

133 FERC ¶ 61,145
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

AER NY-Gen, LLC
Eagle Creek Hydro Power, LLC
Eagle Creek Water Resources, LLC
Eagle Creek Land Resources, LLC

Project No. 10482-104

ORDER DISMISSING APPLICATION FOR
TRANSFER OF LICENSE

(Issued November 18, 2010)

1. On April 30, 2010, AER NY-Gen, LLC (NY-Gen or licensee) and Eagle Creek Hydro Power, LLC, Eagle Creek Water Resources, LLC, and Eagle Creek Land Resources, LLC (Eagle Creek Companies or transferees) filed an application under section 8 of the Federal Power Act (FPA)¹ for authorization to transfer the licenses for the Swinging Bridge Project No. 10482, the Rio Project No. 9690, and the Mongaup Falls Project No. 10481 from NY-Gen to Eagle Creek Companies, as co-licensees for each project. The projects are located on the Mongaup River in Sullivan and Orange Counties, New York. On November 12, 2010, Commission staff issued an order approving the transfer of the licenses for the Rio and Mongaup Projects.² For the reasons described below, in this order we dismiss the applicants' request for a transfer of license for the Swinging Bridge Project.

Background

2. The Swinging Bridge Project has three reservoirs. Starting from the farthest upstream, they are: Toronto, Cliff Lake, and Swinging Bridge. The Toronto and Cliff Lake Reservoirs were built and are operated to store water November through May and release water June through October through Black Lake Creek to the Swinging Bridge

¹ 16 U.S.C. § 801 (2006).

² *AER NY-Gen, LLC*, 133 FERC ¶ 62,143 (2010).

Reservoir, where the project's powerhouses, with a combined installed capacity of 11.7 megawatts (MW), are located. The license requires minimum flow releases from Toronto and Swinging Bridge Reservoirs. Farther downstream of the Swinging Bridge Project are the 4-MW Mongaup Falls Project and the 10-MW Rio Project. The three projects are referred to collectively as the Mongaup River System.

3. The Commission issued an original license for the Swinging Bridge Project, which was existing, but unlicensed, on April 12, 1992.³ Article 405 of the license required the licensee to provide two public recreation areas on Toronto Reservoir. One is a ten-car/trailer parking lot and a boat ramp at Moscoe Road at the northern end of Toronto Reservoir. The second recreation area is a fifteen-car parking area and boat launch on the southeast side of the Toronto Reservoir near Toronto Dam (the Toronto Dam Area).⁴ The license order noted that one of the benefits of the project as licensed would be "development of improved public access and safety facilities for expanded recreation uses at the project."⁵

4. The Moscoe Road area has been developed as required, and is not at issue here. The Toronto Dam Area was constructed consistent with license Article 405, but there have been ongoing problems for several years with public access to that site. Public access to the Toronto Dam Area is via Pine Grove Road to Town Road 62, which leads to a private road owned by Woodstone Lakes Development, LLC (Woodstone), a residential developer that has built private residences along the road, adjacent to Toronto Reservoir. The licensee has an easement to use the road for project purposes.

5. On October 22, 2004, the licensee filed a letter enclosing a resolution by the Town of Bethel Board. According to the letter, following negotiations, the licensee and other entities had agreed that Woodstone would take over maintenance of the Moscoe Road Area, and the licensee would cease maintaining the Toronto Dam Area, although the

³ The license was issued to Orange and Rockland Utilities, Inc. *Orange and Rockland Utilities, Inc.*, 59 FERC ¶ 62,034 (1992). In June 1999, Orange and Rockland Utilities, Inc. transferred the Swinging Bridge Project license to Southern Energy NY-Gen L.L.C. *Orange and Rockland Utilities, Inc.*, 87 FERC ¶ 62,323, *reh'g denied*, 88 FERC ¶ 61,151 (1999). In 2004, Southern Energy NY-Gen L.L.C. changed its name to Mirant NY-Gen, LLC after being acquired by Mirant New York, LLC. In 2007, Mirant NY-Gen, LLC changed its name to AER NY-Gen, LLC, after being acquired by Alliance Energy Renewables, LLC.

