

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Public Service Company of Colorado

Project No. 400-042

ORDER DENYING REHEARING

(Issued October 25, 2005)

1. In this order, we deny a request for rehearing by Willard Janke of an April 15, 2005 letter order issued by the Commission's San Francisco Regional Engineer (Final Action Letter)<sup>1</sup> pertaining to the 3.75-megawatt Tacoma-Ames Project No. 400, which is licensed to Public Service Company of Colorado (Public Service).<sup>2</sup> The Final Action Letter finds that Public Service has satisfied the requirements of a prior Commission order regarding public safety at the Tacoma-Ames Project. Here, we conclude that Mr. Janke has shown no error in the Final Action Letter and therefore terminate the underlying complaint proceeding.

**Background**

2. Project No. 400 has two developments, Tacoma and Ames. In December 2002, Willard Janke filed a complaint concerning one of two penstocks (Lake Fork penstock) that carry water to the Ames powerhouse. Mr. Janke's home is located downslope of a section of the Lake Fork penstock, and a few hundred feet from the Ames powerhouse. Mr. Janke'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

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<sup>1</sup> Letter dated April 15, 2005 to Mr. Randy Rhodes, Water Coordinator, Xcel Energy, from Takeshi Yamashita, San Francisco Regional Engineer.

<sup>2</sup> Public Service is a subsidiary of Xcel Energy, Inc. (Xcel). Many of the filings referenced herein were made by Xcel Energy Services, Inc. (Xcel Services), another subsidiary of Xcel, or Xcel, on behalf of Public Service. For simplicity's sake, all filings made by Public Service or its affiliates will be referred to in the text as filings of Public Service.

being used by trucks in the employ of Pathfinder Development, Inc. (Pathfinder). Pathfinder operates a gravel pit operation and has plans to develop a concrete batching plant in same vicinity.

3. The portion of the penstock in question is on land owned by Pathfinder in San Miguel County, Colorado. Public Service, Pathfinder, and San Miguel County are currently in litigation regarding easements and other agreements pertaining to the penstock and access road.<sup>3</sup> There has also been litigation between Pathfinder and San Miguel County concerning permits for the development of Pathfinder's property.<sup>4</sup>

4. Mr. Janke alleged that Public Service had violated its license in connection with operation and maintenance of the penstock. By order issued April 16, 2003,<sup>5</sup> we found that Public Service had not violated any terms of its license (Order on Complaint). However, because of the importance of assuring the safety of the project, we directed Public Service to file:

- An inspection and engineering design evaluation and analysis of the entire Lake Fork penstock;
- A design analysis, and plans and specifications, for any penstock crossings by the existing access road, or proposed relocated access road, where the roadway overlies or is adjacent to the penstock;

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<sup>3</sup> *Public Service Co. of Colorado v. The Board of County Commissioners of San Miguel County, State of Colorado, et al.*, U.S. District Court, District of Colorado, Civil Case No. 04-RB-1828.

<sup>4</sup> *See, e.g.*, Letter to G. Maloney, San Francisco Regional Office (SFRO); A. Hughes, Public Service; and M. Rozycki, San Miguel County Planning Department; from G. McKay, Pathfinder, filed August 1, 2003.

<sup>5</sup> *Willard Janke v. Public Service Company of Colorado*, 103 FERC ¶ 61,072 (2003), *order on reh'g*, 104 FERC ¶ 61,081 (2003), *appeal dismissed as moot*, *Willard Janke v. FERC*, No. 03-1279 (D.C. Cir., Jan. 30, 2004).

- A design analysis, and plans and specifications for any modifications of the access road, to correct drainage and stability problems created by the previous modifications to the access road by Pathfinder.<sup>6</sup>
- A report addressing the overall slope stability of the hillside traversed by the penstock, with reference to the impacts of the gravel and concrete operations on penstock safety.<sup>7</sup>

5. In addition to these requirements, the Order on Complaint required Public Service, until such time as the Commission determines that Lake Fork penstock can operate safely under existing conditions and future anticipated conditions from the mining and concrete operations, to prohibit use of the access road within the project boundary for commercial operation or, if such use could not be prevented, to cease project operations and dewater the penstock.<sup>8</sup> The Commission also established a restricted service list for the proceeding, which included Mr. Janke and his representatives.<sup>9</sup>

6. Mr. Janke sought rehearing, which was denied. He thereafter filed a petition for judicial review. The court granted the Commission's motion for dismissal on ripeness grounds.<sup>10</sup>

7. Since the Order on Complaint was issued, there has been regular and substantial communication between the staff of the Commission's Division of Dam Safety and Inspections San Francisco Regional Office (SFRO), Public Service, Pathfinder, San Miguel County and Mr. Janke concerning implementation of the Order on Complaint and other matters. Filings with the Commission include Public Service's October 30, 2003

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<sup>6</sup> These drainage and stability problems have since been remedied by relocation of the access road and rerouting of drainage.

