

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Power Authority of the State of New York

Project No. 2000-046

Massachusetts Municipal Wholesale Electric  
Company

v.

Power Authority of the State of New York

Docket No. EL03-224-001

ORDER ON REHEARING

(Issued June 4, 2004)

1. In this order, the Commission grants the request of the Power Authority of the State of New York (NYPA) for rehearing of the order issuing a new license for the St. Lawrence-FDR Project No. 2000,<sup>1</sup> and denies the requests for rehearing filed by the Massachusetts Municipal Wholesale Electric Company (MMWEC), Niagara Power Coalition (NPC), and members of the Mohawk Community. This order serves the public interest by ensuring that the licensing order is based on an appropriate evidentiary record, and by clarifying the discussion of certain issues and license conditions.

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<sup>1</sup>Power Authority of the State of New York and Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York, 105 FERC ¶ 61,102. On November 3, 2003, NYPA filed a request for clarification and issuance of an erratum in order to make the effective date for the new license November 1, 2003, rather than October 1, 2003. The requested erratum was issued on November 21, 2003.

## **BACKGROUND**

2. On October 23, 2003, the Commission issued a new license to NYPA for the 912-megawatt St. Lawrence Project. The license order required NYPA to continue to allocate project power for sale to MMWEC under certain terms and conditions, and dismissed a complaint by MMWEC seeking other relief related to allocation of project power.
3. Timely requests for rehearing were filed by NYPA, MMWEC, the Niagara Power Coalition (NPC), and jointly by the St. Regis Mohawk Tribe, Mohawk Council of Akwesasne, and the Mohawk Nation Council of Chiefs (Mohawks). NYPA also requests clarification or, in the alternative, rehearing on certain matters. The Local Government Task Force (Task Force) filed a motion for clarification. These filings are considered below.
4. On December 5, 2003, MMWEC filed a motion to strike portions of NYPA's request for rehearing. NYPA filed a timely answer opposing MMWEC's motion.
5. On November 3, 2003, the Mohawks filed a letter stating that they do not concur in the Programmatic Agreement among the Commission's Office of Energy Projects, the Advisory Council on Historic Preservation, and the New York State Historic Preservation Officer for the project relicensing, and that the Environmental Impact Statement (EIS) prepared in this proceeding was deficient in its analysis of Mohawk territorial, environmental, and cultural issues. On November 18, 2003, the Advisory Council filed a letter stating that the Mohawks should be invited to participate in the consultations conducted to develop the project's Historic Properties Management Plan.

## **DISCUSSION**

### **MMWEC's Motion to Strike**

6. MMWEC moves to strike various arguments in NYPA's rehearing request pertaining to our reliance on legislative history to find Congressional intent with regard to power allocation, the applicability of res judicata to this proceeding, and the meaning of FPA section 20<sup>2</sup> and whether it has been repealed by implication. MMWEC also moves to strike certain alleged factual misstatements in NYPA's rehearing request.

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<sup>2</sup>16 U.S.C. § 813.

7. MMWEC states that Commission policy disfavors consideration of arguments raised for the first time on rehearing in the absence of good cause, because untimely arguments present a moving target.<sup>3</sup> NYPA responds that the order cited by MMWEC holds only that a complaint may not be amended on rehearing with new factual evidence;<sup>4</sup> it could not be expected to anticipate and preemptively respond to a future order; and its arguments directly address the legal issues discussed in the license order.<sup>5</sup> Finally, it states that MMWEC's motion is really an answer to a request for rehearing, prohibited by Rule 213(a)(2) of the Commission's Rules of Practice and Procedure.<sup>6</sup>

8. The Commission discourages parties from raising issues on rehearing that could have been raised earlier.<sup>7</sup> NYPA's rehearing request does not raise new issues, but does include some new arguments, which respond to the legal discussion in the license order. As to NYPA's alleged misstatements of fact, MMWEC's motion includes argument in rebuttal. We find all of the pleadings to be helpful to the resolution of this proceeding. We will therefore deny MMWEC's motion to strike.

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<sup>3</sup>MMWEC motion to strike at 2-3.

<sup>4</sup>Tenaska Power Service Co. v. Southwest Power Pool, Inc., 102 FERC ¶ 61,140 (2003), does not so hold. Rather, we declined to allow the respondent to the complaint therein to include in its request for rehearing of an order granting the petitioner's complaint new factual evidence that could easily have been adduced prior to the underlying order on the complaint.