⁴ See Article 405 of the license, *Orange and Rockland Utilities, Inc.*, 59 FERC at 63,089, *as amended by*, 65 FERC ¶ 62,175 (1993).

⁵ *Orange and Rockland Utilities, Inc.*, 59 FERC at 63,082.

Toronto Dam Area boat launch could be used when low lake levels precluded use of the Moscoe Road launch.⁶ On November 5, 2004, the Commission issued public notice of the licensee's filing as an amendment application.⁷

6. On November 30, 2004, Commission staff sent a letter to the licensee, stating that staff had been informed that a gate providing access to the Toronto Dam Area boat launch had been closed. Staff explained that the pending amendment application did not obviate the licensee's obligation to keep the recreation area open and staff asked for information, including the licensee's reasons for closing the gate.⁸

7. On December 20, 2004, the licensee filed a response. The licensee stated that the gates were kept open from 7:00 am until 7:00 pm from May 1 until November 1 because road conditions were poor in the winter and spring, and that Woodstone was responsible for opening and closing the gates.⁹

8. On April 18, 2005, the Commission issued an order denying the licensee's amendment application.¹⁰ The Commission noted its general policy to "seek, within its authority, the ultimate development of [recreational] resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project,"¹¹ and further explained that it would not allow the interests of private landowners to override the general public's right to enjoy the recreational resources associated with hydropower projects.¹² The Commission explained that the

⁶ Letter from Elliot Neri (licensee's plant manager) to Ms. Magalie Roman Salas (Commission Secretary) (dated October 22, 2004).

⁷ This was the appropriate action because the licensee could not alter or cede control of the recreation facilities required by the license without prior Commission authorization.

⁸ Letter from John Estep (Commission staff) to Elliot Neri.

⁹ Letter from Elliot Neri to Magalie Roman Salas (dated December 9, 2004).

¹⁰ *Mirant NY-Gen LLC*, 111 FERC ¶ 61,077 (2005).

¹¹ *Id.* P 8 (citing 18 C.F.R. § 2.7 (2004)). The Commission also explained that standard license Article 18, included in the project license, stated that "so far as it is consistent with proper operation of the project, the licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes"

¹² *Id.*, (citing *West Penn Power Company*, 81 FERC ¶ 61,362, at 62,736 (1997)).

two boating access sites at the Swinging Bridge Project provide different types of recreational experiences to different types of people, the Toronto Dam Area being more remote and less developed, and cited statements by some commenters that closing the Toronto Dam Area would make the adjacent portion of the reservoir easily accessible only to private landowners, and not the public.¹³ Finally, the Commission reviewed reservoir elevation data, and concluded that the Toronto Dam Area boat launch will need to be maintained and used with some frequency, thus counseling against closing it.¹⁴

9. By letter dated April 26, 2005, Commission staff replied to the licensee's December 20, 2004 filing.¹⁵ Staff explained the requirements of license Articles 405 and 18, adding that nothing in the license allows the licensee to impose seasonal or hourly limits on access, and that the licensee is "responsible for ensuring that the Toronto Dam access site is available to the public at all times and is operated and maintained pursuant to your license requirements." Staff also reminded the licensee that standard Article 5 of the license requires the licensee to acquire title in fee or the right to use in perpetuity all lands necessary for the project. The letter concluded by stating that it constituted notice pursuant to section 31(a).¹⁶

10. The licensee responded, on April 28, 2005, by filing a letter it had received from Woodstone.¹⁷ Woodstone stated that it was constructing a bypass road to the Toronto Dam Area, and that although it "continues to believe that the public has no right to use our roads to access the remote boat launch and parking area, . . . in the . . . spirit of cooperation . . . we will allow the public to use the new by-pass road"

11. Commission staff replied the next day, authorizing the licensee to temporarily close the Toronto Dam Area, until May 7, 2005, while the bypass road was being built, during which time the licensee was to ensure that the area was ready for public use on that date.¹⁸ Staff also ordered the licensee to obtain an easement to use the bypass road for public access and keep the area open at all times. Finally, staff ordered the licensee to

¹³ *Id.* P 11-12.

