

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

South Carolina Electric & Gas Company

Project No. 516-386

ORDER DENYING REHEARING

(Issued October 29, 2004)

1. In this order, we deny requests for rehearing of our order of November 18, 2003, which extended the term of the license for the Saluda Project No. 516 for three years. We granted the extension to allow the licensee, South Carolina Electric & Gas Company (the Company), adequate time to conduct studies needed to prepare its application for a new license once the project reservoir is refilled and the affected environment has returned to normal after the conclusion of dam remediation activities. This order is in the public interest because it resolves issues regarding the procedures used for granting the license extension.

BACKGROUND

2. In 1984, the Commission issued the Company a new license for the Saluda Project for a term of 30 years, expiring August 31, 2007.¹ Among other things, the new license required the Company to reexamine the ability of the project dam to withstand the maximum credible earthquake. This reexamination ultimately led to the conclusion that the dam embankment material and the foundation of the dam would fail under an event with a magnitude less than that of the 1886 Charleston Earthquake. In 2002, the Commission directed the Company to take remedial action by constructing a “backup” dam immediately downstream of the existing dam.

3. Prior to excavation and backfilling in the downstream toe of the existing dam, the water level of the project reservoir was lowered from the normal operating range of elevation 352 to 358 feet (plant datum) to elevation 345 feet, to ensure the safety of

¹ 27 FERC ¶ 61,332 (1984). The project is located on the Saluda River in Lexington, Newberry, Richland and Saluda Counties, South Carolina.

people and property downstream of the project. Construction of the new dam began on August 12, 2002, and is expected to be complete by July 2005.

4. On January 10, 2003, the Company filed an application to extend the term of the Saluda Project license by five years, to August 31, 2012. In support of its request, the Company stated that it could conduct the studies needed to complete its relicense application only after the reservoir has been refilled and the site returns to pre-drawdown conditions.

5. In response to the Commission's notice of the application, the following parties intervened in opposition to the extension: The Lake Murray Association, Inc.; South Carolina Department of Natural Resources; South Carolina Coastal Conservation League and American Rivers (Conservation League); Lake Watch on Lake Murray; U.S. Department of the Interior; Saluda Chapter of Trout Unlimited; South Carolina Department of Health and Environmental Control's Bureau of Water (Carolina Department); Hawleek Creek Homeowners Association; and South Carolina Department of Parks, Recreation and Tourism.

6. These intervenors opposed the extension as unnecessary, arguing that the Company had already completed some studies and that any other needed studies could be conducted while the reservoir was drawn down during the remediation process. They also maintained that the Commission must prepare an environmental assessment and that the Company must obtain a new state water quality certification pursuant to the Clean Water Act (CWA)² before the license can be extended. We rejected these arguments in our November 13, 2003 Order, but found that a three-year extension of the license term would be sufficient.

7. Interior, Carolina Department, and Conservation League filed timely requests for rehearing, reiterating their arguments that the extension is not necessary. Interior requests that we deny the extension and direct the Company to begin pre-filing consultation and studies now, concurrently with dam remediation activities. Carolina Department and Conservation League renew their argument that the extension requires water quality certification, and Conservation League continues to urge that an environmental assessment is needed. For the reasons explained below, we deny rehearing.

DISCUSSION

8. Intervenors continue to maintain that an extension of the license is not needed because pre-filing consultation and some studies can be conducted concurrently with dam

² 33 U.S.C. § 1321 *et seq.*

remediation activities. Carolina Department focuses solely on water quality issues, stating that much of the information needed for relicensing either is already available or is being collected in connection with a proposed change in the dissolved oxygen standard for the lower Saluda River. Interior and Conservation League argue that the Company did not consult with resource agencies to determine the nature and scope of necessary studies before filing its extension request, and that if it had done so, it could have identified some studies that should proceed while the reservoir is drawn down.

9. In our order granting the extension, we acknowledged that some studies could be conducted before the reservoir is refilled. However, we found that a number of studies that ordinarily are needed for relicensing should be conducted after the reservoir is refilled and the environment has returned to normal. For example, we found that a dissolved oxygen study in the project tailrace will be needed to address issues related to a stocked rainbow trout fishery downstream of the project, and that meaningful results could not be obtained with the reservoir drawn down. Similarly, we found that normal reservoir and operating conditions will be needed for instream flow studies downstream of the project, littoral-zone studies to address water-level fluctuations, fish entrainment and impingement studies that require field work, and lake carrying capacity studies. Finally, we found that if information is needed beyond that provided in the Commission's required Form 80 recreation use report, recreation use surveys should be conducted after the reservoir is refilled. The Company's pre-filing consultation with the resource agencies and any affected Indian tribes may suggest additional studies that will be needed for relicensing and that should be conducted under normal reservoir levels and operating conditions. For many studies, meaningful results cannot be obtained while the reservoir is drawn down. The fact that some studies could be conducted now does not negate the need to conduct other studies later, after the reservoir has been refilled. On balance, we believe it makes sense to extend the license term to allow sufficient time to conduct these studies.

