

140 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

East Texas Electric Cooperative, Inc.

Project No. 12632-004

ORDER ON REHEARING AND CLARIFICATION

(Issued September 20, 2012)

1. By order of August 26, 2011, the Director, Office of Energy Projects (Director), issued an original license to East Texas Electric Cooperative (Cooperative or licensee) to construct, operate, and maintain the proposed 24-megawatt (MW) Lake Livingston Hydroelectric Project No. 12632, to be located on the Trinity River Authority of Texas's (TRA) existing Lake Livingston dam on the Trinity River, in San Jacinto, Polk, Trinity, and Walker Counties, Texas.¹ The Cooperative, individually, and the City of Houston, Texas, and TRA, jointly, have filed requests for clarification and rehearing of that order. We will grant rehearing and clarification to the extent discussed in this order.

Background

2. The Lake Livingston dam and reservoir were constructed in the late 1960s and are operated by TRA primarily for water supply purposes, with recreation as a secondary use. Lake Livingston is the largest water supply reservoir in Texas, with a storage capacity of 1,750,000 acre-feet of water at the normal maximum operating pool level. Houston has contractual rights to store and use about 70 percent of the reservoir's capacity for municipal water supply purposes, while TRA has contractual rights to store, and to market to localities in the vicinity of the reservoir and the lower Trinity River Basin, the remaining 30 percent of the reservoir's capacity. TRA owns in fee the land underlying the lake and the shoreline up to elevation 131.0 feet mean sea level (msl) and also has a flowage easement for certain lands above that level.

¹ *East Texas Electric Cooperative, Inc.*, 136 FERC ¶ 62,171 (2011).

3. TRA operates the dam and reservoir for water supply purposes by maintaining the normal pool elevation of 131.0 feet msl and supplying downstream uses with flows consistent with contractual water rights. TRA releases water from Lake Livingston through Tainter gates onto a spillway, and training walls and aprons direct the water across the spillway into a stilling basin, which empties through a weir into the Trinity River. TRA's current "Livingston Dam and Reservoir Gate Operating Procedures" (1980) (gate operating procedures) describe the criteria, calculations, and steps TRA uses to operate the spillway Tainter gates to provide downstream releases without causing sudden changes in downstream flows and reservoir surface elevations.

4. On February 28, 2007, the Cooperative, TRA, and Houston executed a memorandum of understanding (MOU) concerning the development of a hydropower project at Lake Livingston. The MOU provides that the Cooperative will receive an easement to construct, maintain, and operate a project on TRA-owned lands over the term of any license issued by the Commission. The MOU also reflects the agreement of the three parties that any hydropower facilities constructed pursuant to the MOU will be operated consistently with Lake Livingston's primary function as a water supply reservoir and that hydropower operations may not impair water rights, storage or release procedures, or contractual rights to water stored at Lake Livingston held by TRA or Houston.

5. On March 31, 2009, the Cooperative filed a license application for a 24-MW project at the Lake Livingston site. The proposed project would include the existing dam and reservoir, as well as the existing 170-foot-long stilling basin and an existing concrete wall. The project would also include a number of new facilities: an intake structure and headrace channel, an earth embankment, three steel penstocks, a powerhouse containing three generating units, a tailrace channel, and related transmission and auxiliary works.²

6. The Cooperative proposed to operate the project using water that TRA currently releases through the spillway gates to maintain the reservoir surface elevation at 131.0 feet msl and to satisfy demands by downstream water rights holders according to the TRA gate operating procedures. The hydropower intakes would direct water for power generation through the penstocks located on the reservoir just upstream of the dam and into the powerhouse, from which flows would be released back to the Trinity River just downstream from the stilling basin. For scheduled releases between 1,000 cubic feet per second (cfs) and 4,700 cfs, a minimum flow of 200 cfs would be released through one of the spillway gates to maintain dissolved oxygen and aquatic habitat in the stilling basin, and the powerhouse would generate with the remainder of the flow. When scheduled releases exceed 4,700 cfs, which is the combined powerhouse hydraulic capacity and

² *East Texas Electric Cooperative, Inc.*, 136 FERC ¶ 62,171 at P 9.

minimum flow release, any excess flows would be released through the spillway gates into the stilling basin. The Cooperative proposed a number of other measures, including modification of a notch in the existing downstream weir wall to maintain water depth for aquatic habitat in the stilling basin.

7. The Cooperative asked the Commission not to include in the license for the Lake Livingston Project a substantial number of the otherwise-applicable standard articles from Form L-11, asserting that exclusion of these articles is required to accommodate the need of TRA, as owner of the dam, to preserve the dam and reservoir's function as a source of municipal water supply for Houston and the other communities that hold rights to water impounded by the reservoir. These included: Article 3 (generally precluding substantial alteration of project works without prior Commission approval); Article 5 (requiring the licensee, within five years of license issuance, to obtain title to or the right to use in perpetuity necessary lands); Article 6 (requiring the licensee, in the event of project takeover by the United States, to be responsible for curing title defects); Article 9 (requiring the licensee to install additional capacity or make other changes in the project required by the Commission); Article 10 (requiring the licensee to comply with Commission orders to coordinate project operation with that of other projects); Article 11 (requiring headwater benefits payments, as appropriate); Article 12 (making project operations, including flow releases, subject to Commission rules and regulations protecting life, health, and property and for other beneficial public purposes, including recreation); Article 13 (requiring the licensee to permit reasonable use of the project reservoir and other properties, as ordered by the Commission); Article 14 (requiring safety measures relating to project electrical lines); Article 15 (requiring compliance with fish and wildlife measures); Article 16 (requiring the licensee to allow the United States to construct fish and wildlife facilities on project lands); Article 20 (requiring the licensee to keep the reservoir area clear); and Article 23 (stating that the terms of a license will not impair unmentioned portions of the FPA).

