

**ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 23, 2004**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 03-1026**

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**WISCONSIN POWER AND LIGHT COMPANY,  
PETITIONER,  
v.  
FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**FOR RESPONDENT  
FEDERAL ENERGY REGULATORY  
COMMISSION  
WASHINGTON, D.C. 20426**

**January 2, 2004**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties:

All parties appearing before the Commission and this Court are listed in Petitioner's Rule 28(a)(1) certificate.

### B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Wisconsin Power and Light Company*, "Order Issuing Original License," Docket No. P-11162-002, 99 FERC ¶62,225 (June 27, 2002);
2. *Wisconsin Power and Light Company*, "Order on Rehearing and Amending License," Docket No. P-11162-004, 101 FERC ¶ 61,055 (October 11, 2002); and
3. *Wisconsin Power and Light Company*, "Order Denying Rehearing," Docket No. P-11162-005, 101 FERC ¶ 61,338 (December 20, 2002).

### C. Related Cases:

This case has not previously been before this Court or any other court. There are no related cases pending judicial review.

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Beth G. Pacella  
Attorney

January 2, 2004

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## GLOSSARY

FPA	Federal Power Act
Interior	Department of the Interior
June Order	<i>Wisconsin Power and Light Company</i> , 99 FERC ¶ 62,225 (2002)
WDNR	Wisconsin Department of Natural Resources

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**STATEMENT OF THE ISSUE**

Whether, consistent with Federal Power Act Section 18, 16 U.S.C. §811, the Commission appropriately included in Petitioner's license to operate and maintain the Prairie du Sac Hydroelectric Project the fishway prescription submitted by the Secretary of the Interior.

**STATUTORY AND REGULATORY PROVISIONS**

The pertinent statutory and regulatory provisions are contained in the Appendix to this Brief.

## STATEMENT OF THE CASE AND FACTS

### A. Statutory And Regulatory Background

It is unlawful for any person to operate or maintain a hydroelectric project on navigable waters except under and in accordance with the terms of a permit granted before 1920 or a license issued under the Federal Power Act (“FPA”). FPA §23(b)(1), 16 U.S.C. §817(1). FPA §4(e), 16 U.S.C. §797(e), grants FERC jurisdiction to issue licenses for the construction, operation, and maintenance of hydroelectric projects on federal lands and on waterways that are subject to congressional regulation under the Commerce Clause.

Section 10(j)(1) of the FPA, 16 U.S.C. §803(j)(1), requires that each license include conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the project. While such conditions shall be based on recommendations received from specified state and federal resource agencies, the Commission may determine not to adopt those recommendations, in whole or in part, after giving them due weight. FPA §10(j)(2), 16 U.S.C. §803(j)(2); *see also American Rivers v. FERC*, 201 F.3d 1186, 1202 (9<sup>th</sup> Cir. 1999).

FPA §18, 16 U.S.C. §811, provides that FERC “shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be directed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.”

## **B. Events Leading To The Challenged Orders**

The Prairie du Sac Project, a 29-megawatt project located on the Wisconsin River, was constructed and initially operated pursuant to a pre-1920 50-year federal permit. *See Wisconsin Power and Light Company*, 99 FERC ¶ 62,225 at 64,514 ¶1 (2002) (“June Order”), JA 505; *Wisconsin Power and Light Company*, 55 FERC ¶ 61,169 at 61,547 (1991). After the Commission determined that the project needed to be licensed because the pre-1920 permit had expired, *Wisconsin Power and Light*, 55 FERC at 61,548-49; FPA §23(b)(1), 16 U.S.C. §817(1), Petitioner applied for an original license to continue to operate and maintain the project. R. 38; *see* June Order, 99 FERC at 64,514 ¶1, JA 505. Notice of the application was published on August 11, 1994, and, on December 31, 1996, notice issued that the application was ready for environmental analysis. *See* June Order, 99 FERC at 64,514 ¶2, JA 505.

In 1997, the Department of the Interior (“Interior”), for the Fish and Wildlife Service, and the Wisconsin Department of Natural Resources (“WDNR”), submitted recommended license conditions pursuant to FPA §10(j). R. 80 at 5-18, JA 299-312; R. 83 at 3-11, JA 319-27. Additionally, Interior requested that, if a license were issued for the project, it include a provision reserving Interior’s FPA §18 authority to prescribe the construction, operation and maintenance of appropriate fishways at the project. R. 80 at 18, JA 312.



The Commission issued a draft environmental assessment, R. 116, on June 23, 1998, and a final environmental assessment, R. 174, on November 8, 2000. June Order at ¶3, JA 506. Then, on January 4, 2002, WDNR, noting the recent removal of four dams that opened up an additional 120 miles of river upstream of the instant project's dam, reiterated its §10(j) recommendation that upstream fish passage facilities be installed at the project. R. 198.

### **C. The Challenged Orders**

#### **1. The June Order**

In the June Order, the Commission granted Petitioner a 30-year license for the project, subject to the conditions contained in the license and the terms and conditions of the FPA and Commission regulations. June Order at 64,518, Ordering ¶A, JA 513. The license included virtually all §10(j) recommendations, with the exception of fish entrainment and upstream fish passage conditions. *Id.* at ¶¶11-12; JA 507-08.

The fish entrainment recommendation was not included in the license because Commission staff determined there was no evidence that fish entrainment and turbine mortality at the project were adversely affecting the Wisconsin River fish population, and installation of the recommended protection devices would be expensive and would unduly affect developmental resources. *Id.* at ¶14; JA 508.

