

109 FERC ¶ 61,018
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. 2290-059

ORDER DENYING REHEARING

(Issued October 6, 2004)

1. Kern River Outfitters, the Kern River Valley Community Consensus Council, and the Kernville Chamber of Commerce (Kern River Parties) have filed a request for rehearing of a May 12, 2004 Commission staff order amending the license for the Kern River Project No. 3 Hydroelectric project to incorporate revised conditions submitted by the U.S. Forest Service. *See Southern California Edison Company*, 107 FERC ¶ 62,123 (2004). For the reasons discussed below, we deny rehearing. This order is in the public interest because it complies with applicable law and affirms a reasonable balance of public interest considerations.

Background

2. On December 24, 1996, the Commission issued Southern California Edison Company (Edison) a new license to operate the 40.2-megawatt Kern River No. 3 Hydroelectric Project No. 2290, located on the North Fork of the Kern River, and on Salmon and Corral Creeks, in Tulare and Kern Counties, California. *See 77 FERC ¶ 61,313, on reh'g*, 81 FERC ¶ 61,162 (1997).

3. Because the Kern River Project occupies lands of the United States within the Sequoia National Forest, the license included conditions proffered by the Forest Service pursuant to section 4(e) of the Federal Power Act of 1920 (FPA).¹ *See* 16 U.S.C.

¹ Section 4(e) provides that licenses issued by the Commission within any reservation of the United States shall contain “such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.”

§ 797(e). The Forest Service's Condition 6(f) provided that between May 15 and July 15 of each year, all flow between 700 cubic feet per second (cfs) and 1100 cfs was to remain in the Kern River for whitewater rafting, while Edison could divert flows below 700 cfs and above 1100 cfs for power generation.² *See* 81 FERC at 61,715.

4. The Kern River Parties, along with American Whitewater Affiliation, Americans Outdoors and Friends of the River, argued that Edison should reserve flows of between 200 cfs and 1400 cfs for whitewater releases, thereby maximizing whitewater boating opportunities. The Commission included in the license as Article 422 the flows specified by the Forest Service, explaining that these flows would significantly improve whitewater boating opportunities, and noting that the higher whitewater flows proposed by the Kern River Parties would eliminate power generation during most of the year and have a negative impact on the fishery.³ *See* 77 FERC at 62,430-31.

5. Prior to the issuance of the project license, Edison and the Kern River Parties and other intervenors had filed with the Forest Service appeals of the section 4(e) conditions. As the Forest Service had not resolved the appeals by the date the license was issued, the Commission stated in the December 24, 1996 Order that upon the submission by the Forest Service of revised section 4(e) conditions, the Commission would issue an order amending the license to include them. *See* 77 FERC ¶ 61,313 at 62,425 and ordering paragraph (D).

6. Edison and the Kern River Parties (filing jointly with Friends of the River and American Whitewater Affiliation) filed requests for rehearing of the December 24, 1996 Order. In response to Edison's suggestion that the Commission either revise or delete Article 422, the Commission stated that it would defer a response until it had issued an order reflecting the resolution of the appeals before the Forest Service. *See* 81 FERC at 61,714.

² Forest Service Condition 4 required Edison to release 35 cfs at all times for fish hatchery use, 81 FERC at 61,715, thus somewhat constraining Edison's use of the flows below 700 cfs.

³ The Commission also rejected the argument that the environmental assessment prepared by the Commission staff for the project was inadequate because it did not quantify the benefits of whitewater boating, noting that the Commission is not required to assign dollar values to each benefit and impact of a project. 77 FERC at 62,431 and n.57.

7. The Kern River Parties also objected, among other things, to Article 422, arguing that the authorized flows would prevent increased levels of recreational boating that would occur at higher flows; that the assertion that higher flows would harm the fishery was unsupported; that the Commission had failed to estimate the economic benefits associated with recreation; that the Commission had not determined whether the project was consistent with the purposes of the Sequoia National Forest, as required by section 4(e); and that the Commission had not demonstrated that the new license was best adapted to the comprehensive development of the North Fork Kern River, as required by FPA section 10(a)(1), 15 U.S.C. § 803(a)(1). *See* Friends of the River, *et al.* request for rehearing at 8-15 (filed January 23, 1997). In the November 4, 1997, rehearing order, the Commission discussed and denied rehearing with respect to issues raised by the Kern River Parties regarding state water quality standards, fishery matters, and the energy value of the project, but did not reference the recreation-related arguments. In ordering paragraph (F), the Commission stated that the Kern River Parties' request for rehearing was denied as discussed in the order, and was otherwise dismissed without prejudice to a renewed rehearing request upon the issuance of a final Commission order addressing the Forest Service's final section 4(e) conditions. *See* 81 FERC at 61,717.

