

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern California Edison Company

Project No. 344-015

ORDER DENYING REHEARING

(Issued March 4, 2004)

1. The Southern California Edison Company (Edison), licensee for the San Gorgonio Hydroelectric Project No. 344, seeks rehearing of our order of October 8, 2003, in which we affirmed the validity of the annual license for the project and required the filing of a surrender application.<sup>1</sup> The original license has expired, and Edison has ceased operating the project for power production. Edison therefore argues that the Commission lacks jurisdiction to require a surrender application and to oversee the disposition of project works. For the reasons discussed below, we find that the San Gorgonio Project is subject to the Commission's mandatory licensing jurisdiction under Section 23(b)(1) of the Federal Power Act (FPA). As a result, the Commission was required to issue, and Edison was required to accept, an annual license for the project, and Edison must file an application to surrender its license. We therefore deny rehearing.

**BACKGROUND**

2. The 2.25-megawatt San Gorgonio Project was originally licensed in 1923. The Commission issued a new license for the project in 1983, with an expiration date of April 26, 2003.<sup>2</sup> The project is located along the San Gorgonio River in Riverside and San Bernardino Counties, California, and occupies U.S. lands within the San Bernardino

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<sup>1</sup> Southern California Edison Co., 105 FERC ¶ 61,046 (2003).

<sup>2</sup> Southern California Edison Co., 23 FERC ¶ 61,240 (1983). The original license expired in 1973, and the Commission issued a new license for 30 years from the expiration of the old license.

National Forest.<sup>3</sup> The project as licensed consists of two diversion dams on the East and South Forks of the Whitewater River, a smaller diversion structure on Black Wheel Creek,<sup>4</sup> concrete lined canals, two steel forebay tanks (one of which has been removed), two penstocks, two powerhouses, and transmission lines. There are no storage reservoirs. The powerhouses are located in the drainage area of the San Gorgonio River, which is a tributary of the Whitewater River. Historically, the project has operated to divert water from the Whitewater River for power generation and then deliver it to the Banning Heights Mutual Water Company (Banning Heights) for domestic and agricultural purposes. As explained in more detail below, the project now diverts the water and delivers it through a combination of existing and new structures to Banning Heights, without using it for power generation.

3. In anticipation of relicensing, on April 27, 1998, Edison filed a notice of intent to file an application for a new license for the San Gorgonio Project. In September 1998, a storm damaged one of the diversion dams and both forebay tanks, and the project ceased generating power. On August 23, 1999, following an inspection of the project, the Commission staff referred Edison to the requirement that licensed projects be maintained in satisfactory operating condition and requested that Edison provide a plan and schedule for restoring project operation.<sup>5</sup> By letter dated September 30, 1999, Edison responded that it had refurbished the diversion structure and was developing a plan to remove the San Gorgonio Tank No. 1. Edison added that the San Gorgonio Tank No. 2 was not safe for operation, and that Edison was analyzing whether rebuilding or replacing the tank would be economically feasible.<sup>6</sup>

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<sup>3</sup> The project occupies 237.37 acres of U.S. lands other than for transmission line right-of-way, and 8.6 acres of U.S. lands for transmission line right-of-way. See ordering paragraphs (B) and (D) of the license order, 23 FERC ¶ 61,240 at 61,521, as modified by 45 FERC ¶ 62,112 (1988) (approving revised exhibits showing changes made to avoid crossing the Morongo Indian Reservation and revising annual charges).

<sup>4</sup> See Southern California Edison Co., 27 FERC ¶ 62,309 (1884) (approving Exhibit L showing Black Creek diversion structure).

<sup>5</sup> Letter from Noel Folsom, FERC, to Wesley Moody, Edison (filed August 26, 1999).

<sup>6</sup> Letter from Wesley C. Moody, Edison, to Noel Folsom, FERC (filed Oct. 7, 1999).

4. On December 7, 1999, Edison filed a notice of withdrawal of its notice of intent. Edison explained that, after further analysis, it had decided not to file an application for a new license for the project. Edison added that it was examining potential options for disposition of the project, including a sale of the project.

5. In November 2000, a landslide damaged the project's concrete flowline. Immediately after Edison repaired it, further erosion in November 2001 damaged another section of the flowline downstream of the newly replaced portion. Edison sought and obtained Commission authorization to complete the necessary repairs. Among other things, the Commission's Regional Director required that the repairs include an emergency shut-off system, to minimize environmental damage in case of future flowline failures.<sup>7</sup> However, Edison subsequently informed the Commission that it had abandoned its plan because of the hazardous condition of the hillside and the significant cost of the proposed repairs. Instead, with the Commission staff's knowledge and the Forest Service's authorization, Edison completed a temporary, non-project water conveyance system, consisting of a new diversion and an 8-inch diameter polypropylene pipe, to re-route the water to avoid the damaged water conveyance facilities.<sup>8</sup> Construction began on July 15, 2002, and the new temporary flowline was placed in service on August 30, 2002, thus allowing Edison to resume delivering water to Banning Heights.

6. Edison did not file an application for a new license, which was due by April 26, 2001, and no other applications were received. Consequently, on July 9, 2001, the Commission issued a notice soliciting a new round of applications for the San Gorgonio

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<sup>7</sup> Letter from James Goris, FERC, to Lawrence Hamlin, Edison (dated September 6, 2001). The letter required Edison to start construction as soon as possible, but no later than October 1, 2001.

<sup>8</sup> Since 2001, water from the break in the project flowline has flowed down the hillside into Burnt Canyon. The new diversion structure in Burnt Canyon is located on property owned by the City of Banning, and the new flowline is located almost entirely on private and Forest Service land. Water is now diverted from Burnt Canyon into the temporary flowline and is delivered into the San Gorgonio No. 1 tailrace. Thereafter, the existing project flowline conveys the water through the San Gorgonio No. 2 project works, without generating power, to an existing tank owned by Banning Heights. See letters from Walter D. Pagel, Edison, to Takeshi Yameshita, FERC, dated June 11, 2002; August 14, 2002; and September 12, 2002.

