

104 FERC ¶ 61,108
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell

Willard Janke

Project No. 400-039

v.

Public Service Company of Colorado

ORDER ON REHEARING

(Issued July 14, 2003)

1. In this order we reverse the rejection of a late motion to intervene and deny requests for rehearing of our April 16, 2003 order on a complaint filed against Public Service Company of Colorado (Public Service) with respect to the safety of a project penstock.

BACKGROUND

2. On December 31, 2002, Willard Janke (Petitioner) filed a complaint alleging that Public Service had violated the terms of its license for the Tacoma-Ames Project by making unauthorized changes to a project penstock and surge tank, failing to properly maintain the penstock, and failing to protect the penstock from damaging non-project use that endangers the safety of the project.

3. The complaint concerned the 2½-mile-long Lake Fork penstock, which carries diverted water to the Ames powerhouse. Petitioner's home is located downslope of the section of penstock at issue, a few hundred feet upslope of the Ames powerhouse. The penstock has been the subject of several failures in the past ten years. Petitioner's complaint raised questions about the safety of the penstock, with particular emphasis on an access road which crosses the penstock in several locations and was being used by trucks in the employ of Pathfinder Development, Inc. (Pathfinder), a gravel pit mining operation.

4. Petitioner also alleged that Public Service has violated its license by, among other things, making unauthorized modifications to the penstock, failing to hold necessary property rights in project lands, and failing to take adequate measures on behalf of erosion control and the protection of water quality.

5. In response to the January 3, 2003 public notice of the complaint, timely motions to intervene were filed by the U.S. Forest Service¹ and by the Lake Fork Junction Home Owners Association (Homeowners). Sheep Mountain Alliance (Alliance) filed a month-late motion to intervene, which we denied. Public Service answered the complaint on January 24, 2003.

6. By order issued April 16, 2003, we found that Public Service had not violated any terms of its license. However, because of the importance of assuring the safety of the project, we required the following:²

With respect to the issue of truck traffic over the penstock, we are undertaking an engineering review to ensure the structural integrity of the penstock, as well as confirm or require the adequate design and construction of the vehicular crossing points. To this end, we are requiring a complete engineering evaluation and analysis of the safety issues involved with the continued operation of the penstock and the non-project use of project lands in which the penstock is buried. If necessary, we can for example require wider and more substantial embankment sections, a thicker-walled penstock to support the additional weight, or a bridge-like structure to transfer the load away from the penstock.

Until we have completed our review of the penstock structure and all road crossings over the penstock route and are satisfied that at such crossings the underlying penstock is adequately protected, we are directing Public Service to bar use of the access road within the project boundary for commercial operations. In the event it is for whatever reason unable to restrict such traffic within the project boundary, we will direct Public Service to cease project operation and de-water the penstock to remove any possible safety issues until we have confirmed the safety of the penstock and the stability of the hillside. We will coordinate our review and approval

¹Portions of the project are located in the Uncompahgre National Forest.

²103 FERC ¶ 61,072 at P 15-16.

of the penstock crossing designs as appropriate with San Miguel County, the local permitting authority.

DISCUSSION

7. On May 13, 2003, Petitioner, Homeowners, and the Alliance (together, Petitioners) filed, "jointly and severally," a request for rehearing of our April 16 order. These requests fall into three categories, which we address in turn.

A. Late Motion to Intervene

8. Alliance requests rehearing of the denial of its late motion to intervene.³ Alliance's motion to intervene was filed by Petitioner's counsel and was accompanied by a letter from Petitioner's counsel explaining that the motion to intervene was filed late due to problems transmitting the motion via email, illness of Petitioner's counsel, inclement weather in the Washington, D.C. area, and the need for Petitioner and the Homeowners to review the motion to intervene. We denied Alliance's motion for failure to show good cause for not filing its motion in timely manner. While we affirm our ruling that Alliance did not show good cause for its late motion, we are granting rehearing and late intervention, since Alliance's participation as a party will not disrupt the proceeding or prejudice Public Service.⁴

B. Alleged License Violations⁵

1. License Articles 2 and 3: Amendments to Project Works and Exhibits

9. Petitioner's complaint argued that Public Service violated Articles 2 and 3 of its license when in 1984 it replaced 2,208 feet of steel penstock with fiberglass and in 1994 it capped the pipe to a surge tank on the penstock, both without prior Commission approval.

³Notice of the complaint was issued on January 2, 2003, and set January 21, 2003, as the deadline for interventions. Alliance filed its motion to intervene on February 28, 2003.

⁴See 18 C.F.R. § 385.214(d) (2003).

⁵Articles 1 through 32 of the Project No. 400 license are contained in Commission Form L-1 (Oct. 1975), published at 54 FPC 1799-1800 and incorporated by reference in the Project No. 400 license, 16 FERC ¶ 62,338 (1981) at 63,618, ordering paragraph D.