8. On December 20, 2003, the Forest Service filed revised section 4(e) conditions. Revised Condition 6(f) significantly increased the flows required to be released below the project for whitewater boating. The cover letter accompanying the filing stated that Edison, American Whitewater Affiliation, and the Kern River Parties had appealed earlier iterations of the section 4(e) conditions and that, on December 24, 2002, "the above-named appellants signed and filed with the FERC a Settlement Agreement concerning the issues raised in their appeal" ⁴

9. On March 16, 2004, the Kern River Parties filed a letter stating that they had not participated in the settlement discussions and were not party to the settlement agreement. *See* letter to Magalie R. Salas (Commission Secretary) from R. Dancing. By letter filed April 6, 2004, the Forest Service acknowledged that this was the case, and asked the Commission to correct its December 19, 2003, cover letter accordingly. *See* letter to Magalie R. Salas from Brent Handley.

⁴ American Whitewater Affiliation and Friends of the River filed an appeal of licensing orders. *American Whitewater Affiliates, et al. v. FERC*, Ninth Cir. No. 98-0012. On June 17, 2004, after the settlement was concluded and the revised section 4(e) conditions filed, the appeal was dismissed, at their request.

10. On May 12, 2004, Commission staff issued an order amending the license for the Kern River Project to include the revised section 4(e) conditions. The order noted that the revised conditions were made pursuant to the agreement among the Forest Service, Edison and “Whitewater Interests,” which the order defined as including American Whitewater Affiliation, Friends of the River and their counsel, the Natural Heritage Institute, and that the proposed changes were not in conflict with the project license.

11. On June 14, 2004, the Kern River Parties filed a timely request for rehearing.⁵ They argue that the Commission erred in the May 12, 2004 Order by failing to consider whether acceptance of the revised section 4(e) conditions required additional measures to protect the public interest, by not relying on substantial evidence in adopting the conditions, and by failing to conduct a proper analysis under the National Environmental Policy Act of 1968 (NEPA).

Discussion

As noted above, section 4(e) requires the Commission to include in any license issued within a reservation of the United States conditions proffered by the Secretary of the Department under whose supervision the reservation falls. The Commission is not empowered to determine whether the conditions are reasonable or supported by substantial evidence; those are matters for the courts to determine. *See Escondido Mutual Water District v. LaJolla Band of Mission Indians*, 466 U.S. 765 (1983); *Bangor Hydroelectric Company v. FERC*, 78 F.3d 659 (D.C. Cir. 1996).

A. Acceptance of the Revised Conditions.

12. The Kern River Parties argue that the Commission erred by adopting the revised section 4(e) conditions without imposing “more stringent license conditions to protect recreational and other public values.” Request for rehearing at 5. They assert that during the licensing proceeding, the Commission received requests to identify the benefits of using year-round recreational flows to develop a year-round river recreation economy in

⁵ Friends of the River and American Whitewater Affiliation, who were party to the settlement, did not request rehearing.

the Kern River Valley, but failed to give the matter adequate consideration. According to the Kern River Parties, the Commission failed to give equal consideration to,⁶ and to protect, recreational, aesthetic, and socioeconomic values. *Id.* at 8-10.

13. While the Commission must include in the license for the Kern River Project the section 4(e) conditions proffered by the Forest Service, the Kern River Parties are correct that the Commission could include in the license more stringent requirements if we deemed it appropriate, and if such conditions did not conflict with other mandatory conditions.⁷ In this case, Forest Service Condition 4 sets forth certain streamflow requirements for the purpose of fish and wildlife resource management. To the extent that the Commission did not disturb those requirements, we have the authority, as the Kern River Parties suggest, to increase whitewater flows.