Project.<sup>9</sup> Two entities, the San Gorgonio Pass Water Agency (Water Agency), and L & S Energy, filed timely notices of intent to file an application for a new license,<sup>10</sup> but neither subsequently filed an application for a new license for the project.

7. On March 24, 2003, the Water Agency filed a status report indicating that it was negotiating an agreement with Edison to develop the information needed to accomplish the surrender of Edison's license and transfer of the facility to the Water Agency as a "water only project."<sup>11</sup> On April 16, 2003, the Commission requested that Edison file a schedule for filing a surrender application for the project. On April 26, 2003, the license for the San Gorgonio Project expired. On May 9, 2003, the Commission issued a notice of issuance of an annual license for the project, effective for a period from April 27, 2003, through April 26, 2004, and renewing automatically without further order or notice until issuance of a new license for the project or other disposition under the FPA.

8. On May 19, 2003, Edison filed a response to the Commission staff's request of April 16, 2003. Edison stated:<sup>12</sup>

The Commission issued Project license expired on April 26, 2003. SCE does not want a new license for the Project. As the Project no longer operates and a new license application was not filed, SCE believes the Project is no longer under Commission jurisdiction. Consequently, SCE questions the need to submit an application for license surrender.

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<sup>9</sup> See 18 C.F.R. § 16.25 ("orphaned project" procedures).

<sup>10</sup> These entities filed their notices on August 20, 2001, and October 9, 2001, respectively. Letter from Stephen P. Stockton, Water Agency, to David P. Boergers, FERC, filed August 20, 2001; Letter from Ted S. Sorenson, L & S Energy, to Linwood A. Watson, FERC, filed October 9, 2001. On August 20, 2002, the Water Agency requested a 3-month extension of time, until May 20, 2003, to file its license application, which the Commission staff granted. L & S Energy did not respond to the Commission staff's request of August 28, 2002, for a licensing status report.

<sup>11</sup> Letter from Stephen P. Stockton, Water Agency, to Magalie R. Salas, FERC, filed March 24, 2003.

<sup>12</sup> Letter from Walter D. Pagel, Edison, to Magalie R. Salas, FERC, filed May 15, 2003.

9. The Director of the Commission's Office of Energy Projects responded by letter dated May 30, 2003, stating that an annual license had issued for the project and could be surrendered only upon mutual agreement between the licensee and the Commission, pursuant to Section 6 of the FPA. On June 6, 2003, Edison filed a letter stating that it did not need or want an annual license for the project, and declined to accept it. On October 8, 2003, we issued our order affirming the validity of the annual license and requiring the filing of a surrender application. Edison now seeks rehearing of that order.<sup>13</sup>

## DISCUSSION

10. Edison argues that the Commission lacks jurisdiction under the FPA to issue an annual license for the project, require Edison to accept an annual license, or require Edison to file a surrender application. In essence, Edison maintains that, because the existing license has expired and no one is seeking a new license, the Commission lacks authority to oversee the disposition of the project works. As explained below, we find that the FPA provides ample support for our decommissioning authority in this case.<sup>14</sup>

### A. Commission Jurisdiction under Sections 4(e) and 23(b)(1) of the FPA

11. Edison argues that, under Sections 4(e) and 23(b)(1) of the FPA, the Commission no longer has jurisdiction over the San Gorgonio Project, and that therefore the Commission has no authority to issue an annual license for the project under Section 15(a)(1). Edison maintains that, because these sections of the FPA are concerned with projects designed to produce water power, the Commission lacks jurisdiction over the San Gorgonio Project facilities now that the Project is no longer operated for power purposes.

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<sup>13</sup> In a letter to the Commission dated December 3, 2003, Edison indicated that, although it believes the Commission lacked authority to make and enforce the October 8 Order, Edison would comply with the order and follow the proposed schedule for filing a surrender application until its challenge to the Commission's jurisdiction is resolved. See Letter from Walter D. Pagel, Edison, to Magalie, R. Salas, FERC, at p.2 n.1 (filed December 4, 2003).

<sup>14</sup> Possible forms of decommissioning can extend from simply shutting down a project's power operations to removing all parts of the project, including the dam, and restoring the site to its pre-project condition.

12. In enacting the Federal Water Power Act of 1920,<sup>15</sup> which became Part I of the FPA, Congress intended to provide for “a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so.”<sup>16</sup> Under Part I of the FPA, the Commission licenses and regulates the development of non-Federal hydropower projects subject to the jurisdiction of Congress under the Commerce and Property Clauses of the U.S. Constitution.<sup>17</sup> These include projects that are located on public lands or reservations of the United States, and projects that utilize the surplus water or water power from any Government dam. Also included are projects located on navigable waters, as well as those located on other waters subject to the jurisdiction of Congress under the Commerce Clause. Depending on the particular facts, licensing of a hydropower project may be either discretionary under Section 4(e) of the FPA, or mandatory under Section 23(b)(1) of the FPA.<sup>18</sup> As discussed below, this distinction has relevance for understanding the Commission’s differing treatment of these two types of licenses at the end of the license term. However, both Sections 4(e) and 23(b)(1) use identical language with respect to project works located on U.S. lands and reservations.

13. Section 4(e) of the FPA authorizes the Commission to issue licenses “for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient . . . for the development, transmission, and utilization of power . . . upon any part of the public lands and reservations of the United States . . . .”<sup>19</sup> Section 23(b)(1) of the FPA makes it

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<sup>15</sup> Pub. L. 66-280, 41 Stat. 1063 (June 10, 1920).

<sup>16</sup> *First Iowa Hydro Electric Co-Op v. Federal Power Commission*, 328 U.S. 152, 180 (1946).

<sup>17</sup> See *Federal Power Commission v. Oregon*, 349 U.S. 435, 442-43 (1955) (authority to issue licenses in relation to navigable waters of the United States springs from the Commerce Clause; authority to do so in relation to public lands and reservations springs from the Property Clause).

<sup>18</sup> See *Cooley v. FERC*, 843 F.2d 1464, 1471 (D.C. Cir. 1988), cert. denied, 109 S.Ct. 327 (1988).

