

89 FERC ¶ 61,286

UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

Fraser Papers Inc.

Project Nos. 2395-010,
2421-010, 2473-009, and
2640-017

Flambeau Hydro, L.L.C.

ORDER GRANTING REHEARING AND APPROVING TRANSFER OF LICENSES

(Issued December 20, 1999)

On May 13, 1999, the Commission issued an order denying approval for Fraser Papers Inc. (Fraser) to transfer to Flambeau Hydro, L.L.C. (Flambeau), the licenses for the Upper, Lower, Pixley, and Crowley Projects on the North Fork of the Flambeau River in Price and Ashland Counties, Wisconsin. The denial was premised on our understanding that the Pixley and Crowley Projects required significant and costly construction to ensure the safety of the dams, and our concern that the record did not adequately demonstrate that Flambeau had the financial resources to undertake that construction.

On June 14, 1999, Fraser and Flambeau filed a timely request for rehearing of our May 13 order.¹ For the reasons discussed below, we will grant rehearing and approve the transfer of the four projects.

In our prior order, we stated that, based on recent staff inspections, the Upper and Lower Projects are in good condition, but that the Pixley and Crowley Projects are the subject of certain dam safety requirements that might require significant and costly new construction. At that time, the our staff's concern was that the current spillway capacity of

¹Fraser and Flambeau also filed, on the same date, additional financial data and a request for privileged treatment of that data. No one opposed the request for privileged treatment of the data, and it has been accorded that treatment. The additional data, by itself, does not provide an adequate basis for resolving the questions we had with respect to Flambeau's financial ability to undertake major construction, but in light of our determinations herein we do not need to reach that issue in this order.

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both projects was inadequate, and that both projects might require a dam safety modification to increase their spillway capacity. Of particular concern was the impact of a domino failure of both dams on two specific areas of development downstream of the Crowley Project. As noted in our prior order, the staff's assessment of the safety of the Pixley Project could not be concluded until the submission of the independent consultant's inspection report. For the Crowley Project, the need to increase the spillway capacity depended on the acceptability of a warning system in lieu of modifications.

Subsequent to the issuance of that order, our staff has reviewed the technical aspects of both the Pixley² and the Crowley Projects, and concluded that at this time no dam safety remediation is required at either project. A domino failure of both the Pixley and Crowley dams would not present a danger to life at either area of development identified in our prior order. The two structures located 12 miles downstream of the Crowley Project will already be substantially inundated by a natural flood smaller than one which would overtop and possibly fail either dam, and therefore are considered to be evacuated and not subject to loss of life. Also, while the tavern and two cabins located in the immediate vicinity of the tavern would receive some flooding should the dams fail while the river is in an extreme flood stage, no loss of life is anticipated. A trailer is to be permanently removed from the affected area. The licensee will have the continuing responsibility to monitor future downstream development.

Our primary concern in our prior order was that the potential transferees had not made a showing of financial resources adequate to undertake significant and costly new construction if such construction were required to render the projects safe to operate. In light of our determination since then that such new construction is not required, we will approve the transfer of the four licenses to Flambeau.

While we stated in our prior order that we did not expect the projects to be profitable to operate, it has been our policy not to deny license authority on that basis, but to allow the licensee and its lenders and investors to make their own independent

²On November 1, 1999, Spaulding Consultants, LLLC, an independent consultant, filed, on behalf of Flambeau and North American Hydro, an inspection report for the Pixley Project in which it concluded that the project structures appear to be in good to excellent condition for a 70-year-old structure. Our staff agrees with the conclusions of the independent consultant's report.

judgment. We have applied that policy with respect to the issuance of new licenses,³ and perceive no reason to adopt a contrary policy with respect to the transfer of licenses.⁴ We would not apply that policy if doing so would pose a threat to public health and safety, but, as discussed above, we have now determined that it would not. Finally, we note that Flambeau has a 20-year power purchase agreement with Fraser, which, absent a need for new construction, is a significant indicator of Flambeau's ability to finance its license obligations.

Before approving a sale of project property, such as the sale, lease, and easement transaction involved here, the Commission must ensure that the licensee/transferee will hold and control all property interests necessary for it to accomplish project purposes.⁵ Consistent with these requirements, under the parties' asset purchase agreement, Flambeau is obtaining all property rights necessary to control project operations, and Fraser is retaining none of such rights. Under sections 2.2, 4.7, 7.6, and 8.2 of the agreement, Fraser will convey all project property to Flambeau, including fee simple title to real property, flowage rights, and transmission line easements. Section 10.9 of the agreement provides that notwithstanding any other provisions in the agreement, Flambeau is entitled to perform all actions required by orders of the Commission without prior approval by Fraser. This provision will serve to ensure that the transferee will have the right to fulfill its obligations under the licenses without the prior consent of the transferor, which will no longer be a licensee.⁶ Therefore, the transaction will vest in Flambeau, as the transferee,

³See Mead Corp., 72 FERC ¶ 61,027 (1995); cf. Felts Mills Energy Partners, L.P., 80 FERC ¶ 61,075 at pp. 61,265-66 (1997).

⁴As we noted in our prior order (87 FERC at p. 61,692), citing our 1990 Decommissioning Policy Statement, it is the Commission's policy to take a hard look at license transfer applications under circumstances in which the transferee's financial resources are in question and there is reason to believe that the project may be approaching the end of its useful life. We have taken that hard look here, and have not found any significant physical infirmities or other problems that would cause us to believe that the projects are likely to face decommissioning during the term of the licenses. As discussed above, in the absence of a demonstrated need for significant construction investment, we are unwilling to use economic forecasting by itself as a basis for denying license authority or license transfer authority.

⁵See, for example, City of Vidalia, Louisiana, 52 FERC ¶ 61,200 (1990).

⁶See Linweave, Inc., 23 FERC ¶ 61,391 (1983).

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sufficient rights to accomplish all project purposes and will secure the Commission's ability to carry out its regulatory functions through the transferee.

Fraser has fully complied with the terms and conditions of the license and has agreed to pay the charges which accrue to the date of the transfer. Flambeau has agreed to accept and be bound by all of the terms and conditions of the license as though it were the original licensee.

The proposed transfers are consistent with the Commission's regulations and are in the public interest. The sales transaction between Fraser and Flambeau is consistent with the project-control requirements of the Federal Power Act and will serve to ensure continued project operations and financing.

Accordingly, in light of all of the above, we will approve the transfer of the licenses for the four projects.

The Commission orders:

(A) The request for rehearing is granted, and the transfer of the licenses for the Upper, Lower, Pixley and Crowley Projects, from Fraser Papers Inc. to Flambeau Hydro, L.L.C., is approved.

(B) Fraser Papers Inc. shall pay all annual charges, for all four projects, that accrue up to the effective date of the transfers to Flambeau to Flambeau Hydro, L.L.C.

(C) Approval of the transfer is contingent upon: (1) the transfer of title to the properties under license and the delivery of all license instruments to Flambeau Hydro, L.L.C., which shall be subject to the terms and conditions of the license as though it were the original licensee; and (2) Flambeau Hydro, L.L.C.'s acknowledging acceptance of this order and its terms and conditions by signing and returning the Office of Hydropower

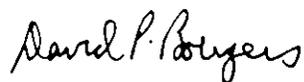
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Licensing's acceptance sheet. Within 60 days from the date of this order, the transferee shall submit certified copies of all instruments of conveyance and the signed acceptance sheet.

By the Commission.

(S E A L)



David P. Boergers,
Secretary.