

130 FERC ¶ 61,038  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Northern States Power Company

Project No. 2417-061

ORDER ON REHEARING

(Issued January 21, 2010)

1. On November 25, 2009, Northern States Power Company (Northern States), licensee for the Hayward Hydroelectric Project No. 2417, filed a request for rehearing of Commission staff's letter order issued on October 27, 2009. In that order, staff required Northern Power to submit a recreation plan providing for safe and suitable public access to an ice-fishing site on the project's impoundment and a fishing pier at or near a city-owned boat launch in the City of Hayward, Wisconsin. Northern States argues that the public access requirement is inappropriate for the size of the project, is contrary to the public interest, and is unsubstantiated, arbitrary, and capricious.<sup>1</sup> For the reasons discussed below, we grant rehearing in part.

**Background**

2. The Commission issued Northern States a subsequent 30-year license to continue operating and maintaining the existing 168-kilowatt (kW) Hayward Hydroelectric Project in 1995.<sup>2</sup> The Hayward Project is located on the Namekagon River, in the City of Hayward and the Town of Hayward,<sup>3</sup> Sawyer County, Wisconsin, and consists of a dam, an intake channel, a powerhouse containing one generating unit having an installed capacity of 168 kW, and a reservoir. The project's reservoir, Lake Hayward, has a surface area of about 247 acres.

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<sup>1</sup> Northern States does not object to the requirement for a fishing pier.

<sup>2</sup> 72 FERC ¶ 62,204 (1995).

<sup>3</sup> The Town of Hayward is a municipality that surrounds the City of Hayward.

3. Lake Hayward and the Namekagon River area primarily attract canoeists and fishermen. The licensee's recreational facilities at the project are a canoe portage facility (take-out, trail, and put-in) around the east side of the dam and a tailwater fishing area on both sides of the river immediately downstream from the dam. In addition to the licensee's facilities, there is a City of Hayward public park, which features a boat launch facility on the lake, a swimming area, restrooms, and picnic areas. The city once provided a popular fishing pier at the site, but it was removed in 2004 due to ice damage. In issuing the subsequent license, Commission staff found that the licensee's canoe portage (with the improvements to it proposed by the licensee<sup>4</sup>) and tailwater fishing area, along with the City of Hayward's public park, would provide adequate public access to both the project's impoundment and tailwaters.<sup>5</sup> Staff noted that future recreation demands could require additional facilities over the term of the license, and therefore included Article 414 in the license, requiring the licensee to monitor recreation use at the project to determine whether existing recreation facilities meet recreation needs and to file with the Commission a report of the monitoring results every six years.<sup>6</sup> The article further requires that, in the event monitoring results show a need for additional facilities, the licensee is to prepare a recreation plan to accommodate the need.

4. On rehearing of the order issuing the subsequent license, Northern States sought deletion of the requirement to file a recreation plan if a need for additional recreation was demonstrated, arguing that the requirement appeared to hold Northern States accountable for future recreational planning and development for the City of Hayward. The Commission denied the licensee's request, but explained that the purpose of Article 414

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<sup>4</sup> The improvements included soil erosion control measures, clearing overgrown vegetation along the portage trail, stabilizing the canoe put-in with rock riprap and timber structures, and stabilizing the shoreline bank to enhance shoreline fishing opportunities below the dam.

<sup>5</sup> See Final Environmental Assessment, FERC Project No. 2417, attached to the 1995 license order EA, section V.C.6.

<sup>6</sup> The report is to be prepared in consultation with the U.S. Fish and Wildlife Service, National Park Service, City of Hayward Parks and Recreation Department, and Wisconsin Department of Natural Resources and is to include, among other information, annual recreation use data and a discussion of the adequacy of the project's recreation resources in meeting recreation demand. In the event monitoring results show a need for additional facilities, the report is to include a recreation plan to accommodate recreation needs in the project area.

is not to require the licensee single-handedly to meet all future recreation needs around the project, but that recreation is a specific project purpose.<sup>7</sup>

5. In 2003, Northern States filed its first recreation report pursuant to Article 414.<sup>8</sup> Northern States indicated that the canoe portage facility is used routinely and is sufficient to meet the current demand and that the public is allowed to use the licensee's lands for access to both sides of the river to support tailwater fishing, which is a prominent recreational activity at the dam site. Northern States also indicated that additional development of recreational facilities was not feasible in light of the licensee's limited landholdings at the dam and safety concerns near the dam structures.

