

172 FERC ¶ 61,255
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Grand River Dam Authority

Project No. 1494-453

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued September 17, 2020)

1. On April 29, 2020, Commission staff issued a letter order (April 29 Letter Order) finding that Grand River Dam Authority (GRDA), the licensee for the Pensacola Hydroelectric Project No. 1494 (Pensacola Project), is not in violation of Article 5 of the project license. On May 29, 2020, the City of Miami, Oklahoma (City of Miami) timely filed a request for rehearing of the April 29 Letter Order. Pursuant to *Allegheny Def. Project v. FERC*,¹ the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),² however, we are modifying the discussion in the April 29 Letter Order and continue to reach the same result in this proceeding, as discussed below.³

I. Background

2. On April 24, 1992, the Commission issued a 30-year license to GRDA for the continued operation and maintenance of the 105.18-megawatt Pensacola Project that was

¹ *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

² 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

³ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the April 29 Letter Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

to expire on March 31, 2022.⁴ In 2019, the Commission granted a 38-month extension of the Pensacola Project license term to May 25, 2025.⁵ The Pensacola Project is located on the Grand (Neosho) River in Craig, Delaware, Mayes, and Ottawa Counties, Oklahoma, and includes a reservoir known as Grand Lake O' the Cherokees (Grand Lake). In general, the project boundary is at the 750-foot Pensacola Datum (PD) contour line,⁶ and it encompasses Grand Lake and a narrow strip of land around the reservoir's perimeter (approximately 521.86 miles of shoreline extending 66 miles upstream of the dam).⁷

3. Standard Article 5 of the license requires GRDA to, within five years from the date of issuance of the license (i.e., by April 24, 1997) 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 Pensacola Project. The licensee or its successors and assigns must retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights for occupancy and use, throughout the period of the license.⁸ The License Order approved the Pensacola Project's Exhibit G maps, which identifies all lands that are needed for project purposes.⁹

⁴ *Grand River Dam Auth.*, 59 FERC ¶ 62,073 (1992) (License Order).

⁵ As discussed below, the license term was extended to allow GRDA time to complete certain studies as part of the relicensing process for the Pensacola Project. *Grand River Dam Auth.*, 168 FERC ¶ 62,145, at P 35 (2019) (2019 Amendment Order), *order on clarification and reh'g*, 170 FERC ¶ 61,027 (2020) (2020 Clarification Order).

⁶ Pensacola datum (PD) is 1.07 feet higher than National Vertical Geodetic Datum (NVGD), which is a national standard for measuring elevations above sea level. Reservoir levels discussed in this order are in PD values unless otherwise specified.

⁷ *Grand River Dam Auth.*, 145 FERC ¶ 62,041, at P 4 (2013). Project boundaries are used to designate the geographic extent of the lands, waters, works, and facilities that the licensee identifies as comprising the licensed project and for which the licensee must hold the rights necessary to carry out the project purposes. *See Wis. Pub. Serv. Corp.*, 104 FERC ¶ 61,295 (2003) (explaining that only lands needed for "project purposes" are considered project lands that must be included with the project boundary).

⁸ License Order, 59 FERC ¶ 62,073 at ordering para. (D) (incorporating the articles in Form L-3 into the license).

⁹ *Id.* at ordering para. (B).

4. Article 401 of the license, as amended, requires GRDA to maintain specific target water surface elevations at the reservoir throughout the year, ranging from a minimum of 741 feet PD to a normal maximum elevation of 744 feet.¹⁰ GRDA shares responsibility for water storage and release operations with the U.S. Army Corps of Engineers (Corps) as part of a basin-wide system of flood control and navigation projects.¹¹ Historically, the Corps has managed flood flowage easements between elevations 750 and 757 feet PD at the dam, and elevations between 750 and 760 feet PD in the upper reaches of the reservoir. Whenever the reservoir elevation is within the limits of the flood pool (745-755 feet), the Corps directs the water releases from the dam under the terms of a 1992 Letter of Understanding and Water Control Agreement between GRDA and the Corps.¹²

5. On February 1, 2017, in accordance with section 15(b)(1) of the FPA,¹³ GRDA filed a Notice of Intent and Pre-Application Document for relicensing the project.

