

120 FERC ¶ 61,266
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New York Power Authority

Project No. 2216-068

ORDER DENYING REHEARING AND PROVIDING CLARIFICATION

(Issued September 21, 2007)

1. On March 15, 2007, the Commission issued to the New York Power Authority (Power Authority) a new license, for the continued operation and maintenance of the 2,755.5-megawatt (MW) Niagara Project No. 2216, located on the Niagara River, in Niagara County, New York.¹
2. Requests for rehearing were filed on April 13, 2007, by the Niagara Improvement Association (Association), and on April 16, 2007, by the Eastern Niagara Public Power Association and Public Power Coalition (jointly, Coalition). A request for clarification was filed on April 16, 2007, by Allegheny Electric Cooperative, Inc., Connecticut Municipal Electric Cooperative, Massachusetts Municipal Wholesale Electric Company, City of Cleveland, Ohio, Pascoag Utility District and Vermont Department of Public Service (jointly, Neighboring States).

Background

3. The Niagara Project has two developments: the 2,515.5-MW conventional Robert Moses development and the 240-MW Lewiston pumped storage development, for a total

¹118 FERC ¶ 61,206 (2007).

installed capacity of 2,755.5 MW. As more fully discussed in our license order, the project is governed by two treaties with Canada and project-specific legislation.²

4. The new license incorporates various provisions of a settlement agreement among the Power Authority and resource agencies, local communities, an Indian tribe, and non-governmental organizations. The new license also includes mandatory conditions submitted by the New York Department of Environmental Conservation (New York DEC).

Discussion

A. Niagara Improvement Association's Rehearing Request

5. The Association represents an African-American community in the Highland Avenue area, located approximately one mile from the Niagara Project in the City of Niagara Falls, New York. The Association participated in the relicensing proceeding, and filed comments in response to the Commission's public notice of the application, and in response to the draft Environmental Impact Statement (EIS).

6. In response to the draft EIS, the Association requested that the Power Authority be required to provide funding to mitigate for the impacts caused by entities which purchased power from the Power Authority and then later left the area, in the amount of \$175 million per year for the length of the license, or until remediation and revitalization of the Highland Avenue area was completed, whichever came first.³ The Association also requested funding for unspecified African-American cultural initiatives; an affirmative action policy for the Niagara Project; a commitment by the Power Authority to employ at least 341 employees at the Niagara Project; a commitment by the Power Authority to employ African-Americans at the Niagara Project; and job commitment at the project for people who reside in the city of Niagara Falls.⁴

²See Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, January 11, 1909, 36 Stat. 2448 (1909); the Niagara River Water Diversion Treaty of 1950 (Diversion Treaty) TIAS 2130, 1 U.S.T. 694 (February 27, 1950); and the Niagara Redevelopment Act of 1957, 16 U.S.C. § 836-836a (2000).

³See comments on draft EIS filed on August 22, 2006, by Renae Kimble, Niagara County Legislator and Vice President of Niagara Improvement Association.

⁴See comments filed on April 7, 2006, by Rev. Joseph Jones, President, Niagara Improvement Association.

7. In the license order, the Commission found that decisions made by businesses which used project power were not project effects that required redress, and further that the alleged impacts were too speculative for the Commission to impose license measures with respect to them.⁵

8. The Association's arguments on rehearing are somewhat unclear, and there is some disjuncture between the statement of issues and the body of the pleading. Moreover, a number of the issues raised, as discussed below, are matters of state law or concerns about the actions of other agencies.

9. The Association argues that the Commission was required, and failed, to consider the standards set forth in Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.⁶ Executive Order 12898 requires that specified federal agencies make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human or environmental health effects of their programs, policies, and activities on minorities and low income populations. However, Executive Order 12898 applies to the agencies specified in section 1-102 of that Order and neither the Power Authority nor this Commission is identified as one of the specified agencies. Consequently, the provisions of Executive Order 12898 are not binding on this Commission,⁷ and the Association is mistaken in asserting to the contrary.

10. Nonetheless, in accordance with our usual practice, as part of the EIS, Commission staff examined the Niagara Project to ensure that it does not have disproportionately high and adverse human health or environmental effects on minority or low income communities, and determined that it will not have such impacts.⁸ In addition, we considered the arguments raised regarding the project's effect on the local community in the license order.⁹ As we previously concluded, the alleged impacts of the project on the community – that certain businesses which purchased power from the project and then left the area had environmental impacts on the community – are at best

⁵See 118 FERC ¶ 61,206 at P 89. The Commission also noted that it is without authority to require the payment of damages. *Id.* at n. 93.

⁶Association request for rehearing at 2, 6.

⁷See, e.g., *Gulf LNG Energy, LLC*, 118 FERC ¶ 61,128 at P 82 (2007) (footnotes omitted).

⁸FEIS at 149-50.

⁹118 FERC ¶ 61,206 at P 88-89.

tangential to the project. It is not appropriate for a hydropower project to be required to mitigate the impacts of other entities whose only tie to the project is that they purchased power from it. Whatever environmental harm those entities may have caused was a result of their independent actions, and cannot be laid at the project's door. Thus, the Association's assertions regarding non-project activities do not truly raise issues of economic justice that warrant further consideration by the Commission.

11. The Association goes on to assert that the Environmental Protection Agency (EPA) and the New York Department of Environmental Conservation (New York DEC) were obliged to ensure that environmental justice issues raised by the African American Community were addressed.¹⁰ Given that these agencies are not subject to the Commission's jurisdiction, the Commission has no authority to consider this matter. The Association must address any complaints regarding these matters to those agencies.