8. In issuing the license, the Director included a number of measures to protect and enhance resources. Among them, Article 402 provides that, when releases from Lake Livingston are between 1,000 cfs and 4,700 cfs, the licensee shall operate the project powerhouse to ensure an instantaneous minimum flow of 200 cfs through the spillway gates for maintenance of water quality and aquatic habitat within and downstream of the stilling basin. Article 402 further provides that, when scheduled flow releases from the dam are 1,000 cfs or less, the powerhouse shall be shut down and all flows shall be passed through the spillway gates. In addition, Article 403 requires the licensee to file for Commission approval the design for the proposed modification to the notch in the existing weir wall downstream from the dam, to maintain a constant water level in the stilling basin to protect aquatic habitat when the minimum flow required by Article 402 is being released.

9. Addressing the MOU, the Director stated that the licensee must have the ability to perform certain requirements, such as dam safety requirements or future requirements needed to protect environmental resources. Therefore, it would not be consistent with the public interest to issue a license that would allow TRA to exercise absolute control over the Lake Livingston dam and reservoir. The Director noted further that standard license Article 5 requires the licensee to acquire title in fee or the right to use in perpetuity all lands necessary or appropriate for the construction, maintenance, and operation of its project. While the Cooperative indicated that it expected to obtain from TRA an easement granting the Cooperative rights to construct, maintain, and operate the project over the term of any original or new license, the Director found that it was unclear whether the Cooperative would be able to obtain rights that allow it to comply with all Commission requirements. Therefore, the Director included Article 205, which requires that, before beginning ground-disturbing activity, the Cooperative provide the Commission with documentation that it has obtained sufficient rights (including to Lake Livingston dam and reservoir) to comply with the terms of the license and any future Commission requirements.

10. The Director further concluded that all of the standard articles that the Cooperative had requested not be included in the license articles should be included, because they represented reasonable public interest restrictions and obligations attached to the right to use the nation's waterways to generate electricity, including the need to modify project operations to take into account future circumstances and deal with unanticipated use conflicts, because they did not impose any specific requirements, and because, given that the Commission could not impose new requirements pursuant to the standard articles without the Cooperative having notice and the opportunity for hearing, the standard articles did not pose a clear conflict with the operation of Lake Livingston for water supply.

Discussion

11. On rehearing, the Cooperative and Houston and TRA argue, in essence, that the license as issued would give the Commission authority over operation of the dam and reservoir that could interfere with TRA's ability to manage Lake Livingston for its principal purpose of water supply, with TRA's existing program to manage lake and shoreline activities, and with established water rights. They contend that, although the Director acknowledged the primacy of the dam and reservoir's use for water supply, he undercut this principle by reserving to the Commission authority to impose conditions for safety and environmental protection that could conflict with the operation of Lake Livingston for its primary purpose. These conditions are to be found particularly in standard L-Form license Articles 5, 9, 10, 12, and 13, which the parties ask us either to waive or to modify, and in license Article 402, provisions of which they ask us to modify. They also seek modifications of license Articles 205 and 410, as well as clarification of the scope of license Article 412.

12. The Commission grants the petitioners' requests for rehearing and clarification. Specifically, the Commission is creating a new Article 413 to accommodate the water supply operations. Article 413 provides that:

Any reopener proceeding will be conducted with the fullest possible consideration of and deference to the project's primary purpose of water supply, to the extent consistent with the Commission's obligations under the Federal Power Act.

As discussed further below, we believe that Article 413 resolves the parties concerns and recognizes the fundamental purpose for which Lake Livingston was constructed, that of water supply to Houston, Texas and surrounding areas. While the Commission will give deference to the water supply operations, the Commission is also bound by its statutory obligations under the FPA.³ In attempting to promote the greatest public interest possible with each project, we find that the optimal approach in this case is to give full consideration to water supply operations, while enabling the development of hydroelectric facilities and the accommodation of other public interests discussed in section 4 and 10 of the FPA.

A. Deletion or Modification of Standard Articles

13. The Cooperative argues that the Director's refusal to omit or modify standard Articles 9, 10, 12, and 13 of the license unreasonably places at risk the security of Lake Livingston's continued operations for the primary purpose of water supply, as well as vested state rights to the waters stored in the reservoir. Houston and TRA add that the project will not proceed without certain revisions to those standard articles, which they include in their rehearing request.

14. As noted above, standard Article 9 requires the licensee, after notice and opportunity for hearing, to install additional capacity or make other changes in the project as directed by the Commission, "to the extent that it is economically sound and in the public interest to do so."

15. Standard Article 10 requires the licensee, after notice and opportunity for hearing, to coordinate the operation of the project electrically and hydraulically with such other projects or power systems and in such manner as the Commission may direct "in the interest of power and other beneficial public uses of water resources. . . ."

³ 16 U.S.C. §§ 797(e) and 803((a)(1) (2006).

16. Standard Article 12 provides that the operations of the licensee, so far as they affect the use, storage, and discharge from storage of waters affected by the license,

shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for these purposes.

17. Standard Article 13 provides, in pertinent part:

On the application of any person, association, corporation, Federal Agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. . . . Applications shall . . . include[e] satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law . . . and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

18. The Cooperative argues that these standard articles could require future modifications to the configuration or operation of Lake Livingston dam and reservoir that may impair TRA's ability to manage the project for water supply and to meet its contractual obligations to deliver water for municipal, industrial, agricultural, and domestic purposes. The Cooperative states that it recognizes the Commission's obligation over the term of the license to ensure that the project is best adapted to a comprehensive scheme for development of the waterway in the public interest. Nevertheless, it argues, the Commission must recognize that the proposed hydropower works are of secondary importance in the scheme of the entire development and cannot be a basis for requiring changes that could compromise the development's water supply functions.