<sup>5</sup>NYPA answer to MMWEC motion to strike (NYPA answer) at 3-4.

<sup>6</sup>18 C.F.R. § 385.213(a)(2).

<sup>7</sup>See, e.g., Baltimore Gas & Elec. Co., 91 FERC ¶ 61,270 at 61,922 (2000) (denying request for rehearing filed by a party that failed to comment on any issues prior to its rehearing request, but had raised the same issues it raised on rehearing in other proceedings and that the Commission had rejected as unpersuasive).

### **Massachusetts Power Allocation**

9. The most vigorously contested issue in this proceeding has been whether NYPA should be required to continue allocating a share of project power to neighboring States in the Northeast, as was required by Article 28 of the original license.<sup>8</sup> When the original license expired, NYPA was selling to Massachusetts, Vermont, Rhode Island, Connecticut, New Jersey, Pennsylvania, and Ohio (the Out-of-State Allottees, or OSAs), at cost-based rates, about 68 MW of power, representing about 8.5 percent of project power.

10. In this proceeding, NYPA proposed to remove Article 28 from the new license, thereby eliminating its obligation to offer power to the OSAs. It asserted that the allocation was not required by Congress; New York law provides a sufficient framework for distribution of project power; current Commission policy favors allocation of power via market forces; and Article 28 became an anachronism as a result of technological advances. The OSAs disputed all of these contentions, and argued that the Commission has authority under various sections of the FPA to require licensees to allocate project power; Congress intended St. Lawrence Project power to be treated as a regional resource for the Northeast; there is no inconsistency between the Commission's market allocation policies and a regional power allocation; and Article 28 should be modified by increasing the OSA allocation or in other ways favorable to the OSAs.

11. Ultimately, all of the OSAs except Massachusetts settled their differences with NYPA and submitted a settlement agreement under which they will receive about half the power and energy they were receiving at the time the original license expired.<sup>9</sup>

12. The license order found that the Commission has authority under FPA section 10(a)(1) to require NYPA to allocate power to neighboring states.<sup>10</sup> It also concluded that, although there is no legislation requiring such an allocation, it was the intent of Congress that the project should be treated as a regional resource and that the economic benefits of the project be shared by the neighboring states. Based on this conclusion, the license order made an exception to the Commission's longstanding and consistently

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<sup>8</sup>12 FPC at 192-93.

<sup>9</sup>See 105 FERC at 61,578, and Article 419, 105 FERC at 61,604.

<sup>10</sup>Id. at 61,578-80.

applied policy that it will not direct a licensee how to distribute its project power. Specifically, NYPA was required to allocate project power to Massachusetts in the same proportion and under the same rate terms and conditions agreed to by the other OSAs (i.e., half the previously received power, to be sold at cost-based rates).<sup>11</sup> This works out to 0.6 percent of project power, or 4.8 MW.<sup>12</sup>

13. NYPA and MMWEC both filed extensive requests for rehearing. NYPA argues: (1) no Congressional intent has been shown, because there is no statutory requirement for a power allocation; (2) the Commission has already determined that it has no authority to determine rates for NYPA's sales of power, and res judicata bars any further consideration of the issue; (3) FPA section 20, on which the Commission relied for jurisdiction and rate authority, was repealed by implication when Congress enacted FPA Part II and other subsequent legislation; (4) prior cases were inadequately distinguished; and (5) even if section 20 was not repealed, it was improperly invoked, because there is no disagreement between New York and Massachusetts as contemplated by that section.

14. MMWEC asserts among other things that the license order failed to apply any standard or provide a rationale for requiring NYPA to provide Massachusetts with the same allocation percentage and rate provisions accepted by the other OSAs, and that it should directly address the merits of MMWEC's allocation request and rate proposals. It further asserts that the Commission should require NYPA to file the contract under which MMWEC previously purchased power as a rate schedule, and permit it to be changed only pursuant to the procedures and standards of FPA Part II.

15. Our decision to deviate from our long-standing policy against allocating project power was based entirely on our conclusion regarding Congressional intent with respect to the St. Lawrence Project. That conclusion, in the absence of legislation, rested on statements by federal and New York officials over the thirty years preceding issuance of the original license. These statements are found in Presidential speeches, Congressional

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<sup>11</sup>Id. at 61,582-83; Article 420, id. at 61,604-05.