<sup>7</sup> Ordering paragraphs (A)(1) to (A)(4), 103 FERC ¶ 61,072 at 61,234-35.

<sup>8</sup> Ordering paragraph (B), *Id.* at 61,235.

<sup>9</sup> "Notice of Proposed Restricted Service List for Commission Proceeding," issued April 23, 2003. No party objected to the proposed restricted service list, which went into effect on May 8, 2003. *See* 18 C.F.R. § 385.2010(d)(4) (2005). Mr. Janke's legal representative is Mr. Paul Nolan.

<sup>10</sup> *See* n. 3 above.

“Report on the Evaluation of the Lake Fork Penstock” (October 2003 Report), a supplemental report filed on February 26, 2004 (Supplemental Report), and additional information filed in 2003 and 2004 by Public Service in response to SFRO’s requests.<sup>11</sup>

8. On April 15, 2005, the Regional Engineer issued the Final Action Letter. The Final Action Letter finds that Public Service has satisfactorily completed the requirements of the Order on Complaint pertaining to inspection, evaluation, and analysis of the Lake Fork penstock. With regard to crossings of the penstock by the access road, the Final Action Letter states that Public Service satisfactorily complies with the Order on Complaint by prohibiting heavy traffic across the penstock or, if heavy traffic is allowed to cross, by first dewatering the penstock. It reminds Public Service that until penstock crossings adequate to support heavy traffic have been approved by the Commission and constructed, it must continue to prohibit heavy traffic or dewater the penstock, monitor the penstock and relevant drainage area, and keep the Commission informed of the status of the relevant legal proceedings.

9. On May 16, 2005, Mr. Janke timely filed a request for rehearing of the Final Action Letter, and a request for additional time to supplement his rehearing request following the receipt of certain Critical Energy Infrastructure Information (CEII)<sup>12</sup> he requested pertaining to the project.

10. On May 31, 2005, Public Service filed an answer to Mr. Janke’s request for rehearing. Public Service’s answer stated, among other things, that it had obtained a temporary restraining order against Pathfinder and San Miguel County pertaining to construction on the access road, and had reached an interim agreement to prevent further construction activity pending conclusion of the litigation.<sup>13</sup>

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<sup>11</sup> Additional information and responses pertinent to this proceeding were filed by Public Service through Xcel on December 12, 2003 and January 16, June 14, July 29, September 16, October 14 and 15, and November 19, 2004.

<sup>12</sup> CEII is information about proposed or existing critical energy infrastructure that could be useful to a person planning an attack on such infrastructure and is exempt from mandatory disclosure under the Freedom of Information Act (5 U.S.C. § 552 (1994)). The Commission established procedures for the filing of CEII and for entities to request the information in Order No. 630, III FERC Stats. & Regs. ¶ 31,140 (Feb. 21, 2003), 68 Fed. Reg. 9857 (Mar. 3, 2003). The implementing regulations are at 18 C.F.R. §§ 388.112 and 388.113 (2005).

<sup>13</sup> Public Service answer at 4-5.

11. On June 8, 2005, Pathfinder filed a copy of a May 24, 2005 Order issued by the U.S. District Court in Case No. 04-RB-1828 denying Public Service's request for a preliminary injunction prohibiting Pathfinder from driving its equipment across the penstock or undertaking any action to relocate the access road and penstock crossing during the pendency of that case. In its transmittal letter, Pathfinder states its intent to immediately reinstate heavy equipment operations in the vicinity of the penstock. Pathfinder has done so and, as required by the Order on Complaint, Public Service has dewatered the penstock.<sup>14</sup>

12. On July 20, 2005, the Commission issued a notice granting Mr. Janke's May 16, 2005 request for an extension of time until August 3, 2005, to supplement his rehearing request following the receipt of CEII material.<sup>15</sup> On August 1, 2005, Mr. Janke filed a request for a second extension of time, until September 15, 2005, to file a supplement to his rehearing request, citing his determination that he would require the assistance of an engineer for this purpose, and stating that Public Service would not be prejudiced because it had declared its intention to obtain by eminent domain Pathfinder's lands on which the Lake Fork penstock is located, and would not re-water the penstock until the conclusion of that proceeding.<sup>16</sup> He stated his expectation that a request for his engineer to obtain access to the CEII material would be filed by August 5, 2005. No such request was filed by August 17, 2005, whereupon the Commission issued a notice granting his request for additional time until September 1, 2005.

