

152 FERC ¶ 62,140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Confederated Salish and Kootenai Tribes
NorthWestern Corporation
Energy Keepers, Incorporated

Project No. 5-098

ORDER APPROVING PARTIAL TRANSFER OF LICENSE

(Issued September 1, 2015)

1. By application filed April 14, 2015, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) and NorthWestern Corporation (NorthWestern) (transferors) and Energy Keepers, Incorporated (transferee or Energy Keepers) seek Commission approval to partially transfer the license from the transferors as co-licensees to add the transferee as a co-licensee for the Kerr Hydroelectric Project, FERC Project No. 5, located on the Flathead River and Flathead Creek in Flathead and Lake Counties, Montana.¹ Transferors seek to add Energy Keepers, a corporation wholly owned by the Tribes, to the license in order to allow it to enter into sales and generation agreements with respect to the Kerr Project.²

2. On May 23, 1930, the Commission issued a 50-year license to the Rocky Mountain Power Company (a subsidiary of Montana Power Company). The license was transferred to Montana Power Company in 1938. On July 17, 1985, the Commission issued a new, joint 50-year license to Montana Power Company and the Confederated Salish and Kootenai Tribes.³ The 1985 license order, which approved a settlement

¹ In its capacity as co-licensee, NorthWestern specially joined in the application and does not dispute the representations made in it concerning the legal or financial status of, or the organizational structure, staffing or proposed operations by either the Tribe or Energy Keepers.

² Specifically, Energy Keepers seeks to enter into power purchase, generation interconnection, and coordination agreements. Application at p. 1

³ 32 FERC ¶ 61,070 (1985), Order Approving Settlement and Issuing License.

agreement by various parties, including the Flathead, Mission, and Jocko Valley Irrigation Districts (Districts), the Department of Interior (Interior), and the Tribes, provided that Montana Power would own and operate the project for the first 30 years of the license term, after which the Tribes, upon payment to the company of a specified sum, become the owner and sole licensee of the project.⁴ Montana Power's interest in the license was partially transferred to PPL Montana on July 7, 1999,⁵ and to NorthWestern on July 24, 2014.⁶

PUBLIC NOTICE, COMMENTS, AND INTERVENTIONS

3. The Commission issued a public notice of the current application for transfer and co-licensee status on April 28, 2015, establishing May 28, 2015, as the deadline for filing comments, motions to intervene, and protests. Timely interventions and comments were filed by the Montana Public Service Commission (Montana Commission), the Montana Land and Water Alliance, Inc. (Alliance) the Districts, and the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts (Joint Board), and Conservation District Supervisor Verdell Jackson and State Senator Bob Keenan.⁷ The Alliance, Supervisor Jackson, and Senator Keenan protested the transfer. The Tribes filed an answer to the interventions and protest, to which the Alliance, the Districts, the Joint Board, Supervisor Jackson, and Senator Keenan responded. The Tribes filed an additional letter requesting the approval of their partial transfer application, to which the Alliance responded.

4. Supervisor Jackson and Senator Keenan request an explanation of how the Commission views the governmental status of Energy Keepers and the Tribe, and documentation of the Tribes' compliance with all conditions of the previous licensee. Specifically, they request an explanation of how Energy Keepers' assertion in Section II (3) of the transfer application that it is in compliance with all applicable state laws reconciles with the Tribe and Energy Keeper's mission statement, which they allege rejects state laws.⁸

⁴ See *The Montana Power Company*, 32 FERC ¶ 61,070, at 61,177 (1985).

⁵ 88 FERC ¶ 62,010 (1999), Order Approving Transfer of License.

⁶ 148 FERC ¶ 62,072 (2014), Order Approving Transfer of License.

⁷ Since no answers were filed in opposition to the timely motions to intervene, the movants become parties at the end of the 15 day period. 18 C.F.R. § 385.215 (2015).

⁸ Supervisor Jackson and Senator Keenan cite to 18 C.F.R. § 131.20(5) (2015),
(continued ...)

5. They further request that the license be transparent with respect to financial transactions involving the disposition of Kerr Dam revenue to public funds (e.g., the federal Reclamation Fund), operational features such as lake levels, contractual obligations (such as irrigation both on and off the reservation), coordination with Hungry Horse Reservoir releases (such as flood control)⁹ and emergency operations. They also request that the Montana Public Service Commission, Interior, and the Commission provide regulatory oversight over the licensee.

6. Finally, Supervisor Jackson and Senator Keenan request information regarding the extent of the Tribe's, Energy Keepers', and the Kerr Dam's participation in "black start" programs,¹⁰ which they allege are activated in case of a national emergency.

7. The Montana Commission, the Alliance, Supervisor Jackson, and Senator Keenan request that the Commission hold a public hearing regarding the transfer. The Montana Commission further requests a designated representative from the Commission to organize this hearing, and specifically asks that the hearing address whether the addition of Energy Keepers as co-licensee is in the public interest under the Commission's regulations.¹¹ The Montana Commission submits that the Commission's public interest determination should consider whether Energy Keepers should be allowed to enter into power purchase, generation interconnection, and coordination agreements on behalf of the Kerr Project, and whether it will voluntarily submit itself to a payment in lieu of state taxes.