<sup>12</sup>When the original license expired, the share of project power received by Massachusetts was about 0.17 percent of the total demand for power in Massachusetts. EIS Table 1-2, p. 1-12. The allocation under Article 420 is about 0.085 percent of Massachusetts' total load.

committee reports, Congressional hearings, and other venues.<sup>13</sup> However, the linchpin of our decision, and without which the cumulative weight of these expressions would have been insufficient to persuade us, was the OSAs' citation to Senate Joint Resolution 104, which addressed a proposed Executive Agreement between the United States and Canada regarding the St. Lawrence Seaway and the hydroelectric project, and the Report of the Senate Committee on Foreign Affairs<sup>14</sup> discussing J.R. 104. The Committee Report states, in pertinent part:

Section 5 of the Senate Joint Resolution 104 . . . contains provisions for the protection of the interests of the United States and of other States. The Committee assumes that . . . the ultimate agreement with New York, which in any event will be subject to approval by the Congress, will include provisions for the allocation of power to the adjoining States within economical transmission distance of the St. Lawrence power site.[<sup>15</sup>]

16. The Commission understood that J.R. 104 had been approved by Congress. NYPA has shown on rehearing, however, that although the Foreign Relations Committee reported J.R. 104 to the full Senate with a recommendation for approval, the resolution was never approved by either house of Congress.<sup>16</sup> Thus, J.R. 104 is no more than a committee recommendation. This is an insufficient basis upon which to conclude that

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<sup>13</sup>See, e.g., protest of Allegheny Electric Cooperative, Inc. (Allegheny) at 11-16 and 19-23; Allegheny Preliminary Terms and Conditions at 5-10; Connecticut Municipal Electric Energy Cooperative (CMEEC) protest at 7-16; City of Cleveland, Ohio protest at 7-17; MMWEC protest at 6-14; Public Power Association of New Jersey (PPANJ) protest at 10-13; PPANJ comments and request for conditions at 6-9; MMWEC protest at 6-14; MMWEC preliminary terms and conditions at 5-14; and Cleveland/CMEEC reply to NYPA response at 11-14.

<sup>14</sup>S. Rep. 1499 (79<sup>th</sup> Cong., 2nd Sess.).

<sup>15</sup>Report to Accompany S.J. Res. 105, S.R. No. 1499: Great Lakes-St. Lawrence Basin, 79<sup>th</sup> Cong. 2d Sess., June 13, 1946, at 44.

<sup>16</sup>NYPA rehearing request at 11, citing 92 Cong. Rec. 588 (1946). A complete search of the Congressional Record for the 79<sup>th</sup> Congress found no indication of action on the proposed resolution.

Congress intended for the Commission to use its license conditioning authority to require an allocation of power to the other Northeastern states.

17. Consistent with this discussion, we are modifying the project license to remove Article 420, which requires NYPA to provide project power to Massachusetts. Our decision on this issue makes it unnecessary to resolve the other power allocation issues summarized above.<sup>17</sup>

### **Niagara Power Coalition**

18. NPC, which consists of the City of Niagara Falls and other governmental units in the Niagara Falls area, seeks an allocation of project power for its members, to be sold by NYPA at cost-based rates. NPC reiterates its previously rejected argument that NYPA is required by its New York enabling legislation (the Power Authority Act)<sup>18</sup> to sell preference power to qualifying municipalities and other subdivisions of the State; that several of NPC's members qualify or are seeking qualification; and that such an allocation would serve customers intended to be benefited by the Power Authority Act. NPC also requested evidentiary hearings on various aspects of a settlement agreement between NYPA and other parties to the proceeding,<sup>19</sup> principally those concerning its request for an allocation of project power, and objected to certain provisions of that settlement agreement that economically benefit other entities in New York. The license order denies NPC's various requests, holding that the eligibility of NPC's members for

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<sup>17</sup>Our decision likewise renders moot MMWEC's October 20, 2003 "Motion to Correct Possible Computational Error," which suggests that the exact amount of power to which it would have been entitled under Article 420 was erroneously calculated, and NYPA's timely answer denying that an error was made.

<sup>18</sup>N.Y. Power Auth. Law, Art. 5, Title 1, §§ 1000-1017.