12. The Association argues that the Power Authority has an obligation to follow the Civil Rights Act of 1964 in its hiring practices, and to comply with New York State Law section 1005(13)(a) and (b), which the Association asserts "governed low-cost power allocations and should have established rules to ensure that the African American Community received and currently receives environmental justice."¹¹ To the extent that issues arise regarding the Power Authority's hiring practices, this is a matter outside of our jurisdiction. Indeed, the Supreme Court has held that the Commission has no authority under the Federal Power Act (FPA) to prohibit or enforce alleged civil rights violations by its licensees.¹² With respect to the allocation of power, as discussed below, it is our policy to allow hydropower generators to contract freely in the market with respect to power sales, in the absence of legislation to the contrary. Moreover, the specific allegation here – that the Power Authority is not complying with state law governing power allocation – is outside of our jurisdiction, and can only properly be adjudicated by state authorities.

13. The Association argues that the Power Authority made false statements that were subsequently relied on in the EIS. According to the Association, the Power Authority stated that it employs 341 workers at the Niagara Project, but actually only has 270 full-

¹⁰Association request for rehearing at 3-4.

¹¹*Id.* at 4-5, 7-8.

¹²*See NAACP v. FERC*, 425 U.S. 662 (1976) (Commission has no authority under the FPA to prohibit discriminatory employment practices or to enforce alleged violations of the Civil Rights Act, but may consider the economic effects of such discrimination as part of its ratemaking authority under the Natural Gas Act).

time workers, having 30 part-time employees, and 41 vacant positions that it does not intend to fill.¹³

14. In citing the employment figure of 341 in the EIS, Commission staff used substantial evidence from the record. Specifically, in the public information package included in its license application filed December 31, 2005, the Power Authority stated that as of the end of December 2003, it employed 77 salaried non-union employees; 225 hourly employees; 3 seasonal employees; 7 co-operative employees; 22 other types of employees; 6 contractors; and one temporary retiree for a total of 341 workers.¹⁴ The Association's unsupported statements regarding employment at the project and its citation to a videotape which is not in the record do not outweigh this information. In any case, regardless of whether the employment numbers supplied by the Association or Power Authority are correct, we did not rely upon the number of people employed by the project in making our decision to issue a new license to the Power Authority. Thus, this issue is irrelevant.

15. Finally, the Association objects to a "host community" settlement agreement, alleging that the annual payments to be made by the Power Authority to the City of Niagara Falls under that agreement are too low.¹⁵ As discussed below, the settlement agreement was reached among various parties outside the ambit of the licensing of the settlement and is not a matter for our consideration.

B. Public Power Coalition and Eastern Niagara Public Power Alliance's Rehearing Request

16. The Public Power Coalition is a group of five municipalities.¹⁶ The Eastern Niagara Public Power Alliance is an alliance of several cities, towns, villages, and school

¹³Association request for rehearing at 5-6, 9.

¹⁴The Past, Present, and Future Socioeconomic Effects of the Niagara Power Project, Final Report, Volume 1 of the Public Information Package, filed December 31, 2005, at 3-2 and 3-24.

¹⁵Association request for rehearing at 8-9.

¹⁶The city of North Tonawanda is located in Niagara County, New York. The city of Tonawanda, the town of Tonawanda, the town of Grand Island, and the town of Amherst are all in Erie County, New York.

districts located in Niagara County, New York.¹⁷ Both Public Power Coalition and Eastern Niagara Public Power Alliance (jointly, Coalition) participated in the relicensing proceeding, and made several filings, including several recommendations and comments on the draft EIS. The Coalition raises a number of issues on rehearing.

1. License Term

17. The Coalition argues that the Commission did not follow its policy on setting license terms when it granted a 50-year license for the Niagara Project.¹⁸ The Coalition notes that the Commission rarely issues 50-year licenses, and argues that the measures required by the Niagara license are minimal, and fall short of the criteria for a 50-year license.¹⁹ The Coalition also states that the Commission cannot rely on settlement provisions that are not included in the license to justify a 50-year term.²⁰

18. As noted in the license order, section 15(e) of the FPA²¹ provides that any new license issued shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years. The Commission's general policy is to establish 30-year terms for projects with little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures.²²

19. Under the terms of the new license, the Power Authority is responsible for: the construction of eight specific Habitat Improvement Projects (HIPs); the establishment of a Fish and Wildlife Habitat Enhancement and Restoration Fund to be used to address impacts from water level fluctuations attributable in part to project operations; public access improvements at three locations within the project boundary that include additional parking (including parking for the disabled), improvements to disabled access

¹⁷Its members include: the school districts of Newfane, Lockport, Wilson, Starpoint, Barker, Royalton-Hartland, and North Tonawanda; the towns of Lockport, Cambria, Hartland, Newfane, Pendleton, Royalton, and Somerset; the villages of Wilson and Middleport; and the City of Lockport.

¹⁸Coalition request for rehearing at 11-15.

¹⁹*Id.* at 11-14.

²⁰*Id.* at 14-15.

²¹16 U.S.C. § 808(e) (2000).