13. On August 24, 2005, Mr. Janke's consulting engineer, Mr. Geoffrey Taylor, submitted a request for access to the CEII materials previously provided to Mr. Janke and his counsel, plus additional CEII materials addressed in an access request filed the same

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<sup>14</sup> E-mail from R. Rhodes, Xcel Energy, to T. Yamashita, SFRO, dated and filed June 17, 2005.

<sup>15</sup> The Commission's letter granting Mr. Janke access to the CEII was issued on May 9, 2005, five days before the deadline for filing requests for rehearing of the Final Action Letter.

<sup>16</sup> FPA section 21 (16 U.S.C. § 814 (1994)) provides that when a licensee is unable obtain by agreement the lands or property necessary for project purposes, it may acquire the same by exercise of the right of eminent domain in state or federal district court. See letter to T. Yamashita, SFRO, from R. Rhodes, Excel, filed July 8, 2005.

date by Mr. Janke.<sup>17</sup> Mr. Janke also requested that Mr. Taylor be designated as an authorized recipient so that all CEII material provided to Mr. Janke and his counsel could be discussed with Mr. Taylor.

14. On September 1, 2005, Mr. Janke filed a supplement to his rehearing request (rehearing supplement). The rehearing supplement consists principally of Mr. Taylor's analysis and recommendations concerning various aspects of dam and project safety. It states that Mr. Taylor's comments are based entirely on his review of publicly-available documents. The filing suggests that additional or revised comments may be submitted at a future date when Mr. Taylor has reviewed those materials.<sup>18</sup> It does not, however, request a further extension of time for this purpose.

15. On September 2, 2005, the Commission issued an order granting Mr. Taylor's request for access to CEII materials already provided to Messrs. Janke and Nolan, and deferring to a later order his request for access to additional CEII materials.<sup>19</sup>

## **Discussion**

### **A. Supplemental Rehearing Request**

16. The July 20, 2005 notice granting Mr. Janke's request to supplement his rehearing request states that "[a]ny supplement to Mr. Janke's rehearing request is limited to a concise discussion of the CEII documents released to Mr. Janke's representative as they may pertain to issues raised by his rehearing request." As discussed below, Mr. Janke has almost entirely failed to heed this admonition, or to ensure that Mr. Taylor's request for access to CEII was timely submitted.

17. As noted, Mr. Taylor's analysis and recommendations are based entirely on public information, all of which has been available to Messrs. Janke, Nolan, and Taylor throughout this proceeding. Indeed, appended to the rehearing supplement are e-mails and a note indicating that Mr. Taylor has been reviewing such information since at least February 2005, long before the deadline for filing rehearing requests. Mr. Janke suggests

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<sup>17</sup> The additional materials consist of documents filed in January and July 2005 pertaining to Public Service's emergency action plan and a video tape of an interior inspection of the Lake Fork penstock.

<sup>18</sup> Rehearing supplement at 2.

<sup>19</sup> *Geoffrey Taylor*, 112 FERC ¶ 62,194.

that Mr. Taylor's failure to base his comments on the requested CEII material is no fault of his own, but offers no reason for the tardiness of Mr. Taylor's CEII access request except bare references to "scheduling conflicts" and "miscommunication."

18. Mr. Taylor's comments are, moreover, mostly concerned with aspects of dam and project safety other than the potential failure of the Lake Fork penstock. These include the stability of Trout Lake dam, the project's emergency action plan (EAP) as it pertains to a break in the Trout Lake dam, and the probable maximum flood based on the inflow design flood. None of these are related to potential failure of the Lake Fork penstock.<sup>20</sup> Only one paragraph of the analysis, concerning removal of a surge tank, relates to the potential failure of the penstock.<sup>21</sup> This issue is discussed below.<sup>22</sup>

19. In this order, we respond to Mr. Janke's request for rehearing, including his supplement, although we will disregard those portions of the supplement that fail to comport with our notice giving Mr. Janke additional time by raising issues that do not pertain to the original rehearing request.<sup>23</sup> Mr. Janke's concerns regarding project facilities and operations other than the potential for failure of the Lake Fork penstock are noted and will be addressed by D2SI in the ordinary course.