19. In the event that we decline to omit the specified standard articles, the Cooperative requests us to add language to each of those articles stating that any license reopener will be conducted with the fullest possible consideration of, and deference to, the project's primary purpose of water supply. The Cooperative points out that, in approving several hydropower settlement agreements, the Commission has included similar language making clear that any future exercise of the Commission's reserved authority would occur only after full consideration of the benefit sought to be achieved as balanced against the possibility that the exercise of authority could cause the settlement to be voided. The Cooperative asserts that such language is appropriate here, since, under the MOU, Houston and TRA could force a surrender of the license if the Commission exercised its reserved authority in a manner that materially impaired water or property rights. Finally, the Cooperative insists that, if standard Article 12 is retained in the license, we should clarify that the exercise of reserved authority it preserves may be implemented only after notice and opportunity for hearing.

20. Houston and TRA propose to modify standard Article 12 to add various references to their adjudicated water rights, to specify water supply as one of the beneficial uses, to limit any required water releases to releases at the times and out of the quantity of water requested by TRA customers or Houston capable of being applied to beneficial use without waste downstream of the project, and to provide that the licensee may be required to allocate the releases requested to meet customers' and Houston's requirements between the powerhouse and the dam spillway gates. Houston and TRA would modify standard Article 13 to specify that TRA is not obligated to pay the licensee, that TRA is the owner of the reservoir and other project properties, and that the licensee occupies TRA's property pursuant to an easement. They suggest modifying standard Articles 9, 10, 12, and 13 to provide that any future activities required under those articles shall not interfere with TRA's operation of Lake Livingston for water supply. Finally, Houston and TRA propose to precede all of the individual standard articles in Form L-11 with definitions of the terms "interference with TRA's operation of Lake Livingston for water supply purposes;" "Lake Livingston;" and "TRA."

21. While we recognize the importance of the reservoir for water supply, we do not believe that omitting standard articles 9, 10, 12, and 13 is necessary to provide the parties the security they seek. This security is fully accounted for through the creation of Article 413 and the FPA. Specifically, section 6 of the FPA provides that licenses may be altered only upon mutual agreement between the licensee and the Commission after thirty days' public notice, thereby preventing the Commission from making changes to project operations without a prior opportunity for notice and comment. We will refer to this process throughout the remainder of the order as a "reopener proceeding." The standard articles have a long history and are included in licenses because a license term may extend for 30 to 50 years, and it is not possible at the time of license issuance to foresee all of the circumstances that might occur years or decades in advance. The standard

articles are the vehicles that preserve the Commission's flexibility to act in these unforeseen situations.⁴

22. So, for example, standard Article 12 provides that the licensee's operations, so far as they affect the use, storage, and discharge of waters affected by the license, shall comply with such rules and regulations as the Commission may prescribe for the protection of life, health, and property. If the Commission were to determine that certain additional measures regarding dam safety were necessary to protect the public, the Commission must have the ability to ensure that any modifications it would make to its dam safety program would be applicable to all its licensees. Similarly, if there were a dangerous upstream flooding event that could only be ameliorated if more flows were released from Lake Livingston than would normally be the case, or if people's lives and property around the lakefront were threatened because of a storm, the Commission might need to order protective flows under the article's provision requiring the licensee to release water at such a rate or volume as the Commission may prescribe for the purposes mentioned in the article.

23. However, because we conclude that the Lake Livingston Project is in the public interest and recognize that the parties do not intend that the new hydropower interfere with the primary water supply purpose of the existing facilities, we are adding new Article 413 to the license, providing, as the Cooperative requested, that any reopener proceeding "will be conducted with the fullest possible consideration of and deference to the project's primary purpose of water supply." Moreover any reopener proceeding, whether pursuant to the articles discussed above or other portions of the license, would include notice and the ability to comment, as well as the opportunity to seek rehearing and judicial review.

24. While the Cooperative, Houston, and TRA request revisions to each of the standard articles, we intend for Article 413 to serve an equivalent purpose by providing deference to water supply functions to the fullest extent possible. As discussed above, the Commission is obligated under the FPA to consider the public interest, which requires

⁴ Cf. *State of California v. FPC*, 345 F.2d 917 at 924-25 (9th Cir. 1965), explaining, in the context of FPA section 6, that

[w]hen the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable . . . it is sufficient . . . to include in the license a condition reserving the problem, including the licensee's right to test the validity of any future action taken.

an accounting of interests such as the protection of life, health, and property, as provided in Article 12. By establishing Article 413, the Commission is thus able to preserve the integrity of the license articles and thereby comply with its basic statutory obligations, while also accommodating the water supply operations for which Lake Livingston was originally constructed. Should Houston, TRA, or the Cooperative find that Article 413 is insufficient to accommodate water supply operations, they are each free to raise these issues in the future and inform us of the specific circumstances that are not addressed in this order.

B. Modification of Article 402

25. As noted, Article 402 contains minimum flow and powerhouse shutdown provisions. It also requires the licensee to operate the project consistent with TRA's 1980 gate operating procedures, except to the extent that the terms of the license or other Commission orders require otherwise.

26. The Cooperative has no objection to those provisions but is concerned with the last paragraph of the article, which provides:

The Commission reserves the right to require changes to the gate opening procedures. Upon Commission approval, the licensee shall implement the gate operating procedures, including any changes required by the Commission. The gate operating procedures shall not be implemented prior to Commission approval.

The Cooperative objects to these provisions insofar as they reserve the Commission's right, without limitation, to order changes to TRA's gate operating procedures and to prohibit TRA from implementing any changes to its gate operating procedures without prior Commission approval.

27. The Cooperative contends that these provisions unreasonably and unnecessarily restrict TRA's flexibility to manage the reservoir for its principal purposes, in that they could prohibit, without prior Commission approval, the implementation of changes that TRA may determine are required to accommodate its water supply obligations, such as periodic increases in reservoir releases to meet increased consumptive demands by Houston and other downstream water rights holders, or changes in release patterns to comply with comprehensive river basin plans adopted by Texas authorities. The Cooperative requests that this language in Article 402 be modified to allow TRA to implement non-hydropower-related changes to the gate operating procedures to the extent that TRA determines immediate implementation is necessary, with any such changes to be submitted to the Commission for its information and review. Similarly, the Cooperative requests that we modify the reservation of the Commission's right to require changes to clarify that any such changes that are not requested or concurred in by the Cooperative, TRA, or Houston will be ordered only after notice and opportunity for

hearing, and only if the required operational changes have a nexus to the project's hydropower operations.

