

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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.<sup>1</sup> 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 City<sup>2</sup>—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.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 1.

on the record before us.<sup>5</sup> 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.<sup>6</sup> 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."<sup>7</sup> 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."<sup>8</sup> 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

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<sup>5</sup> 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.").

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

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

<sup>8</sup> *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.

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Richard Glick  
Commissioner