 112 FERC ¶ 61,244 (2005); *Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 (1987).

[9] While it is true that FPL Energy has recently sought, and obtained, Commission authorization to removal the entire dam, as opposed to a portion of it, this does not change the nature of Essex's concern, which is that the entire project remain in place. In any case, Essex makes no argument that the amendment has altered circumstances as to it. In fact, we provided an opportunity for intervention in the amendment proceeding, to ensure that any entity that was concerned about the change in degree of dam removal would have an opportunity to be heard. As we have said, Essex opposes any form of dam removal.

15. Essex includes a motion to intervene in its motion to amend, stating that it "is a developer of hydroelectric projects that is capable of owning and operating the Fort Halifax Project and desires to do so."[10] Even were we to determine that there was an ongoing proceeding in which we would entertain interventions, we would nonetheless deny Essex's motion. The deadline for intervening in the surrender proceeding passed many years ago. Once a dispositive order has been issued in a proceeding, an entity seeking to intervene bears a high burden to justify late intervention.[11] Essex fails to meet this burden. Likewise, the deadline for intervening in the proceeding regarding FPL's amendment to the dam removal process fell on June 2, 2008, yet Essex makes essentially no attempt to satisfy the requirement that an entity seeking to intervene out of time justify why it did not intervene in a timely manner. Essex does not even cite to the standards in our regulations regarding late intervention,[12] let alone satisfy them.[13]

16. Essex also states that it filed the motion to intervene and to amend the dam removal order "as soon as it was clear" that negotiations to acquire the project were not fruitful.[14] This is belied by Essex's own pleading. Attachment 2 to the motion to amend includes a June 18, 2008 letter from Richard A. Norman, Essex's president, to Mr. Michael Heavner, the Town Manager for the Town of Winslow. Mr. Norman states that Essex "ceased its efforts to acquire the dam in August 2007 . . . ." Thus, Essex clearly did not act as soon as it was clear that it could not obtain the project from FPL.

17. Although we have concluded that both the motion for stay and motion to amend the January 23 Order must be rejected, we will discuss below, for clarity, why they lack substantive merit.

B. Motion for Stay

18. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act; that is, a stay will be granted if the Commission finds that "justice so requires." Under this standard, the Commission considers such factors as

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[10] Motion to amend at 13.

[11] *See, e.g., Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167, at P 10 (2005).

[12] *See* 18 C.F.R. § 385.214(d) (2008).

[13] *See, e.g., California Department of Water Resource and the City of Los Angeles, California*, 122 FERC ¶ 61,150 (2008).

[14] *Id.*

whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay would substantially harm other parties, and where the public interest lies.[15]

19. Essex asserts that it will suffer irreparable injury if removal of the dam is not postponed while it seeks to acquire the Fort Halifax Project.[16] We do not agree. First, Essex has no cognizable interest in the project. It does not own the project and it does not allege that the operation of Fort Halifax in any way affects the operations of its projects. Thus, removal of the project dam works no harm on Essex. Moreover, as Essex states, we have held that pecuniary loss, by itself, does not constitute irreparable harm.[17] Removal of the Fort Halifax Dam does not preclude Essex from proposing to construct a new project on the site; it simply might render such a project more expensive. Thus, Essex has not shown that it will suffer irreparable injury of any kind.

20. Essex also argues that the drawdown of the lake and removal of the dam "will expose previously submerged lands, thus potentially harming native fish and other marine wildlife and vegetation populations, as well as shore birds. The drawdown will also disrupt recreational use of the lake. . . . Removal of the dam would substantially lower the lake, thus permanently removing a source of recreation and renewable energy generation."[18]

21. In the proceeding leading to the January 23 Order, the Commission carefully and thoroughly considered the environmental impacts of dam removal, including those issues raised by Essex, [19] and concluded that, on balance, dam removal was in the public interest. That order has been final for some three years. Essex's arguments regarding the environmental impacts of dam removal are improper collateral attacks on our final order, and we will not entertain them.

22. Essex contends that retention of a clean, renewable energy source demonstrates that the public interest mandates a stay here.[20] Under the circumstances presented here,

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[15] *See, e.g., Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

[16] *Id.* at 2.

[17] *Id*. at 3.

[18] Request for stay at 2-3.

[19] *See* January 23 Order, 106 FERC ¶ 61,038 at P 43-44, discussing the impact of dam removal on fish, wildlife, vegetation, and recreation.

[20] Request for stay at 3.

we find this conclusion overly facile. The parties to the underlying settlement (and even those opposing it) have had a settled expectation for several years that the Fort Halifax Dam will be removed, whether in part or in whole. FPL, the project's licensee, has concluded that dam removal will be more efficient than implementing other fish passage measures. Federal and state resource agencies, as well as interested non-governmental organizations, support this decision. While Essex has expressed an interest in acquiring and operating the project, it has failed to make any progress in doing so. In the absence of much stronger considerations than Essex has presented, we conclude that the public interest in administrative finality and predictability counsels against disrupting the ongoing dam removal process to allow Essex time to pursue a possibly quixotic attempt to take over the Fort Halifax Project.[21]

23. In addition to the foregoing, we note that Essex's filings come at an incredibly late stage of these proceedings. We authorized dam removal four years ago, after a two-year review of FPL's surrender application. As noted above, Essex itself states that it halted its efforts to acquire the project almost a year ago. Essex nevertheless waited until one day before dam removal was to begin to inform us that it wished to acquire the project, and to ask us to impose extraordinary measures on its behalf. The unexcused last-minute nature of Essex's filings is yet another reason to deny them.

C. Motion to Amend Order

24. In addition to asking us to stay the January 23 Order, Essex asks us to amend it "as necessary to enable [Essex] to continue operation of the Fort Halifax Project and implement the fisheries-related enhancements in accordance with the KHDG Agreement."[22] In essence, Essex contends that the only things barring it from obtaining the project are FPL Energy's belief that the KHDG Agreement requires the consent of the signatories for such an action, and the signatories' refusal to agree to it.[23]

25. Essex argues that our general authority, under section 309 of the Federal Power Act,[24] as well as our actions in other cases, grant us the authority to rescind surrender

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[21] *See, e.g., CMS Midland, Inc, Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177 at 61,624 (1991) (noting "the need for finality in the administrative process").

[22] Motion to amend order at 8.

[23] *Id*. at 7-8.

[24] 16 U.S.C. § 825*h* (2000).

orders.[25] While we concur that we can rescind orders in proper circumstances – where either the underlying statute or authority we have reserved in the order give us the ability to do so – we do not believe that we can or should reopen the January 23 Order to grant the relief Essex requests.

26. In *Niagara Mohawk Power Corp. and Fourth Branch Associates (Mechanicville),*[26] which Essex cites, we simply stated the common sense proposition that if the licensee was unable to satisfy the conditions of a license transfer in a timely manner, we might be required to rescind it. Here, there is no allegation that FPL Energy has not complied with the terms of the surrender order. Indeed, it is Essex that seeks to prevent the licensee from doing so. *John C. Jones*[27] likewise does not present a case of us unilaterally rescinding an order. Rather, in that case we modified the conditions of license surrender in response to evidence that the previous conditions could not be satisfied. Here, FPL Energy appears willing and prepared to satisfy the conditions of the January 23 Order.

27. Essex claims that changed circumstances, specifically its willingness to operate the project, provide grounds for amending the January 23 Order.[28] We cannot agree. We will not lightly reopen closed matters or exercise our reserved authority, in the absence of a compelling justification to do so. Otherwise, parties to our proceedings would be at risk of reversed results whenever circumstances allegedly change. It is a fundamental principle of good government that those affected by our decisions can rely on them.[29]

28. Moreover, as discussed above, we are not convinced that delaying dam removal here is in the public interest. In addition to our interest in administrative finality, we have previously found that dam removal, which would further a "carefully-developed plan" for the restoration of anadromous fish in the Sebasticook and Lower Kennebec Rivers was the best alternative.[30] Further, Essex has provided us with no assurance that it will be able to convince the parties to KHDG Agreement to overcome their opposition to Essex's

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[25] Motion to amend order at 9-10.

[26] 103 FERC ¶ 61,358 (2003).

[27] 107 FERC ¶ 61,279 (2004).

[28] *Id*. at 11.

[29] *See, e.g., Eagle Power Company, et al.,* 28 FERC ¶ 61,061 (1984) (stating that "the public will be able to rely upon the predictability and reliability of Commission action").

[30] *See* January 23 Order, 106 FERC ¶61,038 at P 35.

proposal. Thus, even if we did amend the order as Essex suggests, it would be with no certainty of achieving the result Essex seeks. There are many other uncertainties surrounding that scenario, including the question of what fish passage measures might be required of Essex and whether Essex would at the end of the day find the project worth operating. On balance, we determine that allowing the conclusion of the dam removal process is preferable to disrupting it in the interest of an uncertain future.

The Commission orders:

The requests for stay and motion to amend order permitting dam removal, filed by Essex Hydro Associates, LLC on June 30 and July 14, 2008, are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.