<sup>19</sup> Section 4(e) provides that the Commission is authorized and empowered:

(e) To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses,

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“unlawful for any person, State, or municipality, for the purposes of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto . . . upon any part of the public lands or reservations of the United States.”<sup>20</sup> Thus, hydroelectric projects that are located on any part of U.S. lands or reservations fall under the Commission’s mandatory licensing jurisdiction.<sup>21</sup>

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(continued...)

transmission lines, or other project works necessary or convenient for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam . . . .

16 U.S.C. § 797(e).

<sup>20</sup> Section 23(b)(1) provides, in pertinent part:

(b)(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with . . . a license granted pursuant to this Act. . . .

16 U.S.C. § 817(1). The remainder of this section concerns the construction of project works on non-navigable streams over which Congress has jurisdiction under the Commerce Clause.

<sup>21</sup> If any part of a hydroelectric project is located on U.S. lands or reservations, the entire project must be licensed. See Big Bear Area Regional Wastewater Agency, 33 FERC ¶ 61,115 at 61,246 (1985); Escondido Mutual Water Co., 6 FERC ¶ 61,189 at 61,388 (1979), aff’d in pertinent part, Escondido Mutual Water Co. v. FERC, 692 F.2d 1223, 1231 (9<sup>th</sup> Cir. 1982), reh’g denied, 701 F.2d 826 (1983), rev’d on other grounds, Escondido Mutual Water Co. v. La Jolla Indians, 466 U.S. 765 (1984).

14. Sections 4(e) authorizes the Commission to license the construction, operation, and maintenance of water power “project works.” Section 3(12) of the FPA defines “project works” as “the physical structures of a project.”<sup>22</sup> A “project” is defined in Section 3(11) of the FPA as “a complete unit of improvement or development.”<sup>23</sup> Thus, while the Commission does not license “projects” as such, it licenses all the physical structures that comprise a complete unit of development.<sup>24</sup>

15. The San Gorgonio Project includes diversion dams, forebay tanks, canals, powerhouses, and transmission lines. These are all project works “necessary or convenient” for the “development, transmission, and utilization of power” within the meaning of Section 4(e) of the FPA. Although some of them were originally constructed for water delivery purposes, others were added “for the purposes developing electric power” within the meaning of Section 23(b)(1) of the FPA, and could not lawfully be

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<sup>22</sup> 16 U.S.C. § 796(12).

<sup>23</sup> Section 3(11) provides:

(11) “project” means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

16 U.S.C. § 796(11).

<sup>24</sup> Edison argues that project works must be part of a hydroelectric project in order to require licensing under the FPA. We agree. See *Pacific Power & Light Co.*, 184 F.2d 272 (D.C. Cir. 1950). That case involved a transmission line on U.S. lands that the parties stipulated was not a “primary transmission line” within the meaning of Section 3(11) of the FPA. The court held that the Commission had no jurisdiction to license the transmission line, because it was not part of a water power project. Here, despite Edison’s arguments to the contrary, the physical structures of the San Gorgonio Project are part of a hydroelectric project, albeit one in need of repair.

constructed, operated, or maintained without a Commission license. The addition of project works for the development of power made all of the “physical structures” of the project “used and useful” in connection with the project as a “complete unit of development,” and required inclusion of all rights, structures, lands, and interests “necessary or appropriate in the maintenance and operation of such unit” within the meaning of Sections 3(11) and 3(12) of the FPA. Because much of the San Gorgonio Project is located on U.S. lands, the entire project is subject to the Commission’s mandatory licensing jurisdiction under Section 23(b)(1) of the FPA.

16. Although these licensed project works are not currently being used for power production, they nevertheless remain subject to the Commission’s mandatory licensing jurisdiction. Physical structures such as dams, powerhouses, canals, forebay tanks, and transmission lines do not lose their status as “project works” under the FPA during temporary periods of non-generation, even if they have become damaged and are rendered inoperable. Otherwise, licensed project works could drift in and out of the Commission’s jurisdiction, without any rational basis for the change in status. Congress recognized this in enacting Section 10(c) of the FPA, which requires licensees to “maintain the project works in a condition of repair adequate for . . . the efficient operation of said works in the development and transmission of power . . . .”<sup>25</sup> Failure to do so will place the licensee at risk of possible enforcement action, or may cause the

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<sup>25</sup> Section 10 sets forth conditions of all licenses issued under Part I of the FPA. Section 10(c) provides:

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. § 803(c).

Commission to regard the licensee's behavior as an implied surrender of the license. These principles are reflected in Article 30 of the license for the San Gorgonio Project.<sup>26</sup>

17. Thus, if a licensed project is damaged and rendered inoperable, the licensee must either repair it or file a surrender application. Sometimes, the Commission may not find it necessary to insist that the licensee immediately repair the damaged project works.<sup>27</sup> If, for example, the damage occurs near the end of the license term, the Commission may choose to allow the licensee to defer any necessary repairs until the project's future can

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<sup>26</sup> Article 30 provides:

If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 30, Form L-1, Terms and Conditions of License for Constructed Major Project Affecting Lands of the United States (revised October 1975), 54 FPC 1799, 1807 (1975); incorp'd by ref., 23 FERC ¶ 61,240 at 61,518 (ordering paragraph H).

<sup>27</sup> See Swift Creek Power Co., Inc., 61 FERC ¶ 61,227 (1992) (responsibility to repair project extended for a decade in light of licensee's financing difficulties; however, Commission denied approval of long-term power sale contract because existing license was about to expire).

be determined.<sup>28</sup> However, the fact that a project can be rendered temporarily inoperable does not mean that the Commission no longer has jurisdiction over it. A damaged project is still a project for purposes of the FPA.