14. In the licensing proceeding, we considered in detail the Kern River Parties' arguments for increased whitewater flows. We adopted the conclusions reached by staff on this matter in its environmental assessment (EA) to the effect that the flows recommended by the Kern River Parties would indeed maximize whitewater boating opportunities, but would do so at the expense of the fishery and would eliminate power generation for much of the year, and that few people would take advantage of weekday flows because of work schedules. *See* 77 FERC at 62, 43-31 (*citing* EA). We also concluded that the license as issued balanced all competing interests. *Id.* at 62,431.

15. The 1996 license made significant changes in project operations to improve whitewater recreation. *Id.* at 62,430-31. As amended by revised Forest Service Condition 6(f), the license now provides still greater whitewater opportunities. We reaffirm that the license adequately balances developmental and various non-

⁶ FPA section 4(e) requires the Commission to give equal consideration to the developmental (power) and non-developmental (energy conservation, fish and wildlife, recreation and other environmental values) purposes for which licenses are issued.

⁷ Thus, for example, while the section 4(e) conditions require a minimum flow of 35 cfs for fish hatchery purposes, the Commission could not reduce that flow to 25 cfs, but could increase it to 50 cfs, assuming no inconsistency with other mandatory conditions.

developmental resources and is in the public interest. To heavily emphasize whitewater recreation at the expense of other environmental needs and power production would not achieve such a balance.⁸

B. Substantial Evidence

16. The Kern River Parties state that, to the extent that the May 12, 2004 Order relied upon an assumption that the revised section 4(e) conditions were supported by all concerned parties, the order was not based on substantial evidence. The May 12 Order states that the revised conditions reflect the settlement agreement, which in turn lists the settling parties as being the Forest Service, Edison, American Whitewater, Friends of the River and the Natural Heritage Institute. The Commission was not, and is not, under the impression that the Kern River Parties support the settlement. In any event, as discussed above, the license was amended to include the revised section 4(e) conditions because the Commission was obligated to do so as a matter of law, not based on a determination as to which parties supported the settlement.

C. The Commission's Environmental Analysis

17. The Kern River Parties assert that the Commission erred in relying on an EA and a finding that relicensing the Kern River Project would not have a substantial impact on the human environment, instead of preparing an environmental impact statement. Request for rehearing at 12-14.

18. Section 102(2)(c) of the National Environmental Policy Act of 1968 (NEPA), 43 U.S.C. § 4332(2)(c), requires an authorizing agency to prepare an EIS when the proposed action is a "major federal action significantly affecting the quality of the human environment." The 1996 licensing order and EA concluded that relicensing the Kern River Project would not have such an effect, and there is no persuasive evidence before

⁸ The Kern River Parties aver that, because the Sequoia National Forest Plan provides, in part, that the developmental emphasis of the area of the forest affected by the Kern River project is water-oriented recreation and that removal of water from fishery streams should be limited, the Commission's acceptance of the section 4(e) conditions is inconsistent with the forest plan. *See* request for rehearing at 7-8. We do not view condition 6(f) as inconsistent on its face with the forest plan. Moreover, it is for the Forest Service, which administers the forest plan and which prepared the section 4(e) conditions, to determine whether the two are consistent. For our part, we are required by law to include the section 4(e) conditions in the license, regardless of whether they are consistent with other Forest Service documents.

us to dispute that contention.⁹ The fact that we have not chosen to weight the license heavily in favor of whitewater recreation, as urged by the Kern River Parties, does not change the nature of the proceeding or the impact of our action.¹⁰ While the Kern River Parties assert, request for rehearing at 14-15, that the Commission failed to examine its actions in the proper context – restricting flows for a river resource located close to the Los Angeles Basin – we find the analysis in the EA and our previous orders to be sufficient.¹¹

19. The Kern River Parties also contend that the Commission lacked an adequate scientific basis for its analysis of minimum flows, asserting that a 1994 Edison whitewater boating study, which they say “became the foundation for the minimum recreation flow conditions ultimately accepted by FERC,” was flawed. *See* request for rehearing at 15-18.

⁹ In any event, the EA, which comprises 87 pages of analysis and over two hundred pages of additional documentation, thoroughly analyzed all of the issues presented by the license application and reasonable alternatives to it, such that the Commission was able to take the “hard look” required by NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1990).