28. Although Houston and TRA do not make the specific argument presented by the Cooperative, they propose to revise the last paragraph to read as follows:

The Commission reserves the right to require changes to the gate operating procedures to be in effect during periods of power generation; provided that such changes shall never require the release of water at either a rate in cubic feet per second or a volume of acre-feet that exceeds the rate or volume of water requested for release by TRA customers or the City of Houston capable of being applied to beneficial use without waste downstream of the project during such time period. Changes to gate operating procedures shall be in effect during times when the Licensee is generating power. Upon Commission approval, the Licensee shall implement the gate operating procedures, including any changes required by the Commission. The gate operating procedures shall not be implemented prior to Commission approval. Flows to be released through the dam spillway gates shall be subtracted from flows that would pass through the powerhouse if so requested by TRA.

29. The final paragraph of Article 402 must be understood in conjunction with the final sentence of the previous paragraph, which provides that, if, during the license term, TRA amends its 1980 gate operating procedures, the licensee shall file the revised gate operating procedures with the Commission for approval. These provisions do not purport to reserve the Commission's authority to make changes on its own initiative during the license term to the 1980 procedures as filed with the Commission but only to review, modify, and approve any changes to the existing procedures that may be initiated by TRA. In essence, these provisions are consistent with the language requested by TRA. The Commission typically includes this reservation language in any license article that requires a licensee to submit a plan or design regulating some aspect of project operations or licensee responsibilities. We will modify Article 402 to make it clearer that this reservation applies only when or if TRA amends its 1980 gate operating procedures. In addition, any review of the revised gate operating procedures will be conducted consistently with the terms of Article 413.

30. We appreciate the parties' concern that the need for Commission approval could hinder the implementation of changes to the procedures that TRA may deem necessary. However, the Director's conclusion that issuance of the license would serve the public interest was based on the understanding that the 1980 gate operating procedures, which were filed with the Commission, would control the operation of the spillway Tainter gates, which have become licensed project works. Operating the gates according to modified procedures could have effects on project operations and environmental

resources that the Commission will not have had the opportunity to analyze. We have a responsibility to ensure that any changes to the operation of the reservoir gates that might affect how the hydropower project itself is operated will not adversely affect project purposes. While it may be unlikely that any revisions to the gate operating procedures would conflict with other public interests that fall under the Commission's statutory purview, the Commission cannot know this in advance and must have the opportunity to review the revised procedures.

31. Houston and TRA also suggest changes to other provisions of Article 402. While the first paragraph of Article 402 provides that the licensee shall operate the project consistent with TRA's 1980 operating procedures, Houston and TRA would require that such operation also be consistent with specified certificates of adjudication issued by the Texas Commission on Environmental Quality (Texas CEQ) to TRA and Houston, the Texas comprehensive State Water Plan, as amended from time to time, and a rulemaking adopted by Texas CEQ to implement amendments to the Texas Water Code. Further, while Article 402 now requires operation consistent with TRA's operating procedures "except to the extent that the terms of this license or other Commission orders require otherwise," Houston and TRA would substitute for "require otherwise" the phrase "require the releases to otherwise be allocated between the powerhouse and Lake Livingston dam spillway gates, for maintenance of water quality and aquatic habitat within and downstream from the stilling basin." Finally, Houston and TRA would revise the Article 402 requirement for the release of a 200-cfs minimum flow through the spillway gates to clarify that this requirement would only apply when the licensee is generating power.

32. We will not require the licensee's operation of the project to be consistent with the certificates of adjudication issued by Texas CEQ, the Texas comprehensive State Water Plan, as amended from time to time, and the Texas CEQ rulemaking amendments to the Texas Water Code. The 1980 gate operating procedures have been filed with the Commission, and it is reasonable to expect Commission staff to enforce the requirement that project operations be consistent with them, until such time as the Commission approves a request by the licensee to amend the procedures. In contrast, agreeing to Houston's and TRA's request would require Commission staff to ensure compliance with additional requirements by the State of Texas, which could change from time to time. We also will not replace the phrase "require otherwise" by the more involved phrase suggested by Houston and TRA, as we cannot predict the circumstances under which we might need to require different project operations and do not wish to limit the scope of our possible future actions. However, we emphasize that Article 413 will apply for any Commission orders that could change operations and require a reopener proceeding.

33. As Houston and TRA request, we clarify that the 200-cfs minimum flow release requirement will apply only when the project is generating power. This is consistent with the current language of Article 402, which provides that when releases from the dam are

between 1,000 cfs and 4,700 cfs, “the licensee shall operate the project powerhouse to ensure an instantaneous minimum flow of 200 cfs through the Lake Livingston spillway gates.” Thus, we will modify Article 402 to remove any doubt that the minimum flows need be released only when the powerhouse is operating.

C. Management of Project Lands and Waters

34. TRA has a program for management of lake and shoreline activities, under which it regulates the use of land and water in and around Lake Livingston that it owns or in which it has easement rights.⁵ The Cooperative and TRA requested that, in issuing the license, the Commission grandfather this management program or allow TRA’s existing lake and shoreline policies to remain intact to the maximum extent possible.⁶ The Director did not address this request in the license order. However, the license includes Article 412, the Commission’s standard land use article, which gives the licensee the authority to grant permission for certain types of use and occupancy of project lands and waters, and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval.⁷

35. The Cooperative asserts that the license order’s silence on the matter of deferring to TRA’s management program, coupled with the inclusion of Article 412, leaves the parties with uncertainty as to their obligations under the license regarding the regulation of lake and shoreline activities. The Cooperative asks us to clarify that TRA is authorized to continue administering its lake and shoreline management program and that the Cooperative need not obtain prior Commission approval for non-project reservoir uses regulated by TRA.