18. As noted, both Section 4(e) and Section 23(b)(1) use identical language with respect to project works located on U.S. lands and reservations. Therefore, the distinction between voluntary and mandatory licensing jurisdiction is significant only for purposes of understanding the Commission's differing treatment of these licenses at the end of the license term. If a project is required to be licensed under Section 23(b)(1), the licensee must accept an annual license, and must either seek a new license or file a surrender application if no one has filed an application for a new license for the project. In contrast, the holder of a voluntary license under Section 4(e) of the FPA need not seek a new license at the expiration of the existing license, and if neither the licensee nor any other entity files a license application, no annual license will be issued. Upon expiration of the original license, the licensee may either continue operating the project without a license or cease operating it without any Commission authorization or oversight. However, if the holder of voluntary license wishes to stop operating and maintaining the project during the license term, a surrender application is required.<sup>29</sup> As noted, the San Gorgonio Project's location on Federal lands makes it subject to the Commission's mandatory licensing jurisdiction under Section 23(b)(1) of the FPA. Edison must therefore accept an annual license and either seek a new license or file a surrender application.

19. Edison correctly notes that Sections 4(e) and 23(b)(1) of the FPA limit the Commission's licensing jurisdiction to project works that are part of hydropower facilities.<sup>30</sup> This does not mean, however, that the holder of a valid Commission license

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<sup>28</sup> See, e.g., *El Dorado Irrigation District v. Pacific Gas and Electric Co.*, 82 FERC ¶ 61,255 at 62,021 (1998) (where licensee of damaged project has stated that it will not seek a new license and is in the process of surrendering its current license, it may not be in the public interest to require immediate restoration of the project).

<sup>29</sup> See *Pennsylvania Electric Co.*, 56 FERC ¶ 61,435 at p. 62,550 (1991), reh'g denied, 57 FERC ¶ 61,211 (1991); *Mc Ray Energy Inc.*, 57 FERC ¶ 61,061 (1991); *PacifiCorp Electric Operations*, 74 FERC ¶ 61,262 (1996).

<sup>30</sup> *Chemehuevi Tribe of Indians, et al. v. Federal Power Commission*, 420 U.S. 395 (1975) (thermal electric generating plants are not within the Commission's licensing jurisdiction under the FPA).

for a hydroelectric project can unilaterally avoid the Commission's jurisdiction simply by deciding that it will (or can) no longer operate the project for purposes of power generation. As we have explained, licensees are required to keep their projects in good operating order. Project works that have been "used and useful" for power generation can and must, absent Commission authorization to the contrary, be returned to service pursuant to Section 10(c) of the FPA. Moreover, a licensee's intentions have no bearing on a project's jurisdictional status.

20. Edison argues that the Commission addressed this jurisdictional issue in its decision regarding the Moxie Project.<sup>31</sup> At the time of licensing, the Moxie Project was an already-constructed dam and reservoir, with no generating facilities. The license authorized the licensee to operate the project as a storage reservoir in conjunction with other reservoirs to regulate flows for the benefit of downstream power plants. The licensee filed an application for a new license, but later withdrew it, stating that it would cease all "jurisdictional activity" at the site, and that therefore no surrender proceeding was necessary. The Director and the Commission ultimately agreed that no surrender was required, but on very different grounds.

21. Edison suggests that, because the licensee for the Moxie Project had stopped using its licensed storage reservoir for power purposes, the Commission affirmed the Director's decision that the project was "no longer a part of any unit of hydroelectric development," and that therefore "the Commission's jurisdiction over the project ceased as of the expiration of the project's original license."<sup>32</sup> Edison's selective use of quotes yields a misstatement of the Director's decision. The Director found that, because the project for many years had provided downstream licensed projects with only insignificant benefits to generation, it was not part of any unit of hydroelectric development. In affirming the Director's decision, the Commission clarified that licensees cannot, through manipulation of their activities at a project, avoid the need to obtain a new license or else to surrender the project. The Commission stated:<sup>33</sup>

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<sup>31</sup> Central Maine Power Co., 80 FERC ¶ 62,019, aff'd, 81 FERC ¶ 61,087 (1997).

<sup>32</sup> 80 FERC ¶62,019 at 64,036.

<sup>33</sup> 81 FERC ¶ 61,087 at 61,344. See also Escanaba Paper Co., 2 FERC ¶ 61,090 (1978) (order modifying license on rehearing and approving exhibits). In response to the licensee's argument that it should have the right unilaterally to cease operation of the project and terminate its obligations under the license, the Commission stated:

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A licensee cannot, through unilateral action, convert a used and useful or necessary and appropriate project work into one that is not. We reach our finding in this case only because we find that the Moxie Project is not used and useful or necessary and appropriate in the generation of hydropower. That finding is based on the reservoir's lack of impact, with or without manipulation of releases therefrom, on generation at downstream licensed projects.

22. In other words, the fact that the licensee had ceased using the project to manipulate flows was irrelevant. Instead, the Commission relied on the fact that, although the project operator had used the reservoir to manipulate flows, the project's effect on generation was insignificant. Because the project did not require a license for this activity under Section 23(b)(1) of the FPA, the license was a voluntary one under Section 4(e) of the FPA. Therefore, the Commission concluded that its jurisdiction ceased at the end of the license term, and no surrender application was required.<sup>34</sup>

23. Edison argues that its project is no longer used and useful in connection with a hydropower development because it does not and will not operate the project facilities for hydropower purposes. This misses the point. Edison's project is a hydroelectric generating facility that is located in part on U.S. lands. As we have seen, it falls within the Commission's mandatory licensing jurisdiction under Section 23(b)(1) of the FPA. The project works comprise a complete unit of development within the meaning of Section 3(11) of the FPA. Although some of the project works have been damaged and

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Section 6 of the Act provides that licenses may be surrendered only upon mutual agreement between the Licensee and the Commission, not unilaterally as Escanaba desires. Further, Article 26 of the license provides that voluntary abandonment of the project may be accepted by the Commission as an implied surrender of the license, but reserves the right of the Commission to order the removal of the project facilities, or to provide for the operation and maintenance of nonpower facilities, after notice and opportunity for hearing. The inclusion in any license of a proviso that would allow for "abandonment at will" is clearly contradictory to the comprehensive development requirement of the Federal Power Act . . . and thus it would not be in the public interest.

Id. at 61,215 (citations omitted).