¹⁰ We do not read the Kern River Parties’ request for rehearing as suggesting that the Commission was required to perform additional environmental analysis based on the revised section 4(e) conditions. In any case, we do not view those conditions as requiring measures beyond the scope of those studied in the EA, and thus no additional analysis is required. Moreover, as to the issue of concern to the Kern River Parties – whitewater flows – the revised conditions increase such flows, so that, if anything, they decrease the environmental impact of concern to those groups. Finally, as noted, we are required as a matter of law to include the Forest Service’s conditions in the license. Here, we are not reopening the entire license, which became final upon the conclusion of judicial review, *see*, n.4, *infra*, but simply exercising reserved authority to include the revised conditions. The courts have explained that, because the primary purpose of NEPA activity is to aid agency decisionmaking, nondiscretionary acts do not require NEPA review. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988); *Minnesota v. Block*, 660 F.2d 1240, 159 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

¹¹ *See, e.g.,* EA at 50-61 (discussing and analyzing in detail recreational boating, including recognition of “high quality whitewater opportunities for residents of Southern California and the San Joaquin Valley.” *Id.* at 50).

20. Contrary to the Kern River Parties' implication, the Edison boating study was only one of the bases for staff's recommendations regarding whitewater flows. *See* EA at D-75 (explaining that staff evaluated the flow proposals of the Forest Service, Edison, and American Whitewater Affiliation, along with the boating test results, agency and public comments, and other pertinent information).¹² Staff reached its recommendations, which the Commission adopted, based an independent analysis of all the information in the record.¹³ *See* EA at 56-61.

21. In addition, it is inappropriate for the Kern River Parties to be attacking the validity of the EA in this proceeding. The EA was prepared in the licensing proceeding, which ended when the appeal of the licensing orders was dismissed. This proceeding addresses the limited issue of the Forest Service's revised section 4(e) conditions. While

¹² In the EA, staff noted that the Kern River Parties and other groups had filed a request for an additional survey of river recreation, which was untimely because it came more than five months after the deadline for comments on the draft EA. *See* EA at 14-15. Thus, these parties effectively waived their right to request additional studies on this subject.

¹³ The Kern River Parties' main complaint about the study is that when Edison asked experienced boaters for their judgments about whitewater boating quality, the boaters were asked to provide responses from choices such as "fun," "enjoyable," and "pleasurable," rather than terms such as "optimal" or "minimal." Request for rehearing at 16. We see no reason why this undercuts the validity of the study. The Kern River Parties also reference their March 8, 2004 critique of the boating. *Id.* at 17. This critique, filed ten years after the study was performed and eight years after the issuance of the EA -- in which Commission staff responded to all timely comments on the draft EA -- comes far too late to merit consideration here.

questions regarding the application of the EA to the revised section 4(e) conditions would be timely here, matters that could have, but were not, raised on appeal of the licensing orders represent untimely collateral attacks on that order.¹⁴

The Commission orders:

The request for rehearing filed June 14, 2004, by Kern River Outfitters, the Kern River Valley Community Consensus Council, and the Kernville Chamber of Commerce is denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁴ This also applies to all of the Kern River Parties' arguments, discussed above, that address the licensing proceeding. In the December 24, 1996 Order, we made clear the limited nature of any proceeding regarding revised Forest Service conditions. *See* 77 FERC at 62,425 ("Upon the submittal of [revised conditions] by the Forest Service, the Commission will issue an order amending the license. The licensee will then have the opportunity to request rehearing, and thereafter file for court review, *of such revisions.*") (footnote omitted; emphasis supplied). While in the November 4, 1997 Order on rehearing, we indicated with somewhat less clarity that we were dismissing without prejudice those portions of the request for rehearing that dealt with the section 4(e) conditions pending submittal of the revised conditions, this did not as a matter of law prevent the two orders from becoming final for purposes of appellate review. *See* 18 U.S.C. § 825l(b) (requiring appeals to be filed within 60 days of a Commission order on rehearing). Indeed, American Whitewater Affiliation and Friends of the River did file a timely appeal of the licensing orders, while the Kern River Parties did not.