²²*See, e.g. Consumers Power Company*, 68 FERC ¶ 61,077 at 61,383-84 (1994).

to existing walkways, and a new pedestrian trail and gravel path; capital improvements for parks within the existing project boundary; capital improvements to the Water Board's Falls Street Tunnel to help minimize groundwater infiltration into the tunnel in the project area; establishment of a land acquisition fund; and creation of a tribal exhibit at the Power Vista.²³ We find these measures, which have a total cost of \$58,217,645, qualify as extensive.²⁴ Therefore, we affirm our finding that the license term should be 50 years.²⁵

20. The Coalition notes that the Commission has evaluated costs in relation to a project's benefits, and has granted license terms longer than 30 years where the costs of mitigation and enhancement represent a large portion of the total benefit of the project.²⁶ This is true. Where the mitigation measures have not been considered moderate or

²³While we determine whether or not measures meet the standard of a longer license term based on the measures themselves, we note that the settlement parties and the agency responsible for issuing the water quality certification indicated support for the issuance of a 50-year license.

²⁴EIS at 154. In arguing against a 50-year license term for the Niagara Project, the Coalition compares the mitigation measures in the Niagara license with other cases where 50-year terms were not granted. Citing to *Wisconsin Electric Power Co.*, 72 FERC ¶ 62,190 (1995), *Rochester Gas and Electric Co.*, 76 FERC ¶ 61,182 (1996), and *El Dorado Irrigation District*, 117 FERC ¶ 61,284 (2006), the Coalition states that in those cases, even though the licensee proposed operational changes or mitigation of comparable, or even greater magnitude than proposed by the Power Authority, the Commission rejected requests for a license in excess of forty years. However, a review of those cases shows that the cost of the environmental measures required in the Niagara license is much higher. In *Wisconsin Electric*, the additional measures required under the new license decreased the project's net annual benefit by \$218,000, in *El Dorado*, the net annual benefit decreased by \$291,120, and *Rochester Gas and Electric* by \$72,800. By comparison, in Niagara, the new license conditions result in a decrease in the total project net annual benefit of \$4,477,180.

²⁵Contrary to the Coalition's suggestion, we did not include measures that are not required by the license (such as those required by off-license agreements) in establishing the license term.

²⁶Coalition request for rehearing at 13, citing *Consumers Power Co.*, 68 FERC ¶ 61,077 (1994), and *Upper Peninsula Power Co.*, 79 FERC ¶ 61,354 (1997).

extensive on their own, we have examined them in the context of the whole project. However, where the costs themselves are high, we have issued longer term licenses.²⁷

2. Upstream Erosion

21. In the license order, the Commission found that the project contributed to, but was not the primary cause of, erosion upstream of the Niagara Project.²⁸ The Coalition argues that the Commission's finding that upstream erosion was unrelated to project operation was not supported by substantial evidence²⁹ and was contrary to the evidence presented in the EIS.³⁰ The Coalition contends that the project causes erosion and would cause more if its members had not installed barriers.³¹ The Coalition asks the Commission to require mitigation for what it believes are adverse impacts on its members caused by the project.

22. The EIS noted that erosion in the upper and lower Niagara River is caused by a variety of factors including: water level fluctuations from U.S. and Canadian power generation; flow surges from Lake Erie; precipitation patterns; and wind, ice, and water levels in Lakes Erie and Ontario.³² The EIS stated that the primary forces behind the

²⁷For example, we recently issued 50-year licenses in *Power Authority of New York State*, 105 FERC ¶ 61,102 (2003) (St. Lawrence Project); *Portland General Electric Co. and Confederated Tribes of the Warm Springs Reservation of Oregon*, 111 FERC ¶ 61,055 (2005) (Pelton-Round Butte Project); *Public Utility District No. 1 of Chelan County, Washington*, 117 FERC ¶ 62,129 (2006) (Lake Chelan Project); and *Public Utility District No. 1 of Pend Oreille County, Washington*, 112 FERC ¶ 61,055 (2005) (Box Canyon Project). The new licenses for these projects required extensive measures similar in scope to those required in the Niagara license.

²⁸118 FERC ¶ 61,206 at P 85.

²⁹Coalition request for rehearing at 15-20.

³⁰In addition, the Coalition claims that the Commission did not fully respond to its members' specific comments on the draft EIS. However, we note that in an attachment to the final EIS staff provided specific responses to comments filed on the draft EIS.

³¹Coalition request for rehearing at 15-16.

³²EIS at 148.

erosion were waves caused by wind and boating traffic as well as river currents.³³ The EIS acknowledged that water level fluctuations can influence erosion rates, and the project plays a part in influencing water level fluctuations.³⁴ However, the EIS noted that water level fluctuations upstream of the project average less than 1.5 feet per day.³⁵ The EIS noted that even if the project causes 50 percent of this fluctuation, less than a foot of that fluctuation could be attributed to project operation and that such a small level of fluctuation borders on insignificant.³⁶

23. The Coalition states that there are several instances where the EIS mentions water level fluctuations caused by project operation without mentioning other causes and argues that this indicates that the project is causing erosion.³⁷ The sentences to which the Coalition points are not inconsistent with the finding made by staff and affirmed by the Commission. While the Coalition characterizes the language as attributing the cause of erosion to water fluctuation, the language merely states that water fluctuations “may influence” or “contributes” to erosion.³⁸

³³EIS at 27-34, citing to Baird and Associates’ 2005 Shoreline Erosion and Sedimentation Assessment Study Upstream and Downstream of the Power Project, prepared for the Power Authority, filed with the Commission on December 31, 2005.

³⁴EIS at 148.

³⁵This is due to the operating constraints of a 1993 Directive of the International Niagara Board of Control (*see* 118 FERC ¶ 61,206 at ¶ 3 and n.6) which limits fluctuations to 1.5 feet.

³⁶EIS at 148.