#### **B. The Regional Engineer's Authority**

20. As noted, the Final Action Letter was signed by the San Francisco Regional Engineer.<sup>24</sup> Mr. Janke argues that the Regional Engineer lacked authority to issue the

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<sup>20</sup> The EAP does not cover the penstock because, as discussed below, its potential failure poses no risk of loss of life.

<sup>21</sup> See "Trout Lake Dam – Document Review Findings" (August 29, 2005) at paragraph 4.1, attached to Mr. Taylor's letter dated August 30, 2005, which is attached to the rehearing supplement, and discussion at P 39 below.

<sup>22</sup> Mr. Taylor also questions the stability of the slope underlying Colorado State Highway 145 (paragraph 5.1), but the slope in question would not be affected by a penstock rupture because penstock is downhill from the highway.

<sup>23</sup> Mr. Janke's supplement can be read to imply that he may make further filings on rehearing. The time for doing so is past, and we will not accept any such filings.

<sup>24</sup> The Commission's five Regional Engineers report to the Director, Division of Dam Safety and Inspections who, in turn, reports to the Director, Office of Energy Projects (OEP).

Final Action Letter.<sup>25</sup> He first notes that our regulations in 18 C.F.R. Part 375 delegating authority to various Commission officials<sup>26</sup> do not specifically identify a Regional Engineer as having such authority. He adds that 18 C.F.R. § 375.301(b) states that where the Commission's regulations permit an official with delegated authority to further delegate that authority to a "designee" of such official, designee means "the deputy of such official, the head of a division, or a comparable official as designated by the official to whom the direct delegation is made." Mr. Janke contends that a Regional Engineer is neither a deputy to the Director of OEP nor the head of a division.

21. Mr. Janke's argument fails for two reasons. First, Regional Engineers derive their delegated authority directly from part 12 of the Commission's regulations. Section 12.4(b) of our regulations<sup>27</sup> provides that the "construction, operation, maintenance, use, repair, or modification of any project works are subject to the inspection and the supervision of the Regional Engineer or any other authorized Commission representative" for the purposes of "achieving or protecting the safety, stability, and integrity of the project works or the ability of any project work to function safely for its intended purposes, . . ." and "otherwise protecting life, health, or property." In order to achieve these purposes, the Regional Engineers are delegated extensive authorities, which include requiring a licensee to: (1) test or inspect project works; (2) install monitoring instruments; (3) submit reports and information regarding all aspects of the design, construction, operation, and maintenance of project works; (4) modify the projects as necessary; and (5) establish schedules for all of these actions.

22. Mr. Janke's argument also fails because the Director of OEP has ample delegated authority under 18 C.F.R. § 375.308 to take the actions taken by the Regional Engineer in this proceeding, and to subdelegate that authority to the Regional Engineers under 18 C.F.R. § 375.301(b). Regional Engineers have long used the authorities exercised by the Regional Engineer in this proceeding.

23. Mr. Janke next asserts that even if the Regional Engineer would ordinarily have authority under 18 C.F.R. Part 375 to act on the matters involved here, he has overstepped his authority in two respects. First, Mr. Janke argues that the delegations in Part 375 do not apply to contested proceedings. He is only partially correct, and is incorrect with respect to authorities exercised here. Here, the Regional Engineer acted

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<sup>25</sup> Rehearing request at 8-9.

<sup>26</sup> 18 C.F.R. §§ 375.302-14 (2005).

<sup>27</sup> 18 C.F.R. § 12.4(b) (2005).

pursuant to subsections 375.308(c)(6) and 375.308(g). Section 375.308(c)(6) provides that the Director or OEP or his designee has authority to take appropriate action on, among other things:<sup>28</sup>

New or revised exhibits, studies, plans, reports, maps, drawings, or specifications, or other such filings made voluntarily or in response to a term or condition in a preliminary permit, license, or exemption issued for a hydroelectric power project, or in response to the requirements of an order of the Commission or presiding officer's initial decision concerning a hydropower project;<sup>29</sup>

Section 375.308(g) provides the Director or his designee with authority to:

Require licensees and applicants for water power projects to make repairs to project works, take any related actions for the purpose of maintaining the safety and adequacy of such works, make or modify emergency action plans, have inspections independent consultants, and perform other actions necessary to comply with part 12 of this chapter or otherwise protect human life, health, property, or the environment.<sup>30</sup>

Neither of these grants of authority is limited to uncontested proceedings.<sup>31</sup>

24. Mr. Janke's second contention is that the Regional Engineer's determination in the Final Action Letter constitutes a reversal or modification of the Order on Complaint, which is not authorized by the delegation regulations. To be specific, he alleges that the Regional Engineer violated the Order on Complaint by failing to require: (1) an inspection and engineering design evaluation and analysis of the *entire* Lake Fork

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<sup>28</sup> 18 C.F.R. § 375.308 (2005).