8. Similarly, the Alliance states that the Tribes and Energy Keepers, by virtue of their respective tribal and federally-chartered corporate statuses, will evade state regulation

which requires the transferee to submit evidence of its compliance with all applicable State laws, as required by section 9(a)(2) of the Federal Power Act (FPA), 16 U.S.C. § 802 (2012).

⁹ The Hungry Horse Project is located upstream of the Kerr Project, and was constructed by the U.S. Bureau of Reclamation principally for water storage. Under Article 61 of the license, the licensee must regularly consult with the U.S. Bureau of Reclamation to coordinate releases from Hungry Horse Reservoir.

¹⁰ Supervisor Jackson and the Senator believe that the Kerr Dam may be one of several "black start" dams that are activated in case of a national emergency, such as an electromagnetic pulse attack.

¹¹ See 18 C.F.R. § 9.3 (2015).

and the public scrutiny that they claim is required by the Commission.¹² The Alliance further alleges that the Tribe and Energy Keepers are less transparent than federal entities in like positions.¹³

9. In their answer to the interventions and protests, the Tribes assert that the Montana Commission's request for a public hearing is outside of the scope of the transfer application because it requests an examination of whether the transfer of the Kerr Project to the Tribe is in the public interest and the project will convey to the Tribes automatically by operation of law. The Tribes further assert that the Montana Commission has no viable jurisdictional interest in the transfer because the Tribes and Energy Keepers intend to participate in the wholesale market, which is beyond the Montana Commission's regulatory reach. Similarly, the Tribes respond to Supervisor Jackson's, Senator Keenan's, and the Alliance's concerns by characterizing them as pertaining to the Tribe's fitness as a licensee and therefore not germane to the transfer proceeding. The Tribe also asserts that Energy Keepers will not escape Commission scrutiny regarding compliance with the terms of the license, because it will be subject to Commission oversight as dictated by the FPA and the Commission's regulations.

PROCEDURAL MATTERS

10. The Montana Commission states that the licensee failed to provide timely notification of the application and requests an unspecified amount of additional time to submit additional comments after the May 28, 2015 deadline. The co-licensees filed their application for transfer in accordance with the Commission's regulations, and the Commission issued public notice, providing a 30-day opportunity for comment, on April 28, 2015. This gave all interested entities sufficient time to file comments. Moreover, some four months have passed since the notice was issued, during which time any entity could have filed additional comments, which the Montana Commission has not elected to do.¹⁴

¹² The Alliance cites to 16 U.S.C. §803 (a)2(A)ii, (B) and (C); as well as (d) and (e) (2012).

¹³ The Districts and the Joint Board request a mandatory hearing pursuant to Article 40(c) of the Kerr License, to determine whether the Tribe and Energy Keepers must make power available to the United States, for and on behalf of the Flathead Irrigation Project, or the Districts. This request will be addressed in a separate proceeding.

¹⁴ We note that the Commission considers all comments, even those filed after the comment date, to the extent practicable.

DISCUSSION

11. Supervisor Jackson, Senator Keenan, and the Alliance all express concern that the Tribes and Energy Keepers will either evade state law by virtue of their corporate structure, or explicitly reject state law in their mission statement, which violates Commission regulations and the FPA. Questions concerning the Tribes fitness or governmental status are beyond the scope of this partial-transfer proceeding, since they should have been raised on rehearing of the 1985 license order, which made them a co-licensee.¹⁵ Such arguments are collateral attacks on the 1985 order and may not be raised here. As to Energy Keepers, nothing in the transfer application or subsequent pleadings raises doubt about its ability to comply with the terms of the project license, which is the only relevant inquiry here. Moreover, the Tribes and NorthWestern, as co-licensees, are jointly and severally liable for compliance with all license obligations.¹⁶

12. In any event, the FPA contemplates licensing hydropower projects to Indian Tribes.¹⁷ Further, Energy Keepers may also hold a license because it is a corporation established under federal law.¹⁸ Regarding state law, the FPA establishes a dual system of control which separates those subjects which remain under the jurisdiction of the states from those subjects over which the Commission has authority to act.¹⁹ In so far as state laws have not been superseded by the FPA, they remain as applicable and effective as they were before its passage.²⁰ In the 1985 license, the Commission found that “each

¹⁵ The Tribes are already a co-licensee and the Kerr Project will be conveyed to them upon NorthWestern’s receipt of the Estimated Conveyance Price on the Conveyance Date without any further action on the part of NorthWestern, the Commission, or any other entity. *See* License Article C(1). The conveyance is scheduled to occur on September 5, 2015.

¹⁶ *See, e.g., New York Irrigation District*, 46 FERC ¶ 61,379 at 62,183 (2003).

¹⁷ 16 U.S.C.A. § 808 (2)(D) (2012). *See also, Portland Gen. Elec. Co. & Confederated Tribes of the Warm Springs Reservation of Oregon*, 111 FERC ¶ 61,450 (2005).

