

UNITED STATES OF AMERICA 90 FERC ¶ 62,217
FEDERAL ENERGY REGULATORY COMMISSION

Wisconsin Power and Light Company and
710-021 Wolf River Hydro Limited Partnership

Project No.

ORDER APPROVING TRANSFER OF LICENSE

(Issued March 28, 2000)

On November 8, 1999, as supplemented on February 11, 2000,¹ Wisconsin Power and Light Company (Wisconsin Power or transferor), licensee for the 700-kilowatt Shawano Hydroelectric Project No. 710, filed a joint application with Wolf River Hydro Limited Partnership (Wolf River or transferee) for approval of a transfer of the project license to Wolf River. The project is located on the Wolf River in Shawano County, Wisconsin, partially within the Menominee Indian Reservation.

A new license for the project was issued to the transferor on May 16, 1997.² The transfer application was submitted in connection with the intended sale of the project to Wolf River.³

Public notice of the transfer application was issued on November 19, 1999. Motions to intervene (none in opposition) were filed by the United States Department of the Interior (Interior), the Menominee Indian Tribe of Wisconsin (the Tribe), and the Wisconsin Department of Natural Resources (which requests party status only).⁴ Wolf River filed an answer to these motions to intervene on January 7, 2000.

¹The supplement was filed in response to a data request made by Commission staff in a letter dated February 4, 2000.

²79 FERC ¶ 61,181 (rehearing pending).

³By letter filed March 6, 2000, the transferee withdrew its recommendation to combine the transfer proceeding with the relicense rehearing proceeding, and it requested the issuance of a decision on the transfer prior to March 31, 2000, on the ground that a clause in the project sales agreement gives Wisconsin Power the right to unilaterally cancel the agreement if an order approving the transfer is not issued by then.

⁴The 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 CFR Section 385.214(c) (1999).

DISCUSSION

Interior and the Tribe both argue that Interior's license conditions, submitted on May 13, 1997, in the project's relicensing proceeding, pursuant to Section 4(e) of the Federal Power Act, must be included in the license. Inclusion of the Section 4(e) conditions in the new license is at issue in the pending rehearing of the order issuing that license, and the findings in this order should not be construed as determining in any way the issue of inclusion of the 4(e) conditions.

When a license is transferred, the new licensee is subject to all of the requirements to which the old licensee was subject under the license and the Commission's orders thereunder.⁵ Accordingly, Wolf River, as the licensee, will be required to adhere not only to the requirements of the new license, as issued May 16, 1997, but also to the license requirements resulting from any order issued in the pending rehearing proceeding.

Interior and the Tribe question the transferor's compliance record, including compliance under the new license.

On June 2 and 17, 1999, the Commission issued orders on Interior's and the Tribe's complaints of non-compliance with various articles of the license.⁶ The transferor has generally complied with the requirements of those orders. Wolf River, as the licensee, will be the entity that the Commission will look to for compliance with the license.

Interior and the Tribe seek assurance that the transferee is financially capable of fulfilling license requirements, including those that may be imposed on rehearing or appeal of the new license.

⁵Under the governing provisions of Section 8 of the Federal Power Act, 16 U.S.C. § 801, transferees are "subject to all of the conditions of the license ... and ... to all the provisions and conditions of this Act to the same extent as though (they) ... were the original licensee...."

⁶See 87 FERC ¶ 61,279 and ¶ 61,306.

Special financial scrutiny of a transfer application may be warranted where there is evidence to suggest that a project is becoming increasingly marginal, and/or could be in need of decommissioning in the near term,⁷ which is not the case here. The project's impoundment has a low-hazard rating, and the project is in good operating condition.⁸ Additionally, in its supplementary filing of February 11, 2000,⁹ the transferee sets forth, among other things, its power purchase agreement with the transferor. The filing shows that revenues will exceed projected financing and operating and maintenance costs (albeit perhaps not all costs that might be imposed as a result of rehearing of the new license). The record shows -- and Interior and the Tribe do not posit specific allegations to the contrary -- that the project is economically viable, which is a significant indicator of the transferee's ability to finance license obligations.

The Tribe requests a condition requiring the transferee, as the licensee, to serve the Tribe with any request for modification or amendment of the license that affects tribal rights or resources, and Interior requests a similar but more broadly-worded condition requiring the transferee to serve it with any request for modification (including schedule changes), amendment, or appeal of any fish and wildlife related conditions, or any conditions affecting tribal rights or resources.