<sup>29</sup> 18 C.F.R. § 375.308(c)(6) (2005).

<sup>30</sup> 18 C.F.R. § 375.308(g) (2005).

<sup>31</sup> The Director of OEP's delegated authority is limited to uncontested proceedings in the case of an application for a license, exemption, or preliminary permit (375.308(a)), license amendment or surrender of license (375.308(b)); cancellation of a preliminary permit (375.308(d)); revocation of an exemption from licensing (375.308(d)); and revocation of a license (375.308(d)).

penstock; and (2) submission for Commission approval of a design analysis, and plans and specifications, for penstock crossings by the existing or proposed relocated access road.<sup>32</sup>

25. We find no inconsistency between the Regional Engineer's actions and the Order on Complaint. First, as we explained in that order, our dam safety and inspection program is administered through the Regional Offices.<sup>33</sup> As discussed above, the Regional Engineers have been delegated very broad authority to implement the part 12 regulations. The requirements of the Order on Complaint must be read in this context. We rely upon the Regional Engineers to implement our orders in light of the factual circumstances presented by specific cases. In any event, as discussed below, we find that the Regional Engineer carried out the requirements of the Order on Complaint.

26. The penstock was subjected to a four-part inspection and analysis: (1) visual inspection of the pipe exterior; (2) visual inspection of the pipe interior; (3) pipe wall thickness testing of all representative pipe types and ages;<sup>34</sup> and (4) for pipe with unknown material properties, sampling and testing to identify the properties of the pipe materials. Although the entire interior of the penstock was not inspected, we conclude that the interior inspection was as thorough as possible given the site conditions and that, overall, the penstock was comprehensively reviewed and evaluated.

27. The interior of the penstock was inspected using a remotely-operated vehicle (ROV) at areas near existing access points. This represented about 30 percent of the total penstock length and included a representative sampling of the several penstock material ages and types. Some portions were not accessible to the ROV because pipe wall slickness caused it to lose traction. Additional visual inspections made by persons placed into the pipe at various locations increased the total area inspected to 38 percent. Certain

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<sup>32</sup> Rehearing request at 2.

<sup>33</sup> 103 FERC ¶ 61,072 at P 11.

<sup>34</sup> Because the project has been operating for over 100 years, new sections of penstock have been added and sections of the original penstocks have been replaced. Various sections are constructed of cast iron, riveted steel, welded steel, or fiberglass. Pipe thickness measurements were taken at numerous points on the penstock.

sections of the penstock cannot safely be accessed by human beings. The interior inspection did not reveal any condition that would affect the safe operation of the project.<sup>35</sup>

28. The absence of a design analysis and plans and specifications for penstock crossings also is not inconsistent with the Order on Complaint. The Regional Engineer reasonably exercised his discretion to extend the due date for these matters in light of the ongoing disputes between Public Service, Pathfinder, and San Miguel County. So long as the prohibition on heavy equipment crossing the penstock and the requirement to dewater the penstock should such crossings occur remain in place, the fundamental purpose of the Order on Complaint to ensure public safety is served.

### C. Request for Evidentiary Hearing

29. It is well-settled that the Commission is required to hold a trial-type hearing only when there are issues of material fact which cannot be resolved from the written record.<sup>36</sup> Mr. Janke asserts that there are such issues here material to our concerns about the safety of the penstock.<sup>37</sup> We disagree.

30. In fact, Mr. Janke identifies no disputed issues of fact. Rather, he states that an evidentiary hearing is necessary because the Final Action Letter does not identify the specific documents on which it rests with respect to the safety of the penstock. He adds that certain other documents raise questions about the validity of the Final Action Letter. In essence, these are claims that the Final Action Letter is not supported by substantial evidence in the record rather than claims that the record evidence itself reveals material factual disputes that must be resolved through an evidentiary hearing.

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<sup>35</sup> We note additionally that a penstock flood risk evaluation consisting of field and office studies was conducted for Public Service by an independent engineering firm, which concluded that penstock failure would pose no risk to human life or have any significant impact on residents of the Lake Fork Subdivision where Mr. Janke resides. October 2003 Report at 34.

<sup>36</sup> See e.g., *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1168 n. 41 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986); *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1067 (D.C. Cir. 1985).

<sup>37</sup> Rehearing request at 12-19.