<sup>19</sup>The settlement agreement was between NYPA, Interior's Fish and Wildlife Service and National Park Service, the New York State Departments of Environmental Conservation and State, St. Lawrence Aquarium and Ecological Center, Inc., New York Rivers United, and the St. Lawrence Local Government Task Force (consisting of municipalities and other governmental entities in the project vicinity). The settlement agreement incorporated various issue-specific agreements between NYPA and the signatories regarding fisheries, wildlife, various lands and facilities in the project area, and recreation.

preference power and the price at which it is offered to in-state entities are matters to resolved by New York authorities pursuant to the Power Authority Act.<sup>20</sup>

19. On rehearing, NPC again contends that the Commission has authority under the FPA to require NYPA to allocate power to NPC's members and that if there is any doubt about their eligibility to receive project power under New York law, the Commission should hold evidentiary hearings to resolve that matter.

20. As discussed above, we have concluded on rehearing that the weight of the evidence does not support a finding that Congress intended us to exercise our conditioning authority to require the economic benefits of project power to be shared throughout the Northeastern United States.<sup>21</sup> Moreover, the legislative history addresses regional benefits in the context of distributing power among the Northeastern States, not intra-state distribution.<sup>22</sup>

21. NPC also points to section 4.51(a)(5) of our regulations,<sup>23</sup> which requires a license applicant, in the initial statement in its application, to identify the statutory or regulatory requirements of the State in which the project is located that affect the project ". . .with respect to the right to engage in the business of developing, transmitting, and distributing power," to briefly identify the nature of each requirement, and to explain the steps it has taken to comply with the applicable laws or regulations. However, the purpose of this requirement is not to enable the Commission use license conditions as an alternative to State forums for ensuring compliance with State laws. Rather, the purpose of this requirement is to enable the Commission to determine whether all applicable State laws that would affect the ability of the applicant to carry out the license terms have been satisfied, or whether the applicant is taking steps to ensure that they are. In this case,

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<sup>20</sup>105 FERC at 61,572-73.

<sup>21</sup>Id. at 61,579-80.

<sup>22</sup>See the materials cited in n.11, supra.

<sup>23</sup>18 C.F.R. § 4.51(a)(5).

there is no question that NYPA has authority under the Power Authority Act to accept a license for the St. Lawrence Project and to engage in the business of generating, transmitting, and selling power according to the terms of that act.<sup>24</sup>

22. NPC next claims that the license order expressly relied on the Power Authority Act to determine the rates at which project power is to be sold to MMWEC. We specifically stated, however, that the Power Authority Act is not binding on the Commission, but would inform our thinking about what is a reasonable pricing requirement for Massachusetts' allocation.<sup>25</sup> Nowhere do we rely on the Power Authority Act as the basis for asserting authority to require a power allocation under FPA section 10(a)(1) or to set rates for such power.

23. NPC adds that a license condition allocating power to its members is needed because, even if they are ultimately determined the by New York authorities to be eligible to receive project power, all of the power is either allocated to the OSAs or is subject to contracts between NYPA and other in-state purchasers executed pursuant to the Power Authority Act. This may be so, but it is not a sufficient basis for the Commission to intrude upon NYPA's decisions with respect to the distribution of power to New York customers.

24. NPC concludes by asserting that the license should include a specific reservation of authority to modify the allocation of project power during the license term if the public interest so requires, particularly in light of the 50-year license term.<sup>26</sup> Consistent with our discussion above, we decline to include such a provision.

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<sup>24</sup>The initial statement of NYPA's application also identifies its need to obtain water quality certification or waiver thereof from the New York Department of Environmental Conservation pursuant to the Federal Clean Water Act, a consistency certification under New York law implementing the Federal Coastal Zone Management Act, and the steps it had taken or planned to take to obtain those state authorizations when the application is filed. NYPA license application, Volume I, pp. IS-2 and IS-3.

<sup>25</sup>105 FERC at 61,582.

<sup>26</sup>NPC rehearing request at 12-13.

