STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-731

March 12, 2003

OFFICE OF THE PUBLIC ADVOCATE
Request for Commission Investigation Into Whether CMP Ratepayers are Entitled to a Portion of the Proceeds From Property Leased In Dead River Township

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

We decline the Public Advocate's request that the Commission open an investigation into a real estate transaction involving land owned, and to be leased, by Central Maine Power Company (CMP) in Dead River Township, Maine, for the reasons described in this Order. The Commission may consider the treatment of any revenues derived from the property in an appropriate annual ARP review or stranded cost proceeding.

II. PROCEDURAL BACKGROUND

On November 26, 2002, the Public Advocate filed its request, further described in Section IV below, for the Commission to open an investigation. On December 4, 2002, the Commission asked CMP to respond to OPA's request. CMP responded on December 18, 2002 opposing the opening of an investigation. Several individuals and entities filed comments in favor of the Public Advocate's request, including Robert Weingarten, Natural Resources Council of Maine, Barbara Workmen, and the Friends of Bigelow and the Northern Appalachian Restoration Project. Western Maine Foundation and Mr. and Mrs. David Guernsey filed comments requesting that the Commission decline to open an investigation. Mr. Duluth Wing filed a letter setting forth his views about property owners in the Flagstaff area in the 1940's.

The Commission staff issued its recommendation on January 27, 2003, recommending that the Commission decline to open an investigation. The Public Advocate, Robert Weingarten and Friends of Bigelow and Northern Appalachian Restoration Project filed exceptions to that recommendation. The Commission deliberated the matter on March 3, 2002.

III. FACTUAL BACKGROUND

In April 2002, CMP leased 29 acres of land in Dead River Township to Western Mountain Foundation (Western). Western subsequently filed an application with Maine's Land Use Regulation Commission (LURC) for approval to build a sporting camp on the 29-acre parcel. The parcel is part of the land that CMP and its predecessor-in-

title acquired in the 1940's to build a dam, which became known as the Long Falls Dam, and operate a reservoir and storage basin, which became known as Flagstaff Lake, to ensure a continuous head of water to operate downstream hydroelectric generating stations. In 1999, CMP sold Long Falls Dam, and all other assets that are associated with a Federal Energy Regulatory Commission hydro license known as the Flagstaff Project, to FPL Energy Maine Hydro LLC. The "project boundary" for the dam is the 1150-foot elevation mark. CMP retained lands above the 1150-foot mark at the east end of Flagstaff Lake, including the 29-acre parcel leased to Western.

CMP purchased the property now in dispute, as reflected in the deeds attached to OPA's request (See OPA Request, Appendix at 32 – 41). As noted by CMP, the purchase was from four sophisticated sellers: Guy Gannett, a bank and two trusts. There is no evidence that CMP took the property by eminent domain, although it seems likely that negotiations over the various properties that made up the entire project would have included the fact that CMP had the authority to take the property if a sale did not occur.[1]

IV. PUBLIC ADVOCATE'S REQUEST

In its original request, the Public Advocate argues that because CMP acquired the 29-acre parcel explicitly or implicitly by eminent domain, the Commission should decide that CMP may use the land only for the public purpose for which it acquired the land, or at least for a public purpose. The Public Advocate asserts that the operation of a sporting camp is not a public purpose, and asks the Commission to find that CMP must put the land to a public purpose. To resolve the matter, the Public Advocate asks the Commission to refer the matter to the Attorney General, to confirm the Commission's decision in court, or to the Legislature so that it may determine the proper public use for the land at this point. Lastly, the Public Advocate asks that, if CMP is allowed to lease the parcel to Western, the Commission investigate whether any portion of the lease revenue should be reflected in determining CMP's ratemaking revenue requirement.

In its exceptions, the Public Advocate further argues that the charter (private and special law) limits CMP's authority to acquire the property at issue as well as its use, whether eminent domain was threatened or not. OPA interprets the charter language as requiring that land acquired for the project be "for a public use" and that any land it acquired by purchase or eminent domain be "land it may require" for the purposes enumerated in the charter (e.g., damming the Dead River, creating storage basins and driving logs).

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[1] One of the commenters, who lived in the area until 1950, recalls that most property owners sold their property with the understanding that this was preferable to the property being taken through eminent domain proceeding. See letter from Duluth Wing (Jan. 7, 2003).