³⁷Coalition request for rehearing at 17.

³⁸The Coalition has been selective in quoting passages from the EIS. The Coalition, in footnote 24 of its rehearing request, cites to several lines in the EIS that it maintains demonstrates that the EIS says that the erosion is caused solely by project operation. However, in examining those pages of the EIS, we note that the Coalition has omitted relevant text.

As one example, in citing to one phrase (EIS at 30) that states “water level fluctuations may influence erosion,” the Coalition completely ignores the text in the preceding paragraph that states, “[t]he primary driving forces for shoreline erosion are wind-generated and ship/boat generated waves and river currents on the upper and lower rivers.”

24. The Coalition also notes that the Baird and Associates study, Section 4.2.2.1,³⁹ refers to areas with fluctuations of approximately 1.5 feet to be under high influence for erosion.⁴⁰ This is correct and not disputed by staff in the EIS. Nevertheless, the more relevant conclusion of the Baird study, for the purposes of this relicensing proceeding, is that although there are areas under high influence for erosion, the project and its operation are not the primary cause of the erosion.⁴¹

25. The Coalition argues that the Commission in another project required the licensee to study and propose compensation for a town's protection measures where the project contributed to the erosion.⁴² However, the two situations are not similar. The Coalition is citing to a delegated order which found that the information provided was unclear as to the cause of the erosion and directed the licensee to further study the matter. After the additional information was filed, Commission staff determined that the project was not the primary cause of the erosion and required no mitigation.⁴³ Here, the evidence is clear that the project is not the primary cause, and the licensee is already providing mitigation in the form of the habitat improvement projects.

26. The Coalition argues that the erosion would have been worse but for the work done by its membership in protecting the shoreline.⁴⁴ While these community environmental efforts may indeed be laudable, this does not necessarily lead to the conclusion that the Niagara Project is responsible for, and should mitigate, erosion.

³⁹*Supra*, at n. 26.

⁴⁰Coalition request for rehearing at 17.

⁴¹ Thus, while the Coalition argues that the Commission should have studied the rate of erosion, to see if it is increasing, Coalition request for rehearing at 18, the fact that we have concluded that the project, which has operated in a consistent manner under the requirements of the 1993 Directive (*see* n. 35, *supra*), is not responsible for a significant portion of the erosion, makes such a study unnecessary.

⁴²Coalition request for rehearing at 19, citing Order Modifying and Approving Shoreline Erosion Remediation Plan under Article 403, *Holyoke Water Power Co.*, 96 FERC ¶ 62,100 (2001).

⁴³Letter from William Guey-Lee, Chief, Engineering and Jurisdiction Branch, Division of Hydropower Administration and Compliance to Mr. Paul S. Duchenev, Superintendent – Hydro, City of Holyoke Gas and Electric Department issued on July 3, 2007.

⁴⁴Coalition request for rehearing at 18.

27. Notwithstanding the fact that the record supports a conclusion that the project makes only a relatively small contribution to upstream erosion, the Commission nevertheless did include in the license appropriate measures to mitigate for project-caused erosion.⁴⁵ The Coalition has not demonstrated that these measures will not appropriately deal with the project's impacts or that further measures are required.

3. Economic Impact of the Settlement Agreements on Coalition

28. The Coalition argues that the Commission did not consider the economic impact on its members of the settlement agreements entered into by the Power Authority.⁴⁶ The EIS and order noted that the Power Authority had entered into agreements that were outside the authority of the Commission to require or even enforce. The Commission noted these agreements and described in general terms what the effects of the agreements would be from a cumulative impacts standpoint. However, the implementation of the agreements, which are not part of the project license, was not an action within the Commission's jurisdiction.⁴⁷

29. The Coalition argues that because these "off-license" agreements would not have been reached "but for" the license application, the Commission must consider and mitigate economic disparity that it alleges results from them. In other words, the Coalition believes that the Commission should take steps to force the Power Authority to

⁴⁵Three of the eight habitat improvement projects that the Power Authority is required to construct -- Strawberry Island Wetland Restoration, Motor Island Shoreline Protection, and Frog Island Restoration -- will restore areas that were subject to erosion. The Strawberry Island Wetland project includes measures to protect shallow water habitat downstream from the island, reduce shoreline erosion, and expand existing wetlands at Strawberry Island which is located just upstream from Grand Island and is part of Beaver Island State Park. The Motor Island Shoreline Protection project includes shoreline protection measures, including vegetation enhancement and removal of boat dock facilities to restore the island shoreline and minimize future maintenance at Motor Island which is located near Strawberry Island and is managed by New York DEC for fish and wildlife. The Frog Island Restoration project includes measures to create about 5.5 acres of island surrounded by a U-shaped perimeter of breakwater structures in the approximate vicinity of a historical island complex that was located between Motor and Strawberry Islands.

⁴⁶Coalition request for rehearing at 20-23.

⁴⁷118 FERC ¶ 61,206 at P 19.

enter into off-license agreements with the Coalition members. The Coalition is incorrect. Under the FPA, the Commission must license projects that meet the public interest standards set forth in that act. Thus, after careful consideration of the impacts of proposed projects, we issue licenses that provide appropriate mitigation for the project's impacts. Here, the Coalition objects to the fact that the Power Authority has entered into off-license agreements with certain entities, but not with its members. However, because these agreements, unlike our license, do not address project impacts, we have no jurisdiction over them, and cannot consider their merits or scope. The Coalition does not point to any project impact that our license does not address. Rather, it appears to want what it views as its fair share of off-license settlement dollars. This is not a matter the Commission can or should address.