31. The Regional Engineer's conclusions regarding the integrity of the penstock are based on his careful review of all of Public Service's submissions. Mr. Janke does not attempt to question the facts and analyses contained therein.<sup>38</sup>

32. The other documents cited by Mr. Janke are equally unavailing. He first cites a report submitted on November 24, 2004 by Public Service on Pathfinder's plans, specifications, and design calculations for its proposed access road across the penstock easement which questions the adequacy of Pathfinder's plans and specifications.<sup>39</sup> The Final Action Letter does not rely on that document, but merely notes that the issue of penstock crossing is unresolved and reminds Public Service that it must receive Commission approval of plans and specifications before any modifications are made to the penstock crossings.

33. Mr. Janke next states that Public Service has not adequately completed the requirement with respect to slope stability.<sup>40</sup> Mr. Janke is incorrect. This requirement was addressed in the October 2003 Report and Supplemental Report, and the Regional Engineer determined that the information therein is sufficient.

34. Mr. Janke next claims that a June 14, 2004 report by a Public Service consultant raises questions about the adequacy of testing of emergency closure of the penstock's shutoff valve. The section cited by Mr. Janke states that the next functional test of the emergency closure will be scheduled when a dedicated telephone communication link is installed to back up the normal radio communication between the valve and the powerhouse. Mr. Janke asserts that Public Service has failed to explain why the test cannot be performed without a backup communication system in place.<sup>41</sup> We are uncertain what Mr. Janke considers to be problematic in this regard. It is entirely consistent with the Order on Complaint, and quite sensible, for Public Service to install a

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<sup>38</sup> Orders granting access to CEII material to Mr. Janke or his representative were issued on April 1 and 21, June 25, August 17, and November 19, 2004, and on May 9, 2005.

<sup>39</sup> Rehearing request at 14, *citing* N. Kumar, "Subject: Review of Plans, Specifications and Design Calculations for Proposed Pathfinder Gravel Pit Access road, Ames Lake Fork Penstock Easement, Tacoma Ames Hydroelectric Project," November 10, 2004.

<sup>40</sup> Rehearing request at 15-16.

<sup>41</sup> Rehearing request at 16-17.

backup communication system for the shutoff valve, and to test the valve with the backup system in place. In any event, the valve was successfully tested on December 2, 2004<sup>42</sup> and, more recently, on September 7, 2005.<sup>43</sup>

35. Mr. Janke next contends that the Final Action Letter is suspect because of the Regional Engineer's handling of a letter from a local resident concerned about the potential for flooding on U.S. Forest Service lands in an area below Trout Lake Dam, which impounds the water that is diverted to the Lake Fork penstock.<sup>44</sup> The Regional Engineer forwarded this letter to Public Service, with directions to respond and to provide various relevant data.<sup>45</sup> Public Service timely responded.<sup>46</sup> The Regional Engineer, after consulting with the Forest Service, determined that no further action is necessary pending a visual inspection during the 2005 operations inspection by Commission staff.<sup>47</sup> Mr. Janke contends that the Regional Engineer's actions were insufficiently rigorous.

36. We conclude that the Regional Engineer's response was fully appropriate. More important, the concerns expressed about potential for flooding below Trout Lake Dam are unrelated to this proceeding. Any flooding resulting from high inflows to Trout Lake necessarily involves water spilled at the Trout Lake Dam which, by definition, does not enter the Lake Fork penstock.

37. Mr. Janke finds fault with the Regional Engineer for granting an extension of time to Public Service to file a revised EAP and inundation maps for the project. These requirements are also beyond the scope of this proceeding. They concern the

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<sup>42</sup> Oral communication from R. Rhodes, Xcel Energy, to G. Maloney. Internal e-mails confirming the communication were placed into the record on July 6, 2005.

<sup>43</sup> Operation Report for Project No. 400 for the period September 10, 2004 to September 7, 2005, at 10. Mr. Janke was invited to attend the September 7 test, but did not do so.

<sup>44</sup> Rehearing request at 17-19.

<sup>45</sup> Letter from T. Yamashita to R. Rhodes, Xcel Energy, issued December 10, 2004.

<sup>46</sup> Letter from R. Rhodes, Xcel Energy, to T. Yamashita, filed Jan. 31, 2005.