Our April 16 order stated that it was unnecessary to review the circumstances of a pipeline replacement undertaken 19 years ago, inasmuch as we are dealing with the safety of current penstock operation. We held that the 1994 surge pipe capping was not a substantial alteration requiring prior approval.

10. Petitioners request rehearing of our determination that the penstock replacement and the surge pipe capping did not require prior approval. Since our April 16 order declined to revisit the penstock replacement issue, finding it irrelevant to the issues before us, Petitioners' rehearing request on this point is misdirected. With respect to the surge pipe capping, Petitioners argue that we erred in reasoning that a regional director's prior concurrence with the licensee's plans rendered the capping nonmaterial. Petitioners misapprehend our order. We first stated that we do not consider the capping to be a substantial alteration to the project works, requiring prior Commission approval.⁶ We then noted that, in any event, the Regional Director concurred in the licensee's plans before the licensee proceeded with the capping.⁷ We deny rehearing on this matter, and note again that the past actions about which Petitioners are arguing have little if any bearing on how best to ensure a safe project today.

2. License Article 5: Property Interests in Project Lands

11. In his complaint, Petitioner argued that Public Service lacks requisite property rights for a certain portion of the easement that its penstock occupies, in violation of Standard Article 5 of the license, which requires the licensee to hold the rights to project lands and property necessary for the project's construction, operation, and maintenance. Public Service responded that the penstock route is indeed within the legal and survey descriptions of the easement, which it submitted. Our April 16 order found no violation of Article 5.

⁶See generally International Falls Power Co., 66 FERC ¶ 61,086 (1994); see also Burlington Electric Department and Winooski One Partnership, 57 FERC ¶ 61,113 at 61,430 (1991) (finding nonmaterial, and not needing prior approval, certain revisions to location, length, and width of proposed tailrace and to powerhouse dimensions).

⁷Petitioner argues that the subsequent penstock breaks demonstrate that the 1984 replacement was indeed a material alteration. First, it has not been shown that the replacement was the cause or a contributing cause of these penstock breaks. Second, the nature of a change – material or nonmaterial – is not defined by subsequent, or even consequent, events.

12. On rehearing, Petitioners assert that the extent of the licensee's property interests in the easement remains unclear, and asks us to "inspect all Article 5 documentation" against the engineering reports required by our April 16 order, as well as a map Petitioner filed with the Commission on May 6, 2003, and which Petitioners assert shows that parts of the penstock are not on Public Service's easement.⁸

13. The Commission does not require licensees to submit documentation of their compliance with Article 5; compliance is for the most part self-enforcing, since without the requisite rights to project lands and waters, a licensee will be unable to proceed. Consequently, the adequacy of a licensee's property rights in an operating project is rarely an issue, unless the licensee is unable to comply with a particular requirement of the license or a Commission order thereunder because of insufficient property rights. In this proceeding, there is no indication that Public Service's compliance with Commission directives regarding the Lake Fork penstock is in any way compromised by a lack of property rights. We therefore deny rehearing on this matter.

3. License Article 19: Erosion Control

14. In his complaint, Petitioner alleged that Public Service has violated the erosion control provisions of Article 19 by failing to maintain the Lake Fork penstock "so as to avoid soil erosion and water pollution." Our April 16 order found insufficient evidence to prove any violations. Petitioners repeat the assertion on rehearing, but offer no new evidence or arguments. We deny rehearing on this matter.

C. Safety of Penstock Works and Operation

15. Petitioners challenge a number of the findings in our April 16 order regarding the effectiveness and safety of certain penstock features in the event of another penstock

⁸The rehearing request also asks us to test Public Service's compliance with Article 39 in light of these documents. Article 39 authorizes Public Service to grant permission for certain types of use and occupancy of project lands and waters without prior Commission approval. Petitioner's December 31, 2002 complaint had argued that Public Service lacked sufficient authority under Article 39 to allow Pathfinder's trucks to cross the penstock route. We rejected that argument in our April 16 order, and Petitioners' rehearing request, while alleging a "lack of clarity" on the point, offers no new evidence or arguments. We therefore deny rehearing on the matter.

break,⁹ and the order's characterization of the extent of damage, past and potential, attributable to penstock breaks. They assert that, at a minimum, our findings on these matters were premature.

16. As described above, our April 16 order directed a sweeping inspection and analysis of the penstock and its operating tolerances, with the overriding goal of ensuring the safety of penstock operations. We agree that this process should be completed before any final conclusions are drawn with respect to the matters raised by Petitioners.¹⁰

The Commission orders:

(A) The May 13, 2003 request for rehearing filed by Petitioners is granted to the extent the rejection of the Sheep Mountain Alliance's late motion to intervene is reversed and its intervention motion is granted.

(B) The May 13, 2003 request for rehearing filed by Petitioners is granted as set forth herein and is denied in all other respects.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹Petitioners question whether the automatic penstock shut-off valve functions properly, whether the project can be operated safely with the surge line capped, and whether the fiberglass penstock section is strong enough to withstand the stresses of project operation.

¹⁰We take under advisement Petitioners' recommendations on how we should conduct the process.