6. Wisconsin Department of Natural Resources (Wisconsin DNR), an entity consulted in preparing the report, commented that there was a need for off-road parking and a new public access point at Bartz's Bay, a small bay located in the southeast corner of the lake that serves as a popular ice fishing spot. The agency stated that ice fishermen have to park on the shoulders of a narrow road to access the area, causing traffic congestion and potential safety issues.<sup>9</sup> The recreation report explained that anglers access Bartz's Bay by crossing private property from a township road.<sup>10</sup>

7. Recognizing that the ice fishing area is 2.5 miles away from land owned by the licensee,<sup>11</sup> Wisconsin DNR offered to work with the City of Hayward to address the ice fishing concerns, but requested the licensee's support in the event an access point to the area from the licensee's property is found. Wisconsin DNR also identified a need for a

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<sup>7</sup> See *Northern States Power Company*, 75 FERC ¶ 61,136, at 61,473 (1996) (order on rehearing).

<sup>8</sup> Filing of April 10, 2003 (2003 Recreation Report). The deadline for the report coincides with the filing deadline for the Form 80 Recreation Report, which includes information regarding use and development of public recreational opportunities at licensed projects and is also due every six years, pursuant to section 8.11 of the Commission's regulations, 18 C.F.R. § 8.11 (2009). See *Northern States Power Company*, 83 FERC ¶ 62,112 (1998) (order amending Article 414 deadline).

<sup>9</sup> See Wisconsin Department of Natural Resources' Letter dated March 27, 2003, included as an attachment to 2003 Recreation Report.

<sup>10</sup> See 2003 Recreation Report, at 4.

<sup>11</sup> The licensee stated that it does not own any property on Lake Hayward, except small tracts of land which are located near the Hayward Dam and are approximately 2.5 miles from Bartz's Bay. See *Id.*

new fishing pier at the City of Hayward's park to replace the previous one. Wisconsin DNR stated that it would request Northern States' participation in future efforts to meet this recreational need also. Northern States agreed to support any solutions that would involve project land but indicated in the recreation report that it did not believe it should be responsible for providing public access to the Bartz's Bay site.<sup>12</sup>

8. Commission staff approved the 2003 Recreation Report, finding that it satisfied the requirements of Article 414.<sup>13</sup>

9. On April 29, 2009, Northern States filed its second recreation report pursuant to Article 414. The report addressed a recommendation by the National Park Service (Park Service) that the licensee work with Wisconsin DNR, the Town of Hayward, and local sportsmen's clubs to identify whether a platted public access point exists near Bartz's Bay, and, if not, that the licensee help identify, and share the cost of acquiring, a site for public access and low-impact parking.<sup>14</sup> The report stated that it is unclear whether a platted access point is located nearby that would allow public access to the lake and proposed that the licensee continue monitoring the situation and provide an update with the next recreational report.

10. With regard to replacing the fishing pier, Northern States indicated that Wisconsin DNR expects to receive the necessary funding from the agency's urban fishing program in a few years, and Northern States will periodically check on the status and provide an update on the pier in the next recreational report. If a new pier has not been installed by the next report, Northern States proposed to cost-share the replacement with the Wisconsin DNR, the City of Hayward, and local sporting clubs.

11. Commission staff reviewed the report and concluded in its October 27 letter order that additional recreation facilities are needed at the project. The order directed the licensee to file, by May 1, 2010, a recreation plan that provides for (1) installation of a fishing pier at or near the City of Hayward's boat launch, and (2) suitable public access to Bartz's Bay, including a description of all options considered. The plan must also include information on the various site locations that were considered, and the need to purchase additional land for parking and access or to acquire an easement from landowners adjacent to the project for development of an access corridor.

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<sup>12</sup> *Id.*

<sup>13</sup> *See Northern States Power Company*, 104 FERC ¶ 62,126 (2003).

<sup>14</sup> *See* National Park Service's Letter, dated April 8, 2009, included as an attachment to Northern States' Hayward Recreation Report – Article 414 (filed April 29, 2009) (2009 Recreation Report).

12. On November 25, 2009, Northern States filed a timely request for rehearing of the October 27 letter order.

### **Discussion**

13. On rehearing, Northern States objects on several grounds to the letter order's requirement for a recreation plan providing for public access to Bartz's Bay.<sup>15</sup> Northern States contends that ice fishing does not create any problem at the project that needs to be addressed by the licensee. It explains that there is an amicable arrangement with a landowner who has freely allowed the ice fishermen access across his private property for years and continues to be amenable to this use.<sup>16</sup> Moreover, the Town of Hayward has posted "No Parking" signs prohibiting parking along one side of the road, which has alleviated any traffic congestion or safety issues.