¹⁴ *Id.* P 13.

¹⁵ Letter from Joseph D. Morgan to Elliot Neri.

¹⁶ 16 U.S.C. § 823(b) (2006). Section 31(a) empowers the Commission to issue compliance orders.

¹⁷ Letter from Elliot Neri to Ms. Magalie Roman Salas (filed May 5, 2005).

¹⁸ Letter from Joseph D. Morgan to Elliot Neri (April 29, 2005).

file, by May 7, 2005, notification that the access area was open, and to document its right to use the access road by June 15, 2005.

12. The required documentation was not filed. On July 12, 2005, Commission staff again wrote to the licensee, reminding it of its obligation to obtain an appropriate easement for the bypass road that allows public access to the Toronto Dam Area, and stating that it had failed to file by June 15, 2005, the required documentation showing its right to use the road.¹⁹

13. On July 20, 2005, the licensee filed a response, including a letter from Woodstone, which the licensee cited as "demonstrating that [it] has the rights to provide public access via the newly constructed bypass road."²⁰ In fact, the letter from Woodstone stated that, while Woodstone "will continue to cooperate with [the licensee] in allowing you to meet your license obligations . . . it would be premature to have further discussion on a permanent resolve of the access issue" Accordingly, Commission staff notified the licensee that its response was inadequate and that its failure to demonstrate that it has the necessary rights to provide public access put it in noncompliance with its license and that staff's letter constituted notice under section 31(a) of the FPA.²¹

14. On August 3, 2005, the licensee requested an extension of time to file the documentation, based on the assertion that Woodstone had proposed that the private road be transferred to the Town of Bethel, which action would be completed within 90 days.²² Based on the licensee's assertions, Commission staff granted an extension until November 1, 2005.²³ However, the road was never made a public road, and the licensee did not make the required filing.

15. On February 1, 2006, the licensee asked for another extension of time (until May 1, 2006) to provide a status report on negotiations. By letter of March 1, 2006, staff denied the request, stating:

¹⁹ Letter from Joseph D. Morgan to Elliot Neri (July 12, 2005).

²⁰ July 19, 2005 letter from Elliot Neri to Magalie Roman Salas (enclosing letter from Woodstone).

²¹ July 27, 2005 letter from John E. Estep to Elliot Neri.

²² Letter from Carrie Hill Allen to Ms. Magalie Roman Salas (filed August 3, 2005).

²³ Letter from John E. Estep to Elliot Neri.

As a licensee, you are required to provide public access to the project lands and waters. We expect the recreation site and access at Toronto Reservoir to be open to the public immediately. If access is not via the newly constructed [bypass] road because you cannot get the needed rights, then you must provide access along the original road. . . .

You are in non-compliance with your license and will continue to be in non-compliance until such time that you demonstrate the area is available to the public. . . . Your efforts to bring yourself into compliance in a timely manner may be a factor in determining future Commission actions. You must file the appropriate documentation immediately. This letter constitutes notice pursuant to section 31(a) of the [FPA].²⁴

16. In response, the licensee on July 3, 2006 informed the Commission that it had commenced litigation regarding its easement,²⁵ and in an update filed on January 8, 2007, the licensee explained that litigation was continuing.²⁶

17. To date, the road to the Toronto Dam Area remains closed to the public.

Transfer Request

18. On April 30, 2010, the applicants filed a request for authorization to transfer the license for the Swinging Bridge Project from NY-Gen to the Eagle Creek Companies, jointly.²⁷

19. Public notice of the transfer application was issued May 7, 2010, establishing June 6, 2010, as the deadline for filing comments, protests, and motions to intervene. On May 26, 2010, in response to several comments, the comment period was extended until July 7, 2010.

²⁴ Letter from John E. Estip to Elliot Neri.

²⁵ Letter from Carrie M. Safford to Magalie R. Salas.

²⁶ Letter from Carrie M. Safford to Magalie R. Salas.