<sup>34</sup> Central Maine Power Co., 81 FERC ¶ 61,087 at 61,344.

are not currently being used to generate power, they remain licensed project works that, if repaired, could again be used for hydroelectric generation. The Commission's mandatory licensing jurisdiction over the project works stems from their location on U.S. lands and reservations, coupled with their construction, maintenance, and operation for the purposes of hydroelectric generation. The state of repair of those project works does not defeat that mandatory jurisdiction. In our view, it is inconceivable to suggest that the San Gorgonio Project, simply by virtue of being temporarily inoperable, is somehow no longer a hydroelectric project subject to the Commission's mandatory licensing jurisdiction under the FPA.

### **B. Annual Licenses under Section 15(a)(1) of the FPA**

24. Edison maintains that Section 15(a)(1) of the FPA is inapplicable to the San Gorgonio Project. Section 15(a)(1) provides that, if the United States does not exercise its right to take over a project at the expiration of a license, the Commission may issue a new license to the existing licensee or a new licensee. It also provides that the Commission shall issue an annual license to the existing licensee under the terms and conditions of the existing license, until the property is taken over or a new license is issued.<sup>35</sup> Edison acknowledges that, under existing case law, the issuance of annual

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<sup>35</sup> Section 15(a)(1), 16 U.S.C. § 808(a)(1), provides:

That if the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in Section 14 hereof, the Commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

licenses is a ministerial and non-discretionary act that the Commission must perform.<sup>36</sup> However, Edison contends that the cases establishing this principle are inapplicable, because they involved continued operation of a project pending relicensing. Edison argues that the purpose of Section 15 is to allow a project to keep operating while relicensing or federal takeover are still being considered. Because the San Gorgonio Project is no longer operating, Edison contends that Section 15(a)(1) does not apply.

25. In our view, Edison reads Section 15(a)(1) too narrowly. Nothing in the statutory language expressly limits that section's applicability to a project that is operating at the time the existing license expires. Section 15(a)(1) simply provides that, if the existing license expires and no decision has yet been made about federal takeover or relicensing, the Commission shall issue an annual license for the project. The language is mandatory, which has yielded the now well-settled principle that issuance of an annual license is a ministerial and non-discretionary act that the Commission must perform.

26. As contemplated in Section 15(a)(1), an annual license is a statutory mechanism designed to ensure that the terms and conditions of the existing license will remain in effect until a decision can be made about what will be done with the project. Significantly, there is no mention in Section 15(a)(1) of whether the existing licensee or another entity has filed an application for a new license, or whether anyone wants to continue operating the project. The only event of statutory significance for the issuance of an annual license is the expiration of the existing license.<sup>37</sup> Edison's license for the San Gorgonio Project has expired, the United States has not exercised its option to take over and operate the project, and the Commission has not issued a new license for the project. Therefore, we find that Section 15(a)(1), by its express terms, compels the Commission to issue an annual license for the San Gorgonio Project.

27. Edison correctly points out that, when Section 15 was first enacted, its purpose was to ensure that power operation would not cease abruptly upon expiration of an existing license. However, we do not believe this purpose can appropriately be used to

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<sup>36</sup> *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1136 (9<sup>th</sup> Cir. 2002); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC (Platte River I)*, 876 F.2d 109, 114 (D.C. Cir. 1989); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission*, 510 F.2d 198, 198 (D.C. Cir. 1975).

<sup>37</sup> See *Lac Courte Oreilles*, 510 F.2d 198 at 205 (the Commission's authority to issue annual licenses derives not from its consideration of an application for a new license, but rather from the expiration of the existing license).

limit the applicability of Section 15(a)(1) in a manner that does not appear in the statutory language. Rather, in light of the language and legislative history of the FPA as a whole, and in order to give effect to all of the statute's provisions and purposes, we conclude that the annual license provision of Section 15(a)(1) must be read as a means of preserving the "option of making a careful, deliberate judgment concerning disposition of a project at the end of an initial license term."<sup>38</sup>

28. When the Federal Water Power Act was first enacted, Sections 14 and 15 were key parts of the legislation. The focus at the time was plainly on continued operation of a project at the end of the license term. Congress provided for three options: Federal takeover and continued operation of the project under Section 14; issuance of a new license to the existing licensee under Section 15; or issuance of a new license to a new licensee under Section 15. Because of concern for the industries and communities dependent upon the project for service, Congress included in Section 15 a provision for annual licenses if the issue of Federal takeover or relicensing had not been resolved by the time the existing license expired. The only other provision dealing with the end of a license was Section 6, which provided that licenses may be revoked only for prescribed reasons, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission.<sup>39</sup>

29. In 1968, Congress added the option of a non-power license in FPA Section 15(f), to allow for the orderly disposition of a project that the Commission determines should no longer be used for power production.<sup>40</sup> Later, in 1986, Congress amended Section 15

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<sup>38</sup> Lac Courte Oreilles, 510 F.2d 198 at 206.

<sup>39</sup> See Project Decommissioning at Relicensing; Policy Statement (December 14, 1994), 18 C.F.R. Part 2, 60 Fed. Reg. 339 (January 4, 1995), FERC Stats. & Regs., Regs. Preambles 1991-1996 ¶ 31,011 at 31,223-25.

<sup>40</sup> A non-power license is a temporary license intended to serve as a bridge between a power license and the conclusion of the Commission's involvement with the site. To date, the Commission has issued only two non-power licenses. See Wisconsin Electric Power Co., 94 FERC ¶ 61,038 (2001) (order on offer of settlement and notice of intent to issue and grant surrender of non-power license); 96 FERC ¶ 61,009 (2001) (order issuing non-power license and approving decommissioning plan); and New York State Electric & Gas Corp., 105 FERC ¶ 61,381 (2003), reh'g pending. In the first case, Section 15(a) of the FPA did not apply to the project's minor license, and the Commission had authorized continued operation pursuant to 18 C.F.R. § 16.21 of its

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to establish new procedural requirements for the filing and processing of applications for new licenses. At the same time, Congress amended other parts of the FPA to require the Commission to give greater attention to environmental concerns. These changes have made it increasingly possible that a project might need to be decommissioned rather than continue to operate for the term of a new license.<sup>41</sup> Thus, although the basic provision of Sections 6, 14, and 15 have remained essentially the same, they are not frozen in time, and must be read in conjunction with other, more recently amended portions of the FPA.

