

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
William L. Massey, Linda Breathitt,
and Curt Hébert, Jr.

Wisconsin Electric Power Company

Project Nos. 1759-036, 1980-009,
2072-008, 2073-008, 2074-007,
2131-020, 2471-005, 11830-000,
and 11831-000

ORDER ON OFFER OF SETTLEMENT
AND ISSUING NEW LICENSE

(Issued January 12, 2001)

Wisconsin Electric Power Company (Wisconsin Electric) has filed an application for a new license, pursuant to Sections 15 and 4(e) of the Federal Power Act (FPA),¹ for the continued operation and maintenance of the 1,800-kilowatt (kW) Way Dam and Michigamme Reservoir Project No. 1759, located on the Michigamme River² in Iron and Dickinson Counties, Michigan. The project occupies 31.47 acres of federal lands.³ This order grants the project a new license.

Wisconsin Electric's application for Project No. 1759 is one of eight applications it filed to relicense eight hydropower projects.⁴ As originally licensed, Project No. 1759 included three developments: Way Dam and Michigamme Reservoir (Way Dam), Peavy Falls, and Twin Falls. Wisconsin Electric has filed a separate relicense application for each of these developments. The applications for Peavy Falls and Twin Falls have been

¹16 U.S.C. §§ 808 and 797(e).

²The Michigamme and Menominee Rivers are navigable waterways of the United States. 3 FPC 449 (1943).

³See n. 51, *infra*.

⁴Wisconsin Electric also filed relicense applications for the Hemlock Falls Project No. 2074, Lower Paint Project No. 2072, Michigamme Falls Project No. 2073, and Kingsford Project No. 2131. The applications were filed on October 1, 1999, except for the application for the Big Quinnesec Falls Project, which, because of its license's earlier expiration date, was filed on February 26, 1996.

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designated Project Nos. 11830 and 11831, respectively.⁵ The company has also filed an application to surrender the license of a ninth project.⁶ We are concurrently issuing eight orders granting new licenses for the eight Upper Menominee Projects,⁷ and a ninth order proposing issuance of a non-power license for the Sturgeon Project.⁸

I. THE MULTI-PROJECT PROCEEDING

PROJECT DESCRIPTIONS

All nine projects under discussion are located in the Upper Menominee River Basin, in Wisconsin and Michigan. The 118-mile-long Menominee River originates at the confluence of the Michigamme and Brule Rivers and flows southeasterly as the boundary between Wisconsin and Michigan's Upper Peninsula, emptying into Green Bay at the twin cities of Marinette, Wisconsin, and Menominee, Michigan. The Michigamme, Brule, Paint, and Sturgeon Rivers are major tributaries of the upper Menominee River. As described below, four of the projects are located on the Michigamme River, one on the Paint River, three on the Menominee, and one on the Sturgeon River.⁹ Most of the Basin is forested and sparsely populated. The region's economy depends primary on recreational tourism and timber-based industries.

⁵Under both the existing licenses and the new licenses we issue today, the Way, Twin Falls, and Peavy Projects constitute a single unit of development (see Wisconsin Michigan Power Company, 5 FPC 590 (1946)), a unit which also includes the Lower Paint Project No. 2072, Michigamme Falls Project No. 2073, and Hemlock Falls Project No. 2074 (see Wisconsin Michigan Power Company, 52 FPC 1201, 1204 (1974)).

⁶Wisconsin Electric filed its to surrender application for the Sturgeon Project No. 2471 on October 1, 1999.

⁷See Wisconsin Electric Company, 94 FERC ¶¶ 61,____; 61, ____; 61,____; 61,____; 61,____; 61,____; 61,____, and 61,____.

⁸See Wisconsin Electric Company, 94 FERC ¶ 61,____.

⁹ There are 56 dams within the Menominee River Basin, of which 19 are used to generate hydroelectric power. Wisconsin Electric owns and operates 13 of these hydroelectric projects.

As noted, the eight projects for which relicensing is being sought were originally authorized under six licenses. Five of the six original licenses will expire in 2001.¹⁰ The sixth license, for the Big Quinnesec Project, expired in 1998, and the project has been operating under annual licenses.

The eight Upper Menominee projects have a combined installed capacity of 61.1 megawatts (MW) and dependable capacity of about 52 MW, with annual generation of 275,500 megawatt-hours. Two of the projects (Way Dam and Peavy Falls) function as seasonal storage reservoirs. Four of the eight projects (Michigamme Falls, Twin Falls, Kingsford, and Big Quinnesec Falls) have been operated to provide peak energy and capacity to the regional grid.

