

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

El Dorado Irrigation District.

Project No. 184-110

ORDER DISMISSING FILING AS DEFICIENT

(Issued December 8, 2006)

1. On October 16, 2006, the Director, Office of Energy Projects (Director), issued to El Dorado Irrigation District (District) a 40-year license for the continued operation and maintenance of the 21-megawatt El Dorado Hydroelectric Project No. 184, located on the South Fork of the American River and its tributaries in El Dorado, Alpine and Amador Counties, California.¹ On November 17, 2006, the District filed a request for rehearing of the license order, asking the Commission: (1) to extend the term of the license beyond 40 years, and (2) to modify the project's water quality certification issued by the California Water Resources Control Board (Water Board) under section 401 of the Clean Water Act² to conform to modifications made as a result of the District's appeal of its certification to the Water Board.
2. The District's rehearing request is deficient because it fails to include a Statement of Issues section separate from its arguments, as required by Rule 713 of the Commission's Rules of Practice and Procedure.³ Rule 713(c)(2) requires that a rehearing request must include a separate section entitled "Statement of Issues" listing

¹ 117 FERC ¶ 62,044 (2006).

² The conditions of the certification must be included as conditions of the license. See section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d) (2000).

³ 18 C.F.R. § 385.713(c)(2). See *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). See also, Order 663-A, effective March 23, 2006, which 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* ¶ 31,211 (2006) (codified at 18 C.F.R. § 385.713(c)(2) (2006)).

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. Accordingly, we will dismiss the District's rehearing request.⁵

3. In any event, we find the District's arguments with respect to the extension of the license term beyond 40 years unpersuasive. The Commission issues new licenses for 30-, 40-, or 50-year terms, depending on the extent of redevelopment, new construction, new capacity, or additional environmental measures required by the new license.⁶ We issue a 30-year license for projects with little or no such activities, a 40-year license for projects with a moderate amount of such activities, and a 50-year license for projects with extensive activities of this kind.⁷

4. The Director concluded that the El Dorado Project license requires a moderate level of mitigation and enhancement measures, for which a term of 40 years is appropriate.⁸

⁴ As explained in Order No. 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 *See, e.g., Duke Power Company, LLC*, 116 FERC ¶ 61,171 (2006), and *South Carolina Electric & Gas Company*, 116 FERC ¶ 61,218 (2006).

⁶ *See, e.g., Wisconsin Power Company*, 94 FERC ¶ 61,037 at 61,164 (2001).

⁷ *See, e.g., Consumers Power Company*, 68 FERC ¶ 61,077 at 61,383-84 (1994). For example, a 50-year new license is appropriate where project redevelopment entails building a new dam and powerhouse. *See Central Maine Power Co.*, 6 FERC ¶ 61,122 (1979).

⁸ The new license requires specified minimum stream flows, target and minimum water levels at the four project reservoirs, and ramping rates. In addition, the District must implement a comprehensive monitoring program and establish other operational and environmental protection, mitigation, and enhancement measures.

5. The District argues that extensive capital expenditures made at the close of the prior license term⁹ and continuing through the new term warrant a license term of more than 40 years. However, our comprehensive development analysis considers those only costs and measures that are authorized or required by the new license.¹⁰ It does not look back to the licensee's obligations under the prior license. Indeed, the types of repairs in question (replacement of Echo Tunnel due to failure, reconstructing Silver Lake Dam to reduce leakage, and replacing Flumes 49 and 50) are not typically included in relicensing costs, but are rather considered operation and maintenance costs that occur throughout the license term. The Commission has not considered such costs in determining license term. Rather, the Commission has found relevant to license term the extent of redevelopment, new construction, new capacity, or additional environmental measures. Also, it is not clear whether even adding the \$5 million as a new expenditure would change our characterization of the expenditures under the new license from "moderate" to "extensive."

6. It is also the Commission's policy to coordinate, whenever reasonable, the expiration dates of licenses for projects in the same basin, in order to facilitate future consideration of cumulative impacts of those projects.¹¹ Citing to this policy, the District argues that the 40-year license term should be extended to coincide with future expirations of new licenses for the Upper American River Project No. 2101 and the Chili Bar Project No. 2155, located in the same watershed. These two existing licenses expire July 31, 2007. However, at this time, we cannot predict with certainty if, when, or for what term the licenses for these projects will be issued. Thus, while it is Commission policy to coordinate license terms for related projects whenever possible, we recognize that exact coordination of expiration dates cannot always be accomplished.¹²

⁹ In 2005, the District replaced the failing Echo Tunnel with a pipeline at a cost of \$2 million. Renovations in 2006 include reconstruction measures at the Silver Lake Dam and complete replacement of Flumes 49 and 50 at a cost of \$3 million.

¹⁰ See *Ford Motor Company*, 110 FERC ¶ 61,236 (2005).

¹¹ *Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts*, 59 Fed. Reg. 66,718 (December 28, 1994), FERC Stats & Regs ¶ 31,010 at 31,219 (1994).

¹² In the event we issue new licenses for the Upper American River and Chili Bar Projects, we may at that time consider whether coordination of their license terms with the El Dorado Project is warranted.

7. With respect to the District's request to amend its license to include the conditions of the water quality certification for the project, as revised by the Water Board on appeal, the District has not provided sufficient information for us to do so. The District's rehearing request includes a November 15, 2006 letter and order from the Water Board requiring the Water Board to issue a revised certification that deletes one of the certification conditions. The letter also explains that two additional Water Board orders will be forthcoming. One will require changes to several certification conditions,¹³ and the other will issue a revised water quality certification that includes all the changes. These two orders have not been filed with the Commission. Until we receive a final amended water quality certification, we cannot revise the license order. Upon finalization of the water quality certification, the District may file a request to amend its license to reflect those changes.

The Commission orders:

El Dorado Irrigation District's request for rehearing filed in this proceeding on November 17, 2006, is dismissed.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹³ It will address instream minimum flow requirements in the South Fork American River, monitoring for foothill yellow-legged frog surveys, mountain yellow-legged frog surveys, fish population surveys for hardhead, and reporting on geomorphic sensitive sites.