30. In recognition of this, the Commission's 1989 revisions to its relicensing rules reflected a practical approach to Section 15(a)(1), incorporating the broader statutory purposes reflected in the 1986 amendments to the FPA. Among other things, the Commission provided in Section 16.18 of its regulations that annual licenses would be issued to allow not only for the continued operation of a project while the Commission reviewed any applications for a new license, non-power license, or surrender; but also for the orderly transfer or removal of the project.<sup>42</sup> The Commission also established the

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regulations. In the second case, the project had stopped generating power (with the Commission's authorization) some five years earlier, and the project was under annual license pending disposition of its application for a non-power license. As the orders illustrate, issuance of a non-power license is similar to issuance of an order approving the surrender of a license. However, a licensee may decline to accept a non-power license, but cannot decline a surrender order. See 105 FERC ¶ 61,381 at 62,689 n. 13. In addition, it is unclear whether issuance of a non-power license triggers various other provisions of the FPA, such as Section 18 fishway prescriptions or Section 10(j) fish and wildlife conditions. A surrender application is not subject to these provisions. *Id.* It is perhaps for this reason that licensees have generally elected to file a surrender application rather than to seek a non-power license.

<sup>41</sup> See *Edwards Manufacturing Co., Inc., and City of Augusta, Maine*, 81 FERC ¶ 61,255 (1997) (order denying new license and requiring dam removal). Among other things, the order provided that the project would continue to be subject to annual licenses, including the Commission's dam safety regulations (18 C.F.R. Part 12) incorporated by reference therein, until such time as the Commission issued an order terminating the license.

<sup>42</sup> Section 16.18(b), as adopted in 1989 and currently in effect, provides:

The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license to allow:

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requirement, now found in Section 16.25(c) of its regulations, that if notices of intent to apply for a new license are filed, but no one later files a new license application, including in an “orphaned project” proceeding,<sup>43</sup> the existing licensee must file a schedule for the filing of a surrender application.<sup>44</sup> In that connection, the Commission explained that it would issue annual licenses until “the Commission grants a new license, federal takeover occurs, or the existing licensee vacates the site pursuant to Commission order.”<sup>45</sup>

31. Similarly, the Commission also included provisions, now found in Section 16.21 of its regulations, to require existing licensees of minor projects not eligible for an annual license to continue to operate and maintain their projects following license expiration. The Commission explained that this would allow it to “ensure that the safety and environmental provisions of the existing license will continue until the Commission acts on a competing application, or takes other appropriate action regarding termination of the existing licensee’s presence at the site.”<sup>46</sup> In each case, the intent was to prevent the

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(1) The licensee to continue to operate the project while the Commission reviews any applications for a new license, a nonpower license, an exemption, or a surrender;

(2) The orderly removal of a project, if the United States does not take over a project and no new power or nonpower license or exemption will be issued; or

(3) The orderly transfer of a project to:

(i) The United States, if takeover is elected; or

(ii) A new licensee, if a new power or nonpower license is issued to that licensee.

18 C.F.R. § 16.18(b) (2003).

<sup>43</sup> See n. 9, *supra*.

<sup>44</sup> 18 C.F.R. § 16.25(c) (2003); see Order No. 513, Hydroelectric Relicensing Regulations Under the Federal Power Act, 54 Fed. Reg. 23,756 (June 2, 1989), FERC Stats. & Regs., Regs. Preambles 1986-1990 ¶ 30,854 at 31,447.

<sup>45</sup> Order No. 513, note 15 *supra*, ¶ 30,854 at 31,448 n. 374.

<sup>46</sup> *Id.* at 31,446. The Commission relied on the authority of Section 309 of the FPA, which authorizes the Commission “to prescribe, issue, make, amend, and rescind

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existing licensee from simply “walking away” from the project at the end of the license term, without any Commission review of possible safety and environmental concerns. In short, the Commission’s settled interpretation of Section 15(a)(1) has been that, regardless of a project’s operational status, an annual license (or its functional equivalent) must be issued at the expiration of an existing license, and the licensee must apply to surrender its license if no one seeks a new license for the project.<sup>47</sup>

32. Edison maintains that our order affirming the validity of an annual license for the San Gorgonio Project is unnecessary, because it is intended to require Edison to file a surrender application, which would essentially prohibit project operation for power purposes and terminate the annual license. Edison argues that the Commission’s objective has already been reached, because the project is no longer operating and Edison is negotiating with the Forest Service regarding the disposition and permitting of project facilities on forest lands.

33. Edison misses the point. At issue is not whether the San Gorgonio Project will continue to exist for purposes of power production, but rather, who possesses the authority and responsibility to provide for the safe and orderly disposition of the project works at the end of the license term. Edison contends that it may do so unilaterally, as

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such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions” of the FPA. Id. See 18 C.F.R. § 16.21 (2002).

<sup>47</sup> Edison contends that the Commission has stated “unequivocally” that, if the Federal takeover provisions of Section 14 have been waived but Section 15 applies, the license applicant has an “absolute right to continue to operate either under a new license or an annual license, except upon transfer of the license or condemnation proceedings.” Request for rehearing at 8, quoting Wisconsin Power & Light Co., 33 F.P.C. 275 (1965). From this, Edison reasons that an “absolute right” to receive an annual license does not mean an “absolute obligation” to accept one. As we have explained, this is incorrect. If Section 15(a)(1) requires the issuance of an annual license in a particular case, the licensee is obligated to accept it. In any event, we question the relevance of the quote from Wisconsin Power & Light. That case involved a minor project, which the San Gorgonio Project is not, and it explained the Commission’s prior waiver practice as a means of preserving its authority to “clear the stream” (that is, require project removal) at the end of the license term. In any event, the Commission has since affirmed that the FPA does not confer on any licensee a “perpetual license” to operate and maintain a licensed hydroelectric project. PacifiCorp, 98 FERC ¶ 61,238 (2002).

long as it meets any Forest Service requirements.<sup>48</sup> However, as we have established, the San Gorgonio Project is subject to the Commission's mandatory licensing jurisdiction under Section 23(b)(1) of the FPA. As a result, Section 15(a)(1) requires the Commission to issue, and Edison to accept, an annual license for the project, which may be surrendered under Section 6 only upon mutual agreement between the licensee and the Commission. Therefore, we conclude that, when all of the relevant statutory provisions are considered, the FPA requires that the Commission and Edison must mutually agree on the terms of a license surrender for the San Gorgonio Project.