6. On December 26, 2018, the City of Miami filed a complaint with the Commission alleging that approximately 13,000 acres of non-federal land located outside the Pensacola Project's project boundary (at the upper reaches of Grand Lake and along the Neosho River near the city) have been repeatedly flooded by GRDA's project operations since the license was issued.¹⁴ The complaint asked the Commission to find that GRDA is in violation of Article 5 for failure to acquire the 13,000 acres of flowage rights, and order GRDA to obtain these rights. GRDA's January 15, 2019 answer to the complaint asserted that project operations are not the cause of upstream flooding and that by statute the Corps has exclusive jurisdiction for flood control at the project, including the acquisition of lands needed to support the Corps' flood control operations.

7. By letter dated January 28, 2019, Commission staff notified City of Miami that, consistent with Commission practice, the complaint had been referred to the Commission's Office of Energy Projects, Division of Hydropower Administration and

¹⁰ *Grand River Dam Auth.*, 160 FERC ¶ 61,001 (2017).

¹¹ For purposes of flood control in the Grand River Basin, the Corps, Tulsa District, manages an expansive system of 11 large reservoirs, of which Grand Lake is one located in the middle of the flood control system.

¹² *Grand River Dam Auth.*, 77 FERC ¶ 61,251 (1996).

¹³ 16 U.S.C. § 808(b)(1) (2018).

¹⁴ City of Miami December 26 Complaint at 5.

Compliance.¹⁵ On February 27, 2019, the city sought rehearing of staff's letter, objecting to the referral and arguing that the Commission should have addressed the complaint under its formal complaint procedures. The request for rehearing was dismissed by a March 26, 2019 Secretary's notice, which stated that the January 28 Letter was an initial procedural step and not a final action subject to rehearing. On April 25, 2019, the City of Miami filed a request for rehearing of the March 26 Notice. In a February 20, 2020 Order denying rehearing, the Commission noted that in addressing the December 26 complaint staff "would review the complaint, request additional information, if necessary, and provide a written response regarding the allegations."¹⁶

8. The April 29 Letter Order found that it was unclear whether it was GRDA's operation of the project pursuant to the license or the flood control operations directed by the Corps that had caused the flooding referenced in complaint and that in the absence of substantial evidence that GRDA's project operations had regularly caused the upstream flooding at issue, the Commission had not required GRDA to bring any additional land into the project boundary.¹⁷ The April 29 Letter Order explained that, in any event, Section 7612 of the National Defense Authorization Act for Fiscal Year 2020, titled *Pensacola Dam and Reservoir, Grand River, Oklahoma* (Pensacola Act), provides, with respect to the Pensacola Project, that "the licensing jurisdiction of the Commission for the project shall not extend to any land or water outside the project boundary" and that "any land, water, or physical infrastructure or other improvement outside the project boundary shall not be considered to be part of the project."¹⁸

9. On May 29, 2020, City of Miami filed a timely request for rehearing of the April 29 Letter Order, claiming that it has repeatedly presented substantial evidence that GRDA's operation of the project has caused unauthorized flooding for decades so that GRDA should have acquired 13,000 acres of additional flowage rights, in order to comply with Article 5. The city further asserts that Section 28 of the FPA, which provides that changes to the FPA shall not affect issued licenses or the rights of licensees,

¹⁵ *Grand River Dam Auth.*, Project No. 1494-445 (Jan. 28, 2019) (delegated order).

¹⁶ *Grand River Dam Auth.*, 170 FERC ¶ 61,136, at P 9 (2020). The April 29 Letter Order at 1-2 discusses the procedural history leading up to the February 20, 2020 Order (February 20 Order).

¹⁷ April 29 Letter Order at 3.

¹⁸ *Id.* at 4 (citing National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 §§ 7612(b)(3)(A), (b)(3)(B), 133 Stat. 1198, 2313 (2019)).

bars the Pensacola Act from affecting the Commission's jurisdiction over the existing license.

II. Discussion

10. As an initial matter, we note that the issue of whether, and to what extent, GRDA and the Corps are respectively responsible for flood control operations at the Pensacola Project is not presented by this case. These responsibilities are clearly delineated in the relevant statutes and regulations, as reflected in the project license. Rather, the issue before the Commission is whether, because of frequent flooding of lands outside the project boundary, GRDA is in violation of Article 5 of its project license for failure to obtain flowage rights on these lands.