14. Northern States argues that, if it is required to provide public access to Bartz's Bay for the ice fishermen, it would be forced potentially to expend significant resources to purchase private land or secure easements,<sup>17</sup> and to provide more than an appropriate amount of recreation facilities at the project, given its small size, its highly uneconomic condition, and negative economic benefits, and that this would be contrary to the Commission's responsibility to strike an equitable balance between power and non-power values in making its comprehensive development and public interest determinations under section 10(a)(1) of the Federal Power Act.<sup>18</sup>

15. We agree. The Commission's policy regarding recreational development at its licensed projects is set forth in section 2.7 of the regulations.<sup>19</sup> That section provides, in pertinent part, that the Commission will seek the ultimate development of a project's recreation resources "to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development ... will be included as part of the project cost."

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<sup>15</sup> As stated previously, Northern States does not seek rehearing of the requirement that it provide for a fishing pier at or near the city's public park.

<sup>16</sup> The landowner's only stipulation is that no motorized vehicles cross his land.

<sup>17</sup> Northern States estimates a cost of \$1,000-\$1200 per front foot to acquire land in the Lake Hayward area for access and associated parking.

<sup>18</sup> 16 U.S.C. § 803(a) (2006).

<sup>19</sup> 18 C.F.R. § 2.17 (2009).

16. In the public interest and comprehensive development balancing of power and non-power values and competing resource interests, the Commission generally does not require extensive recreation facilities for minor projects (i.e., those with a total installed generation capacity of 1,500 kW or less).<sup>20</sup> As we explained in *FPL Energy Maine Hydro, LLC*,<sup>21</sup> the Commission considers “project impacts on natural resources, the kind and degree of resource protection and enhancement needs, and project economics” when deciding whether and under what conditions to license projects.

17. Inasmuch as the Hayward Project is a relatively small, minor project with little land available for recreational development, we believe it is appropriate to remove the October 27 letter order’s requirements regarding public access to Bartz’s Bay, with one exception. Since Northern States indicates in its recreation reports that it is unclear whether a platted access point is located nearby that would allow public access to the lake, we are requiring Northern States to determine whether such a platted access point exists and to include a report on its findings in the recreation plan that is due May 1, 2010.<sup>22</sup> In addition, we are clarifying the entities with which the licensee must consult in preparing its plan. We remind the licensee that it is essential to include in the filing supporting information and justification, so that we can understand why it does not adopt or incorporate into the plan any agency recommendation.<sup>23</sup>

The Commission orders:

(A) The request for rehearing filed by Northern States Power Company in this proceeding on November 25, 2009, is granted to the extent set forth in this order and is otherwise denied.

(B) The recreation plan requirement established in the letter order issued in this proceeding on October 27, 2009, is revised to read:

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<sup>20</sup> 18 C.F.R. § 4.30(b)(17) (2009).

<sup>21</sup> 88 FERC ¶ 61,116, at 61,273 (1999).

<sup>22</sup> The other requirements of the October 27 letter order pertaining to the fishing pier will remain unchanged.

<sup>23</sup> The justification for not providing access to Bartz’s Bay, which the licensee provided in its rehearing request, should have been included in the 2009 recreation report. Its inclusion would have assisted staff in its review and decision on the need and feasibility of such access.

Northern States Power Company shall file, for Commission approval, a recreation plan that provides for a fishing pier at or near the City of Hayward's boat launch and includes a report on whether a platted access point exists near the project that would allow public access to Lake Hayward. The plan should include a detailed description of the measures and/or facilities that the licensee proposes to provide the fishing pier, including a description of the type and location of the measures/facilities, appropriate maps and drawings of the sites, and a schedule for implementing the necessary measures or installing the facilities. The plan should identify the design of the pier to be constructed and indicate the entity or entities that would be responsible for construction, operation, and maintenance of the pier.

The licensee shall prepare the plan after consultation with the Wisconsin Department of Natural Resources, the National Park Service, the U. S. Fish and Wildlife Service, the Town of Hayward, and the City of Hayward Parks and Recreation Department. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

By the Commission. Commissioner Norris voting present.

( S E A L )

Kimberly D. Bose,  
Secretary.