34. Edison suggests that, because the San Gorgonio Project is no longer generating power, the Commission has no unique expertise to regulate its disposition. This ignores the range of Federal interests protected by the FPA that may be at stake when a licensed hydroelectric project is decommissioned. The Commission must ensure adequate consideration of safety and environmental issues, as well as disposition of the project works in a manner that serves the public interest. In this case, for example, failures of project works have caused erosion, resulting in some environmental damage.<sup>49</sup> Thus, the matter of site restoration is potentially at issue.<sup>50</sup> In addition, the project is over 100

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<sup>48</sup> Edison maintains that, if the Commission had wanted to determine the physical disposition of the San Gorgonio Project facilities, it "should have exercised its right to take over the Project pursuant to Section 15, including providing compensation" to Edison. Request for rehearing at 9. This reflects a misunderstanding of the Federal takeover provisions of the FPA. As contemplated in Sections 14 and 15 of the FPA, the United States has the right to "take over, maintain, and operate" a project. There is no statutory authority to take over and decommission a licensed hydroelectric project at government expense. See Decommissioning Policy Statement, 1991-1996 Regs. Preambles, ¶ 31,011 at 31,227.

<sup>49</sup>Banning Heights recently expressed concern about the environmental damage that resulted when the San Gorgonio Tank No. 1 "ruptured and washed out the mountain side," as well as the "large amount of erosion [that] has occurred where water was turned out of the flume at Raywood Flats into Burnt Canyon." Letter from Calvin Lewis, Banning Heights, to Magalie Salas, FERC, at 1 (filed December 30, 2003). These are the sorts of concerns that a surrender application is designed to address.

<sup>50</sup>In that regard, Article 19 of the San Gorgonio Project license provides:

In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil  
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years old and is eligible for listing in the National Register of Historic Places. Accordingly, consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation will likely be required under Section 106 of the National Historic Preservation Act. Depending on what actions are proposed in connection with the license surrender, water quality certification may be required under Section 401 of the Clean Water Act. A surrender application is needed to allow the Commission to give appropriate consideration to these types of issues.<sup>51</sup>

### **C. Applicability of Section 6 of the FPA**

35. Edison argues that, even if the Commission is required to issue an annual license for the San Geronio Project, Edison cannot be compelled to accept an annual license under Section 15(a)(1). Edison maintains that, because it informed the Commission that it did not want a new license and was rejecting the annual license, no annual license is currently in effect. Edison reasons that, pursuant to Section 6 of the FPA, licenses are conditioned on “acceptance by the licensee.”<sup>52</sup> Edison argues that Section 6 applies to all

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erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 19, Form L-1, 54 FPC 1799 at 1805.

<sup>51</sup> Edison’s legal arguments give no indication of why it might prefer to avoid filing a surrender application.

<sup>52</sup> Section 6 of the FPA states:

Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license (U.S.C., title 41, Sec. 20). Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual

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licenses issued under the FPA, including annual licenses, and that therefore Section 6 grants a prospective licensee the right to accept or reject an annual license.

36. Edison misreads Section 6 of the FPA. Section 6 applies to original and new licenses issued under the FPA, but it applies to annual licenses only by virtue of its applicability to the underlying expired license that the annual license was designed to extend. The ministerial and nondiscretionary nature of an annual license not only compels the Commission to issue it, but also compels the licensee to accept it. Otherwise, the licensee could unilaterally defeat the purpose of an annual license by refusing to accept it.<sup>53</sup>

37. Although termed a “license,” an annual license is not subject to other provisions of the FPA that apply to licenses, except as necessary by reference to the underlying expired license. Thus, issuance of an annual license is not a licensing action under the FPA, and can proceed without reference to the equal consideration of environmental and developmental values required under Section 4(e) of the FPA, or the comprehensive development standard of Section 10(a)(1) of the FPA.<sup>54</sup> Similarly, in issuing annual licenses, the Commission need not consider any possible mandatory conditions for Federal reservations under Section 4(e),<sup>55</sup> fish and wildlife recommendations under Section 10(j), or fishway prescriptions under Section 18 of the FPA, all of which pertain to licenses, without qualification. Similarly, there is no need for a water quality

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agreement between the licensee and the Commission after thirty days’ public notice.

16 U.S.C. § 799.

<sup>53</sup> It was for this reason that the D.C. Circuit stated: “[a]n old licensee has an obligation to continue operation of a project under annual licenses pending Commission disposition, whether he desires to or not.” *Lac Courte Oreilles*, 510 F.2d 198 at 205 n. 26. Edison rejects this as dicta, because the licensee in that case had applied for a new license and the possibility of rejecting an annual license was not at issue. However, we regard the court’s observation not as dicta, but as an essential part of its reasoning in support of the holding in the case.

<sup>54</sup> *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC* (Platte River II), 962 F.2d 27, 32-33 (D.C. Cir. 1992).

<sup>55</sup> *Lac Courte Oreilles*, 510 F.2d 198 at 207, 210.

certification under Section 401 of the Clean Water Act,<sup>56</sup> or formal consultation under Section 7(a)(2) of the Endangered Species Act<sup>57</sup> before the Commission may issue an annual license.

38. An annual license can be amended if and only if the underlying license contains a reservation of the Commission's authority to do so.<sup>58</sup> This means that, although Section 6 operates to protect annual licenses from unilateral amendment by the Commission, it does so not because it applies directly to the annual license, but because it applies to the underlying expired license, which is the source of the Commission's authority and can be amended only if the requisite reopener clause is present. In short, the Section 6 requirement that licenses are conditioned on acceptance by the licensee is not applicable to an annual license.