V. DISCUSSION AND DECISION

A. Construction of Private and Special Law

A brief historical summary is necessary to understand how CMP obtained its authority to participate in the damming of the Dead River. In 1927, the Legislature, by Private and Special Law, created the Kennebec Reservoir Company (Kennebec). P. & S.L. 1927, ch. 113. It was authorized to build dams and other storage structures on the Dead River. In 1937, the Legislature amended the charter to allow the Kennebec Reservoir Company to sell or otherwise transfer its franchises, rights and property to CMP. That amendment authorized CMP to exercise all the same rights as Kennebec in order to further the corporate purposes of both CMP and the Kennebec Reservoir Company. P. & S.L. 1937, ch. 62 § 5. CMP acquired the Kennebec Reservoir Company in 1940. CMP purchased the property now in question in 1945.

As described above, the OPA claims that Kennebec's 1927 charter limits the uses of the property acquired pursuant to the charter. The Public Advocate argues strongly that the language that Kennebec (and subsequently, CMP) is "authorized and empowered to take and hold as for public uses such lands . . . as it may require for any of the aforesaid uses and purposes…" means that the land can only be put to public uses and that the lease with Western would violate this restriction. [2] For purposes of this argument, the key phrase in the law is "as for public uses."

We interpret the private and special law differently. The law does not say that the Kennebec may take the land for "public uses." It says that it may take the land "as for public uses" (emphasis added). We interpret this to mean that even though the land is being taken by a private corporation, it will be treated as if it were being taken by a government entity with eminent domain authority. [3]

Under the law, the standard which defines the purposes for which the land may be taken and held is narrower than "public uses." Rather, it must be for one or

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[2] The Public Advocate also argues that CMP violated the charter because it obtained land it does not require. We disagree. It would not be unusual for an entity to acquire by purchase or eminent domain some amount of land that might ultimately be in excess of what is required to fulfill the purposes authorized by the Legislature. CMP had the right to acquire any land that "it might require." In this instance, there may have been uncertainties about the size of the lake to be formed, thereby affecting the location of the high water mark and the amount of land needed. Also, in a purchase or eminent domain situation, landowners often are unwilling to sell a portion of their property, resulting in a utility acquiring a larger parcel that is precisely "needed." In either instance, such purchases would not be considered to be beyond CMP's charter authority.

[3] We believe this interpretation is consistent with the "narrow construction" of the charter urged by the Public Advocate in his Exceptions. OPA Exceptions at 2 – 3.

more of the "aforesaid uses or purposes," which as set forth in section 3 of the authorizing legislation encompass "making more constant flow of water … for use at all seasons of the year for manufacturing and power purposes on said Kennebec river and for facilitating the driving of logs and lumber on the Dead river."[4] The question that the statute does not expressly answer is what happens when the land is no longer needed for those purposes.

We do not believe that the charter limits the property's use to a public purpose if it is no longer usable for any of the purposes enumerated in the authorizing statute. Rather, the answer to the question of what happens in these circumstances is found in the earlier quoted phrase that the land is being taken and held "as for public uses." If we view that phrase as treating the property as it would be treated had it been taken by a governmental entity, the cases and statutes governing what happens to property taken by those entities pursuant to their eminent domain authority govern this situation, as described in the following section.

B. Required Use For Property Taken by Eminent Domain

After reviewing Maine law, we find neither statute nor common law has placed restrictions on a property's use based on the fact that it was acquired by eminent domain or under a "threat" of eminent domain. In particular, Maine common law and case law have not required that the property be forever imbued with the public use for which it was originally taken.

The Law Court recently addressed a situation in which a municipality had taken property for a public use (fire station) and then decided 15 years later not to use the property for that purpose and to instead sell it. The original owner sought to purchase it at the amount the City originally paid for it. *South Portland Associates v. City of South Portland*, 2000 ME 29, 746 A.2d 365. The statutory provision under which the City took the property provided in part that "land taken for the purposes described shall not be used for purposes other than those for which it was originally taken." *Id.* at ¶ 5. The original owner argued that this language created a statutory right to reconveyance of the property to the original owner, if the City were not going to use it for the purpose for which it was originally taken.

The Law Court disagreed, finding that any statute modifying the general rule would have to be clearly stated. It described the general rule recognized by many jurisdictions as:

> when land has been acquired in fee simple absolute by eminent domain, the former landowner retains no rights in the land, and the public use may

[4] As noted above, the amendment to the Charter in 1937 expanded the purposes to include the "corporate purposes of said Central Maine Power Company." P. & S.L. 1937, ch. 62 § 5.

