

UNITED STATES OF AMERICA 72 FERC ¶ 62, 065
FEDERAL ENERGY REGULATORY COMMISSION

Menominee Company
N.E.W. Hydro, Inc.

Project No. 2744-019
Wisconsin/Michigan

ORDER APPROVING LEASE AGREEMENT AND
APPROVING TRANSFER OF LICENSE

JULY 31, 1995

Menominee Company (Menominee/transferor) and N.E.W. Hydro, Inc. (N.E.W./transferee) seek Commission approval to transfer Menominee's license to N.E.W. for the Menominee/Park Mill Project, on Menominee River, Marinette County, Wisconsin, and Menominee County, Michigan. The parties also request approval of the lease agreement between N.E.W. and Menominee.

BACKGROUND

On March 11, 1985, the Commission issued a major license for Project No. 2744 to Menominee (30 FERC ¶ 62,264). By application filed March 7, 1995, Menominee requested Commission approval to transfer the license to N.E.W., and of its leases of project property. The transferor uses the project's power in its paper mill.

The leases are part of the parties' sale, lease, and easement transaction executed on January 20, 1995.¹ The transaction includes: (1) an Asset Purchase Agreement, which provides for the sale of project property for each project -- that is, lands, structures, and equipment, except the project property included in the parties' Lease, Easement, and Operations Agreement -- from the respective transferor (Menominee) to the transferee (N.E.W.); and (2) the Lease, Easement, and Operations Agreement (incorporated by reference into the Asset Purchase Agreement), under which: (a) the transferee leases to the transferor land beneath each project's powerhouse, (b) the transferor leases to the transferee certain areas of each project's powerhouse, structures, and equipment, and (c) the transferor grants easements to transferee for ingress and egress over transferor's property to operate and maintain the project. The transferor and transferee have entered into a power sales agreement.

Public notice of the application was issued on March 20, 1995, with a comment deadline of April 6, 1995. In response to the public notice of the application, timely motions to intervene were filed by the Wisconsin Department of Natural Resources, the

¹The transaction also includes Project No. 2689, the subject of a separate application that will be treated in a separate order.

United States Department of the Interior, the Wisconsin Electric Power Company, and the Michigan Department of Natural Resources. A late motion to intervene was filed jointly by Anglers of the AuSable, Inc.; The Great Lakes Council, Inc., of the Federation of Fly Fishers, Inc.; the Michigan United Conservation Clubs; the Michigan Council of Trout Unlimited; The Michigan Hydro Relicensing Coalition; and the Izaak Walton League of America. Late filed comments were received from David Doberstein of Marinette, Wisconsin. Intervenors and commenter argue that several issues involving license requirements, including the transferee's ability to finance compliance with the requirements, should be resolved prior to approval of the transfer.

DISCUSSION

Standard license Article 5 requires licensees to acquire and retain title in fee to, or the right to use in perpetuity, project property sufficient to accomplish all project purposes. Any disposal of project property rights once acquired is subject to Commission approval under the terms of Article 5. Before approving a transfer of project property, such as the sale, lease, and easement transaction involved here, the Commission must ensure that the licensee involved holds and controls all property interests necessary for it to accomplish project purposes. The Commission stated that deviations from the requirements of Article 5 may be approved upon a showing of good cause and that the alternative form of ownership is sufficient for all project purposes.²

That the sale and lease transaction already occurred is not a bar to approving it. While, as noted, a licensee's transfer of rights in project property to a non-licensee requires prior Commission approval, the Commission has approved ("ratified") already-completed transfer of project property, such as would be the case here, where it is in the public interest to do so. Under Sections 8.3 and 8.4 of the Asset Purchase Agreement, the transferor is continuing to operate and maintain the project, until its license transfer is approved.

The Commission has found that fee simple title or an easement provides licensees with sufficient rights in project property, so long as the title or easement is perpetual, transferable, and conveys rights necessary to fulfill project purposes. The fee simple title here is in the form of a warranty deed that was free of all encumbrances when conveyed to the transferee. Transferor guarantees that the easement is suitable for transferee's purposes or needs in operating the project as a hydroelectric generating facility. Moreover, the easements "run with the land" and are binding upon and inure to the benefit of

² Niagara Mohawk Power Corp., 16 FERC ¶ 61,180 (1981).

transferor's and transferee's respective successors, assigns, and transferees.