### **St. Lawrence Local Government Task Force**

25. The license order stated that the record lacked sufficient information concerning the frequency and level to which the shoreline of Lake St. Lawrence, which is formed by the project, and lands upstream of the proposed project boundary are inundated above Elevation 246 feet mean sea level as a result of project operations. Such information is necessary in order to determine whether the project boundary needs to remain at a higher elevation than proposed by NYPA. Article 204 requires NYPA to file the necessary data in order for the Commission to make a final determination of whether to approve or modify NYPA's proposed project boundary.<sup>27</sup>

26. The Task Force notes that the statement in Article 204 that approval of NYPA's proposed project boundary must await submission and review of the specified information appears to conflict with Ordering Paragraph (F), which states that license application Exhibits A, F, and G are approved.<sup>28</sup> Exhibit G drawings show the proposed project boundary.

27. The approval of Exhibit G in Ordering Paragraph (F) was an oversight. On November 4, 2003, however, NYPA filed the data required by Article 204. The Commission has reviewed the data and, on December 23, 2003, issued an unreported order approving NYPA's Exhibit G drawings and amending the license accordingly.

### **Mohawk Issues**

#### **Settlement Negotiations**

28. The Mohawks contend that the Commission failed to satisfy its trust responsibility by allowing NYPA to exclude Mohawk representatives from the settlement negotiations that stemmed from the alternative licensing process (ALP). More specifically, they state that they presented NYPA early in the ALP with a discussion document stating their views concerning the project's impacts to Mohawk cultural resources, and principles upon which they and NYPA could work cooperatively to resolve past grievances and prevent future problems, but that NYPA did not formally acknowledge or act on that document. They add that they actively participated in the ALP to ensure that their

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<sup>27</sup>105 FERC at 61,587-89.

<sup>28</sup>Id. at 61,597.

concerns would be addressed, but that NYPA did not formally recognize their proposals, and never engaged them in settlement discussions. The Mohawks suggest as well that the Commission abetted NYPA's alleged conduct by failing to respond adequately to the Mohawks' comments on NYPA's Preliminary Draft Environmental Impact Statement and additional study requests, and by failing to adopt certain Mohawk recommendations for license terms and conditions which were not included in the terms of the Settlement Agreement.

29. We cannot under the circumstances of this case fault NYPA for not engaging in settlement discussions with the Mohawks. There was, despite the efforts of the parties and Commission staff, never a consensus among the parties regarding tribal consultation or other matters of interest to the Mohawks. In the absence of such agreement, the only practicable course is for the parties to make their recommendations to the Commission pursuant to the customary notice and comment procedures. That is what occurred here.<sup>29</sup>

30. The Mohawk recommendations that we did not adopt were discussed in the license order.<sup>30</sup> The Mohawks make no specific allegations of error, but rather suggest that we did not adopt their recommendations, in particular those related to fish, wildlife, water quality, and monetary compensation, because they were not included in the Settlement Agreement. This, they maintain, violates our trust responsibility because it treats the interests of the Mohawks like those of any other interest group, rather those of a nation whose lands and waters were taken in order for the project to be constructed. This circumstance, they assert, requires recompense in addition to related measures to which non-Mohawks have agreed.<sup>31</sup>

31. Our discussion of Mohawk recommendations identified any provisions of the Settlement Agreement that address the same subject matter, such as fish and wildlife habitat. Our decisions did not however rest on the fact that the Mohawk

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<sup>29</sup>We note, in any event, that a license applicant cannot be compelled to engage in settlement negotiations with any party. 105 FERC at 61,574.

<sup>30</sup>*Id.* at 61,583-85. The recommendations highlighted by the Mohawks in their rehearing request are funding for additional improvements to fish and wildlife habitat, aquaculture, studies of erosion and water quality, and conveyance to the Mohawks of various lands.

<sup>31</sup>Mohawk rehearing request at 8-9.

recommendations were not included in the Settlement Agreement. We considered, as we must, the recommended terms and conditions of all parties, not just those in the Settlement Agreement, in light of the evidentiary record and pursuant to the public interest standard of FPA sections 4(e) and 10(a)(1) and any other applicable law. For instance, we did not adopt the recommendation of the St. Regis Mohawk Tribe for a dredge spoils disposal area study, because the EIS found that NYPA had already completed such a study and that it was sufficient.<sup>32</sup> We declined to require installation of upstream and downstream fish passage, because the record did not support a finding that it is needed to protect or enhance project-area fisheries.<sup>33</sup> Some recommendations, such as payments into a general compensation fund for Mohawks to compensate for project-induced harm not otherwise addressed, were denied because the Commission lacks authority to award damages.<sup>34</sup>

### **National Historic Preservation Act**

32. Section 106 of the National Historic Preservation Act (NHPA)<sup>35</sup> requires that before the Commission may issue a license for a project, it must take into account the effects of its action on historic properties, and afford the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment. Consultation under Section 106 usually results in the preparation of a Programmatic Agreement (PA) between Commission staff, the State Historic Preservation Officer (SHPO), and the Advisory Council which provides for the protection of historic and cultural resources through the establishment of a Historic Properties Management Plan (HPMP).