30. The Coalition also argues that there is no evidence that the new license will mitigate or improve the economic disparity between upstate and downstate New York.⁴⁸ It states that upstate communities are subsidizing power rates to downstate areas because the upstate municipalities are not fairly compensated for remediating impacts caused by Niagara operations. Again, these global economic issues are beyond our jurisdiction. We have issued a license that properly addresses the impacts of the Niagara Project and have no role in supervising the economic development of New York State.

4. Payment in Lieu of Taxes

31. The Coalition argues that the Commission did not consider the impact of the Power Authority's tax exempt status on its members, which it asserts we are required to do in analyzing socio-economic impacts under NEPA.⁴⁹ The Coalition asks that the Commission require the Power Authority to make payments in lieu of taxes to its members, and notes that the Long Island Power Authority is required by statute to make such payments.⁵⁰

32. As we stated in the license order, under New York State law, the Power Authority (as a municipality) is exempt from state and local property taxes.⁵¹ While state law does

⁴⁸Coalition request for rehearing at 23-27.

⁴⁹*Id.* at 27-29. The Coalition states that although the Commission claims it lacks authority to require payment in lieu of taxes, it approved the off-license agreements. The Coalition is incorrect. The Commission did not approve the off-license agreements entered into by the Power Authority and others, but simply took note of them.

⁵⁰Coalition request for rehearing at 27.

⁵¹118 FERC ¶ 61,206 at P 87.

require the Long Island Power Authority to make payments in lieu of taxes as the Coalition notes, there is no corresponding state provision regarding the Power Authority.⁵²

33. The Commission is not a taxing authority. Nevertheless, Commission staff discussed the licensee's tax-exempt status among other socio-economic issues in the EIS.⁵³ Should the state see fit to require the Power Authority to pay taxes, it may do so. The Commission will not usurp this function or establish a tax regime in addition to those provided for by state and federal law.

5. Cumulative Impact Analysis of Adam Beck Project

34. The Coalition claims that the Commission's cumulative impact analysis of the Canadian Adam Beck Hydroelectric Project is inadequate in that the EIS did not cite to any studies to support its conclusions or quantify the impacts of the proposed upgrades at the Adam Beck Project.⁵⁴

35. The Sir Adam Beck hydroelectric complex, located on the Canadian side of the Niagara River across from the Niagara Project, consists of the 498-MW Sir Adam Beck 1 generating station; and the 1,499-MW Sir Adam Beck 2 generating station with the 750-acre reservoir (Pump Generating Station). Between 1996 and 2005, Ontario Power Generation completed a major upgrade at Sir Adam Beck 2, increasing its potential generating capacity by 194 MW to its current 498 MW. Currently, Ontario Power is building a third intake tunnel to allow it to divert more of its share of Niagara River water.⁵⁵

36. The 1950 Diversion Treaty stipulates: "Until such time as there are facilities in the territory of one party to use its full share of the diversions of water for power purposes

⁵²Pursuant to NY CLS Pub. A. §1012 and 1020-p, the New York and Long Island Power Authorities are exempt from paying taxes. Pursuant to NY CLS Pub. A. §1020-q, Long Island Power Authority is specifically directed to make payments in lieu of taxes.

⁵³EIS at 142-50.

⁵⁴Coalition request for rehearing at 29.

⁵⁵Originally, the Canadian share of the water available for power generation was used at the 98-MW Toronto, 132.5-MW Ontario, and 75-MW Rankine Power Generating Stations, as well as the Sir Adam Beck stations. All but the Sir Adam Beck stations have been retired: Toronto Power Generating Station in 1973, Ontario in 1999, and Rankine in 2005.

agreed upon in this Treaty, the other party may use the portion of that share for the use of which facilities are not available."

37. The Power Authority and Ontario Power Generation signed an agreement in 1965 to share generation capacity. Both power companies have rented available power generating capacity from each other to maximize use of their respective shares of water available for power production, while maintaining original ownership of the water shares. In simple terms, when Ontario Power has surplus water shares available for diversion and no extra generation capacity, it rents generation capacity at the Niagara Project. The power generated is for the use of Ontario Power. The agreement is reciprocal and when the Power Authority is unable to use its surplus water, it rents generation capacity at the Sir Adam Beck Project.

38. Currently Ontario Power is capable of diverting 64,448.9 cfs for its Sir Adam Beck 1 and 2 projects. Niagara River water available to Canada under the treaty for power generation currently exceeds the capability of the existing Sir Adam Beck power canal and diversion tunnels approximately 65 percent of the time. With the new tunnel, Ontario Power will be able to divert an additional 17,657.2 cfs. This new tunnel is expected to reduce the amount of time flows exceed capacity to about 15 percent of the time.

39. The EIS noted that several commenters believed that Ontario Power's plans to expand the Sir Adam Beck capacity with the Niagara Tunnel Project could have cumulative effects on water resources in the Niagara River.⁵⁶ However, the EIS found that the Canadian power plant expansion would not have an effect on net water withdrawals or fluctuation limits in the Chippewa-Grass Island Pool because those levels are set by international agreement.⁵⁷

40. While the Coalition might wish for more empirical data regarding the Canadian Beck Hydro Project, such information is not required in this case. The adequacy of the content of an EIS is determined by a rule of reason which requires only "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences."⁵⁸ We find that the analysis of the cumulative effects of the Beck Project was sufficient upon which to base our finding.

⁵⁶EIS at 59.