10. Interior argues that the three-year extension will result in continuing adverse impacts to fish, wildlife, and recreational resources, and will delay resolution of important issues at relicensing. Interior cites the need to re-evaluate the Land Use and Shoreline Management Plan, address issues of water quality and habitat below the dam, consider fish passage requirements, and evaluate the effect of the project on the Congaree Swamp National Park. Implicit in Interior's argument is the assumption that, if we were to deny the license extension, these issues could be resolved three years earlier. The facts reveal that this is not the case.

11. The extension changes the time by which the licensee must file its relicense application, moving it three years later. It is true that, without an extension, the licensee would be required to file its application three years earlier. However, because the reservoir has been drawn down, the Company would have a valid basis for requesting

(and the Commission, for granting) an extension of time to complete any necessary studies and to file any additional information needed in support of the application. Upon expiration of the existing license, the Commission would be required to issue, and the Company would be required to accept, an annual license authorizing continued operation under the terms and conditions of the expired license. Issuance of an annual license does not require a state water quality certification under section 401(a)(1) of the CWA.³ The annual license would remain in effect until the Commission acted on the relicense application. Thus, in practical terms, no time could be saved by denying the extension, because there is a need to obtain information and conduct studies after the reservoir is refilled and conditions have returned to normal. The extension is therefore more procedural than substantive in the circumstances presented here.

12. The effects of project operation, both beneficial and adverse, will continue unchanged until the Commission acts on the Company's relicense application. The concerns that Interior raises will be addressed at relicensing, and there is nothing in the record to suggest that there are any particular problems that must be addressed before relicensing, in the form of interim protective measures.⁴

13. Interior requests that we deny the extension and direct the Company to begin pre-filing consultation and studies now, so that studies can be completed concurrently with the dam remediation. As we have seen, although denying the extension would result in earlier consultation and completion of some studies, other studies would have to await refilling of the reservoir. In addition, while we strongly encourage applicants to engage in early consultation with the resource agencies, our regulations provide no basis upon which we could require it. Although our regulations require that an applicant consult with resource agencies and conduct any necessary studies before the license application is filed, they do not dictate any particular time period for these activities.⁵

14. A licensee must file its notice of intent to seek a new license at least five years, but no more than five and one-half years, before the expiration of the existing license.⁶ Thus,

³ See *California Trout, Inc., v. FERC*, 313 F.3d 1131 (9th Cir. 2002).

⁴ Moreover, the Commission continues to resolve ongoing matters regarding environmental matters at the Saluda Project. See, e.g., *South Carolina Electric and Gas Company*, 108 FERC ¶ 61,064 (2004) (accepting settlement resolving water quality complaint); *South Carolina Electric and Gas Company*, 107 FERC ¶ 62,273 (2004) (approving update to Land Use and Shoreline Management Plan).

⁵ See 18 C.F.R. § 16.8 (2004).

⁶ See 18 C.F.R. § 16.6(c) (2004).

the Company will need to file a new notice of intent as a result of the license extension. A licensee must file its relicense application at least two years before the existing license expires, which leaves a three to three-and-one-half-year period for engaging in pre-filing consultation and conducting studies.⁷ However, we understand that some licensees find it advantageous to begin their pre-application consultation earlier, and there is nothing in the regulations to prevent them from doing so. In this case, agencies have suggested that some studies can (or should) be conducted now, while the reservoir is drawn down. Thus, the dam remediation presents a unique opportunity to obtain some results that might not otherwise be available. We therefore urge the Company to begin consulting with the resource agencies now, if it has not already done so, to determine whether some studies should be undertaken concurrently with dam remediation activities.

15. Conservation League submits what it terms an offer of settlement, proposing to stipulate that, if we deny the Company's request to extend the license term, the parties will not request, and the Commission will not require, additional information or studies based on the ground that the reservoir was below normal elevation during the study. No other party seeks to join Conservation League's proposal, and we are unable to adopt it. We must ensure that the Company provides sufficient information in its application to allow us to determine whether the project should be relicensed, and if so, what terms and conditions should govern operation of the project for the next thirty to fifty years. If additional information is needed, we must ensure that it is obtained, and we cannot agree to forego requesting whatever information may be needed to evaluate whether the project is in the public interest and meets the standard for relicensing, as required by the Federal Power Act (FPA), or to allow us to take the "hard look" required by the National Environmental Policy Act.⁸

16. Conservation League and Carolina Department reiterate their argument that a water quality certification is needed for the license extension. Carolina Department simply states, without elaboration, that the Commission should require certification for the license. Conservation League argues that we erred in concluding that the certification issued for the new license in 1984 still applies, and that a new certification would be required only if extending the license term would result in a new or greater discharge. Conservation League argues that the 1984 certification was for a 30-year license term, and the extension authorizes three additional years of operation that will therefore result

⁷ See 18 C.F.R. § 16.9(b) (2004).

