

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

South San Joaquin Irrigation and
Oakdale Irrigation Districts

Project No. 2067-026

ORDER DISMISSING FILING AS DEFICIENT

(Issued April 5, 2006)

1. On February 16, 2006, Commission staff issued an order granting a new license to the South San Joaquin and Oakdale Irrigation Districts (Districts) to continue operation and maintenance of the 24.1-megawatt Tulloch Hydroelectric Project No. 2067, located on the mainstem of the Stanislaus River in Tuolumne and Calaveras Counties, California.¹
2. On March 17, 2006, the California Department of Fish and Game (Cal Fish and Game) filed a timely request for rehearing of the February 16 Order.² The rehearing request is deficient because it fails to include a Statement of Issues, as required by

¹ 114 FERC ¶ 62,162 (2006).

² Cal Fish and Game correctly points out (rehearing request at 1) that the license order (114 FERC ¶ 62,162 at P 3) erroneously fails to list Cal Fish and Game as a party to the relicensing proceeding. In fact, on March 1, 2004, Cal Fish and Game filed a timely, unopposed motion to intervene, which was granted by operation of 18 C.F.R. § 385.214(c)(1) (2005).

On March 28, 2006, the Districts filed an answer to Cal Fish and Game's rehearing request. Answers to rehearing requests are not permitted (18 C.F.R. § 385.213(a)(2)), and the March 28 filing is accordingly rejected.

Order No. 663,³ which became effective September 23, 2005. Order No. 663, *inter alia*, amended Rule 713 of the Commission's Rules of Practice and Procedure to require that a rehearing request must include a "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.⁴ Under Rule 713, any issue not so listed will be deemed waived. In addition to not having the required Statement of Issues section, Cal Fish and Game's pleading does not clearly specify each issue and does not include Commission and court precedent on which it relies. Accordingly, we will dismiss Cal Fish and Game's rehearing request.⁵

3. In any event, the issues raised by Cal Fish and Game have no merit. Cal Fish and Game first argues that the licensee should be required to perform studies on the effect of project operations on downstream water temperatures and, if necessary, modify project operations based on the study results. Commission staff answered that argument in its Final Environmental Impact Statement (FEIS) for Project Nos. 2067, *et al.*⁶

³ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 *Fed. Reg.* 55,723 (September 23, 2005), *FERC Statutes and Regulations* ¶ 31,193 (2005) (to be codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)). Order 663-A, effective March 23, 2006, amends Order 663 to limit its applicability to rehearing requests. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 *Fed. Reg.* 14,640 (March 23, 2006), *FERC Statutes and Regulations* ¶ (2006) (to be codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)).

⁴ As explained in Order 663, the purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues. Having a clearly articulated Statement of Issues ensures that issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission. *See* Order No. 663 at P 3-4.

⁵ *Compare American Municipal Power-Ohio v. PJM Interconnection, L.L.C.*, 114 *FERC* ¶ 61,019 (2006) (order dismissing a complaint because it lacked a Statement of Issues).

⁶ *Final Environmental Impact Statement, Stanislaus River Projects*, issued March 1, 2005, at 46, 97-99, and C-5 and C-6.

Commission staff concluded, and we agree, that requiring studies and possible changes in operations at the Tulloch Project, as Cal Fish and Game recommends, would serve no useful purpose. Outflow from Tulloch reservoir is controlled under a 1988 agreement with the Bureau of Reclamation (Reclamation) (to which the Districts' adherence is required under Article 402 of the new license⁷). Under this agreement, the Tulloch reservoir is operated essentially as an afterbay of Reclamation's much larger, next-upstream New Melones dam and reservoir.

4. Reclamation is considering whether changes should be made to Tulloch's operation in order to benefit water temperatures and fishery resources downstream of the project in more comprehensive proceedings addressing temperature and flows in the lower Stanislaus River. As explained in the FEIS,⁸ it would be an inefficient use of resources to address operational changes to Tulloch reservoir when Reclamation, which has a greater ability than the Districts to effect changes in the Stanislaus River in the project area, is already assessing these matters on a more global level. To the extent that Reclamation does recommend changes to the operation of the Tulloch Project, we have the ability to consider such recommendations pursuant to the license's standard reopening provisions.⁹

5. Cal Fish and Game also argues, for the first time, that Commission should convene a hearing under section 10(j) of the Federal Power Act (FPA), 16 U.S.C. § 803(j), to allow Cal Fish and Game to discuss its recommendations. Section 10(j) of the FPA provides that the Commission shall include conditions in a license based on recommendations by federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, *et seq.*, to protect, mitigate damages to, and enhance fish and wildlife affected by the project. If the Commission believes that any such recommendation may be inconsistent with Part I of the FPA or other applicable law, the Commission and the agencies must attempt to resolve any such

⁷ 114 FERC ¶ 62,162 at P 22 and 64,428.

⁸ *See* FEIS at C-5 and C-6.

⁹ *See* standard Article 15 of the new license, contained in Form L-5 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States," and incorporated by reference in the license by ordering paragraph (E), 114 FERC ¶ 62,162 at 64,426.

inconsistency. This is usually done by telephone conference. However, Cal Fish and Game did not submit any recommendations for the Tulloch Project under FPA section 10(j),¹⁰ so there was no reason for Commission staff to apply the Commission's section 10(j) procedures in this case.

The Commission orders:

(A) California Department of Fish and Game's request for rehearing filed in this proceeding on March 17, 2006, is dismissed.

(B) The answer to the California Department of Fish and Game's request for rehearing, filed by the South San Joaquin and Oakdale Irrigation Districts on March 28, 2006, is rejected.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁰ See 114 FERC ¶ 62,162 at P 21.