⁵⁷*Id.*

⁵⁸*See Columbia Land Basin Protection Assn. v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981), quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

6. Upstream Fish Passage

41. The Coalition argues that the issue of upstream fish passage on Gill Creek was not adequately addressed by the Commission in light of the fact that the American Eel is anticipated to be listed by Canada as a species at risk and Lake Ontario is anticipated to be designated by Canada as critical habitat for the North American eel.⁵⁹

42. At the time the license was issued, the North American eel was not listed as a protected species in either the United States or Canada. In addition, the U.S. Fish and Wildlife Service had completed a status review of the American Eel and determined that protecting the eel as an endangered or threatened species under the Endangered Species Act was not warranted.⁶⁰ However, the Coalition is correct that Canada is still examining the status of the American Eel. In April 2006, the Committee on the Status of Endangered Wildlife in Canada (Canadian Committee)⁶¹ issued an assessment and status report on the American Eel.⁶² The eel was given a status assessment of “Special Concern.”⁶³ The assessment noted that “Niagara Falls is the natural limit of the American eel’s distribution in the Great Lakes.”⁶⁴

43. In response to the American Eel assessment and status designation, the Canadian Minister of the Environment issued a response statement on November 29, 2006, stating

⁵⁹Coalition request for rehearing at 29-30.

⁶⁰U.S. Fish and Wildlife Service News Release, January 30, 2007.

⁶¹The group responsible for conducting assessment as part of the process for a species to become listed on Canada’s Species at Risk Act (SARA) list.

⁶²Tremblay, V., J.M. Casselman, N.E. Mandrak, F. Caron and D.K. Cairns, *COSEWIC Assessment and Status Report on the American Eel *Anguilla rostrata* in Canada*. Committee on the Status of Endangered Wildlife in Canada. Ottawa. 2006. 81 pp.

⁶³Canadian Committee assesses a species as extinct, extirpated, endangered, threatened, special concern, data deficient, or not at risk.

⁶⁴Assessment at 9. A Draft Management Plan was issued on January 15, 2007. It states that “[r]ecent occurrences of in the Great Lakes above Niagara Falls (Lake Erie, Huron and Superior) are the result of recent dispersal through the Erie and Welland canals and should be considered as introductions outside the historic range.” Draft American Eel Management Plan, January 15, 2007, Canadian Eel Working Group, Fisheries and Oceans Canada, Ontario Ministry of Natural Resources, at 4.

that consultations will be undertaken with regional governments, aboriginal peoples, stakeholders, and the public on whether the American Eel should be added to the List of Wildlife Species at Risk (Schedule 1). This consultation period was held from January 23, 2007 through March 31, 2007. The Minister's next step would be to send the assessment and recommendation to the Governor in Council for action. To date, there is no indication on the SARA website that the assessment and recommendation has been forwarded.⁶⁵

44. In any event, the Commission examined the issue of passage on both Gill and Fish Creeks in the EIS and the license order. The Commission noted that portions of both Gill and Fish Creeks were relocated to accommodate the construction of Lewiston Reservoir, but that there is a non-project dam (Hyde Park Dam) near the mouth of Gill Creek that impedes the upstream and downstream movement of fish and fragments fish habitat between upper and lower Gill Creek and the Niagara River.⁶⁶ The Commission noted that there were other non-project features -- two culverts and four small "check dams" -- that are barriers to upstream fish passage on Gill Creek. The Commission therefore found that if upstream fish access to Gill Creek is an issue, it is not an issue related to continued operation of the Niagara Project.

45. The Commission also questioned whether any such passage prior to the existence of the Niagara Project was any more than incidental rather than deliberate on the part of the aquatic organisms achieving passage via that route. This is because Fish and Gill Creeks flow in different directions toward the Lower and Upper Niagara reaches, respectively, and would have provided an inefficient and unlikely passage route. It is more likely that fish and other aquatic organisms used both creeks as spawning and/or nursery habitat and returned to the Niagara River from the creek they ascended, thereby accomplishing their life history requirements while never passing over or around Niagara Falls.⁶⁷ In sum, we appropriately found that the Niagara Project has no impact on eel passage at Fish and Gill Creeks, and nothing in the Canadian government's actions indicates to the contrary.

⁶⁵If it is listed on schedule 1 as a species of special concern, it would be subject to a management plan. The Draft Management Plan, *supra* fn. 50, was circulated for comment during the consultation period.

⁶⁶118 FERC ¶ 61,206 at P 77-79.

⁶⁷118 FERC ¶ 61,206 at P 79.

7. Settlement Agreement

46. The Coalition argues that the Commission improperly approved the settlement agreements without considering whether they were in the public interest.⁶⁸ It argues that the Commission should have considered the impact of the off-license settlement agreements on its members.

47. The license order noted that the Offer of Settlement that was filed included four separate agreements: (1) Relicensing Settlement Agreement Addressing New License Terms and Conditions (Relicensing Agreement); (2) Host Community Settlement Agreement Addressing Non-License Terms and Conditions (Host Community Agreement); (3) Relicensing Settlement Agreement Between the Power Authority of the State of New York and the Tuscarora Nation (Tuscarora Agreement); and (4) Relicensing Settlement Agreement Addressing Allocation of Project Power and Energy to Neighboring States (Allocation Agreement).

48. The license order further explained that the individual settlement agreements resolved among the settling parties all issues associated with the Niagara Project relicensing. However, the order specifically noted that only the Relicensing Agreement and the Allocation Agreement include measures proposed by the settling parties to result in license articles. The Host Community and Tuscarora agreements do not address project impacts, but rather are settlements regarding other matters. That being the case, these agreements generally were not included in the license, except for a very few individual measures that were either included in the water quality certification or found to be directly related to a project facility such as the visitor center exhibit, and thus there was no need to analyze their effects.

