

106 FERC ¶ 61, 173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Sabine River Authority of Texas
Sabine River Authority of Louisiana

Project No. 2305-018

ORDER REJECTING REQUEST FOR REHEARING

(Issued February 18, 2004)

1. The Toledo Bend Bi-State Alliance (Alliance) has filed a request for rehearing of a November 24, 2003 analysis by Commission staff concluding that the Commission need not reopen the license for the Toledo Bend Project No 2305 to set minimum reservoir levels requested by the Alliance. Because the request for rehearing was not timely filed, we are required by law to reject it. Nevertheless, we will address the substantive concerns raised by the Alliance, and we find that Commission's staff's analysis was reasonable.

BACKGROUND

2. The 85-Megawatt Toledo Bend Project is located on the Sabine River on the Texas-Louisiana border. The project includes a dam, a powerhouse, and a 65-mile-long reservoir with a surface area of 185,000 acres and about 1,200 miles of shoreline at the reservoir's normal maximum surface elevation of 172 feet mean sea level (msl). See Toledo Bend Project, Final Analysis (Final Analysis) (Commission staff, November 24, 2003). In 1963, the Commission issued an original license authorizing the Sabine River Authority of Texas and the Sabine River Authority of Louisiana (Authorities) to construct and operate the project. See 30 FPC 1009.

3. Article 37 of the project license states that "[t]he reservoir operation schedule shall be adjusted to accommodate the recreation use of the reservoir area as far as such adjustment is compatible with the primary purpose of the project and requirements of downstream releases." License Article 43 states that "[t]he Licensees shall 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, after notice and opportunity for hearing."

4. Project reservoir levels may vary during the year from a normal maximum pool elevation of 172 feet msl to a minimum pool level of 162.2 feet msl. Typically, the reservoir is at its highest during the winter and early spring months. Beginning in May, the Authorities gradually draw down the reservoir, which reaches its lowest level in the fall. In practice, the reservoir level rarely drops below 165 feet msl. Final Analysis at 12.¹

5. In July 1998, the Alliance filed with the Commission a request that the Commission set 168 feet msl as the minimum level for the project reservoir, pursuant to license Articles 37 and 43. According to the Alliance, this level would not significantly affect power production and would greatly benefit recreational use of the reservoir and thereby increase local revenue.

6. Following the receipt of the Alliance's request, Commission staff initiated a review of the matter. On November 23, 1999, the Director, Office of Energy Projects (Director), sent a letter to the Alliance, explaining that Commission staff had reached an initial conclusion that there was not sufficient evidence to demonstrate that it was necessary to reopen the Toledo Bend Project license under license Article 43 to set a minimum reservoir level of 168 msl. See letter to Larry E. Kelly (Chairman, Toledo Bend Bi-State Alliance) from J. Mark Robinson.

7. In addition to the review which culminated in the Director's letter, Commission staff facilitated a nearly two-year-long collaborative process, in an effort to explore the concerns of local residents. Much of the discussion focused on a 1998 Brown & Root study, commissioned by the Authorities, which examined eight possible operating scenarios for the project. In the course of the collaborative process, two groups took diametrically opposed positions. The Alliance, as discussed above, asserted that the Commission should set a minimum reservoir level of 168 feet msl, to promote recreation. The Sabine River Action Coalition (Coalition), a group of residents along the Sabine River downstream of the project, advocated setting a lower reservoir level and implementing other measures that the Coalition asserted would decrease flooding below the project.

8. On July 12, 2002, the Director sent a letter to the parties involved in the collaborative process, noting the participants' inability to reach agreement on reservoir operating levels at the project, and explaining that Commission staff would prepare a preliminary analysis of the Alliance's request to establish a 168-foot msl minimum

¹ From 1969-1997, the reservoir elevation varied from a low of 164.77 feet msl in 1987 to a high of 173.73 in 1989. The average reservoir level during the period was 169.64 feet msl. Final Analysis at 13.

reservoir level and of the project's flood control capabilities. The participants would have an opportunity to comment on the preliminary analysis, after which Commission staff would prepare final findings.

9. On December 30, 2002, Commission staff, after examining historical data, the Brown & Root study, and other information in the record, issued its preliminary analysis. With respect to the minimum reservoir level, the analysis concluded that: (1) current reservoir operations are sufficient to meet the overall public recreation needs of the area, including boating access; (2) setting a minimum reservoir level of 168 feet msl would not significantly enhance public recreation opportunities or private reservoir access; and (3) setting a minimum level of 168 msl would slightly reduce energy generation and operational flexibility, and could, under certain circumstances, decrease the project's small contribution to flood control. The preliminary analysis therefore concluded that there was insufficient evidence to support initiation of a proceeding to set the project's minimum reservoir levels as suggested by the Alliance.

10. With respect to flood control, the preliminary analysis concluded that: (1) as designed and currently operated, the project cannot provide significant flood control benefits; (2) the project itself does not contribute to downstream flooding; and (3) lowering the reservoir level to 162 feet msl, as would be necessary to provide flood control for large storms, would prohibit power production and adversely affect recreation. The preliminary analysis therefore stated that project operations should not be changed for flood control purposes.²

11. On November 24, 2003, following the receipt of public comment on the preliminary analyses, Commission staff issued its final analysis with respect to minimum reservoir levels and flood control at the Toledo Bend Project. The analyses affirmed the preliminary analyses and again concluded that no changes in project operations were warranted.