While the lease of project property does not convey the type of property interests -- fee simple title or easement -- that the Commission has found to be consistent with the requirements of Article 5 for major projects, it appears that good cause is shown to approve the lease as a permissible deviation from the requirements of Article 5. In finding an easement acceptable under the requirements of Article 5, the Commission found that:

... an easement in project property meets the requirements of Article 5, if the easement vests in the licensee sufficient rights to accomplish all project purposes; secures the Commission's ability to carry out its regulatory functions; and vests control that is perpetual and transferable.³

The subject lease of project property vests property interests in the transferee/licensee that would be consistent with the above-quoted requirements of Article 5. Under Section 10.1 of the Lease, Easement, and Operations Agreement, the transferee has the right to "quiet enjoyment" of the leased premises. Moreover, it ensures that the transferee will be able to comply with the license without regard to the rights conveyed in the lease to the lessor/nonlicensee, and the lease contains a so-called Linweave clause (Linweave, Inc., 23 FERC ¶ 61,391 (1983)), which states that notwithstanding any other of the lease's provision, the licensee shall have the right to perform any and all acts ordered by the Commission. Section 4.2 of the lease provides that the term of the lease is:

... co-extensive with the FERC license applicable to the Menominee/Park Mill sites [Project No. 2744] and shall be deemed automatically renewed to a term identical with the terms of the FERC license at such time as the FERC license is renewed...

Moreover, the transferee may assign the lease without the consent of the transferor. Therefore, the lease appears to meet the requirements of Article 5, since it would vest in the transferee sufficient rights to accomplish all project purposes; it would secure the Commission's ability to carry out its regulatory functions; it would be transferable; and, while not perpetual (as in the case of a fee simple title or an easement), it would extend for the term of the license and any new license for the

³ Niagara Mohawk Power Corporation, 23 FERC ¶ 61,034 at p. 61,090 (1983).

project. Consequently, we believe that the subject sale and lease are acceptable deviations from the requirements of Article 5.

Intervenors and commenter discussed the following issues: maintenance of the run-of-river mode of operation, including the use of the computer system; water quality; fish passage and entrainment; habitat degradation, mitigation, and restoration; fish and wildlife impacts; economic feasibility of dam operation; recreational access; threatened and endangered species; financial responsibility and long-term planning; financial status of N.E.W.; effects on local businesses of the proposed license transfer; dam maintenance; motivation of Menominee to sell the project; headwater benefits enjoyed by Menominee; funds to be established for dam removal; project ownership and responsibilities; value of fish lost; downstream fish passage; and the FERC Decommissioning Policy Statement.

The transfer will be approved. N.E.W., as the new licensee, will be bound by all terms and conditions of the license as though it were the original licensee. Also, in the order issuing license, the Commission made an independent determination that the project is economical and, as noted, N.E.W. has a power sales agreement with Menominee.

Intervenor's requests to determine the transferee's financial capacity to fulfill the terms of the license is relevant, in view of the Commission's December 14, 1994, Policy Statement on Project Decommissioning at Relicensing, where the Commission stated that:

Several commenters noted also that a licensee might seek to transfer an increasingly marginal project to a new licensee that lacked the financial resources to maintain it or close it down in an appropriate manner. Throughout that process, the former owner relieves itself of the responsibility, which then may fall to State authorities or, at least when Federal lands are involved, on other Federal agencies. While the Commission is aware of no widespread problems on this score, it agrees that transfer applications should be scrutinized to foreclose this sort of situation, and where warranted, the authorities should be consulted before transfers are approved.

The concerns quoted from the Commission's decommissioning policy statement do not require denying the application or requesting further evidence. The project, as noted, is economically viable. Project decommissioning, including dam removal, is not reasonably anticipated now or within the 30-year term of the license. The transfer is not an attempt by Menominee to relieve itself of an increasingly marginal project to a new licensee that lacks the financial resources to maintain it.

The licensee has fully complied with the terms of the license and agrees to pay annual charges that accrue to the date of transfer.

N.E.W. is qualified, under 18 C.F.R. § 4.30(24) and Section 4(e) of the Federal Power Act, to hold the license, and agrees to comply with the terms and conditions of the license and to be bound by the license as if it were the original licensee.

Also, a review of Commission records indicates that N.E.W. is not a Commission licensee, and therefore, has no current compliance record to be considered in this proceeding.

Approval of the lease agreement and transfer of the license for this project are consistent with the Commission's regulations and in the public interest.

The Director orders:

(A) The lease agreement between Menominee and N.E.W. is approved. Transfer of the Menominee/Park Mill Project license is also approved.

(B) Menominee shall pay all annual charges that accrue up to the effective date of transfer.

(C) Approval of the transfer is contingent upon transfer of title of the properties under license and delivery of all license instruments to N.E.W., which shall be subject to the terms and conditions of the license as though it were the original licensee.

N.E.W. shall submit certified copies of all instruments of conveyance within 60 days from the date of this order.

(D) N.E.W. shall acknowledge acceptance of this order and its terms and conditions by signing and returning the attached acceptance sheet within 60 days from the date of this order.

(E) 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.

**J. Mark Robinson
Director, Division of Project
Compliance and Administration**

Project No. 2744-019

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, _____ 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)