<sup>47</sup> Letter from T. Yamashita to R. Rhodes, Xcel Energy, issued February 12, 2005.

hypothetical failure of Trout Lake Dam, and the emergency response to the volume of water that would be released in such an event. They were developed in the context of the normal five-year reissuance requirement for the EAP for this project.<sup>48</sup>

38. Finally, the comments of Mr. Taylor attached to the rehearing supplement suggest that the failure of the penstock in 2001 may have been attributable to the removal in the early 1990s of a surge tank, the purpose of which was to reduce pressures caused by abrupt changes in the flow rate within the penstock. Mr. Taylor produces no evidence to support this suggestion. There have also been no operational problems or concerns regarding pressure in the penstock following removal of the surge tank.<sup>49</sup> In any event, as discussed above,<sup>50</sup> the penstock is now equipped with a shut-off valve which was recently successfully tested.

39. With regard to slope stability, Mr. Taylor states that penstock failures have eroded the fill supporting Colorado State Highway 145 and that the highway has been reinforced at those locations. He adds that the “overall stability of the slope appears questionable,” but offers no analysis or factual support for this statement. We see nothing in Mr. Taylor’s comments that gives rise to the need for an evidentiary hearing.

#### **D. Due Process Claims**

40. Mr. Janke also claims that his due process rights were violated. First, he states that neither he nor his counsel were served with copies of Public Service’s filings on

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<sup>48</sup> The Trout Lake Dam is classified as a “significant-hazard dam;” that is, a dam the failure of which would not result in the loss of life, but which could cause economic loss, environmental damage, or disruption of lifeline facilities. The Trout Lake Dam is regularly inspected, most recently on September 6 and 7, 2005, and the inspections give no indication that it is likely to fail. *See, e.g.*, Letter from T. Yamashita to R. Rhodes, Xcel Energy, issued September 19, 2005. The revised inundation maps and EAP were filed on July 28, 2005.

<sup>49</sup> The shutoff valve is designed to close off the penstock in six minutes. Additional stresses in the penstock are insignificant (*i.e.*, a two percent rise) with the six-minute closure time. Memorandum, “Re-Evaluate Needle Valve Closure Times and Pressures,” Wright Water Engineers, July 14, 2003, at 4.

<sup>50</sup> *See* P 34 above.

which the Final Action Letter was based, and that the Commission failed to issue public notice of such filings. This, he states, precluded him from participating in the proceeding.<sup>51</sup>

41. Mr. Janke is correct that neither he nor his counsel were served with these documents, but he has not been precluded from participating in this proceeding. When Public Service filed the documents in question, it requested confidential treatment for CEII contained therein. As required by our regulations,<sup>52</sup> Public Service submitted separate copies of the documents with and without the CEII appendices. Copies of the submissions, without the material designated CEII, were served on the restricted service list, including Mr. Janke.<sup>53</sup> Mr. Janke submitted requests under the CEII regulations for numerous Public Service filings made in connection with this proceeding. Public Service did not object to the release of any of this information to Mr. Janke or his representatives, and the Commission issued orders granting their requests.<sup>54</sup> The last such information prior to the Final Action Letter was provided on November 19, 2004, about five months previous to that letter.

42. Mr. Janke adds that he filed a letter on June 9, 2004 complaining of improper *ex parte* communications between the Commission staff and others,<sup>55</sup> but that no action has been taken. Specifically, the June 9, 2004 letter complains about:

- a letter from Pathfinder to the SFRO staff, Public Service, and the San Miguel County Planning Department, concerning a July 15, 2003 meeting between those entities at the Pathfinder gravel site, filed August 1, 2003;
- oral communications between the above-mentioned parties at the July 15, 2003 site meeting;

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<sup>51</sup> Rehearing request at 3-4.

<sup>52</sup> See 18 C.F.R. § 388.112(b).

<sup>53</sup> See, e.g., Letter from R. Rhodes, Xcel Energy, to T. Yamashita, transmitting the October 2003 Report, filed October 31, 2003.

<sup>54</sup> See note 36 above.

<sup>55</sup> Letter from Paul Nolan to Secretary Salas, filed June 9, 2004.

- letters from Pathfinder to the Regional Engineer, filed March 24 and April 22, 2004; and
- a letter from Public Service to the Regional Engineer, filed on April 4, 2004 in response to Pathfinder's March 24, 2004 letter.

Pathfinder's letters and Public Service's April 4, 2004 response were sent to decisional employees and concerned, among other things, the issues of penstock safety and slope stability. As such, they are relevant to the merits of this contested proceeding. The letters are not, however, "off-the-record" communications, because they were filed with the Commission.<sup>56</sup> They did not, therefore, violate the *ex parte* rules.

