

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeem G. Kelly.

Pacific Gas and Electric Company

Project No. 2118-011

ORDER ON REHEARING

(Issued June 15, 2006)

1. Pacific Gas and Electric Company (PG&E) has requested rehearing of a Commission staff order issuing the company a subsequent license for the Donnell-Curtis Transmission Line Project No. 2118, located in Tuolumne County, California, and entirely within the Stanislaus National Forest.¹ For the reasons discussed below, we grant rehearing in part and deny rehearing in part.

Background

2. The 9.85-mile-long Donnell-Curtis Transmission Line transmits power from the Donnell and Beardsley powerhouses of the Tri-Dam Project No. 2005 to PG&E's Spring Gap Junction.² It is licensed as a primary transmission line, because there are no other connections between the Tri-Dam Project and PG&E's interconnected system.³

3. On December 26, 2002, PG&E filed an application for a subsequent license to continue to operate and maintain the Donnell-Curtis Project. Because the project is located on lands of the Stanislaus National Forest, the Secretary of Agriculture (within

¹ *Pacific Gas and Electric Company*, 114 FERC ¶ 62,216 (2006).

² The Tri-Dam Project is licensed to the South San Joaquin Irrigation District and the Oakdale Irrigation District.

³ See 114 FERC ¶ 62,216 at P 2, n.3, citing section 3(11) of the FPA, 16 U.S.C. § 796(11) (2000), for the definition of a primary transmission line.

whose department the U.S. Forest Service is located) was authorized, pursuant to section 4(e) of the Federal Power Act (FPA),⁴ to impose such conditions as the Secretary deemed necessary for the protection and utilization of the forest. On November 30, 2004, the Forest Service timely filed 36 section 4(e) conditions.

4. The Energy Policy Act of 2005 (EPAct 2005)⁵ was enacted on August 8, 2005. Section 241 of that act added new section 33 to the FPA.⁶ That section provides that licensees and other parties to licensing proceedings may propose alternatives to section 4(e) conditions promulgated by the relevant Secretaries, and establishes standards under which such alternatives are to be considered.

5. As required by EPAct 2005, the Secretaries of Agriculture, Commerce, and the Interior on November 17, 2005, issued regulations establishing procedures for, among other things, the consideration of alternative section 4(e) conditions.⁷ The regulations provide that, in the case of licensing proceedings where the relevant Secretary had submitted section 4(e) conditions before November 17, 2005, but the Commission had not yet issued a license, the deadline for submitting alternative conditions would be December 19, 2005.⁸

6. On December 19, 2005, PG&E filed 11 alternative section 4(e) conditions for the Secretary's consideration. According to PG&E, the Forest Service has indicated that it will act on the alternative conditions in the spring of 2007.⁹

7. On March 3, 2006, Commission staff issued a subsequent license for the Donnell-Curtis Project. The license included the 36 section 4(e) conditions proffered by the Forest Service. Ordering paragraph (E) reserved the Commission's right to amend Appendix A to the license (which contained the Forest Service's conditions) as appropriate in light of the Forest Service's disposition of the proposed alternative

⁴ 16 U.S.C. § 797(e) (2000).

⁵ Pub. L. 109-58, 119 Stat. 595.

⁶ 16 U.S.C. § 823d.

⁷ See 70 Fed. Reg. 69804 (November 17, 2005). The regulations are to be codified at 7 C.F.R. Subtitle A.

⁸ See 7 C.F.R. § 1.604.

⁹ See request for rehearing at 4.

conditions, and to make whatever additional conforming changes in the license might be necessary.¹⁰

8. On March 31, 2006, PG&E filed a timely request for rehearing.

Discussion

A. Section 4(e) Conditions

9. PG&E first asks that the Commission delete the 11 conditions to which it has proposed alternatives or delay their effectiveness until the completion of the Forest Service's proceedings on the alternative conditions. The company asserts that if the Commission does not do so, PG&E's ability to challenge the conditions at issue will be jeopardized. According to PG&E, were it to seek judicial review following a Commission order on rehearing, but prior to Forest Service action on the proposed alternatives, such an action "most likely" would be dismissed as unripe. However, the company asserts, if the Forest Service decides not to alter its conditions, the Commission will have no reason to issue a further order (in contrast to a situation where the Forest Service does change its conditions, in which case the Commission would issue an order incorporating the changes, which order would be subject to rehearing and judicial review), so that PG&E would not be able to return to court to contest the conditions.

10. PG&E's assertion that it has been placed in a procedural quandary is unconvincing. If PG&E considers itself to be aggrieved by the orders in this proceeding, it may seek judicial review. Whether any such petition for review would proceed during the pendency of proceedings before the Forest Service would be up to the court. To the extent that there are ongoing proceedings at another agency that are relevant to the license, PG&E can ask the court to take whatever action (such as holding an appeal in abeyance) it deems appropriate. We cannot presume any particular course of future administrative or judicial proceedings, and we decline to delay the effectiveness of the section 4(e) conditions based on speculation about those matters.¹¹

11. PG&E contends that our issuance of a license that includes section 4(e) conditions that are still under agency review appears contrary to Congress' intent. We disagree. Congress' expressed intent was that all parties to licensing proceedings get the benefits of the new procedures mandated in EAct 2005, including the consideration of alternative

¹⁰ See 114 FERC ¶ 62,216 at 64,580.

¹¹ We note that PG&E does not allege that the conditions at issue will have any immediate impact on it or in any way result in irreparable harm.

conditions. However, Congress did not specify the timing or manner of that consideration.

12. Under the agencies' new regulations, the consideration of alternatives, along with other actions mandated by EAct 2005 section 241, regarding projects for which mandatory conditions and fishway prescriptions were submitted after November 17, 2006, will take place in parallel with the Commission's licensing process, such that the new procedures will not delay the Commission's consideration of license applications. However, with respect to "transition" projects – those projects whose processing was too advanced at the time that the regulations were issued for the regulations to apply to them, but for which a license had not yet been issued – the agencies stated that they would establish a timetable for implementing the new procedures. As noted above, the Forest Service has stated that it will act on PG&E's proposed alternatives in the spring of 2007.

13. We see no reason to delay implementation of this license for at least another year, until the Forest Service has completed its review of PG&E's alternative conditions. It is in the public interest for the environmental and developmental benefits contemplated by the new license for the Donnells-Curtis Project to be realized now, rather than at some point more than a year in the future. Given that the Forest Service is providing PG&E the consideration of alternatives required by EAct 2005, we do not consider issuance of the license and action on rehearing to be in any way inconsistent with Congressional intent.

14. PG&E next argues that the Commission should modify the contested section 4(e) conditions, as proposed by the company. The Commission does not have the authority to revise section 4(e) conditions,¹² and we therefore deny PG&E's request.

15. PG&E requests that we clarify that the Forest Service's conditions do not apply to lands outside of the project boundaries. We have previously interpreted section 4(e) conditions as applying only to project works located on forest lands or to forest lands within the project boundaries,¹³ and we reiterate that conclusion here. This clarification is consistent with the alternatives that PG&E proposes to 6 out of the 11 conditions at issue: PG&E asks the Forest Service to amend those conditions to state that they are applicable only to forest lands within the project boundaries. The other five conditions to which PG&E objects are administrative in nature and do not appear to require any immediate significant expenditures or any changes in project operations.

¹² See *Escondido Mutual Water Company v. LaJolla Band of Mission Indians*, 466 U.S. 765 (1984).

¹³ See *Pacific Gas and Electric Company*, 69 FERC ¶ 61,070 at 61,309 (1994).

B. Standard License Articles

16. Licenses for hydroelectric projects include, in addition to articles specifically designed for individual projects, certain standard license articles, contained in what are known as “L-Forms.”¹⁴ The license for the Donnells-Curtis Project includes those articles in form L-20. Two of those articles are at issue here.

17. Article 8 provides as follows:

The Licensee shall do everything reasonably within its power, and shall requires its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparation for suppression of, and to suppress fires on the lands to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

18. Article 9 states:

The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

19. PG&E asks the Commission to either modify the articles or clarify that they are not intended to impose strict liability on licensees, which, the company notes, a federal district court recently held was the effect of the articles.

20. Nothing in our orders setting out the standard license articles, nor any other Commission precedent we have examined, explains the precise purpose of the two articles, and whether they were intended to establish a particular form of liability. It is

¹⁴ The L-Forms are published at 54 FPC 1792-1928 (1975) and are incorporated into project licenses by an ordering paragraph.

our conclusion that the articles simply carry out section 10(c) of the FPA,¹⁵ which requires that the licensee properly maintain project works, and conform to the Commission's rules and regulations regarding the protection of life, health, and property. Section 10(c) also provides that "[e]ach licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works appurtenant or necessary thereto, constructed under the license, and in no event shall the United States be liable therefor."

21. In *South Carolina Public Service Authority v. FERC*,¹⁶ the court held that the Commission exceeded its authority by including in a license a provision that the licensee would provide compensation for all foreseeable property damage arising from dam failure in the event of an earthquake. The court carefully reviewed the wording and the legislative history of section 10(c) and concluded that, while Congress intended for the Commission to ensure that hydroelectric projects were operated and maintained in a safe manner, "Congress intended for 10(c) merely to preserve existing state laws governing the damage liability of licenses" and that "it follows that the Commission may not encroach upon this state domain by engrafting its own rules of liability."¹⁷

22. The court's holding makes clear that, even had we intended the standard articles to define the nature of our licensee's liability, we would lack the authority to do so. Moreover, the fact that the provision at issue in *South Carolina Public Service Authority* was one specially included in that license indicates that we did not think that the standard articles established a liability standard; if that were the case, there would have been no need to craft a redundant provision dealing with that subject.

23. We conclude that standard license Articles 8 and 9 of the license for Project No. 2118 do not establish the standard of liability to which our licensees are to be held in the event of damages occasioned by the construction, maintenance, or operation of the project works. That being the case, we see no need to revise those articles.

¹⁵ 16 U.S.C. § 803(c) (2000).

¹⁶ 850 F.2d 788 (D.C. Cir. 1988).

¹⁷ *Id.* at 795. The United States Court of Appeals for the Ninth Circuit has reached the same conclusion. See *Skokomish Indian Tribe, et al. v. United States, et al.*, 410 F.3d 506, 519 (9th Cir. 2005). See also *DiLaura v. Power Authority of State of N.Y.*, 982 F.2d 73 (2d Cir. 1992).

The Commission orders:

The request for rehearing filed on March 31, 2006, by Pacific Gas and Electric Company is granted to the extent set forth herein and is otherwise denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.