> be abandoned or the land may be devoted to a different use, without any impairment of the estate acquired or reversion to the former owner.

Id. ¶ *4,* 746 A.2d at 367, citing 3 *Julius L. Sackman et al., Nichols on Eminent Domain* § 9.07(7)(f) (3rd ed. 1999); *see* also, e.g., *Mainer v. Canal Auth. of State*, 467 So. 2d 989, 991 (Fla. 1985); *Board of Educ. Of Unified Sch. Dist. 512 v. Vic Regnier Builders, Inc.,* 648 P.2d 1143, 1147 (Kan. 1982). The Law Court held that because the Legislature had not included a clear process for repurchase in the statute, the Court would not infer one. *Id.* at ¶ 10, 746 A.2d at 368.

In 2001, the Legislature enacted legislation apparently in response to this decision. *See* 1 M.R.S.A. § 815. The statute applies to any entity, not just municipalities. For property taken after October 1, 2001, the new statute creates a right of first refusal for a condemnee, if the entity taking property does not use it for the purpose for which it was taken within eight years. Therefore, for the first time, the Legislature created a reversionary interest in property taken by eminent domain if not used for the original purpose. However, if the condemnee does not exercise this right, the property is not forever held to be only available for a public purpose. Instead the statute allows, after proper notice to condemnees or heirs, the entity "to dispose of the property in any manner allowed by law. . . ." 1 M.R.S.A. § 815(2)(B).

This statute only applies to property taken after October 2001. However, its enactment indicates that the Legislature had the opportunity to place restrictions on the use or sale of any land taken by eminent domain (or threat of eminent domain) such as requiring that it be used for some other public purpose, but it did not.[5]

Neither the common law nor case law requires the Commission to interpret the charter to require that this property be forever limited to a public use. There also appear to be no statutory requirements particular to utilities that would limit its use. Title 35-A M.R.S.A. § 1102 in fact allows a utility to dispose of property that is not necessary or useful in the performance of its duties to the public, without Commission review. Given our lack of authority, we need not reach the question of whether CMP's lease to Western is a public use.[6]

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[5] We further note that the Legislature's Joint Committee on Utilities and Energy recently voted ought not to pass on a bill that would have required utilities to seek Commission approval before disposing of property obtained through eminent domain, or which it had the right to obtain by eminent domain. L.D. 67 (121st Legis. 2003).

[6] We also need not decide whether the property was taken under threat of eminent domain since we conclude that, even if that were the case, it would not prohibit the lease.

C. Treatment of Proceeds

The Public Advocate requests that if CMP is allowed to lease the parcel to Western, the Commission investigate whether any portion of the lease revenues should be reflected in CMP's rates. Who has the right to receive the proceeds from the sale or lease of any property held by CMP, and whether the Commission should act to ensure that property is being disposed of in a way that maximizes ratepayer benefit, are both legitimate issues that can be raised when and if they are germaine in a proceeding designed to set CMP's rates.

Friends of Bigelow argues that because the property was purchased in connection with the Flagstaff Project generation project, it continues to meet the definition of "generation asset" in 35-A M.R.S.A. 3201(10) and should have been divested by March 2000 as required by 35-A M.R.S.A. § 3204(1). This issue was already considered by the Commission when it approved CMP's sale of its generation assets. The Commission approved the sale with the exclusion of certain property that was not deemed to be generation-related, including the property at issue here. Docket No. 1998-058, *Central Maine Power Co. Divestiture of Generation Assets – Request for Approval of Sale of Generation Assets,* Order (Dec. 17, 1998). Therefore, the time to raise the issue of its treatment as a generation asset, or appeal our decision to approve the sale as proposed by CMP, has passed.

VI. CONCLUSION

As described above, we decline to further investigate this matter as requested by the Public Advocate because we do not interpret Maine statutory or case law as giving us the authority to find that the property at issue here must be devoted to public use. We retain jurisdiction over the issue of whether ratepayers should receive all or some of the financial benefits that may be derived from this land and will consider that issue in appropriate rate or stranded cost proceedings.

Finally, we emphasize, what may be obvious, that our jurisdiction extends to laws governing actions by utilities as utilities. We do not have authority over land use questions that may arise from this lease and related transactions. We understand that this authority rests with LURC. Nothing in this Order should be taken to reflect our view on how LURC should decide any matters before it.

Dated at Augusta, Maine, this 12th day of March, 2003.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.