However, notice of, and interventions in, Commission orders rendered after the issuance of a license will ordinarily be entertained only if the order: (1) entails a material change in the plan of project development or in the terms and conditions of the license; (2) would adversely affect the rights of a property holder in a manner not contemplated by the license when issued; or (3) is being challenged by an agency or other entity specifically given a consultation role in the post-license proceeding.¹⁰ There is no basis for departing from the described notice and intervention policy, as Interior and the Tribe request.

⁷See Niagara Mohawk Power Corporation and Erie Boulevard Hydropower, L.P., 90 FERC ¶ 61,148 n. 49 (2000), citing Fraser Papers Inc. and Flambeau Hydro, L.L.C., 89 FERC ¶ 61,286 (1999), and Pacific Gas and Electric Co. and Eldorado Irrigation District, 87 FERC ¶ 61,022 at p. 61,084 (1999).

⁸79 FERC at p. 61,856 and n. 53.

⁹The transferee requested that pursuant to 18 CFR 388.112 (1999) of the Commission's regulations, the Commission treat its February 11 filing as confidential. The transferee noted that it had sent each intervenor a copy of the filing.

¹⁰See Kings River Conservation District, 36 FERC ¶ 61,365 (1986) and Pacific Gas and Electric Company, 40 FERC ¶ 61,305 (1987).

On March 2, 2000, the Tribe filed a motion requesting that the Commission require the immediate payment by Wisconsin Power of \$31,791.50 (the Tribe's calculation of the annual charges for use of the Tribe's land that have accrued from the issuance date of the new license through December 31, 1999), plus \$37.26 per day ($\$13,600 \div 365$), until the date of the transfer,¹¹ or, in the alternative, to require Wisconsin Power to deposit the same amount of money in an escrow account.

However, the issue of the appropriate annual charges for the use of the Tribe's lands is under consideration in a separate proceeding,¹² and we will not make that determination here. Furthermore, the condition recommended by the Tribe for an escrow account requires technical conditions and control for release of funds that make it an administratively undesirable remedy here. However, until the level of payment of annual charges is determined, this order will retain jurisdiction over Wisconsin Power for the limited purpose of requiring it to pay whatever annual charges accrue up to the date of the transfer's consummation, based on the level of annual charges payment the Commission determines in the future.

CONCLUSIONS

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

The transferee is not a licensee of the Commission. Therefore, we have no compliance record to review. Nevertheless, the transferee is qualified to hold the license

¹¹The Tribe's motion, at page 6, makes the following calculations:

1997	\$ 8,532.54 (\$37.26 per day for 229 days)
1998	\$13,600.00
1999	<u>\$13,600.00</u>
	\$35,732.54
Less amount paid	<u>-\$ 3,941.04</u>
Total due as of 12-31-99	<u>\$31,791.50</u>

¹²87 FERC ¶ 61,279 n. 1 (1999).

and to operate the property under the license. It has agreed to accept all the terms and conditions of the license, and to be bound by the license as if it were the original licensee.

The proposed transfer is consistent with the Commission's regulations and is in the public interest.

The Director orders:

(A) Transfer of the license for Project No. 710, the Shawano Hydroelectric Project, from Wisconsin Power and Light Company to Wolf River Hydro Limited Partnership is approved, subject to Wisconsin Power and Light Company being retained as co-licensee for the limited purpose of paying annual charges that accrue up to the date of the transfer's consummation, based on the level of annual charges payment that the Commission will determine in a separate order.

(B) Wisconsin Power and Light Company shall pay all annual charges that accrue up to the effective date of the transfer.

(C) Approval of the transfer is contingent upon: (1) transfer of title of the properties under license and delivery of all license instruments to Wolf River Hydro Limited Partnership, which shall be subject to the terms and conditions of the license as though it were the original licensee; and (2) Wolf River Hydro Limited Partnership acknowledging 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, Wolf River Hydro Limited Partnership shall submit certified copies of all instruments of conveyance and the signed acceptance sheet.

(D) 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 CFR § 385.713.

Daniel M. Adamson
Director
Office of Energy Projects

Project No. 710-021

IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, _____, this _____ day of _____, 20____, Wolf River Hydro Limited Partnership has caused its name to be signed hereto by _____, its _____, and its seal to be affixed hereto and attested by _____, its Secretary, pursuant to a resolution of its _____, duly adopted on the _____ day of _____, 20____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary
(Executed in quadruplicate)