11. On rehearing, City of Miami maintains that for decades it has presented the issue of upstream flooding to the Commission and that the Commission has "ignored" or "turned a blind eye to GRDA's obstruction of efforts to investigate the unauthorized flooding."¹⁹ The city contends that the April 29 Letter Order improperly relies on the fact that the Commission has not previously found GRDA in violation of Article 5.²⁰

12. Contrary to City of Miami's claim, the April 29 Letter Order did not make what would have been the circular argument that GRDA cannot be in violation of Article 5 now because the Commission has never previously found an Article 5 violation. Rather, the order states that because there was no substantial evidence that project operations are causing the upstream flooding at issue, the Commission has never had cause to require GRDA to bring any additional lands into the project boundary. Accordingly, GRDA was not found to be in violation of Article 5.

13. City of Miami's assertion that the Commission ignored its claims over the years is also without merit. City of Miami and others have made numerous filings with respect to

¹⁹ City of Miami Rehearing Request at 3, 12.

²⁰ *Id.* at 10. Citing *Entergy Services Inc.*, 127 FERC ¶ 61,226, at P 10, n. 11 (2009) (quoting *Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 834 (D.C. Cir. 2005), the city contends that "past inaction by the Commission" with respect to whether the project regularly floods property where GRDA does not hold the rights required by Article 5 "is not the legal equivalent of a merits finding," and that any "attempt to give . . . past inaction preclusive effect violates the doctrine of *res judicata*." It is not clear why the city makes this argument, since the subject has not arisen in these proceedings.

upstream flooding, to which the Commission has fully responded.²¹ While we recognize the seriousness of the issues raised by the city, it has not provided substantial evidence that the flooding has been caused by GRDA such that the licensee should be required to acquire additional flooding easements.

14. City of Miami also argues that, contrary to the Commission's directive in the February 20 Order, the April 29 Letter Order

did not review the evidence in the Complaint—unrebutted by GRDA—that GRDA's Project operations caused unauthorized flooding. It did not request additional information. And it did not make a substantive determination as to whether unauthorized flooding is occurring.²²

15. We reject these claims. It is clear that staff indeed did review the evidence in the complaint.²³ We also find no basis for the City of Miami's claim that the evidence set forth in its complaint is "unrebutted" by GRDA: GRDA states in its reply to the complaint that its "longstanding position in the Commission's record is that lands outside the current Project boundary are *not* flooded due to Project operations."²⁴

16. In fact, notwithstanding the lack of evidence to support a claim that GRDA is violating its current license, the Commission has previously explained that the flooding issue can be explored in depth in the relicensing proceeding for the GRDA Project.²⁵ In a

²¹ See, e.g., *Grand River Dam Auth.*, 67 FERC ¶ 62,131, at 64,263 (finding violation of Article 401, and no violation of Article 5 based on GRDA's representation of no unauthorized upstream flooding), *rescinded* with respect to Article 401 violation, 67 FERC ¶ 62,239 (1994); *Grand River Dam Auth.*, 77 FERC ¶ 61,251 (1996) (approving a change in the Article 401 rule curve); *Grand River Dam Auth.*, 140 FERC ¶ 62,123 (2012); *Grand River Dam Auth.*, 152 FERC ¶ 61,129 (2015); *Grand River Dam Auth.*, 156 FERC ¶ 61,106 (approving variances to the rule curve in 2012, 2015, and 2016); and *Grand River Dam Auth.*, 160 FERC ¶ 61,001 (2017) (approving a permanent change to the Article 401 rule curve and rejecting requests to condition proposed amendment on the acquisition of additional property rights due to flooding concerns).

²² City of Miami Rehearing Request at 11.

²³ See *supra* note 11.

²⁴ GRDA January 15, 2019 Reply at 4 n.17.

²⁵ On relicensing, the Commission can require a licensee to alter its project boundaries, if appropriate.

2017 order approving a permanent change to the project's rule curve, the Commission explained that the issue of ongoing flooding due to the project is more appropriately addressed during relicensing.²⁶ Accordingly, on November 8, 2018, as required by the Integrated Licensing Process schedule, Commission staff issued a Study Plan Determination that sets forth those studies that are required in order to address identified data needs and reasonably inform staff's National Environmental Policy Act analysis of the environmental effects of continued project operation under a new license. Because of issues raised throughout the existing license term and during scoping regarding upstream flooding, including the extent of flooding that is attributable to project operation, the Study Plan Determination requires GRDA to complete a comprehensive Hydrologic and Hydraulic (H&H) Modeling Study (i.e., Flooding and Inundation Studies) to determine the duration and extent of inundation under the project's current operation and support an analysis of project-related flooding. Thus, the Commission established a means for examining during relicensing the issue of what lands are needed for project purposes.

