

124 FERC ¶ 61,251
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.

Brazos River Authority

Project No. 1490-046

ORDER GRANTING APPROVAL UNDER SECTION 22 OF THE FEDERAL
POWER ACT AND LICENSE ARTICLE 5

(Issued September 18, 2008)

1. On December 6, 2007, as supplemented January 22, 2008, the Brazos River Authority (the Authority), licensee for the 22.5-megawatt (MW) Morris Sheppard Dam Project No. 1490, filed, pursuant to standard license Article 5 and section 22 of the Federal Power Act (FPA),¹ a request for approval of the Facility Use Agreement (the Agreement) between the Authority and the Brazos Electric Power Cooperative, Inc. (the Cooperative).² The Agreement would supersede the parties' existing power sales agreement by stipulating the Cooperative's operation and maintenance of the project's power generating facilities and by extending the term of contractual power sales beyond the term of the project's license. As described below, the requested relief will be granted.

Background

2. The project is located on the Brazos River, in Palo, Pinto, Young, and Stephans Counties, Texas, and includes a 3,370 foot-long dam impounding Possum Kingdom Lake; a powerhouse (integrated in the dam) containing two 11.25-MW generators; an intake tower; two 12-foot-diameter; 140-foot-long penstocks directing water flow from the intake tower to the powerhouse; a 6.9 kilovolt (kV) transmission line; and a tailrace channel.

¹ 16 U.S.C. § 815 (2000).

² The Authority's initial filing did not request FPA section 22 approval, but when staff notified the Authority that section 22 approval was needed, the Authority supplemented its filing on January 22, 2008, to explain why the contract should be approved under section 22, while also arguing that such approval was not needed.

3. The Federal Power Commission issued the original license for the project on May 25, 1938, and the project was constructed in 1941. The Commission granted the Authority a new license for the project in 1989 with a 30-year term.³ The new license expires on August 31, 2019.

4. As described in the 1989 licensing order,⁴ the Authority has been selling the project's power to the Cooperative under long-term agreements since 1941. Under the agreements, the Cooperative, which is a generation and transmission cooperative, buys the power at the powerhouse bus and provides it to its member cooperatives through its transmission system, which connects to the licensed transformer banks located in the Cooperative's substation adjacent to the project.

5. As noted, the Agreement would replace all of the current contractual arrangements between the parties that involve the project, including their power sales agreements.⁵

³ 48 FERC ¶ 62,190 (1989).

⁴ *Id.* at 63,232.

⁵ Article II of the Agreement states in its entirety:

The Parties hereby agree that, beginning on the Commencement Date this Agreement shall supersede and replace all prior contracts relating to hydroelectric generation executed by and between the Authority and [the Cooperative] as listed in "Exhibit C. Contracts", attached hereto and incorporated by reference herein. The Parties hereto specifically agree that this Agreement shall exclusively govern and dictate all future rights, duties, responsibilities and obligations of the Parties as of the Commencement Date and there shall be no residual obligations surviving the aforementioned contracts, listed in "Exhibit C. Contracts". It is the intent of the Parties to this Agreement that all prior contractual or implied rights and responsibilities under such contracts shall be amended and replaced by this Agreement, and that the conduct and responsibilities of the Authority and [the Cooperative] beginning on the Commencement Date shall be governed solely by the terms of this Agreement.

The agreements listed in Exhibit C of the Agreement include the power sales agreements and amendments to those agreements between the Authority and the Cooperative, which were initiated by a March 25, 1941 agreement and culminated in a July 12, 2005 amendment to the parties' March 15, 1991 power sales agreement. The Agreement is
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Instead of the Authority operating and maintaining the hydroelectric generating facilities and selling project power to the Cooperative, as currently is the case, under the Agreement the Cooperative would be given the right and responsibility, at its own cost, to operate and maintain those facilities and to use all of the project power, subject to certain restrictions and rights reserved to the Authority. The generating facilities the Cooperative would operate and maintain under the Agreement are described in detail in Exhibit A of the Agreement. Briefly, they include the head gate assembly, trash rack assemblies, head gate tower, three penstock openings, two penstocks, the powerhouse building containing two 12-MW generating units, and the 6.9-kV transmission line.⁶

6. The term of the Agreement is 30 years beginning on the Agreement's effective date of November 1, 2007, and the Agreement provides the Cooperative with an option to extend the term for an additional 10-year period.⁷ Thus, the term of the Agreement could extend until 2047. Under sections 13.1 and 18.3 of the Agreement, if the Commission grants a new license to an entity other than the Authority following expiration of the current license in 2019, or denies the Authority's future application for new license, or revokes the current or new license, the Agreement would terminate.⁸

7. On February 5, 2008, the Commission issued public notice of the Authority's request for approval of the Agreement, with comments due by February 26, 2008. The Cooperative filed a motion to intervene on February 25, 2008, which was timely and unopposed, and therefore automatically granted 15 days after its filing, pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure.⁹

effective November 1, 2007, and its provisions will commence the later of: (1) the date the Commission approves the Agreement or (2) the date the Cooperative obtains any necessary approvals from the Rural Utilities Service. *See* the December 6, 2007 filing at 2-3 and section 1.1 of the Agreement.