The Commission also determined not to include the recommended upstream fish passage conditions (installation of a conventional fish ladder and rehabilitation of the navigation lock) in the license. *Id.* at ¶¶15-19, JA 508-09. An immediate commitment to implement upstream fish passage measures was unnecessary to adequately protect the fishery, and it was uncertain whether the costly recommended measures were technically feasible or would succeed in assisting the passage of the species at issue. *Id.* at ¶¶15 and 18, JA 508-09.

A conventional fish ladder was not suitable because most resident species, such as walleye, northern pike, bass and other gamefish, do not extensively use conventional fishways of the length and height necessary at the project's dam. *Id.* at ¶¶16-17, JA 508. Moreover, there was little indication that lake sturgeon or paddlefish would make effective use of a conventional fishway. *Id.* at ¶17, JA 508.

Nor was a rehabilitated navigation lock suitable for passage of these species. *Id.* at ¶16, JA 508. As the downstream floor of the lock chamber was three to four feet above normal tailwater elevation at the project's dam, a pool-weir-type of structure would have to be constructed to enable fish to enter the lock chamber. *Id.* at ¶18, JA 509. The bottom-oriented species present at the site, such as catfish, walleye, saugar, sturgeon, and suckers, would be reluctant, however, to swim towards the surface to surmount the 20-foot-high wall supporting the upstream lock gates. *Id.* Additionally, increasing flows to attract fish to the lock chamber

would cause flow velocities that might prevent fish from accumulating in the lock chamber. *Id.* Moreover, removing the wall and reconfiguring the lock would cost several million dollars. *Id.*

The Order concluded that construction of a conventional fishway or rehabilitation of the navigation lock would not be in the public interest because of their dubious chance for success and high cost. Instead, the license required Petitioner to file for Commission approval a plan, developed in consultation with resource agencies, to identify specific measures to enhance the fish and other aquatic species populations in the project's vicinity. *Id.* at 64,515 ¶¶14-15, 64,521-22 at Article 408, JA 508, 520. Further, "should new information in the future indicate a different finding," the Order "reserved Interior's authority to prescribe fishways at the Prairie du Sac Project, in article 406 of this license." *Id.* at ¶19, JA 509.

Interior and WDNR petitioned for rehearing. R. 209, 210. Interior's rehearing petition also "resubmit[ted] its fishway recommendation as a fishway prescription pursuant to section 18 of the FPA." R. 210 at rehearing request p. 3, JA 544 ; *see also id.* at pp. 4-5, JA 545-46.

## **2. The Orders On Rehearing**

Since Interior had resubmitted its prior FPA §10(j) fishway recommendations as FPA §18 fishway prescriptions, the Commission dismissed as

moot Interior's and WDNR's rehearing requests seeking imposition of the fishway recommendations, and included the prescriptions as conditions in the license. *Wisconsin Power and Light Company*, 101 FERC ¶ 61,055 at ¶5, n.7, Ordering Paras. A-C, and Appendix B (2002), JA 552, 553-54.<sup>1</sup>

Petitioner sought rehearing, contending that the Commission erred in including Interior's fishway prescriptions as conditions to the project's license. R. 229; JA 555-60. The Commission denied rehearing, explaining that it "has no authority to amend or reject a Section 18 prescription that is timely filed before issuance of a license or, as here, that is filed after license issuance pursuant to reserved authority." *Wisconsin Power and Light Company*, 101 FERC ¶ 61,338 at 62,398-99 ¶4 (2002) (citing *American Rivers v. FERC*, 201 F.3d 1186), JA 562.

This petition for review followed.

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<sup>1</sup> The Commission also rejected WDNR's claim that the removal of four dams, which opened up another 120 miles of river upstream of the project's dam, necessitated that Petitioner conduct a feasibility study regarding the installation of fishways. *Id.* at ¶4 and n.6, JA 551. "[T]he availability of more upstream habitat does not reduce the difficulties of designing a fishway for the fish to reach such habitat." *Id.* at n.6, JA 551.

## SUMMARY OF ARGUMENT

The Commission appropriately included in Petitioner's license the fishway prescriptions submitted by Interior under FPA §18. Courts have interpreted FPA §18 as mandating that FERC include Interior's fishway prescriptions as conditions in a hydroelectric license.

## ARGUMENT

### **The Commission Appropriately Included In Petitioner's License The Fishway Prescriptions Submitted By Interior Under FPA § 18**

Both this Court and the Ninth Circuit have interpreted FPA §18 as mandating that FERC include Interior's fishway prescriptions as conditions in a hydroelectric license. *American Rivers*, 201 F.3d at 1210; *Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659, 662 and n.2 (D.C. Cir. 1996). The Courts have found that, under FPA §18, "FERC performs primarily as a neutral forum responsible for compiling the record for the benefit of the court of appeals." *Id.* at 663; *see also American Rivers*, 201 F.3d at 1210. Petitioner does not contend otherwise. Rather, Petitioner's challenge concerns whether Interior's prescription is lawful and supported by substantial evidence. Pet. Br. at 3 (Statement of Issue).

FERC acted in accordance with the Courts' interpretation of FPA §18 in including Interior's fishway prescriptions as conditions in the license, and its action should be summarily affirmed.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied as it relates to FERC.

Respectfully submitted,

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