43. Neither did Pathfinder's filing of these letters violate our rules pertaining to service, which apply to "participants" in a proceeding,<sup>57</sup> because Pathfinder is not such an entity.<sup>58</sup> Although our rules do not require it, it would have been appropriate for the Commission staff to request Pathfinder to serve these letters on all parties to the proceeding, or to notify all parties on the restricted service list that they were filed. Public Service did violate the service requirement by failing to serve its response filed April 4, 2004 on Mr. Janke. However, it is clear that Mr. Janke was not prejudiced by not being served with these documents, because they were available to the public on the Commission's website within days of their filing.<sup>59</sup>

44. The oral communications between SFRO staff and Public Service made at the July 15, 2003 meeting were "off-the-record" because they were made without reasonable notice to all entities on the restricted service list and without the opportunity for them to be present at the meeting.<sup>60</sup> Commission staff should have prepared a written summary

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<sup>56</sup> In order for these communications to have been made "off-the record," they must have been "not filed with the Secretary *and* not served on the parties to the proceeding." (emphasis added). 18 C.F.R. § 385.2201(c)(4) (2005).

<sup>57</sup> 18 C.F.R. § 385.2010(a) (2005).

<sup>58</sup> Pathfinder did not intervene and is not on the restricted service list.

<sup>59</sup> Mr. Janke also requests that we issue an order that would provide him with access to all CEII filed in this proceeding, subject to an appropriate protective order, so that he does not have to make multiple CEII requests and multiple non-disclosure agreements. Because we are terminating this proceeding, this request is moot.

<sup>60</sup> *See* 18 C.F.R. § 385.2201(c)(4) (2005).

of the July 15, 2003 meeting and submitted it to the Secretary, to be placed into the public file associated with, but not part of, this proceeding, with any CEII redacted.<sup>61</sup> Although the July 15, 2003 meeting violated the Commission's prohibition on *ex parte* communications, the Final Action Letter states that the basis for the Regional Engineer's decision was the October 2003 Report and subsequent technical submittals. Therefore, the July 15, 2003 meeting had no impact on the Regional Engineer's decision and did not adversely affect Mr. Janke.

45. We note further that the public record includes many documents in this proceeding filed by Public Service or other parties, or placed into the record by Commission staff, that, although available to Mr. Janke, should have been served on him. We remind the parties and Commission staff that, except where CEII is involved, or the filing entity requests confidential treatment for other reasons pursuant to our regulations,<sup>62</sup> all written and oral communications in this proceeding are required to be served on everyone on the restricted service list. No further action is being taken at this time, however, because the relevant information has been otherwise available to Mr. Janke, and because, as discussed below, we are terminating the complaint proceeding. Parties are further reminded that failure to serve everyone on the official service list maintained by the Commission Secretary may result in the rejection of a filing in accordance with Rule 2001(b).<sup>63</sup>

46. Finally, although permanent measures to ensure that Pathfinder's operations do not compromise the safety of the Lake Fork penstock have not been completed, we conclude that the Regional Engineer's decision to terminate the proceeding was reasonable in light of the uncertainty regarding when the seemingly intractable dispute between Public Service and Pathfinder will be resolved. We will return the matter fully to OEP and the Regional Engineer, and direct that the penstock remain dewatered until the Regional Engineer has approved all necessary measures to ensure the safety of the penstock and those measures have been completed to the Regional Engineer's satisfaction.

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<sup>61</sup> 18 C.F.R. § 385.2201(f)(2) (2005).

<sup>62</sup> Others reasons for which privileged treatment may be requested include protection of trade secrets or commercial or financial information. *See* 18 C.F.R. § 388.107 (2005).

<sup>63</sup> 18 C.F.R. § 385.2003(b).

The Commission orders:

(A) Public Service Company of Colorado's motion for leave to answer Willard Janke's request for rehearing is granted.

(B) Mr. Janke's request for additional time to supplement his request for rehearing is denied.

(C) The request for rehearing, filed on May 16, 2005, as supplemented on September 1, 2005, filed by Willard Janke, is denied.

(D) The proceeding in Project Nos. 400-038 and 400-042 is terminated.

(E) Public Service shall not rewater the Lake Fork penstock until authorized to do so by the Regional Engineer.

(F) Unless provided otherwise in writing by the Regional Engineer, Public Service remains under direction to file for approval, before the Lake Fork penstock is rewatered, a design analysis, and plans and specifications, for any penstock crossings of the existing access road, or proposed relocated access road, where the roadway overlies or is adjacent to the penstock.

(G) Public Service shall continue to comply with the requirements of the Final Action Letter until further order of the Regional Engineer.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.