33. On October 1, 2003, a PA was executed by the Commission's Director of the Division of Hydropower, Environment and Engineering, SHPO, and the Advisory Council. NYPA signed the PA as a concurring party. No other signatures were required to execute the PA. The license, which was issued shortly thereafter, requires NYPA to

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<sup>32</sup>105 FERC at 61,584.

<sup>33</sup>Id.

<sup>34</sup>Id. at 61,585.

<sup>35</sup>16 U.S.C. § 470f.

complete the HPMP within one year of license issuance.<sup>36</sup> When the license was issued, consultations were continuing with the Mohawks as other interested parties, but they had not yet concurred with the PA.<sup>37</sup> The Mohawks later filed the above-mentioned letter declining to concur.

34. On rehearing, the Mohawks assert that they were not afforded a reasonable opportunity to identify their concerns through a detailed consultation process, as evidenced by the Commission's denial of their requests for certain studies in addition to those conducted by NYPA, the lack of a formal response on the record by Commission staff to Mohawk comments on the draft PA, and the fact that the license was issued prior to the completion of an HPMP.

35. The Commission encourages completion of both a PA and an HPMP prior to the issuance of the license. However, this is not always possible, and preparation of an HPMP may be deferred until after a license is issued. In this proceeding, notwithstanding the best efforts of the Commission staff, SHPO, and Advisory Council, no agreement was reached with the Mohawks on the specific requirements of the PA, let alone the HPMP.

36. The PA ensures that Mohawk cultural and historic properties will be identified, evaluated, and protected in compliance with the NHPA through development of the HPMP. Studies conducted by NYPA's consultants have already identified many such properties, including properties identified by the Akwesasne Task Force for the Environment<sup>38</sup> at the request of the Mohawks. As requested by the Advisory Council, the PA requires that the HPMP be developed and implemented in consultation with the Mohawks, who may use this consultation opportunity to address any remaining concern. The HPMP process will include completion of identification of historic properties within the project's Area of Potential Effects; evaluation of those properties to determine their eligibility for the National Register of Historic Places; protection of properties threatened by erosion, ground-disturbing activities, and other causes; consideration of project alternatives to avoid adverse impacts and mitigation of unavoidable impacts; an action

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<sup>36</sup>Article 422, 105 FERC at 61,604-05.

<sup>37</sup>See 105 FERC at 61,590.

<sup>38</sup>The Akwesasne Task Force for the Environment, which the Commission understands to be financially supported by the Mohawk Community, employed Mohawks for this purpose.

plan for unanticipated discoveries during any project construction; treatment and disposition of human remains in compliance with all applicable federal and state laws; and several other measures.<sup>39</sup> NYPA is required to file the HPMP for Commission approval within one year of license issuance, i.e., October 2004.

#### **FPA Section 4(e) Terms and Conditions**

37. The license includes Article 418,<sup>40</sup> which reserves the Commission's authority to require NYPA to implement conditions for the protection and use of the St. Regis Mohawk Tribe Reservation as may be provided by the Secretary of the Interior pursuant to FPA section 4(e),<sup>41</sup> should pending litigation in federal court<sup>42</sup> result in project lands and waters becoming federal reservations for purposes of the FPA.

38. NYPA states that it can accept Article 418 if the Commission makes certain clarifications regarding when and how the Article will apply. These are, first, that the Commission will not invoke the article until: (1) the Mohawks at Akwesasne gain an interest in lands within the project boundary as a result of a settlement or judicial determination in the UMLC litigation; (2) the United States subsequently obtains an interest in such lands within the project boundary; and (3) the lands are converted to a federal reservation, as defined in FPA section 3(2) pursuant to any applicable federal process. Second, NYPA requests that that we clarify that if the above conditions are met, the Secretary will be afforded a single opportunity to submit conditions which cannot thereafter be changed during the license term, and that such conditions will be limited in the same manner as conditions imposed during a license application proceeding: that is, any conditions may relate only to the portion of the project located on the federal reservation. Finally, NYPA requests that we clarify that any section 4(e) conditions will be imposed in the context of a license amendment proceeding rather than treated as a

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<sup>39</sup>See Programmatic Agreement, pp. 2-5.