49. The Commission, in its Policy Statement on Hydropower Licensing Settlements, stated that “[s]ettling parties are free to enter into “off-license” or “side” agreements with respect to matters that will not be included in a license. However, the Commission has no jurisdiction over such agreements and their existence will carry no weight in the Commission’s consideration of a license application under the FPA.”⁶⁹ This policy is fully applicable to the off-license agreements at hand.

⁶⁸Coalition request for rehearing at 33-35.

⁶⁹*Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 at P 3-6 (2006).

8. Water Quality Certification

50. Under section 401(a)(1) of the Clean Water Act (CWA),⁷⁰ the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.⁷¹ On January 31, 2006, the New York DEC issued a water quality certification for the Niagara Project which conditions were included as Appendix A of the license order.

51. The Coalition argues that in accepting New York DEC's certification, the Commission failed to make a finding that the state followed its own procedural rules as required by *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) (*Tacoma*).⁷²

52. In fact, the *Tacoma* decision, which considered a challenge to a state's compliance with its public notice procedures, does not require the Commission to examine all aspects of state procedure. The court in *Tacoma* stated that "FERC may not act based on any certification the state might submit; rather, it has an obligation to determine that the specific certification "required by [section 401] has been obtained," and without that certification, FERC lacks authority to issue a license."⁷³ It further noted that "this obligation does not require FERC to inquire into every nuance of the state law proceeding, especially to the extent doing so would place FERC in the position of applying state law standards, but it does require FERC at least to confirm that the state has facially satisfied (emphasis added) the express requirements of section 401."⁷⁴ The Court stated that section 401(a)(1) expressly requires states to "establish procedures for public notice in the case of all applications for certification,"⁷⁵ and that, by implication, section 401(a)(1) requires states to comply with their public notice procedures, and the

⁷⁰33 U.S.C. § 1341(a)(1) (2000).

⁷¹33 U.S.C. § 1341(d) (2000).

⁷²Coalition request for rehearing at 35-45.

⁷³460 F.3d at 67-68

⁷⁴460 F.3d at 68.

⁷⁵*Id.*, citing to 33 U.S.C. § 1341(a)(1).

Commission to obtain some minimal confirmation of such compliance, at least in a case where compliance has been called into question.⁷⁶

53. Here, there was no allegation that New York DEC failed to issue public notice of the application for water quality certification. While three days prior to the issuance of the license order, members of the Coalition filed for the first time a request for a “City of Tacoma” determination, it raised only the concern that the state did not convene a public hearing and perform an environmental review on the water quality certification. Because these allegations do not involve the express provisions of the Clean Water Act, they are properly placed before a state court.

54. In any event, at the time the Commission issued the license order, the New York State Supreme Court had determined that the New York DEC had complied with the state’s procedural rules with regard to its issuance of the water quality certification.⁷⁷

55. The Coalition also argues that Condition 10 of the water quality certification, which requires a 50-year license term, conflicts with the Commission’s exclusive authority to determine the appropriate license term.⁷⁸ Because we have already affirmed our decision to issue a 50-year term based on the measures required, and the condition is not inconsistent with our finding, we need not address this issue.

9. Need for Power and Generation Capacity

56. The Coalition argues that the Commission did not analyze whether the project should be required to increase its capacity and generation, stating that there is a need for additional hydropower from the project because the lower cost hydropower can be used to stimulate the local economies.⁷⁹ The Coalition notes that the project generated more

⁷⁶*Id.*

⁷⁷Letter to Peter Henner, Esq. and Karen R. Kaufmann, Esq. from Vincent G. Bradley, Justice of the New York Supreme Court, dated October 16, 2006, and filed with the Commission on January 23, 2007, as an attachment to the Answer of the New York Power Authority to the Submission of Notice of Appeal concerning Water Quality Certificate. [Entered into court record on November 2, 2006.] Since issuance of the license, on July 26, 2007, the New York Supreme Court, Appellate Division, Third Judicial Department, denied the Coalition’s appeal. A copy of the decision was filed by the licensee with the Commission on July 27, 2007.

⁷⁸Coalition request for rehearing at 45.

⁷⁹Coalition request for rehearing at 46-52.

than 18,000 MWh in 1973 prior to project upgrades, and that the EIS estimates the proposed project would generate an average of 13,700 MWh annually. The Coalition asks that we address this loss of generation.

57. In answering a similar argument on project capacity in the license order we found that the Niagara Project is properly sized to utilize the available water resources. We noted that the Niagara Project was specifically designed to use the flows authorized for diversion in accordance with the Niagara Redevelopment Act, and the 1950 Treaty as authorized by the International Joint Commission. We also noted the upgrades to 13 of the project's generating units, which have increased the maximum hydraulic capacity of the Robert Moses powerhouse by about 22,100 cfs. The effect of upgrading the Robert Moses turbines has been an increase in the project's peaking capability,⁸⁰ and a decrease in the amount of time that flows exceed generating capacity at this site.⁸¹ Nothing in the Coalition's filing causes us to change our conclusion that the Niagara Project is properly sized to utilize the available water resources.