Four of the eight projects are located in Michigan on the Michigamme River:

(1) farthest upstream, at river mile 23, the 1.8-megawatt (MW) Way Dam and Michigamme Reservoir Project No. 1759 (Way Dam Project), located in Iron and Dickinson Counties;¹¹

(2) at river mile 19, the 2.8-MW Hemlock Falls Hydroelectric Project No. 2074, located in Iron County;¹²

(3) at river mile 4.2, the 12-MW Peavy Falls Hydroelectric Project No. 11830, located in Iron County;¹³ and

¹⁰The existing licenses for Project Nos. 2073, 2074, and 2131 expire at the end of October 31, 2001, and those for Project Nos. 1759 and 2072 expire at the end of December 31, 2001. (In order to facilitate a coordinated relicensing review of projects in the Menominee River Basin, the Commission granted Wisconsin Electric's application to accelerate the termination date of the license for the Kingsford Project No. 2131 from June 30, 2004, to October 31, 2001. 75 FERC ¶ 62,086 (1996).)

¹¹52 FPC 1201 (1974).

¹²10 FPC 1437 (1951).

¹³52 FPC 1201 (1974).

(4) just above the mouth of the river, at river mile 0.1, the 9.6-MW Michigamme Falls Hydroelectric Project No. 2073, located in Iron County.¹⁴

The 100-kilowatt (kW) Lower Paint Hydroelectric Project No. 2072 is located on the Paint River in Iron County, Michigan, six miles upstream from the Paint's confluence with the Brule River.¹⁵

Three of the projects are located on the Menominee River, in both Michigan and Wisconsin:

(1) about eleven miles below the confluence of the Michigamme and Brule Rivers, at river mile 106.6, the 6.1-MW Twin Falls Hydroelectric Project No. 11831, located in Dickinson County, Michigan, and Florence County, Wisconsin;¹⁶

(2) about four miles below the Twin Falls Project, at river mile 100.2, the 7.2-MW Kingsford Hydroelectric Project No. 2131, located in Dickinson County, Michigan, and Florence County, Wisconsin;¹⁷ and

(3) about six miles below the Kingsford Project, at river mile 94.8, the 21.5-MW Big Quinnesec Falls Hydroelectric Project No. 1980, located on in Dickinson County, Michigan, and Florence and Marinette Counties, Wisconsin.¹⁸

The ninth project in these proceedings is Wisconsin Electric's 800-kilowatt Sturgeon Project No. 2471, located on the Sturgeon River eight miles above its confluence with the Menominee River in Dickinson County, Michigan. The original license for Project No. 2471 was issued in 1966¹⁹ and expired on December 31, 1993. Wisconsin Electric did not apply to relicense this project, despite its earlier notice of

¹⁴10 FPC 1413 (1951).

¹⁵10 FPC 1558 (1952).

¹⁶52 FPC 1201 (1974).

¹⁷6 FERC ¶ 61,069 (1979).

¹⁸7 FPC 544 (1948).

¹⁹36 FPC 869 (1966).

intent to do so. Therefore, pursuant to the Commission's relicensing regulations,²⁰ the Commission solicited applications from potential applicants other than the existing licensee. When no applications were received, Wisconsin Electric applied to surrender the project license.²¹

BACKGROUND

On May 15, 1997, Wisconsin Electric submitted a "Wilderness Shore Settlement Agreement" (Agreement) addressing issues pertaining to its Upper Menominee River Basin Projects.²² With its relicense applications filed on October 1, 1999, Wisconsin Electric submitted a collaboratively-prepared draft environmental assessment (APEA),²³ and a number of resource management, mitigation, and enhancement plans required by the Agreement. The Agreement is described below.

Notice was issued of the Agreement and of each license application. Timely motions to intervene in the multi-project proceeding were filed by the U. S. Department of the Interior, Fish and Wildlife Service (FWS); the River Alliance of Wisconsin; the Wisconsin Department of Natural Resources (Wisconsin DNR); the Chicago Whitewater Association; and jointly by the Anglers of the Ausable, Inc.; the Great Lakes Council, Inc., of the Federation of Fly Fishers, Inc.; the Michigan United Conservation Clubs; and the Michigan Council of Trout Unlimited.²⁴ The intervenors support the Agreement and the issuance of the eight relicenses consistent with its terms.²⁵

²⁰ 18 CFR 16.20 (2000).

²¹ See 73 FERC ¶ 61,208 (1995).

²² The Agreement was executed on February 10, 1997.

²³ The Commission's regulations require that relicense applications include an Exhibit E (environmental report). The APEA is a substitute for the Exhibit E. See 18 CFR 4.51(f) and 16.8(f). The Agreement was included as Appendix A in volume 2 of the APEA.