36. As described by the Cooperative, TRA’s management program prescribes regulations addressing, among other things, the erection of structures on the lake or

⁵ The Cooperative states that, while most of the shoreline is privately owned above the 131-foot contour, TRA’s flowage easement varies from 135 feet msl at the lower end of the reservoir to 140 feet msl at the upper end.

⁶ TRA motion to intervene, filed June 18, 2010, at 6-7; Cooperative response to agency comments, filed September 9, 2010, at 11.

⁷ The licensee may exercise this authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For non-project uses not covered by this article, the licensee must seek prior Commission approval before it may authorize the use.

within TRA's flowage easement, various lake and shoreline recreation activities, public safety, and protection of TRA's property and of aesthetic values on and around the lake. TRA requires each property owner who wishes to install a structure or engage in other regulated activity within the flowage easement to execute a joint use agreement with it that requires the property owner to obtain any necessary approvals required by TRA or any other regulatory body having jurisdiction over the proposed activity. TRA's program establishes fees for the permitting of shoreline facilities, commercial ventures, and other activities on the lake. Property owners adjacent to the lake are responsible for the construction and maintenance of any shoreline erosion control measures necessary to protect their property from erosion, and TRA must inspect and license any shoreline control measures installed by such private landowners.

37. The Cooperative states that many of the permits issued and the joint-use agreements entered into by TRA are for the types of uses and occupancies within the licensed project boundary that are granted blanket authorization by Article 412. The Cooperative asks us to find that TRA's regulation and management of those activities is acceptable and that we would not expect the Cooperative to assume TRA's responsibilities with respect to them.

38. The Cooperative also requests us to clarify that, for uses and occupancies the permission of which is not authorized by Article 412, prior Commission approval is not required to the extent that such activities are regulated by TRA, as long as no conveyance or other authorization is granted by the Cooperative as licensee. In this regard, the Cooperative states that TRA sells water from Lake Livingston to various political subdivisions, industries, and individuals, mostly by pipeline withdrawals directly from the reservoir, and that it needs to retain the flexibility to authorize such water withdrawals without the Cooperative having to obtain Commission approval. Similarly, subdivisions around the lake often require the installation of marinas that have more than ten boat slips,⁸ and the Cooperative states that TRA is unwilling to be dependent on the initiation of a license amendment proceeding by the Cooperative each time TRA wishes to authorize such a marina.

39. The Cooperative insists that, as the operator of a hydropower facility that has no ability to affect reservoir levels, it is in no position to assume responsibility for permitting and obtaining Commission approval of non-project uses and occupancies around the entire reservoir. In contrast, it states, TRA operates under an enabling statute authorizing it to promulgate reasonable regulations on all of its lands and easements, holds authority under the Texas Water Safety Act to promulgate regulations to protect the public's safety

⁸ No more than 10 boat slips may be authorized without prior Commission approval under Article 412.

in water activities, is a political subdivision of the state charged with promoting the public interest, and has managed the reservoir effectively since it was completed in 1969. Therefore, the Cooperative maintains that TRA is in the best position to regulate lake and shoreline activities.

40. Houston and TRA emphasize that, under Texas law, TRA has the statutory responsibility for operating the reservoir, including the surface of the lake and the shoreline. Houston and TRA assert that conflicts between TRA's statutory authority and Article 412 should be resolved by amending Article 412 to include the following introductory paragraph:

TRA is the owner and operator of Lake Livingston and by statute is charged with administering Lake Livingston and regulating uses thereof. This license is not meant to interfere with TRA's authority or shift responsibility to the licensee or Commission for regulation of uses of the lake. The licensee shall have the rights set forth hereafter provided they are consistent with the easement granted to the licensee by the TRA.

In addition, Houston and TRA would remove the licensee's right to convey fee title from paragraph (d) of Article 412. They would also add language at the end of the article providing that the authority granted to the licensee under the license shall not apply without first obtaining a written agreement from TRA agreeing to such actions, and that the agreement shall be filed with the Commission for informational purposes.

41. Because we require a licensee to take responsibility for project lands and waters, and to have all necessary property rights to carry out this responsibility, we cannot confirm, as TRA and Houston request, that this license will not shift responsibility to the licensee for regulation of the lake's uses. Throughout our discussion, we have acknowledged and given fullest possible consideration to Lake Livingston's water supply operations. To the extent the Cooperative must file with the Commission for authorization of any project management activities, we will provide deference to the activities necessary for the provision of water supply operations, as discussed in Article 413. However, the Commission requires a licensee to obtain and retain sufficient rights to project property to carry out all necessary project purposes. These include the management of a project reservoir and any shoreline lands that are within the project boundary, to carry out the Commission's responsibilities under the FPA.

42. We recognize that, in this instance, TRA owns the reservoir, has responsibilities under state law to operate it, and has a legitimate interest in retaining control of its uses. We do not expect conflicts between state and federal laws here; at the same time, a licensee must have all the rights necessary to satisfy project purposes and to fulfill its obligations under its license. These rights ensure that the licensee has the ability to take actions to preserve the public interest when, for instance, such actions are necessary to protect life, health, and property. The Commission's authority is over its licensee, and

accordingly it is the licensee that must have sufficient authority to ensure that the project waters and lands are being used consistently with project purposes. That said, we commit to working with parties and Texas to the greatest extent possible in order to resolve any conflicts in the future, should they arise.

43. The parties have indicated that an easement will be the vehicle through which TRA will grant the Cooperative the rights to construct, maintain, and operate the project. Since the Cooperative, pursuant to Article 205, must submit documentation showing that it has been granted all of the rights necessary to comply with the terms of the license and any future Commission requirements, we will defer until that time any consideration of whether the Cooperative has obtained those rights in respect to the reservoir and adjacent project lands.