<sup>40</sup>105 FERC at 61,604.

<sup>41</sup>16 U.S.C. § 797(e).

<sup>42</sup>Nos. 82-CV-829, 82-CV-1114, and 82-CV-783, U.S. District Court for the Northern District of New York (Unified Mohawk Land Claims (UMLC) litigation).

compliance matter, in order that NYPA will have the opportunity to seek rehearing or judicial review of any such conditions.<sup>43</sup>

39. We grant NYPA's clarification request in part. Any section 4(e) conditions the Secretary may prescribe will be imposed in the context of a license amendment proceeding. We further clarify that any 4(e) conditions are limited in their applicability to those portions of the project lands and waters that are encompassed in the federal reservation.<sup>44</sup> We do not have authority to prevent the Secretary from modifying section 4(e) conditions, if the Secretary's initial section 4(e) condition includes a provision reserving the Secretary's right to make such modifications.<sup>45</sup>

40. We decline to address NYPA's request for clarification concerning the circumstances under which Article 418 may be invoked. It is for the Secretary of the Interior to determine in the first instance whether Interior has sufficient authority over any project lands and waters as result of the resolution of the UMLC litigation to invoke section 4(e). We assume that any Secretary submittal to the Commission will address this matter. The Commission will issue public notice of any such submittal in order to ensure that NYPA and any other affected entities have the opportunity to comment on all matters relating to the submission.

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<sup>43</sup>A licensee may seek rehearing and judicial review of section 4(e) conditions by seeking rehearing and judicial review of the license order in which such conditions are imposed. See *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 661-63 (D.C. Cir. 1996).

<sup>44</sup>See, e.g., *Escondido Mutual Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 780-781 (1984) (section 4(e) conditions apply only to the federal reservation).

<sup>45</sup>See, e.g., *Central Maine Power Co.*, 82 FERC & 61,191 (1998) (while a State may modify water quality certification when it has reserved such authority in the certification, where the certification contains no such reservation, a purported amendment is without effect).

### **Historic Properties Management Plan**

41. As discussed above, the license order requires NYPA to comply with the PA and the HPMP to be developed thereunder.<sup>46</sup> In response to objections expressed by the Council of Akwesasne and Mohawk Council of Chiefs to the removal of any land from the project boundary, whether or not included in the UMLC, that may contain or be identified as Traditional Cultural Properties, and their request for consultation regarding any artifacts, burial sites, or other culturally significant sites identified on such lands, we stated that the PA and HPMP “will ensure that [Tribal Cultural Properties] in the Project vicinity are protected, even if they are outside of the Project boundary.”<sup>47</sup>

42. NYPA requests that we clarify that, although the Project’s Area of Potential Effects with respect to historic and cultural properties may extend beyond the project boundary, the HPMP will govern only NYPA’s activities inside the project boundary that affect historic and cultural properties within the Area of Potential Effects. NYPA also asks us to clarify that the HPMP will not govern the activities of other parties on non-project lands.<sup>48</sup>

43. NYPA’s request for clarification is granted in part and denied in part. The HPMP does not govern the activities of parties other than NYPA on non-project lands. It does however govern NYPA’s activities outside of the existing project boundary that are in furtherance of the HPMP and within the Area of Potential Effects. The PA specifies that the HPMP applies to the identification of historic properties within the project’s Area of Potential Effects, and provides for their evaluation and protection.<sup>49</sup> The Area of Potential Effects is defined to include lands enclosed by the project boundary and “lands or properties outside the Project boundary, or a 500 foot buffer inland from the Project boundary, where the Project may cause change in the character or use of Historic Properties. . . .”<sup>50</sup> Indeed, in the course of this proceeding NYPA has made maps

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<sup>46</sup>Article 422, 105 FERC at 61,605.

<sup>47</sup>Id. at 61,590.

<sup>48</sup>NYPA rehearing request at 47.

<sup>49</sup>Programmatic Agreement, section I.D.

<sup>50</sup>Id., section id.1.

showing the Area of Potential Effects agreed upon by the parties to the PA, and that the Area of Potential Effects extends beyond the project boundary.