39. Edison argues that the Commission may not require the surrender of an expired license. In essence, Edison maintains that the last sentence of Section 6, which provides for the modification or surrender of licenses by mutual agreement between the licensee and the Commission, applies only during the license term, and that the Commission cannot unilaterally direct the surrender of an expired license. As explained above, the Commission's longstanding interpretation has been to the contrary. At the expiration of an existing license, projects subject to Section 15 are issued annual licenses, and projects not subject to Section 15 are authorized to continue operating pursuant to Commission order under 18 C.F.R. § 16.21. Thereafter, if no one files an application for a new or subsequent license, the existing licensee is required to file a surrender application.<sup>59</sup> In

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<sup>56</sup> *California Trout v. FERC*, 313 F.3d 1131 (9<sup>th</sup> Cir. 2002).

<sup>57</sup> *Platte River II*, 962 F.2d 27 at 33 n. 2. Edison reads this case as support for the proposition that Section 6 refers to each type of license issued by the Commission, including an annual license. As explained above, however, this is incorrect. Section 6 protects an annual license from revision only if the underlying expired license does not contain a reservation of authority. Thus, the applicability of Section 6 is dependent on the terms of the underlying expired license.

<sup>58</sup> *Platte River I*, 876 F.2d 109 at 113-14.

<sup>59</sup> The only exception, as we have seen, concerns projects that are not subject to the Commission's mandatory licensing jurisdiction under Section 23(b)(1) of the FPA. For those projects, the Commission is not required to issue (and the licensee, correspondingly, is not required to accept) an annual license when the existing license expires.

Edison's case, the expired license continues in effect by virtue of an annual license and must be surrendered.<sup>60</sup> Any other result would allow the licensee to dictate the terms of the surrender, without any Commission oversight. This, in turn, would contravene the Congressional intent that the Commission and the licensee must mutually agree to the conditions under which a license may be surrendered.

40. Edison argues that the expired license does not give the Commission jurisdiction to require a surrender application. Edison reasons that, under Section 6 of the FPA, the Commission could require Edison to accept an annual license only if the expired license contained terms requiring such acceptance. Edison relies on Article 31 of the expired license for the San Gorgonio Project, which Edison reads as allowing Edison to choose whether to obtain an annual license or a new license for the project, and allows continued operation only if Edison does so. As we have just explained, Edison's view is based on an incorrect interpretation of Sections 6 and 15(a)(1) of the FPA. It also reflects a misunderstanding of the purpose of Article 31 of the license.

41. Article 31 is a standard article that is routinely included in licenses for all constructed major projects affecting U.S. lands. It provides:

The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

The purpose of this article is to reserve the right of the United States to control its waters and lands, and to put the licensee on notice that any right to use those waters and lands shall absolutely cease at the end of the license term unless the licensee obtains a new license or an annual license. Without such a license, Edison would have no right to enter onto U.S. lands to access its property, and the project works would constitute a trespass

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<sup>60</sup> In that regard, we think it makes no practical difference whether it is the expired license or the annual license that is considered the subject of a surrender application. Similarly, the Commission's notice of issuance of an annual license does not actually issue the annual license, but rather provides public notice of a mandated event. Accordingly, the Commission need not issue the notice before the existing license expires in order for the annual license to be valid.

and be subject to immediate removal. As we have explained, annual licenses are issued automatically, and must be accepted by the licensee. Thus, Edison currently holds an annual license, which entitles it to continue to use and maintain its project, including those portions that are located on U.S. lands. Article 31 does not dictate the issuance or acceptance of an annual license; that is accomplished by virtue of Section 15(a)(1) of the FPA. Rather, Article 31 simply recognizes that, in the absence of such a license, Edison may not lawfully occupy and use U.S. lands for any purpose in connection with its project.<sup>61</sup>

42. Finally, Edison argues that the Commission cannot exceed the authority granted under Sections 4(e), 6, and 23(b)(1). In essence, Edison reiterates its arguments that, because the Commission has no jurisdiction over the San Gorgonio Project under Sections 4(e) and 23(b)(1) of the FPA, and Edison has the right to reject a license pursuant to Section 6, the Commission “may not read Section 15 to nullify these other sections.”<sup>62</sup> This we have not done. As we have explained throughout this order, we have read all of the relevant sections of the FPA congruently, giving meaning to their various provisions in a manner that we believe best accomplishes the intent of Congress.

43. For all the foregoing reasons, we conclude that Edison currently holds an annual license for the San Gorgonio Project and must file a surrender application.

The Commission orders:

(A) The request for rehearing filed by Southern California Edison Company on November 7, 2003, in this proceeding is denied.

(B) Southern California Edison Company currently holds a valid annual license for the San Gorgonio Nos. 1 and 2 Project No. 344, and must file a surrender application

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<sup>61</sup> Edison contends that, “[w]ithout a valid FERC license, the Project facilities are SCE’s private property, and the Commission has no authority to dictate what SCE should or should not do with that private property, unless the Commission has exercised its authority under FPA Sections 14 and 15 to take over the Project facilities.” Request for rehearing at 10. As noted earlier, the Federal takeover authority does not extend to project decommissioning. Moreover, as we have explained, Edison’s property is not wholly private, because it is located on U.S. lands. Without a valid license, Edison’s property constitutes a trespass, and the United States can order its removal.

<sup>62</sup> Request for rehearing at 19.

for the project in accordance with its approved schedule and the requirements of Part 6 of the Commission's regulations. The licensee shall file six-month progress reports on its efforts to negotiate an agreement to transfer to the San Geronio Pass Water Agency portions of the project facilities that are related to their municipal water system, and shall obtain prior Commission approval before transferring the project, or any portion of it.

(C) Before filing a surrender application, the licensee shall consult, at a minimum, with the San Bernardino National Forest, U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Army Corps of Engineers, all Indian tribes having an interest in the project or project site, the California State Historic Preservation Office, California Department of Fish and Game, and the California Regional Water Quality Board. The licensee shall include with the application documentation of consultation, copies of comments and recommendations on the completed application, and specific descriptions of how the agencies' and entities' comments have been accommodated by the application. The licensee shall allow a minimum of 30 days for the agencies and entities to comment and to make recommendations before filing the application with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons based on project-specific information.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.