17. The dissent contends that the Commission should set this matter for hearing and require GRDA to complete the needed studies on an expedited basis in order to determine the extent of project-related flooding, rather than resolving the matter during relicensing. However, the dissent does not explain how the H&H Modeling Study, which is required to be filed by September 30, 2021,²⁷ could be performed more quickly than is currently required, how long it would take to hold a hearing, which would likely involve extensive discovery and be hotly contested, and, given the legal constraints imposed by the Pensacola Act, what remedy could be imposed with respect to the City of Miami's allegations. Further, the dissent also does not explain how developing an adjudicatory record on only one of the many issues that are being considered on relicensing and attempting to resolve that single issue would be consistent with our obligation to balance all public interest issues on relicensing.

18. However, notwithstanding the foregoing, much of which took place before passage of the Pensacola Act, that act would preclude the Commission from granting the relief City of Miami seeks, even were we to agree that GRDA was in violation of Article 5 of the project license. As noted above, the Pensacola Act specifically deprives the Commission of jurisdiction over "any land or water outside the project boundary" and further provides that lands outside the project boundary shall not be considered to be part

²⁶ *Grand River Dam Auth.*, 160 FERC ¶ 61,001 at P 49.

²⁷ 2020 Clarification Order, 170 FERC ¶ 61,027, at P 13 (citing 2019 Amendment Order, 168 FERC ¶ 62,145 at ordering para. (C) and Appendix A).

of the project. Accordingly, we cannot, as a matter of law, require GRDA to acquire and bring additional lands within the project boundary.²⁸

19. The City of Miami asserts that section 28 of the FPA bars the Pensacola Act from affecting the Commission's jurisdiction under the existing license. Section 28 states:

The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder.²⁹

The city asserts that section 28 prohibits subsequent legislation such as the Pensacola Act because the latter violates the two prongs of the section: it has an effect on an existing license and it has an effect on the rights of licensees under such license.³⁰ The city claims that because there is no express reference to section 28 in the Pensacola Act, repeal would need to be implied which, it contends, is disfavored, and a court will not find implied repeal "unless an intent to repeal is 'clear and manifest.'"³¹

20. As an initial matter, it is not clear how the Pensacola Act, the sole effect of which is to limit the Commission's jurisdiction with respect to the Pensacola Project, can be said to alter, amend, or repeal any particular provision of the FPA. It is not uncommon for Congress to pass legislation for the limited purpose of addressing discrete issues for a particular licensed project, without revising the FPA itself.³² Further, assuming,

²⁸ We disagree with the dissent's assertion that the limits on the Commission's jurisdiction established by the Pensacola Act are unclear and do not preclude the relief requested.

²⁹ 16 U.S.C. § 822.

³⁰ City of Miami Rehearing Request at 16.

³¹ *Id.* at 16-17.

³² *See, e.g.*, Pub. L. 113-122, 128 Stat. 1375 (June 30, 2014) (authorizing Commission to reinstate terminated licenses and extend deadline for start of construction for two licenses for hydroelectric projects located in Hartford County, Ct.); Pub. L. 107-376, 116 Stat. 3114 (Dec. 19, 2002) (authorizing extension of time for start of construction for City of Albany Hydroelectric Project No. 11509); Pub. L. 105-317 (Oct. 30, 1998) (authorizing Commission to issue a license for the Fall Creek Project No. 1169 located within a national park, contrary to FPA prohibition (16 U.S.C. § 797(c)) on locating new hydroelectric projects within a national park); and Pub. L. 104-246, 120 Stat. 3146 (October 9, 1996) (authorizing Commission to issue up to three additional

arguendo, that the Pensacola Act is inconsistent with section 28 of the FPA, it is a basic tenet of statutory construction that where there are two irreconcilably conflicting statutes, subsequent legislation is to be construed as overriding earlier, inconsistent legislation³³ and, similarly, that specific legislation overrides general provisions.³⁴

21. Most important, to the extent the City of Miami argues that the Pensacola Act is unlawful, that is a matter for the courts to determine, and is outside of our jurisdiction.

The Commission orders:

In response to City of Miami's request for rehearing, the April 29 Letter Order is hereby modified, and the result is sustained, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

two-year extensions of time to commence and compete construction for the Tygart Dam Project No. 7307).

³³ *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (“the more recent of two irreconcilably conflicting statutes governs”).

³⁴ *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment”).