12. On December 30, 2003, the Alliance filed a letter expressing its disappointment with Commission staff's final analysis and asking for an oral hearing before the Commission.

² While Commission staff did not recommend any change to project operations with respect to flood control, it did conclude that a number of improvements should be made to the project's Emergency Action Plan, which provides early notification in the event of dam safety emergencies and large spillway releases. These changes have been made. See Final Analysis at 16-20.

DISCUSSION

13. Section 313(a) of the Federal Power Act, 16 U.S.C. § 8251(a), states that requests for rehearing of orders issued by the Commission must be filed within 30 days after the issuance of the order. The Director's order was issued on November 24, 2003.

Accordingly, the deadline for filing a request for rehearing was December 24, 2003.

Because the Alliance's pleading was not filed until December 30, 2003, it is not a timely request for rehearing, and we are required by law to reject it.³ However, we will in any event respond to the points raised by the Alliance.

14. The Alliance argues that Commission staff has misinterpreted the record, in particular erring in its comparison of Brown & Root's simulation No. 6 to actual operations. Further, the Alliance asserts without elaboration that there would be significant improvements to recreation if the minimum reservoir level were set at 168 msl.

15. Under Brown & Root's simulation No. 6, the project reservoir would generally be kept at 168 feet msl. See Final Analysis at 16. Brown & Root concluded that, under this scenario, project generation would increase from an average of 6,912.53 million kilowatt hours (kWh) to 7,164,58 kWh, a gain of 252.05 million kWh, or 3.6 percent.

16. As Commission staff explained, Brown & Root's methodology was flawed. Specifically, staff noted that historical data showed that actual average reservoir levels during the 28-year study period were higher than the average level assumed for simulation No. 6.⁴ Staff stated that the average higher reservoir level logically would have meant that more water was available for generation, so that Brown & Root should have concluded that historical generation was higher than the generation that would have

³ See City of Tacoma, Washington, 105 FERC ¶ 61,333 (2003) at n.19, citing Sierra Association for Environment v. FERC, 791 F.2d 1403 (9th Cir. 1986). While the Alliance does not specifically request rehearing, it objects to staff's Final Analysis and references Section 313(a) (the rehearing provision of the Federal Power Act), and we will therefore construe its pleading as a request for rehearing. Our decision to discuss the issues raised by the Alliance does not cure the untimely nature of the request for rehearing, and thus this order will not be subject to further consideration by the Commission or appellate review. Because we are required to reject the request for rehearing, we need not address here the issue of whether rehearing lies from the Commission's exercise of its discretion with respect to initiating or not initiating a proceeding.

⁴ See n.1, supra.

occurred under simulation No. 6. Id. at 16-17. Also, as staff noted, Brown & Root overestimated generation under simulation No. 6 by not taking into account decreases in generation caused by mechanical issues and varying hydrological conditions (in other words, comparing actual generation figures with optimal generation figures under simulation No. 6). See id. at 17. Moreover, the Authorities do not always operate the project solely for generation purposes, so that historic figures do not represent optimal power production. Id. Thus, comparing historic operations to optimal generation under simulation No. 6 does not yield a fair comparison. Staff's criticisms of the Brown & Root study appear reasonable, and the Alliance provides no evidence that staff is incorrect.

17. With respect to the impact of simulation No. 6 on recreation, Commission staff's detailed analysis shows that the project includes numerous recreation facilities, such as boat ramps, marinas, fishing, piers, and access points, and that, under current operating conditions, these provide a range and level of recreational use of project waters comparable to that found at similar projects. Id. at 18-20. Further, the reservoir has historically dropped below 166 feet msl (a point at which some evidence suggests recreation may become constrained) only about 6.5 percent of the time. Id. at 20. While in low water years, operation under simulation No. 6 could improve private access to the reservoir on some days for some private property owners, it would not offer significant improvement in normal water years. Id. at 21-24. In sum, current operations provide a reasonable access to recreation at the project, and there is accordingly no basis for altering projects operations.

18. The Alliance also disagrees with Commission staff's conclusion that setting the minimum reservoir level at 168 msl would slightly increase the chance of downstream flooding. While the Alliance acknowledges that flooding can occur under the right rain event, it states that the project was not built for flood control, while recreation and economic development are project purposes.

19. As staff's analysis explains, the Toledo Bend Project cannot generally provide flood control without significant negative impacts on both power production and recreation, and staff does not recommend that the project's basic operations be altered to attempt to provide flood control. See id. at 34-35, 47-48, 53. At the same time, as staff concluded after analyzing recent significant storms, the project's flood control capabilities, such as they are, would be reduced if the reservoir level was kept higher. See, e.g., id. at 51 (January 1999 storm could have been contained if reservoir started at 162 feet msl, but could not be totally contained if reservoir started at 168 feet msl). This conclusion rests on the common sense general principle that the greater the amount of available storage, the more flood control a project reservoir can provide.

The Commission orders:

The request for rehearing, filed by the Toledo Bend Bi-State Alliance on December 30, 2003, is rejected.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.