D. Article 410 and Recreation Plan

44. Article 410 directs the licensee to file for Commission approval a recreation plan that includes provisions for a gazebo, parking spaces, a trail, an access road, removal of abandoned structures, and soil and sediment erosion control measures. All of these provisions involve facilities in or measures relating to the 33.35-acre Southland Park, which the Cooperative proposed to bring into the project boundary. This park is located immediately downstream of the dam on the eastern shore of the Trinity River and is currently closed to the public.⁹ Article 410 also provides that the plan include a provision to develop a recreation use monitoring report to assess future recreation use levels and needs at the project and a provision for future public access downstream from the dam should a need for such access be found. Houston and TRA propose to amend Article 410 to specify that the plan shall not be implemented in a manner that interferes with the operation of Lake Livingston for water supply purposes.

45. The recreation measures at Southland Park were proposed by the Cooperative itself. Similarly, the Cooperative supported the monitoring of recreational use and agreed that it would construct and maintain reasonable public river access if the monitoring reveals that existing facilities are not providing that access.¹⁰ Thus, Article 410 simply requires the submission of a plan reflecting land-based measures proposed or agreed to by the Cooperative itself. Under the article, TRA is a consulting entity in the development of this plan. We see no reason why the implementation of this plan should have to interfere with the primary use of Lake Livingston for water supply purposes.

⁹ Polk County, Texas, owns 20 acres of this park and TRA owns the remaining 13.35 acres. See *East Texas Electric Cooperative, Inc.*, 136 FERC ¶ 62,171 at P 10.

¹⁰ See *East Texas Electric Cooperative, Inc.*, 136 FERC ¶ 62,171 at P 50-52.

Thus, we will modify Article 410 to make it clearer that the measures specified by the plan are to be undertaken at Southland Park and do not affect management of the dam or reservoir.

E. Sufficient Property Rights

46. As noted above, standard Article 5 provides that the licensee, within five years of the issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. It provides further that the licensee shall retain the possession of all project property covered by the license during the period of the license. Houston and TRA propose to modify standard Article 5 by limiting the licensee's right to use project lands to the term of the license and any renewal thereof, and to provide that all unused property and rights thereto shall revert to TRA upon such non-use.

47. Standard Article 5 requires a licensee to retain the possession of all project property during the period of the license, so that the Commission can be assured that the licensee will be able to carry out all project purposes. Therefore, it would not be necessary to modify the article to provide for any automatic reversion of project property to TRA at the end of the license term. Reversion of the project property at such time when it is no longer subject to a license is outside the Commission's jurisdiction.

48. Article 205 provides that, if the licensee submits any grant of easement to the Commission as proof of its compliance with the requirements of standard Article 5, such a grant shall state that the licensee shall have the right to perform all acts required by the Commission without prior approval of the grantor. Houston and TRA propose to restrict this provision to such acts as pertain only to the licensee for the purpose of generating hydropower.

49. Not every action that we might require the licensee to take would necessarily involve generation, since we must also ensure dam safety, for instance. Therefore, the parties must fashion an easement that will not restrict the licensee's ability to comply with possible future Commission requirements.

F. Other Issues

50. Section 10(a)(1) of the FPA provides that the project adopted by the Commission shall be such as, in the Commission's judgment, will be best adapted to the comprehensive development or improvement of the waterway.¹¹ Section 10(a)(2)(A) of

¹¹ 16 U.S.C. § 803(a)(1) (2006).

the FPA¹² provides that, in order to ensure that the project adopted will be best adapted to the comprehensive plan described in section 10(a)(1), the Commission must consider the extent to which the project is consistent with state and federal comprehensive plans for improving, developing, or conserving a waterway. The Commission's regulations provide that the Commission will treat as a comprehensive plan a plan that: is a comprehensive study of one or more of the beneficial uses of a waterway or waterways; includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan; and is filed with the Secretary of the Commission. In the case of a state comprehensive plan, the plan must be prepared by a state agency, of the state in which the facility is or will be located, authorized to conduct such planning pursuant to state law.¹³

51. The Director found 16 comprehensive plans that had been filed by federal and state agencies and that addressed resources in Texas, including 13 that were relevant to this project.¹⁴ Upon reviewing them, the Director found that there were no conflicts between the proposal and those plans.

52. Houston and TRA contend that the license order fails to comply with section 10 of the FPA to the extent that it fails to adapt to provisions of state plans that set operational, environmental, and supply plans for Texas in general and for Lake Livingston in particular. Houston and TRA complain that the license order does not contemplate potential conflicts with the comprehensive state plans and does not provide any alternative in case of a conflict. Rather, they assert, the license order allows the Commission or the licensee to take action that may reduce water availability or change environmental flows without considering state plans, and the Commission's authority to limit TRA's control of flows out of Lake Livingston creates inconsistencies with state plans that provide for TRA to operate its reservoirs to maximize water availability.

¹² 16 U.S.C. § 803(a)(2)(A) (2006).

¹³ 18 C.F.R. § 2.19 (2012).

¹⁴ Those plans are listed in the Environmental Assessment prepared for the license application, at n.13. Four of the 13 plans are plans prepared by agencies of the State of Texas: (1) Texas Water Development Board. 2007. Water for Texas: a comprehensive plan for the future. Document No. GP-8-1. Austin, Texas. January 2007; (2) Texas Parks and Wildlife Department. 1988. The Texas wetlands plan: addendum to the 1985 Texas outdoor recreation plan. Austin, Texas. May 1988; (3) Texas Parks and Wildlife Department. 1990. Texas Outdoor Recreation Plan (SCORP). Austin, Texas; and (4) Texas State Soil and Water Conservation Board. 1981. Soil and water conservation: the Texas approach. Temple, Texas. August 1981.

53. Section 10(a)(2) requires only that, when deciding whether or under what conditions to issue a license, the Commission consider the extent to which a project would be consistent with federal or state comprehensive plans. It does not require that a project actually be consistent with the plans. Moreover, section 10(a)(2) addresses conflicts that might exist between a proposed project and comprehensive plans at the time of license issuance; any future conflicts are to be addressed by reservations of authority in license articles. The license as issued does not require any actions that would reduce water availability or change environmental flows. Houston and TRA do not identify any present conflicts between the state plans that were filed with the Commission as comprehensive plans and any actions to be taken pursuant to the terms and conditions of the license. For these reasons, the Director's review and findings fully complied with the requirements of section 10(a)(2)(A).