58. As to the loss in annual generation since 1973, there appear to be three contributing factors. First, upgrading the Robert Moses turbines allows the Niagara Project to generate more on-peak power (when power is needed to meet the highest electric demand), but this comes with a corresponding reduction in off-peak generation. Thus, the project's overall generation may be reduced in favor of increasing its output during the critical peak use periods. Second, in upgrading the Robert Moses powerhouse's 13 generating units, one unit per year has been taken out of service. Finally, the average flow of the Niagara River in 1973 was over 247,000 cfs. The average Niagara River flow between 1973 and 2000 was about 223,000 cfs, or about 10 percent less than the river flow in 1973.⁸² Reduced river flow will also contribute to reduced annual generation because there is less water available to pass through the

⁸⁰The Niagara Project increase in peaking capacity is due to the downstream Robert Moses powerhouse working in tandem with the upstream Lewiston powerhouse. The 71-acre Robert Moses forebay is the tailwater for the Lewiston powerhouse. The more water the Robert Moses powerhouse can discharge downstream, the faster the forebay can be lowered, allowing the Lewiston powerhouse to use more water to replace the discharged water in the forebay resulting in more generation during peak periods.

⁸¹The maximum hydraulic capacities of the Niagara and the Canadian Sir Adam Beck 1 and 2 projects plotted together on the annual flow duration curve shows that flows exceeded the projects' hydraulic capacity prior to the upgrade about 45 percent of the time, or 164 days, and about 14 percent of the time, or 51 days with the upgrades.

⁸²See <http://www.niagarafrontier.com/riverdiversion.html>.

turbine generating units. Given this explanation and the fact that we find the project properly sized, we have appropriately addressed this matter.

10. Economic Analysis

59. The Coalition argues that the Commission undervalued the economic benefits of the project by applying an average kilowatt-hour price to value power, which is inappropriate for a peaking facility such as the Niagara Project.⁸³ The Niagara Project is operated to maximize the amount of energy produced during periods of peak demand, but also generates power at night and on weekends when demand is relatively low. Since the project operates during peak and off-peak periods, there is merit in using an average power value for peak and off-peak demand periods. Further, as explained in the developmental analysis section of the EIS, the Commission employs an analysis that uses current costs to compare the cost of the project and likely alternative power with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date.⁸⁴ The power value is used to reasonably estimate the cost of replacing power for any alternative that would reduce project generation, not for estimating how much profit the project generates. Although we do not explicitly account for effects that inflation may have on future electricity costs, the fact that hydropower generation is relatively insensitive to inflation compared to fossil-fueled generation is an important economic consideration for power producers and the consumers they serve.

11. Niagara Redevelopment Act

60. The Coalition argues that the power allocation approved by the Commission violates the intent of the Niagara Redevelopment Act.⁸⁵ Specifically, it states that it does not receive low cost power and instead pays some of the highest rates in New York. It states that the Commission cannot find the allocation to be in the public interest until the Commission considers the economic impact on the Coalition communities of not receiving low cost power, the alternative of the Coalition receiving low cost power, and whether the Power Authority's operation of the project complies with the Niagara Redevelopment Act.⁸⁶

⁸³Coalition request for rehearing at 52-54.

⁸⁴EIS at 152.

⁸⁵Coalition request for rehearing at 54-56.

⁸⁶*Id.*

61. As noted in the license order, the Niagara Redevelopment Act section 836⁸⁷ authorizes and directs the Commission to issue a license to the Power Authority for the construction and operation of a project with the electric generation capacity to use all of the United States' share of the Niagara River water available for power generation. It requires the Commission to include among the license conditions, in addition to those deemed necessary and required under the terms of the FPA, provisions to:

- Assure that at least 50 percent of the project power is available primarily for the benefit of consumers, particularly domestic and rural consumers, and to make such power available at the lowest rates reasonably possible to encourage the widest possible use, and to give preference to public bodies and nonprofit cooperatives within economic transmission distance.
- Make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States up to 20 percent of the project power subject to such preference provisions.

62. The Allocation Agreement proposed to preserve the *status quo* with respect to this issue by including Articles 20 and 21 in the new license, modified only by specific identification of the neighboring states. This satisfies the requirements of the Niagara Redevelopment Act.

63. As we noted in the license order, in the absence of a statutory directive to the contrary, it is our policy not to require specific allocation of power from licensed projects, but to leave those matters to private contract and, as appropriate, state regulation.⁸⁸ Therefore, having determined that power sales from the project meet the statutory requirements, we will not impose further requirements regarding power sales.

C. Neighboring States' Request for Clarification

64. The Neighboring States ask the Commission to clarify that footnote 35 of the license order, which discussed power allocation addressed in a prior order, Opinion No. 229-A,⁸⁹ was not intended to modify that earlier order's conclusion that the Commission believed its decision to require the licensee to allocate to the neighboring

⁸⁷16 U.S.C. § 836 (2000).

⁸⁸118 FERC ¶ 61,206 at P 73.

⁸⁹Opinion No. 229-A, 32 FERC ¶ 61,194 (1985).

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states the maximum amount Congress set aside was correct on the basis of law as well as the facts. We so clarify.

The Commission orders:

(A) The rehearing request filed on April 13, 2007, by the Niagara Improvement Association, is denied.

(B) The rehearing request filed on April 16, 2007, by the Public Power Coalition and Eastern Niagara Public Power Association, is denied.

(C) The request for clarification filed on April 16, 2007, by Allegheny Electric Cooperative, Inc., Connecticut Municipal Electric Cooperative, Massachusetts Municipal Wholesale Electric Company, City of Cleveland, Ohio, Pascoag Utility District and Vermont Department of Public Service, is granted to extent discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.