¹⁸ *See* 16 U.S.C. § 797(e) (2012) (Commission may issue license to “any corporation organized under the laws of the United States or any State thereof”).

¹⁹ *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152 at 167, (1946).

²⁰ *First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, at 178 (1946).

applicant [Montana Power Company and the Tribes] has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.”²¹ Again, it is too late to raise this matter with respect to the Tribe, and there is nothing in the record that suggests a relevant issue regarding Energy Keepers.

13. The Montana Commission, the Alliance, Supervisor Jackson, and Senator Keenan requested a hearing in Montana. While the Commission may conclude, in its discretion, that it is appropriate to set a hydropower matter for a hearing, the hearing can be based on the written record.²² The intervenors have not identified any issues of material fact that cannot be adequately resolved based upon the record before us.

14. The Montana Commission also asserts that the Commission should consider whether Energy Keepers should be allowed to enter into various agreements on behalf of the Kerr Project, and whether it will voluntarily submit itself to a payment in lieu of state taxes. Similarly, Senator Keenan and Supervisor Jackson raise issues regarding the governmental status of Energy Keepers and the Tribes, compliance with the existing license, transparency in financial transactions, oversight, and Homeland Security issues. To the extent that the intervenors have concerns regarding Energy Keepers’ status and obligations under state law, those matters are not germane to this proceeding.

15. Section 8 of the FPA²³ sets forth no specific standard for transfers; the Commission has held that a transfer may be approved on a showing that transferee is qualified to hold the license and operate the project, and that transfer is in the public interest.²⁴ Approval by the Commission of transfer of a license is contingent upon the transfer of title to the properties under license, delivery of all license instruments, and a showing that such transfer is in the public interest.²⁵ There is no substantial evidence in

²¹ 32 FERC ¶ 61,070 at 61,178 (1985).

²² See, e.g., *Cascade Power Company*, 74 FERC ¶ 61,240 at 61,822 and n. 16 (1996), citing *Sierra Association for Environment v. FERC*, 744 F.2d 661, 661-62 (9th Cir. 1984).

²³ 16 U.S.C. § 801 (2012).

²⁴ See, e.g., *Gallia Hydro Partners and Rathgar Associates, LLC*, 110 FERC ¶ 61,237 at P 10 and n.12 (2005)

²⁵ 18 C.F.R. § 9.3 (2015).

the record suggesting that Energy Keepers does not satisfy the Commission's transfer standard.

16. Transferors have generally complied with the terms and conditions of the license and agree to pay annual charges that have accrued to the date of the transfer.

17. Transferee will be required to comply with the requirements of the license as though it were the original co-licensee. Transferee has agreed to accept all of the terms and conditions of the license.

18. Transfer of the license for this project is consistent with the Commission's regulations and is in the public interest.

The Director orders:

(A) The partial transfer of the license for the Kerr Project No. 5 from NorthWestern Corporation and the Confederated Salish and Kootenai Tribes as co-licensees, to NorthWestern Corporation, the Confederated Salish and Kootenai Tribes and Energy Keepers, Incorporated, as co-licensees, is approved.

(B) The motions to intervene by the Montana Public Service Commission, the Flathead, Mission and Jocko Valley Irrigation Districts, the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts and Conservation District, Supervisor Verdell Jackson, and Senator Bob Keenan are granted.

(C) The requests for public hearing are denied.

(D) The request for a hearing pursuant to Article 40(c) will be addressed in a separate proceeding.

(E) The co-licensees shall pay all annual charges that accrue up to the effective date of the transfer.

(F) Approval of the transfer is contingent upon: (1) transfer of title of the properties under license, transfer of all project files including all dam safety related documents, and delivery of all license instruments to Energy Keepers, Incorporated, which shall be subject to the terms and conditions of the license as though it were the original co-licensee; and (2) Energy Keepers, Incorporated as co-licensee acknowledging acceptance of this order and its terms and conditions by signing and returning the attached acceptance sheet. Within 60 days from the date of this order, the Confederated Salish and Kootenai Tribes and Energy Keepers, Incorporated, and Northwestern as co-licensees shall submit certified copies of all instruments of conveyance and the signed acceptance sheet.

(G) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in § 313(a) of the FPA, 16 U.S.C. § 825*l* (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2015). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensees' failure to file a request for rehearing shall constitute acceptance of this order.

Heather Campbell
Deputy Director
Division of Hydropower Administration
and Compliance

Project No. 5-098

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IN TESTIMONY of its acknowledgment of acceptance of all of the terms and conditions of this order, _____ this ____ day of _____, 20____, has caused its corporate name to be signed hereto by _____, its President (or other authorized representative), and its corporate seal to be affixed hereto and attested by _____ its Secretary (or other authorized representative), pursuant to a resolution of its Board of Directors (or other authorized representative(s)) duly adopted on the _____ day of _____, 20____, a certified copy of the record of which is attached hereto.

By _____

Attest:

Secretary (or other authorized representative)
(Executed in triplicate)

Document Content(s)

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