54. Houston and TRA assert that the licensing order conflicts with the final Environmental Assessment (EA) prepared for the application. They note that, in the EA, Commission staff stated that the proposed project would operate within the constraints of TRA's existing reservoir operations, that the quantity and timing of flows would be unaffected by the proposed hydropower operations, and that the hydropower project would not be expected to modify existing water surface elevations in the impoundment. Commission staff also found that it would be necessary for the Cooperative to submit a final MOU with TRA governing project operations, with the objective of maintaining net reservoir releases and surface elevations in accordance with existing operational protocols. Houston and TRA state that these and other statements in the EA caused them to expect that the Commission would avoid a conflict between water supply requirements and the hydroelectric project operations. Houston and TRA complain that the license order directly conflicts with the EA's deference to existing reservoir operations by stating, without limitation, that the Cooperative must be capable of controlling dam safety and releases for environmental flows at Lake Livingston. Thus, in Houston and TRA's view, while the EA suggested that generation would be subservient to water supply, the order places hydropower-related environmental requirements ahead of water supply.

55. The order does not conflict with the EA's statements and findings. We believe that the project could be operated within the constraints of the existing reservoir operations. While the Commission must retain its authority over its licensee to address safety and environmental issues that might arise in the future, we recognize the importance of the project operating within the constraints of the existing reservoir operations. Article 413 provides further evidence of the Commission's recognition of the importance of water supply operations to the parties of this proceeding.

56. Houston and TRA criticize the license order for failing to note that, under the MOU, they have the right to withdraw from participation in the project and may direct the Cooperative to reject the license in the event that it imposes unacceptable terms and conditions, including modifications to the physical facilities or impairment of water

rights, requirements to develop or acquire additional lands, or requirements to alter the flows, releases, or diversions in the reservoir. They point out that 24 years earlier, TRA itself sought and received a license for a hydroelectric project for Lake Livingston¹⁵ but ultimately returned the license and declined to develop the project because the Commission denied its requests for modifications of license articles, including standard L-form articles, that TRA considered necessary to protect the primary purpose of the reservoir. Houston and TRA assert that, while the Commission has since become more flexible, in that it has been willing to waive certain boilerplate license terms when appropriate or necessary for the success of the project, and while there has been increasing recognition of the value of capturing hydroelectric power from dams constructed for other purposes, the license order in the present proceeding perpetuates the inflexibility of the past.

57. As we have explained above, we will modify the license to require that any reopener proceeding “will be conducted with the fullest possible consideration of and deference to the project’s primary purpose of water supply.” We believe that this is sufficient to provide the parties the security they request. .

58. The Director noted that, as to licensed projects at federal dams, the Commission lacks jurisdiction to require the federal dam owners to allow licensees to make dam safety repairs or to manipulate flows for flood control, water quality and other environmental considerations, irrigation, or other purposes, beyond the extent that the federal agencies permit. The Director found that those restrictions do not apply to TRA, since it is not a federal entity, and that it would not be consistent with the public interest to issue a license that allows TRA to exercise the absolute control over the Lake Livingston dam and reservoir that the Corps and the Bureau of Reclamation (Reclamation) exercise over their facilities.

59. Houston and TRA state that the Director failed to support his assertion that TRA should not be treated as the Corps and Reclamation are treated. They acknowledge that the Commission lacks jurisdiction over federal dams and reservoirs, but they argue that the Commission also does not purport to assert jurisdiction over non-licensee operators of non-federal dams and reservoirs, and that TRA is an operator of a dam and reservoir, just as the Corps and Reclamation are operators of their respective dams and reservoirs. They add that, in fact, the public interest supports treating non-licensee-owned private dams similarly to federal dams because concern over the extent of federal jurisdiction over non-licensees is likely to chill interest in the development of new hydropower projects at existing dams and reservoirs whose original and primary purpose is not generation.

¹⁵ *Trinity River Authority of Texas*, 41 FERC ¶ 61,300 (1987).

60. Similarly, Houston and TRA argue that the license order frustrates the intent of Congress to encourage the development of hydropower at existing dams. In this respect, they note that the Energy Policy Act of 2005 expanded the availability of renewable energy credits to generating devices owned or operated by non-federal entities that are added to an existing dam or conduit, and that the American Recovery and Reinvestment Act of 2009 included an investment tax credit and grants for building new hydropower capacity at existing plants and non-powered dams.

61. While we render no judgment as to the parties' policy arguments, we find that we lack the statutory authority necessary to treat them as they request. The Commission has no jurisdiction over the operation of a dam or reservoir that is owned by a federal entity, but it does have jurisdiction over state-owned dams and reservoirs that have become project works through the issuance of a license. While parties may assert that it is good policy to treat state-owned dams and reservoirs in the same way we treat federally-owned facilities, we cannot create an exception to our jurisdiction when Congress has not given us the discretion to do so. Similarly, while the Energy Policy Act of 2005 and the American Recovery and Reinvestment Act of 2009 may reflect Congress' intent to facilitate the development of hydropower at existing dams, they do not alter our statutory authority in this regard. That said, we appreciate and support the parties' desire to develop hydropower resources at Lake Livingston while protecting their water supply, and have attempted to accommodate their needs to the greatest extent possible.

62. Houston and TRA propose changes in the license order to the Director's discussion of the Commission's authority to direct the licensee to take future actions and of the need to retain the standard articles in Form L-11. In brief, Houston and TRA would modify the Director's statements to specify that the licensee would have to comply with future Commission requirements only where changes would not have occurred absent hydropower operations, that only while the project is generating would it be inconsistent with the public interest to allow TRA absolute control over Lake Livingston dam and reservoir, and that the standard articles could under certain circumstances impair TRA's ability to operate Lake Livingston for its primary purpose and therefore will be amended.¹⁶ We decline to adopt these modifications as either in conflict with the Commission's obligations under the FPA or as resolved by Article 413.