⁶ *See* Article VII of the Agreement and the Authority's December 6, 2007 filing at 2. The Authority will continue to operate and maintain the dam and reservoir.

⁷ *See* Agreement, sections 9.1 and 9.2.

⁸ *See* Agreement, section 13.1.

⁹ 18 C.F.R. § 385.214(c)(1) (2008).

Discussion

A. Section 22 of the FPA

8. Section 22 of the FPA provides in pertinent part:

That whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the Commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, . . . and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts. [¹⁰]

The Authority does not agree that the Agreement needs Commission approval under FPA section 22. In essence, it contends that the Agreement simply grants the Cooperative the right (and obligation) to operate and maintain the power generating facilities of the project in exchange for a fee and that the Cooperative's right to use the project's power – or to generate any power at all – under the Agreement is only incidental to the Cooperative's right to operate the generating facilities.¹¹ However, the Agreement supersedes and replaces all of the parties' existing power sales agreements, and requires the Cooperative to pay the Authority a fee, which includes a component that reflects annual changes in average fuel related to the sale of power.¹²

¹⁰ Section 14 of the FPA, 16 U.S.C. § 807 (2000), provides that the United States shall have the right upon or after expiration of any license to take over a project, upon payment of the licensee's net investment therein. Hydropower projects licensed to municipalities are not, however, subject to such federal take-over. *See* the Act of August 15, 1953, 67 Stat. 587, as amended on July 31, 1959, 73 Stat. 271, 16 U.S.C. § 828b (2000). The Authority is a “municipality” within the definition of that term in section 3(7) of the FPA, 16 U.S.C. § 796(7) (2000), since it is an “agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.”

¹¹ *See* the January 22, 2008 supplemental filing at 2.

¹² The Cooperative will make a “Base Payment” to the Authority whether or not the Cooperative generates electricity, and following the second anniversary of the

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9. In addition, the Authority states that, in light of the fact that the Agreement terminates upon relicensing to an entity other than the Authority, the Agreement is not an agreement for the sale of power beyond the term of the license for Project No. 1490 and consequently section 22 is inapplicable to the Agreement. However, the Commission has found that including such a provision in a power sales agreement does not render section 22 inapplicable.¹³

10. We now consider whether to approve the Agreement under section 22 of the FPA. The purpose of section 22 is to accommodate situations where, in the absence of power contracts extending for a period beyond the license termination date, the licensee would be unable to sell the project power and thereby finance the project.¹⁴ The Authority argues that its contract meets this test. The Authority states¹⁵ that the Agreement:

will ensure that the financial resources necessary to make the required repairs at the project in the near future will be available, along with the resources necessary to remedy any problems that may arise in the future. This in turn will ensure that the project is properly maintained consistent with Commission standards and provide [the Cooperative] with the assurance that it will be able to consistently rely on the project as a source of power to meet the needs of its member cooperatives in the future.

Moreover, although the potential 40-year term of the Agreement (which could end as late as 2047) could extend well beyond (28 years) the term of the project's license, there is a

Agreement's commencement date the Base Payment will be adjusted annually by a factor that reflects annual changes in average fuel costs. *See* Agreement, section 8.1 and Exhibit F.

¹³ *See, e.g., Public Utility District No. 2 of Grant County, Washington*, 112 FERC ¶ 61,230 P 8 (2005).

¹⁴ *See, e.g., Public Utility District No. 2 of Grant County, Washington*, 75 FERC ¶ 61,190, at 61,627 (1996); and *Kootenai Electric Cooperative, Inc., et al.*, 72 FERC ¶ 61,222, at 62,032 (1995).

¹⁵ January 22, 2008 supplement at 4. As outlined in a January 2003 inspection report, at 12.1, drafted by the Authority's independent consultant under the Commission's dam safety regulations at 18 C.F.R Part 12, certain corrective actions relating to the project's generating facilities are needed, including providing tailrace dewatering facilities and repairing or replacing the project's trashracks. *See* the December 6, 2007 filing at 4, section 13.3 and Exhibit H to the Agreement, and January 22, 2008 filing at 3-4.

long history of the parties' power sales arrangement, which includes the Cooperative using the Cooperative's transmission facilities located at the project to convey the project's power to its member cooperatives. For these reasons, we find that approval of the Agreement is in the public interest.¹⁶

B. License Article 5

11. Under standard license Article 5, licensees under Part I of the FPA must hold all property and other rights necessary for the construction, maintenance, and operation of the licensed project.¹⁷ Contractual arrangements a licensee may make with non-licensees for assistance in financing, constructing, or operating a project are permissible, provided the licensee maintains in such arrangements sufficient ownership and control of the project to fulfill its license requirements and to enable the Commission, through the licensee, to carry out its regulatory responsibilities with respect to the project. Any non-licensee party to such contractual arrangements who controls rights necessary to fulfill requirements of the project license must either convey them to the licensee or become a licensee itself.¹⁸

12. We have reviewed the Agreement and find that, with the exception described below, it is consistent with the project control requirements of Article 5. While allowing the Cooperative to operate and maintain the project, there are several provisions of the Agreement that maintain the Authority's control over the project's generating facilities. Article III of the Agreement requires the Cooperative to comply with all Regulatory Requirements (including "federal, state or local law, and any permits, rules, orders or regulations") and the license relating to the use, coordination, and occupancy of the

¹⁶ As noted, section 22 provides that power sales contracts extending beyond the license termination date must be approved by both the Commission and the public service commission or other similar authority in the state in which the sale or delivery of power is made. The Authority states (January 22, 2008 filing at 4, n. 2) that there is no need for the Authority to obtain approval of the Agreement by the Texas Public Utility Commission (presumably the state agency that would otherwise approve the Agreement) because that agency does not have authority to approve agreements entered into by the Authority.

¹⁷ See standard Article 5 set forth in Form L-10 (October 1975) [reported at 54 FPC 1858], entitled "Terms and Conditions of License for Constructed Major Project Affecting the Interests of Interstate and Foreign Commerce," incorporated by reference in the 1989 license for Project No. 1490, 48 FERC at 63,236.

¹⁸ See, e.g., *Duke Energy Corporation, Duke Energy Fossil-Hydro, LLC, and Duke Energy Nuclear, LLC*, 97 FERC ¶ 61,177, at 61,825 (2001).

Agreement facilities. Under Agreement section 13.1, the Authority retains the right to require the Cooperative to perform any acts necessary to ensure compliance with those portions of the project's license applicable to the involved generating facilities. Section 13.6 of the Agreement specifies that, notwithstanding any provisions contained in the Agreement, the Authority, its successors, and assigns, have the right to perform any and all acts required by an order of the Commission affecting the project and the Agreement facilities without the prior approval of Cooperative or any other person. This provision will serve to ensure that the Authority will possess the rights necessary to fulfill its license requirements for the facilities involved in the Agreement.¹⁹

13. Section 6.5 of the Agreement gives the Authority the right of access to the involved generating facilities for site inspections and specifies that "the Authority may enter and have access to the [involved facility] in the event the Authority reasonably determines that access is necessary to preserve public health, safety, welfare or to protect surrounding Authority infrastructure." We find this provision unduly restrictive, because it limits our licensee's access to licensed project power generation features, other than access for "site inspections," to situations in which it "reasonably determines" involves such what are properly classified as "emergency events" involving "public health, safety, welfare or to protect surrounding Authority infrastructure." The Authority must retain rights of unlimited access to licensed project power generation features to enable it to meet its license obligations, which include requirements beyond the emergency situations described in section 6.5 of the Agreement, and section 6.5 of the Agreement must be modified to provide the Authority with such unrestricted access.²⁰ Subject to this

¹⁹ See *Linweave, Inc.*, 23 FERC ¶ 61,391, at 61,830 (1983) (creating the "Linweave clause" to modify a long-term lease of project property to prevent the non-licensee/lessor from controlling rights necessary to accomplish project purposes and to ensure that the licensee/lessee would possess all such rights).

²⁰ See *Greenwood County, South Carolina*, 73 FERC ¶ 61,336, at 61,947 (1995), where the Commission approved a lease of project property to a non-licensee providing for the exclusive occupancy, possession, and use of the project works for the purpose of generating electric power for and on its own behalf, similar to the provisions of the Agreement, subject to, *inter alia*, an amendment to the lease to "explicitly give [the licensee] the right to reenter the project without limitation." See also *New York Irrigation District, et al.*, 58 FERC ¶ 61,271, at 61,857 (1992), where the Commission found:

[E]very licensee must retain sufficient control over its project to be able to comply promptly and fully with the Commission's rules and orders under the license and the FPA. Such compliance cannot be subject to possible delay,

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modification, we find that the Agreement satisfies the requirements of standard Article 5 of the Authority's license.

The Commission orders:

(A) The 40-year term of the Facility Use Agreement (30 years from November 1, 2007, plus an optional 10-year extension) executed November 1, 2007, between the Brazos River Authority and the Brazos Electric Power Cooperative, Inc., for the sale of power from Morris Sheppard Dam Project No. 1490 is approved.

(B) The authorization in Ordering Paragraph (A) is without prejudice to the authority of this Commission, or any other regulatory body, with respect to rates, service, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before this Commission or any other regulatory body.

(C) The request filed December 6, 2007, as supplemented January 22, 2008, by the Brazos River Authority for Commission approval under Article 5 of the license for Project No. 1490 of the Facility Use Agreement executed November 1, 2007, between the Brazos River Authority and the Brazos Electric Power Cooperative, Inc., is granted, subject to the modification described in this order.

(D) This order constitutes final agency action. Requests for rehearing may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2008).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

alteration, or veto by a third party over which the Commission has no direct authority. We therefore cannot, and will not, subordinate the Commission's regulatory control over a licensed project to the terms of private contracts. To do so would be to abrogate our responsibility under the FPA to ensure that the project is constructed, maintained, and operated in the public interest. [Footnotes omitted.]