²⁴ The motions were timely and unopposed, and therefore automatically granted, pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 CFR 385.214(c)(1).

²⁵ Certain local residents and organizations filed comments in the Sturgeon Project surrender proceeding opposing the proposal to remove the Sturgeon Project dam. Those
(continued...)

On November 9, 2000, Commission staff issued an Environmental Assessment (EA) that evaluates the potential impacts of the eight projects pending relicensing and recommends issuance of new licenses for the eight Upper Menominee Projects and surrender (including dam removal) for the Sturgeon Project, as proposed in the Wisconsin Electric's applications and the Agreement.²⁶ Michigan DNR filed comments in support of the EA. The Commission has considered all the motions and comments filed in this proceeding in determining whether, and under what conditions, to issue the eight relicenses and propose issuance of a non-power license for the ninth project.

THE MULTI-PROJECT SETTLEMENT AGREEMENT

The Agreement was reached among Wisconsin Electric, Wisconsin DNR, Wisconsin Department of Administration, Michigan Department of Natural Resources (Michigan DNR), Michigan Department of Environmental Quality (Michigan DEQ), Michigan Attorney General, FWS, National Park Service (NPS), River Alliance of Wisconsin, and Michigan Hydro Relicensing Coalition (collectively, the Collaborative Team).

A. Project Operations and Water Quality

The Agreement sets forth, for each of the eight developments to be relicensed, proposed changes to basic operational modes, minimum flow releases, rates of changes in flow releases, and reservoir elevations.²⁷ These changes include reduced winter reservoir drawdowns, increased minimum flows, reduced impoundment fluctuations, and spring time run-of-river operations.

Under the Agreement, the Way and Hemlock Falls plants will no longer be used for daily peaking, and the Michigamme Falls, Twin Falls, Kingsford, and Big Quinnesec Falls peaking operations will be modified to reduce daily changes in river flows. During the spring spawning periods, the latter three projects will operate in a run-of-river mode. Wisconsin Electric will operate the Michigamme Falls Project to re-regulate flow from

²⁵(...continued)
concerns are addressed in the Sturgeon Project order also issued today.

²⁶On the same day, Commission staff issued an EA evaluating the impacts of decommissioning the Sturgeon Project No. 2471.

²⁷Agreement, section 3.

the upstream Peavy Falls Project, and will operate the other two projects with greater minimum flows. The Hemlock Falls Project will operate in a run-of-river mode year-round, passing the minimum flows from Way Dam. The Lower Paint Project will continue to divert flows in excess of the required minimum flows and up to the hydraulic capacity of the diversion canal from the Paint River into Peavy Pond. The Agreement proposes increased minimum instream flows from the Lower Paint River Dam. The Agreement also provides that Wisconsin Electric will develop and implement for each project operations testing and compliance plans and plans to draw down reservoirs for routine maintenance and emergency repair.²⁸ Wisconsin Electric submitted these plans with its license applications.

The Agreement provides that Wisconsin Electric's projects shall meet specified water temperature and dissolved oxygen standards, and shall develop and implement a plan to monitor these parameters, as well as impoundment stratification and selected chemicals in fish and sediment behind the dams.²⁹ On April 12, 2000, Wisconsin Electric submitted its water quality monitoring plan.

B. Fish Passage

Upon the state fishery agencies' preparation of a fish/watershed plan providing the biological justification for upstream fish passage, Wisconsin Electric commits to develop and (with Commission approval) operate upstream fish passage structures at the Way, Lower Paint, Hemlock Falls, and Kingsford Projects.³⁰ The state agencies agree not to pursue fish passage at the other four projects, which are located at natural barriers (waterfalls).³¹

²⁸Id.

²⁹Id., section 4.

³⁰Id., section 4.2.

³¹Id., section 4.2.1.

Wisconsin Electric will provide a total of \$3.4 million³² to design and (with Commission approval) operate downstream fish protection devices at all the projects, as well as develop performance evaluation plans therefor.³³

For its part, Interior reserves its authority, pursuant to FPA Section 18,³⁴ to prescribe upstream and downstream fishways at any of the eight projects.³⁵

C. Land Use and Fish and Wildlife Protection and Enhancement

The Agreement divides its land use management provisions into proposals for "project lands" --lands within FERC project boundaries and jurisdiction³⁶ -- and non-project lands, over which the Commission exercises no jurisdiction.³⁷ With respect to project lands, Wisconsin Electric commits to develop for each project a comprehensive land use management plan that includes riparian buffer zones managed for old growth forest, wildlife enhancements, bald eagle protection, and nuisance plant control.³⁸

³²Id., section 4.3.1. The \$3.4 million will be provided over the terms of the licenses, adjusted annually for changes in the Consumer Price Index. The Agreement does not seek to involve the Commission in the funding process.

³³Id., sections 4.3.2. through 4.3.5.

³⁴16 U.S.C. § 811.

³⁵Agreement, section 4.2.2.7.

³⁶Although the Lower Paint Project has an installed capacity of only 100 kW, it received a major license, and has a project boundary. See 10 FPC 1558. Its new license, issued today, is also for a major project.

³⁷The Agreement states at the outset (section 2.3.4.) that any Agreement conditions the Commission deems beyond its jurisdiction will be enforceable by the parties in a court of appropriate jurisdiction.

The Agreement has provisions for the use, management, and disposition of certain of Wisconsin Electric's real estate holdings. Agreement, section 5.2. The use, management, and disposition of licensee holdings not required to be within the project boundary are matters beyond the Commission's jurisdiction.

³⁸Agreement, section 5.1.4.

Wisconsin Electric submitted with its relicense applications a Terrestrial-Based Natural Resources Management Plan that includes the required provisions.

Wisconsin Electric also agrees to provide \$145,000 (indexed) annually throughout the license terms, to fund Commission-approved studies in the Upper Menominee River Basin, such as aquatic research and enhancements to water quality and terrestrial habitat beyond that required by the license.³⁹

D. Woody Debris Management

The Agreement provides for Wisconsin Electric to file for Commission approval a plan to improve aquatic habitat by increasing the amount of large woody debris and vegetative material at each of the projects.⁴⁰ Wisconsin Electric submitted its woody debris plan with its license applications. The plan calls for Wisconsin Electric to pass accumulated woody debris downstream, unless passing such debris would create a navigation hazard or other such public safety hazard. The plan further requires Wisconsin Electric to consult with the resource agencies regarding any future proposal to place fish habitat structures in the project impoundment.

E. Recreation

Wisconsin Electric will file for Commission approval a comprehensive plan for recreation at the projects, incorporating recreational facilities agreed to by the signatories, and delegating to the Collaborative Team certain operational and oversight functions.⁴¹ The proposed recreational development includes construction of new boat launches, fishing areas, and canoe portages, and continued maintenance of existing camping areas.

F. Dam Removal

As noted above, we required Wisconsin Electric to surrender its license for the Sturgeon Project, inasmuch as neither it nor anyone else applied to continue to operate it.

³⁹Id., section 4.4.

⁴⁰Id., section 4.5. Woody debris is an important habitat feature in aquatic ecosystems. See EA at 106.

⁴¹Of course, a licensee bears ultimate responsibility for the construction, operation, and maintenance of recreational facilities required by its license. See, e.g., Smith Falls Hydropower, 56 FERC ¶ 61,279 (1991).

The Agreement provides for removal of project structures sufficient to at a minimum allow free passage by fish and restore a high-gradient river reach. The Agreement also provides that, if the resource agencies⁴² still wish it, Wisconsin Electric will, some time after 2020, apply to the Commission to surrender its license for the Pine Project No. 2486 and remove the project works at the end of that project's current license term (2025).

The Pine Project, which is not a subject of the instant relicensing proceedings, is a 3.6-MW facility located on the Pine River in Florence County, Wisconsin. It was issued a new license in 1995.⁴³ The issue of whether the project should be deauthorized and removed is not before us at this time, and we render no opinion thereon. The Agreement (at section 8.3) sets forth the circumstances under which, some 20 years hence, Wisconsin Electric would file an application to surrender the project license and to remove the project works. If and when the Commission receives such an application, it will at that time perform the appropriate environmental and other reviews and make a public interest determination.

G. Dispute Resolution

Section 9.1 of the Agreement provides for a Settlement Implementation Team that will coordinate and implement the Agreement.⁴⁴ Section 9.3 of the Agreement provides a

⁴²"Resource agencies" is defined in the Agreement (at section 2.1.2.) as the Wisconsin DNR, Michigan DNR, Michigan DEQ, FWS, and National Park Service.

⁴³Wisconsin Electric Power Co., 73 FERC ¶ 61,346 (1995). Wisconsin Electric has also agreed to remove the state-authorized Woods Creek Dam, in the Town of Fern, Florence County, within two years of issuance of new licenses for the eight projects at issue herein. Agreement, section 8.1. This is a matter beyond the Commission's jurisdiction.

Wisconsin Electric has in addition committed to the other signatories that, during the 40-year term of the Agreement (which is essentially coterminous with the relicensing terms established in this order and the seven companion relicensing orders) if it decides to sell its projects to a non-affiliated entity, it will sell them only as a group; will pre-qualify the bidders to ensure their financial ability to meet a license's responsibilities; and may require performance bonds or other insurance to cover the cost of project retirement. (Agreement, section 7). This, too, is not a matter for inclusion in a Commission license.

⁴⁴The Settlement Implementation Team is comprised of representatives of
(continued...)

dispute-resolution mechanism for conflicts that arise among members of the Implementation Team. The team members are required to engage in good-faith negotiations for a minimum of 90 days, and if agreement is not reached by then, the team is required to engage the services of a neutral third party (such as an arbitrator) to resolve the dispute. If the third party is unsuccessful, the team will then refer the dispute to the "appropriate authority" for resolution.

DISCUSSION

The Agreement provides for increased minimum flows, limited reservoir drawdowns, maintenance of water quality standards, installation of downstream fish protection devices, management of woody debris and riparian buffer zones, protection of the bald eagle and its habitat, and nuisance plant control. These measures will protect and enhance the projects' fish, wildlife, and aquatic resources. For example, reductions in the depth of winter drawdowns should benefit the walleye population by increasing recruitment of young-of-year walleye and increasing the amount of over-winter habitat within the reservoir which may discourage predators and downstream movement of fish.⁴⁵ Increased minimum flows will benefit fish species in riverine reaches downstream of the projects by reducing downstream discharge fluctuations, thus providing increased habitat stability. Increased habitat stability will increase productivity and elicit positive changes in fish abundance and diversity within the riverine reaches, while springtime run-of-river operations will increase spawning success.⁴⁶

In addition, riparian buffer zones, bald eagle protection measures, and nuisance plant control will enhance habitat for all wildlife at the projects, including threatened and endangered species, by for example minimizing habitat fragmentation. The Agreement further provides for protection of cultural resources affected by the project, and for enhanced recreational resources in the project vicinity.

As noted, Wisconsin Electric submitted (1) operation compliance plans; (2) reservoir drawdown plans; (3) a water quality monitoring plan; and (4) a woody

⁴⁴(...continued)

Wisconsin Electric, Michigan DNR, Wisconsin DNR, FWS, NPS, and "ex-officio members" (currently, the River Alliance of Wisconsin and the Michigan Hydro Relicensing Coalition). Agreement, section 2.1.2 and Appendix 9.

⁴⁵ See EA at 84-85.

⁴⁶ Id. at 87-89.

debris plan. We have reviewed these plans, and find them to be reasonable and appropriate. We are modifying the woody debris plan to require Wisconsin Electric to submit for our approval any proposal prepared in consultation with the agencies to place fish habitat structures in the project impoundment. With this modification, we approve these plans and will include appropriate conditions in the eight licenses. Wisconsin Electric also submitted a terrestrial-based natural resources management plan that implements the Agreement as it pertains to management of project lands, specifically riparian buffer zones, wildlife enhancements, protection of the bald eagle and its habitat, and nuisance plant control. We have reviewed these provisions of the plan, and find them to be reasonable and appropriate. We are modifying the bald eagle protection measures to include a provision of the Agreement⁴⁷ requiring the licensee to reimburse Michigan DNR up to \$1,000 per year (adjusted annually) for airplane flights over the project to identify bald eagle nest locations and collect data. With this modification, we approve the specified provisions of the terrestrial-based natural resources management plan and will include an appropriate conditions in each of the eight licenses.

For these reasons, we conclude that the eight licenses, conditioned as discussed above, will satisfy the comprehensive development/public interest standards of Sections 4(e) and 10(a)(1) of the FPA.⁴⁸

As we have recently reiterated, we generally consider project-related dispute resolution procedures agreed to by a licensee and one or more third parties to fall beyond the ambit of the Commission's oversight role.⁴⁹ For this reason, we are not adopting the dispute resolution section (9.3) of the Agreement (described above) as a license term. That section does not in any event appear to rely on its inclusion in the licenses, and as noted earlier the Agreement provides, in section 2.3.4., for the parties to pursue in other fora the enforcement of provisions not included in the Commission license.

II. THE PROJECT NO. 1759 PROCEEDING

BACKGROUND AND RELICENSING PROPOSAL

The Way Dam and Michigamme Reservoir Project (Way Dam Project) was originally licensed in 1946 to Wisconsin Electric's predecessor, Wisconsin Michigan

⁴⁷Agreement, section 4.6.3.

⁴⁸16 U.S.C. §§ 797(e) and 803(a)(1), respectively.

⁴⁹See Avista Corp., 93 FERC ¶ 61,116 at p. ____ (2000).