44. NYPA argues that the project boundary geographically defines the licensee's obligations under the license. A project boundary serves the function of indicating that the lands within are used in some manner for project purposes. This helps to reduce ambiguity for purposes of license administration and compliance by clarifying the geographic scope of the licensee's responsibilities under its license (and the Commission's regulatory responsibilities). However, a project boundary does not define those responsibilities and does not always reflect the geographic extent of those responsibilities.<sup>51</sup>

45. Small areas outside of the project boundary that are needed for project purposes, such as nest platforms or a fenced area to protect riparian vegetation, including those on lands of non-licensees, need not be within the project boundary. For such places, it is sufficient that the license clearly identify the obligation.<sup>52</sup> It is up to the licensee to obtain whatever rights are needed to carry out the license obligation with regard to those

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<sup>51</sup>Pacificorp, 80 FERC & 61,334 (1997).

The cases cited by NYPA for the proposition that licensees can never have responsibilities under the license outside of the project boundary do not support its position. NYPA's citation to *Georgia Power Co.*, 88 FERC ¶ 62,314 at 64,695 (1999), is only to a sentence in the environmental assessment for that license application, and which merely notes that the licensee proposes to implement a Cultural Resources Management Plan (CRMP) to protect resources within the project boundary. In *Potlatch Corp.*, 83 FERC ¶ 62,257 at 64,429 (1998), the Commission approved exclusion from the CRMP of a site which was outside of the project boundary, but that site was also outside of the Area of Potential Effects. In *Southern California Edison Co.*, 95 FERC ¶ 62,142 (2001), the site in question had been removed from the project boundary because regulatory responsibility for the transmission line corridor in which it was located passed to the U.S. Forest Service. In *New York State Electric & Gas Corp.*, 103 FERC ¶ 61,139 (2003), the Commission required the licensee to take actions within the project boundary to protect the project from the effects of activities to be conducted by a different party adjacent to the project boundary. Unlike here, there was no question of project operations having impacts outside of the project boundary.

<sup>52</sup>See Pacificorp, 80 FERC & 61,334 at 62,115.

places.<sup>53</sup> Similarly, a requirement for the licensee to carry out a one-time action outside of the existing project boundary may not require the locations where the act is to be performed to be included within the project boundary.<sup>54</sup>

46. As indicated in the Advisory Council's regulations, however, a licensee is not expected to carry out the HPMP with respect to properties located on the lands or waters of non-licensees if the landowner is unwilling to grant the necessary access and rights.<sup>55</sup> Nonetheless, we expect NYPA to act with diligence and good faith in seeking to obtain necessary access and rights to any project-affected properties within the St. Lawrence Project Area of Potential Effects to carry out the HPMP, regardless of the existing project boundary.

47. Finally, the last sentence of Article 422 states that, if the PA is terminated prior to Commission approval of the HPMP, "the licensee shall obtain approval before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the project's area of potential effect." NYPA requests that we capitalize the term "area of potential effect" in the article to clarify that the article refers to the term "Area of Potential Effects" as defined in the Advisory Council's regulations<sup>56</sup> rather than a more general area not contemplated by those regulations. It was our intent to refer to

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<sup>53</sup>This may be accomplished by easements, leases, or other devices.

<sup>54</sup>E.g., Pacific Gas and Electric Co., 97 FERC 61,084 (2001) (adding spawning gravel to creek, removing portions of a weir, building spawning channels, and installing terraced planting sites).

<sup>55</sup>The Advisory Council's regulations recognize that, in identifying historic properties that may be affected, a "reasonable and good faith effort" is all that is required. Similarly, the regulations reflect an understanding that access to properties may be restricted. See 36 C.F.R. § 800.4(b)(1) and (2); 800.5(a)(3).

<sup>56</sup>36 C.F.R. §800.16(d) defines "area of potential effects" as the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

the term as it is used in the Advisory Council's regulations. Accordingly, we will modify the article as requested.

The Commission orders:

(A) MMWEC's motion to strike, filed December 5, 2003, is denied.

(B) Article 420 of the Project license is deleted.

(C) Article 422 of the Project license is modified by removing the phrase "area of potential effect" from the last sentence of the article and adding in its place the phrase "Area of Potential Effects".

(D) All other requests for relief not specifically granted above are hereby denied.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.