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Grand River Dam Authority

Project No. 1494-453

(Issued September 17, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because I believe that the Commission should set the City of Miami's complaint for hearing to resolve the disputed issues of material fact. The City has suffered from repeated—often serious—flooding since the Commission issued a license to Grand River Dam Authority's (GRDA) Pensacola Project in 1992.¹ It is our responsibility to gather the evidence necessary to establish the cause of that flooding and, if appropriate, take whatever action is required by the current license to protect the City and its residents. We simply cannot continue to kick the can down the road.

2. The City alleges that the Pensacola Project has caused repeated flooding of over 13,000 acres of land in and around the City²—an area roughly the size of Manhattan. The City argues that the flooding violates Article 5 of the Pensacola Project's license, which requires GRDA to acquire all the lands it needs to operate the project.³ To address this alleged violation, the City seeks a Commission order finding that GRDA is violating the license and requiring GRDA to obtain all necessary flowage rights to lands outside the project boundary.⁴ GRDA responds that the project operations are not causing the flooding and that the Army Corps of Engineers is responsible for any flooding associated with the Pensacola Project.

3. To resolve the claims in the City's complaint, the Commission must first determine the cause of the flooding—a question of material fact that cannot be resolved

¹ For example, the City states that between 1992 and 1997, it flooded 14 times, and from July 2007 to June 2010, the City and surrounding area was suffered 23 separate floods. City of Miami December 26 Complaint at 18-19.

² *Id.* at 5.

³ *Id.* at 4.

⁴ *Id.* at 1.

on the record before us.⁵ Answering that question appears to require certain technical studies, including a comprehensive Hydrologic and Hydraulic (H&H) Modeling Study, some of which are already underway as part of the Pensacola Project's upcoming relicensing. These studies would allow the Commission to determine the cause of the flooding and, by extension, whatever remedial actions GRDA must take to remain in compliance with Article 5 of its license. There is no reason to leave the City of Miami in limbo, forced to wait for relicensing which is at least several years away.⁶ Instead, we ought to move expeditiously to provide the City and its residents an indication of their potential path forward and what it would take to resolve this issue once and for all. They deserve nothing less.

4. The Commission, however, denies the complaint, concluding that the record lacks substantial evidence that GRDA is responsible for the flooding. But that is only because we have not directed GRDA to develop the necessary studies as part of this complaint proceeding. Accordingly, I would set the matter for hearing, require GRDA to expeditiously complete the H&H study, and then determine on that fully developed record who bears responsibility for the flooding and what remedy the public interest requires.

5. The Commission responds that a hearing "would likely involve extensive discovery and be hotly contested."⁷ No doubt it would. But that is no excuse for shirking our responsibilities by summarily dismissing the City's complaint rather than conducting the fact-finding necessary to address its claims regarding the *existing* license, which does not expire until 2025. Our responsibility to the public interest does not extend only to those matters that can be easily resolved.

6. In addition, the Commission also suggests that "developing an adjudicatory record on only one of the many issues that are being considered on relicensing" would somehow be inconsistent with our "obligation to balance all public interest issues on relicensing."⁸ This complaint, however, raises serious concerns about GRDA's compliance with its *existing* license, which is the only issue currently before us. The Commission attempts to

⁵ See, e.g., *PJM Interconnection, L.L.C.*, 172 FERC ¶ 61,183, at P 24 (2020) (concluding that a hearing is appropriate where the filing "raises issues of material fact that cannot be resolved based on the record before" the Commission); see also *Ohio Power Co. v. FERC*, 744 F.2d 162, 170 (D.C. Cir. 1984) ("[A]n evidentiary hearing generally is required for resolving issues of material fact.").

⁶ The current license for the Pensacola Project does not expire until May 25, 2025.

⁷ *Grand River Dam Auth.*, 172 FERC ¶ 61,255, at P 17 (2020).

⁸ *Id.*

confuse things by pointing to the upcoming relicensing proceeding. That proceeding, however, is years, perhaps several years, away from addressing the upstream flooding, leaving the City up the proverbial creek.

7. The Commission also suggests that even if it were to find GRDA responsible for the flooding, the recently enacted Pensacola Act may preclude it from enforcing Article 5 of the Pensacola Project's license. I do not agree that the law so clearly prevents us from providing the City any relief whatsoever. In any case, I believe that we have a public interest responsibility to the City and its residents, which requires us to do everything we can to determine the cause of the flooding and implement whatever remedies may be appropriate instead of just unilaterally waving the white flag at the outset.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner