

UNITED STATES OF AMERICA 82 ferc & 62, 138
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Company	)	Projects Nos. 1855-018,
USGen New England, Inc.	)	1892-007, 1904-026, 2077-010,
		2323-029, 2669-006

ORDER APPROVING TRANSFERS OF LICENSE

(ISSUED FEBRUARY 27, 1998)

On October 15, 1997, New England Power Company (NEP) and USGen New England, Inc. (USGen) filed applications requesting Commission approval to transfer the licenses for Bellows Falls, Wilder, Vernon, Fifteen Mile Falls, Deerfield River, and Bear Swamp Hydroelectric Projects (Nos. 1855, 1892, 1904, 2077, 2323, and 2669, respectively) from NEP to USGen. The first four named projects are located on the Connecticut River in New Hampshire and Vermont and the last two are on the Deerfield River in Massachusetts and Vermont.

The transfers are requested because, as a part of NEP's implementation of electric utility restructuring, the company is divesting substantially all of its generation business in order to facilitate greater competition at the wholesale and retail levels. 1/

As discussed below, the transfers will be approved.

BACKGROUND

1/ Concurrently with this order, the Commission is issuing an order in Docket Nos. ER98-6-000 and EC98-1-000 approving the divestiture transaction and accepting for filing certain related agreements, amendments to NEP's wholesale and transmission tariffs, and market-based rates, pursuant to Sections 203 and 205 of the Federal Power Act.

NEP holds new licenses for the Bellows Falls, Wilder, and Vernon Projects that terminate in 2018; 1/ it holds an original license for the Bear Swamp Project that terminates in 2020; 1/ and it holds an original license for the Fifteen Mile Falls Project that terminates in 2001. 1/ (On April 23, 1996, and November 5, 1996, respectively, NEP filed, and the Commission published, NEP's notice of intent to file an application for a new license for the Fifteen Mile Falls Project.) On April 4, 1997, the Commission approved a settlement offer and issued NEP a new 30-year license for the Deerfield Project, 1/ and issued an order amending the license for the Bear Swamp Project, as proposed in the settlement offer. 1/

On October 27, 1997, public notice of the transfer application was issued. Timely motions to intervene were filed by the Vermont Agency for Natural Resources; the Vermont Department of Public Service; the Public Utilities Commission of the State of Rhode Island and Providence Plantations; the Town of Walpole, New Hampshire; the Town of Rockingham, Vermont; the Appalachian Mountain Club (Mountain Club); the Island Corporation; and the Northeast Center for Social Issue Studies (Northeast Center). 1/

DISCUSSION

- 2/ Project No. 1855 - original license at 7 FPC 777 (1948), new license at 8 FERC 61,122 (1979); Project No. 1892 - original license at 4 FPC 3 (1943), new license at 9 FERC 61,322 (1979); Project No. 1904 - original license at 4 FPC 670 (1943), new license at 7 FERC 61,292 (1979).
- 3/ 43 FPC 568 (1970).
- 4/ The 50-year license was issued to the Connecticut River Power Company in 1952 (11 FPC 751) and transferred to NEP in 1955 (14 FPC 504).
- 5/ 79 FERC & 61,006. Concurrently with this order, the Commission is issuing an order on rehearing of the Deerfield River Project. The original license for the Deerfield River Project was issued in 1963, with a termination date of 1993. 30 FPC 1120.
- 6/ 79 FERC & 61,009.
- 7/ The motions to intervene were timely, unopposed, and accordingly granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. Section 385.214(c) (1997).

The Vermont Agency for Natural Resources, the Vermont Department of Public Service, and the Public Utilities Commission of the State of Rhode Island and Providence Plantations requested party status, only.

The Town of Rockingham asks that NEP's transfer application for the Fifteen Mile Falls Project be considered a withdrawal of NEP's notice of intent to file an application for new license for that project. Rockingham asks that we issue a notice accepting such withdrawal and soliciting applications for new license for the project to cure any chilling effect on competition for relicensing that could have been caused by the notice of intent filed by NEP, as the incumbent licensee. 1/

Rockingham's requested relief is unwarranted and will be denied. The Commission scrutinizes a transfer of license for a project undergoing the relicensing process to determine whether the transfer's primary purpose is to give the transferee an advantage in relicensing, by for example escaping consideration of an incumbent licensee's poor compliance record, 1/ or to transfer a project that is becoming increasingly marginal, or is in need of decommissioning in the near term, to a transferee that lacks the financial or operational capacity to become the licensee. 1/ Neither purpose is indicated here. NEP has generally complied with the terms and conditions of its licenses.

The proposed transfers are part of NEP's divestiture of its generation business in response to electric industry restructuring. USGen has signed an asset purchase agreement with NEP to buy all of NEP's fossil and hydroelectric assets for \$1.6 billion and expects to retain key hydroelectric plant management personnel. There is no basis for concluding that the transfers are intended to give the transferee an advantage in relicensing or to allow NEP to discard projects that are operationally imperiled, to an unfit transferee.

8/ Section 15(a)(2), 16 U.S.C. § 808(a)(2), provides for a tie-breaker preference for the incumbent licensee in a competitive relicense proceeding.

2/ See Hydroelectric Relicensing Regulations Under the Federal Power Act, 54 Fed. Reg. 23,756; FERC Statutes and Regulations, Regulations Preambles 1986-1990 & 30,854 at p. 31,438, n. 318.

10/ See Policy Statement on Project Decommissioning at Relicensing, 60 Fed. Reg. 339, 346 (Jan. 4, 1995); FERC Statutes and Regulations, Regulations Preambles 1991-1996 & 31,011 at pp. 31,232-33 (Dec. 14, 1994).

The Mountain Club asks that any transfer order include the terms of settlement agreements on, respectively, the Deerfield River and Bear Swamp Projects, and the Fifteen Mile Falls Project, to which the Mountain Club is a party.

The Mountain Club's request must be denied. As noted, the first of these two settlement agreements has been incorporated into the new license for the Deerfield River Project and into the license amendment for Bear Swamp. When a license is transferred, the new licensee steps into the shoes of the old licensee, and is subject to any and all requirements to which the old licensee was subject under the license and the Commission's orders thereunder. ^{11/} Consequently, the USGen, as the licensee, will be required to adhere to the requirements of the Deerfield River settlement to the extent that the settlement is incorporated into the Deerfield River and Bear Swamp licenses.

As to the settlement agreement that relates to the Fifteen Mile Falls Project, the application for new license for that project is due to be filed by July 31, 1999. The mere transfer of a license does not alter a project's environmental impacts, or the determination of what mitigation measures are warranted. It is consequently inappropriate to bring into transfer proceedings issues of project impacts and proposed mitigation measures for such impacts. ^{11/} Therefore, this is not the appropriate forum for determining the extent to which the settlement agreement relating to Fifteen Mile Falls Project should be incorporated into the new license for that project. We suggest that concerns

^{11/} Section 8 of the FPA, 16 U.S.C. § 801, provides, in pertinent part:

[N]o voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee . . . shall be subject to all of the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder .

^{12/} See *Menominee Company*, 74 FERC & 61,023 at p. 61,067 (1996), aff'm sub. nom. *State of Wis. v. FERC*, 104 F.3d 462 (D.C. Cir. 1997).

about environmental impacts and proposals of mitigation measures at the Fifteen Mile Falls Project by refiled when notice is given that the project is ready for environmental analysis.

The Town of Walpole (regarding the Bellows Falls Project, which is located within the Town) and the Northeast Center (regarding all the involved projects) express concern that the transfers may result in reductions in the valuation of project property for tax purposes that would contribute to reductions in municipal services, employment, and private property values in the towns in which the projects are located. ^{1/} However, property valuation for tax purposes is beyond the Commission's jurisdiction, and in any event, the concerns expressed here are speculative and lack any reasonable degree of specificity concerning the asserted economic and social impacts of the transfers.

The Town of Walpole contends that USGen may not fulfill what the Town believes is USGen's share of the responsibility for remedying shoreline erosion assertedly caused by an ice jam at the Bellows Falls Project, and concerning which NEP and resource agencies have conducted discussions.

Article 19 of the license for the Bellows Falls Project requires the licensee to take reasonable measures to prevent soil erosion, and reserves authority in the Commission, upon request or upon its own motion, and after notice and opportunity for hearing, to require the licensee to take such erosion-control measures as the Commission finds necessary for these purposes. ^{1/}

As noted, the transferee will be bound by these requirements. However, this proceeding is not the proper forum for determining what such erosion-control measures, if any, may be required.

The Island Corporation, the owner of a mill site adjacent to the Bellows Falls Project, claims the right to 300 kilowatts of power from NEP, by virtue of a 1914 Lease Indenture with a predecessor company of NEP and expresses concern that such right could be affected by transfer of the license for Project No. 1855. The Island Corporation fails to show how the requested transfers infringe on its asserted rights, and in any event, the

^{13/} In its motion, filed December 1, 1997, to intervene in the divestiture proceeding in Nos. ER98-6-000 and EC98-1-000, the Northeast Center makes the same arguments.

^{14/} See Article 19 of Form L-3 entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States," 54 FPC 1817 at 1823, incorporated by reference into the Bellows Falls license, 8 FERC at p. 61,475.

Commission is not the appropriate forum to review the validity of an alleged private contract. 1/

Northeast Center requests that the license transfer application be included in the Commission's consolidated review of NEP's divestiture applications and the several applications be assigned to an Administrative Law Judge. Since there are no material factual issues in dispute regarding these transfers that cannot reasonably be resolved on the existing written record, and without consolidation with the divestiture proceeding, Northeast Center's request will be denied.

The applicants' request to make this order effective on the date of their conveyance of project properties will be denied. The applicants' request is miscast. In essence, the applicants are requesting a stay of the effectiveness of this order pending their conveyance of project property. Approval of the transfer is conditioned upon the conveyance of project properties and transferee's signed form acceptance of the licenses within 60 days of the issuance of this order. Any problems that the applicants may experience in complying with the deadlines imposed in this order can be addressed through the filing of appropriate extension requests.

CONCLUSIONS

NEP has generally complied with the terms and conditions of the licenses. NEP has paid and agrees to continue to pay charges which accrue until the transfer is effective.

USGen is not a licensee of the Commission. Therefore, we have no compliance record to review. Nevertheless, USGen is qualified to hold the licenses and to operate the properties under the licenses, and it has agreed to accept all the terms and conditions of the licenses, and to be bound by the licenses as if it were the original licensee.

The proposed transfers are consistent with the Commission's regulations and are in the public interest.

The Director orders:

15/ Compare Vermont Electric Cooperative, Inc., 23 FERC & 61,174 at pp.61,378-79 (1983).

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(A) The Town of Rockingham, Vermont's request that the transfer application for the Fifteen Mile Falls Project No. 2077 be considered a withdrawal of New England Power Company's notice of intent to file an application for new license for that project, and for issuance of public notice soliciting applications for new license for Project No. 2077, is denied.

(B) The Appalachian Mountain Club's request that this order include the requirements of the settlement agreements on, respectively, the Deerfield River Project No. 2323 and Bear Swamp Project No. 2669, and the Fifteen Mile Falls Project No. 2077, is denied.

(C) The request by Northeast Center for Social Issue Studies that the license transfer application be included in the Commission's consolidated review of New England Power Company's divestiture applications in Docket Nos. ER98-6-000 and EC98-1-000

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and the several applications be assigned to an Administrative Law Judge is denied.

(D) Transfer of the licenses for Projects Nos. 1855, 1892, 1904, 2077, 2323, and 2669, the Bellows Falls, Wilder, Vernon, Fifteen Mile Falls, Deerfield River, and Bear Swamp Hydroelectric Projects, from New England Power Company to USGen New England, Inc. is approved.

(E) New England Power Company shall pay all annual charges that accrue up to the effective date of the transfer.

(F) Approval of the transfer is contingent upon: (1) transfer of title of the properties under license and delivery of all license instruments to USGen New England, Inc., which shall be subject to the terms and conditions of the licenses as though it were the original licensee; and (2) USGen New England, Inc. acknowledging acceptance of this order and its terms and conditions by signing and returning the attached acceptance sheets. Within 60 days from the date of this order, USGen New England, Inc. shall submit certified copies of all instruments of conveyance and the signed acceptance sheets.

(G) The request of New England Power Company and USGen New England, Inc. to make this order effective on the date of their conveyance of project properties is denied.

(H) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

Carol L. Sampson
Director
Office of Hydropower Licensing

Project No. 1855

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, USGen New England, Inc., this _____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its President, and its corporate seal to be affixed hereto and attested by _____, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary
(Executed in quadruplicate)

Project No. 1892

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, USGen New England, Inc., this _____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its President, and its corporate seal to be affixed hereto and attested by _____, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary
(Executed in quadruplicate)

Project No. 1904

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, USGen New England, Inc., this _____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its President, and its corporate seal to be affixed hereto and attested by _____, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary
(Executed in quadruplicate)

Project No. 2077

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, USGen New England, Inc., this _____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its President, and its corporate seal to be affixed hereto and attested by _____, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary
(Executed in quadruplicate)

Project No. 2323

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, USGen New England, Inc., this _____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its President, and its corporate seal to be affixed hereto and attested by _____, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary
(Executed in quadruplicate)

Project No. 2669

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, USGen New England, Inc., this _____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its President, and its corporate seal to be affixed hereto and attested by _____, its Secretary, pursuant to a resolution of its Board of Directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary
(Executed in quadruplicate)