63. The Cooperative and Houston and TRA request that we hold a technical conference to explore the issues they have raised and to evaluate proposed changes to the license articles. We believe that the record provides sufficient information for us to resolve the issues that have been raised without the need for a conference.

¹⁶ The proposed changes would be made in PP 62 and 66-68 of the Director's license order.

64. Finally, license Article 304 requires the submission of a dam safety program to the Commission's Division of Dam Safety and Inspections. We will revise the article to make it clear that this is to be the licensee's dam safety program, not TRA's, and to update the article's reference to information on the Commission's website.

The Commission orders:

(A) The requests for rehearing and clarification filed by East Texas Electric Cooperative and by the City of Houston, Texas, and the Trinity River Authority of Texas of the Director's August 26, 2011 order issuing an original license for the Lake Livingston Project are denied except to the extent indicated in this order.

(B) The request of the City of Houston, Texas, and the Trinity River Authority of Texas for a technical conference in this proceeding is denied.

(C) Article 304 of the license issued August 26, 2011, for this project is revised to read as follows:

Article 304. Project Owner's Safety Program. Within 90 days from the issuance date of the license, the licensee shall submit to the Commission's Division of Dam Safety and Inspections – Atlanta Regional Engineer, a licensee's Dam Safety Program which, among other items, demonstrates a clear acknowledgement of the licensee's responsibility for the safety of the project, an outline of the roles and responsibilities of the dam safety staff, and access of the dam safety official to the Chief Executive Officer (CEO). For guidance on what constitutes a good dam safety program the licensee should reference the information posted on the FERC website at:
<http://ferc.gov/industries/hydropower/safety/initiatives/odsp.asp>.

(D) Article 402 of the license issued August 26, 2011, for this project is revised to read as follows:

Article 402. Operating Procedures and Minimum Flow Releases. The licensee shall operate the project consistent with the Trinity River Authority of Texas's (TRA) "Livingston Dam and Reservoir Gate Operating Procedures" (1980), as filed with the Commission on March 13, 2009, except to the extent that the terms of this license or other Commission orders require otherwise.

When the powerhouse is operating, i.e., when releases from Lake Livingston dam are between 1,000 cubic feet per second (cfs) and 4,700 cfs, the licensee shall ensure an instantaneous minimum flow of 200 cfs

through the Lake Livingston dam spillway gates, for maintenance of water quality and aquatic habitat within and downstream from the stilling basin. When scheduled flow releases from the dam are 1,000 cfs or less, the powerhouse shall be shut down and all flows shall be passed through the spillway gates.

The aforementioned flow releases may be temporarily modified during operating emergencies beyond the control of the licensee, upon mutual agreement between TRA and the licensee. If flow releases are modified, the licensee shall notify the Commission, the Texas Parks and Wildlife Department (Texas PWD), and the Texas Commission on Environmental Quality (Texas CEQ) as soon as possible, but no later than 10 days after each such incident.

If, during the term of this license, TRA amends its "Livingston Dam and Reservoir Gate Operating Procedures" (1980), the licensee shall file the revised gate operating procedures with the Commission for approval and submit copies with Texas PWD and Texas CEQ.

The Commission reserves the right to require changes to the revised gate operating procedures. Upon Commission approval, the licensee shall implement the revised gate operating procedures, including any changes required by the Commission. The revised gate operating procedures shall not be implemented prior to Commission approval.

(E) Article 410 of the licensee issued August 26, 2011, for this project is revised to read as follows:

Article 410. Recreation Plan. Within 1 year of license issuance, the licensee shall file with the Commission for approval a plan and schedule for implementing recreation measures proposed by the licensee and shown in Figure R-2 in the licensee's May 20, 2010 filing and described in detail in that filing at 3. These measures include the provision of the following facilities at Southland Park: (1) a covered, barrier-free gazebo equipped with lights; (2) a lighted parking area for approximately 10 parking spaces; (3) an approximately 1,500-foot-long non-motorized barrier-free trail that includes benches, interpretative signs, and plantings of native grasses, flowers, and trees; and (4) an access road connecting the existing Recreation Road 5 with the new parking area for the gazebo.

The plan shall also include: (1) a provision for the continued operation and maintenance of the recreation facilities at Southland Park; (2) a description of the site remediation for removing abandoned structures

at Southland Park and revegetation with native vegetation; (3) a description of soil erosion and sediment erosion control measures to be used where ground-disturbing activities are proposed; and (4) a description and length of the realigned Recreation Road 5 that shall provide access to, and parking for, the gazebo.

The plan shall include appropriate site drawings, specifications, and a map or maps showing the facilities and their location in relation to the project boundary.

The plan shall also include: (1) a provision to develop a recreation use monitoring report that shall assess future recreation use levels and needs at the project, and that is filed in conjunction with the Licensed Hydropower Development Recreation Report (Form 80); and (2) a provision for future public access downstream from Lake Livingston dam, should a need for such access be found.

The plan shall be developed after consultation with the National Park Service, the Texas Parks and Wildlife Department, Polk County, the Texas State Historic Preservation Officer, and the Trinity River Authority of Texas. The licensee shall include with the plan documentation of consultation, copies of recommendations on the completed plan after it has been prepared and provided to the above entities, and specific descriptions of how the entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific evidence.

The licensee shall develop the plan in coordination with the bat protection measures required under Article 409, so that recreation enhancements do not conflict with the species.

The Commission reserves the right to require changes to the plan. Land-disturbing or land-clearing activities associated with the recreation facilities shall not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval the licensee shall implement the plan, including any changes required by the Commission.

(F) The license issued August 26, 2011 for Project No. 12632 is revised to add the following article:

Article 413. *Consideration of Water Supply Purposes.* Any reopener proceeding will be conducted with the fullest possible consideration of and deference to the project's primary purpose of water supply, to the extent consistent with the Commission's obligations under the Federal Power Act.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.