²⁷ Applicants state that the transferees are Delaware limited liability corporations authorized to do business in New York. The Eagle Creek Companies are wholly owned by Eagle Creek Hydro Energy, LLC, which itself is wholly owned by Eagle Creek Renewable Energy, LLC, which in turn is wholly owned by Hudson Clean Energy Partners, L.P. and its affiliated investment funds.

20. Timely, unopposed motions to intervene were filed by County of Sullivan, New York (Sullivan); Town of Thompson; Town of Bethel; Woodstone; Bob and June Barrett; Swinging Bridge Property Owners Association (Swinging Bridge Association); Chapin Estate Homeowners Association, Inc. (Chapin Homeowners); Town of Lumberland; Homeowners on Toronto, Inc. (Toronto Property Owners); Iroquois Hunting and Fishing Club, Inc. (Iroquois); and the New York State Council of Trout Unlimited.²⁸ The New York State Department of Environmental Conservation (New York DEC) filed a late motion to intervene, which was granted by Secretary's notice of October 1, 2010.

21. Comments were filed by Friends of Toronto, Elaine Olshan, Representative Maurice Hinchey, Samuel and Jean Goldman, Herman Goldfarb, Lynne Fumigli, New York State Senator John J. Bonacic, Teri Helsons, Elizabeth Barrett-Alexander, Upper Delaware Council, Town of Highland, and Senator Charles Schumer.²⁹

22. Almost all of the comments and interventions oppose the transfer application, arguing that the Commission should not authorize a transfer of the licensee until the issue of public access to the Toronto Dam Area has been resolved. Some of the commenters further contend that no transfer should take place without revisiting and revising the project's operating regime.

23. On June 11, 2010, Commission staff issued an additional information request to the applicants regarding outstanding non-compliance issues and upcoming compliance deadlines for the three projects. For the Swinging Bridge Project, Commission staff directed the licensee to address its failure to open the second public access point on the Toronto Reservoir.

24. The licensee filed a response on July 6, 2010.³⁰ It explained that, in April 2005, local residents (users of the Toronto Dam Area) sued Woodstone for false imprisonment³¹ and malicious prosecution and NY-Gen for failing to provide the second

²⁸ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2010).

²⁹ The Sullivan County Partnership for Economic Development filed comments, which it later withdrew.

³⁰ Staff's June 11 letter also requested information regarding the status of several repairs, installations, tests, and inspections for each of the three developments that were either overdue or due in the near future. NY-Gen has since made the required filings and submitted updates on the status of filings that are due in the near future.

³¹ Woodstone apparently blocked the road, preventing access to, and exit from, the recreation area. This prevented some residents from exiting the area.

public access point. NY-Gen asserted a cross claim against Woodstone, seeking a judgment that NY-Gen is entitled to an unrestricted right to use the road leading to the Toronto Dam Area for any project purpose, including allowing the public to access the recreation area.³² NY-Gen contended that it has attempted to settle the litigation with Woodstone, but Woodstone has refused to allow the public to use the road until NY-Gen agrees to change operation of the Toronto Reservoir to ensure higher lake levels during the recreation season, presumably for the benefit of homeowners in Woodstone's development. NY-Gen explained that, based on its experience operating the Mongaup River System, higher water levels in the Toronto Reservoir cannot be guaranteed without a reduction of mandatory downstream releases for environmental protection and other non-power purposes.

25. Commission staff sent a second request for additional information on July 23, 2010, asking for more specific information on NY-Gen's efforts to provide public access to the Toronto Dam Area. NY-Gen responded that its case against Woodstone is still in the discovery phase, depositions have not yet commenced, and, in light of settlement discussions, the case has not yet been scheduled for trial.³³ In addition, NY-Gen stated that it has not initiated condemnation proceedings to gain the necessary rights to obtain public access for its second recreation area, because it believes that it already has the necessary rights. However, in the event that it is unsuccessful in court, NY-Gen stated it would initiate condemnation proceedings, as necessary.

Discussion

26. Under section 8 of the FPA, "no voluntary transfer of any license ... shall be made without the written approval of the commission...."³⁴ Approval by the Commission of a license transfer is contingent upon, among other things, a showing that the transfer is in the public interest.³⁵ Our transfer application regulations require that a licensee seeking approval to transfer its license "certifies that it has fully complied with the terms and conditions of its license, as amended, and that it has fully satisfied and discharged all of its liabilities and obligations thereunder"³⁶

³² The residents' claim was dismissed, and NY Gen's claim was severed from the residents' claim and remains pending.

³³ See licensee's August 23, 2010 filing.

³⁴ 16 U.S.C. § 801 (2006).

³⁵ 18 C.F.R. § 9.3(a) (2010).

³⁶ See 18 C.F.R. § 131.20 (2010) (requirements for transfer applications regulations).

27. Although NY-Gen's transfer application included the required certification, it is clear from the record of this project that NY-Gen has been in violation of its license from 2005 to the present due to its failure to provide public recreation access to the Toronto Dam Area, one of only two recreation areas on Toronto Reservoir. Furthermore, NY-Gen has made essentially no progress over the last five years in obtaining the rights necessary to provide the required access. During this entire period, the public has been denied access to project lands and waters, a right that the Commission required in the project license, and which Commission staff has made extensive efforts to vindicate.

28. NY-Gen states that it has put litigation of the easement on hold while it attempts to negotiate an agreement with Woodstone. There is no assurance when, if ever, these negotiations will bear fruit. Moreover, Woodstone has apparently indicated that its acquiescence is conditioned on NY-Gen agreeing to modify the operating regime of Toronto Reservoir, which would in turn affect the operation of the Mongaup River System. And NY-Gen has stated that, "based on its experience in operating the Mongaup River System projects, . . . higher water levels cannot be guaranteed at the Toronto Reservoir without a reduction of mandatory downstream releases for environmental protection and other non-power purposes."³⁷

29. Given the stated positions of NY-Gen and Woodstone and the more than five years that the parties have had to negotiate an agreement, there appears to be little, if any, hope that the matter can be resolved through negotiation. Moreover, it would be inappropriate to condition public access to the Toronto Dam Area on the licensee's maintenance of certain reservoir levels deemed desirable by private developers and lakefront residents but likely damaging to downstream resources. Instead, the licensee must obtain the property rights (e.g., easement or fee title) necessary to ensure public access to the recreation area regardless of the operational aspects of the project. This, the licensee has failed to do.

30. As a general rule we do not look beyond the basic elements of a transfer in considering an application under section 8. However, doing so is a matter within our sole discretion, and we find it appropriate under the unusual facts of this case. As a result of the licensee's and Woodstone actions, the public has not had access to the Toronto Dam Area for more than five years. It would not be in the public interest to allow NY-Gen to divest itself of the Swinging Bridge Project until it has resolved the access issue by

³⁷ NY-Gen's July 7, 2010 Filing at 8.

obtaining the necessary property rights. Accordingly, we will dismiss the application to transfer the license for the Swinging Bridge Project, without prejudice.³⁸ At such time as the access issue is resolved, NY-Gen may file a new transfer application.

The Commission orders:

(A) The application for authorization to transfer of license for the Swinging Bridge Project No. 10482 from AER NY-Gen, LLC to Eagle Creek Hydro Power, LLC, Eagle Creek Water Resources, LLC, and Eagle Creek Land Resources, LLC is dismissed.

(B) This order constitutes final agency action. Any party to this proceeding may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 8251 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2010).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁸ Many of the commenters that object to the license transfer ask that, if the Commission grants the transfer request, it attach conditions to the transfer regarding revisions to the project's operating regime so that higher lake levels would be maintained during the recreation season. However, as the Commission has explained, entities cannot use a transfer proceeding as a mechanism to reopen issues settled in the initial licensing proceeding. *See, e.g., Menominee Co.*, 74 FERC ¶ 61,023, at 61,067 (1996); and *Niagara Mohawk Power Corp.*, 32 FERC ¶ 61,291, at 61,678 (1985). In any event, because we are dismissing the transfer request, those comments and arguments are moot.