⁸ Some studies that cannot be undertaken while the reservoir is below its normal level might also be needed to satisfy the Commission's obligations under other statutes, such as the Endangered Species Act.

in a discharge. Conservation League maintains that the situation is analogous to issuance of a new license that makes no changes in license conditions, which the Commission would treat as requiring certification for the new license term. Citing *North Carolina v. FERC*, Conservation League argues that the test is not whether the activity will alter a discharge, but rather, whether it will result in any discharge.⁹

17. Here, there is no question of alteration of a discharge, because project operation will not change. Rather, we find that extending the license term for an additional three years in the circumstances presented here is not an “activity . . . which may result in any discharge” within the meaning of section 401(a)(1) of the CCWA. The extension authorizes the Company to continue operating its project under the terms of the existing license for an additional three years, with no changes in project facilities or operation. The project discharges that are already authorized in the existing license will continue to occur, without change, under the same license. Thus, the extension of the license term is not an activity that will result in any discharge. Only the license term will change as a result of the extension. Under section 6 of the FPA, the term of a license is in the Commission’s discretion, subject only to the statutory limitation of 50 years.¹⁰

⁹ *North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997).

¹⁰ 16 U.S.C. § 799; *See Montana Power Co. v. FPC*, 330 F.2d 781, 788 (9th Cir. 1964); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 157-58 (D.C. Cir. 1967). For original and new licenses, the Commission’s license term policy is linked to the extent of development and environmental measures that are proposed or required. The Commission grants a longer term, up to the 50-year maximum, if a substantial amount of development or improvement is involved, or substantial environmental measures are required. This increases the likelihood that the project will be financially feasible by allowing the license more time to recover the cost of its investment. *See Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,383-84 (1994); *see also Montana Power Co.*, 47 FERC ¶ 61,277 at 61,963 (1989), and cases there cited. In license amendment situations, the policy is similar, and extensions are often granted in connection with amendments that involve substantial improvement or significant redevelopment of the project, and may include not only an increase in installed generating capacity, but also physical improvements to enhance the environment. Such amendments typically involve activities that trigger the certification requirement of the CWA. *See, e.g., Milstar Manufacturing Corporation*, 32 FERC ¶ 62,711 at 63,914 (order amending license, including condition of water quality certificate), *appeal granted in part*, 33 FERC ¶ 61,329 (1985) (extending license term). Term extensions that are unrelated to substantial improvement or significant redevelopment are rare; we are aware of only one other case in addition to this one. In *Montana Power Company*, the project reservoir was part of a Superfund site, and the licensee was unable to prepare a relicensing application
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18. Carolina Department issued water quality certification for the 1984 license on May 3, 1977.¹¹ Contrary to Conservation League's assertion, the certification states that it is issued for the relicensing, without any mention of a particular license term. Thus, the certification supports whatever license term the Commission may establish, consistent with its license term policy, including any extension.

19. Issuance of a new license for a hydroelectric project is fundamentally different from an extension of the license term. Under the FPA, a relicensing proceeding requires the Commission to reexamine whether the project should be permitted to continue to operate, and if so, under what terms and conditions. Issuance of a new license represents a new commitment of a public resource, rather than a mere continuation of the *status quo*. Thus, the Commission must make the same public interest determinations on relicensing as on initial licensing, even if no changes are proposed in project facilities or operation.¹² An applicant for a new license seeks authorization to operate and maintain its project for the term of a new license. Because the applicant seeks a federal license for operation and maintenance of a hydroelectric project, which is an activity that may result in a discharge, certification (or waiver) is required before the Commission may issue a new license authorizing the activity. In contrast, extension of the license term simply allows the licensee to continue its already-authorized activity, without change in a discharge, for an additional period of time, in a manner that does not trigger the certification requirements of the Clean Water Act.¹³

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without first knowing how EPA intended to proceed with remediation, because some options might preclude continued operation of the project. The Commission therefore granted several license extensions to allow time for EPA to make a decision on the Superfund remediation. *See Clark Fork and Blackfoot, LLC*, 107 FERC ¶ 62,028 (2004); *Montana Power Co.*, 99 FERC ¶ 61,049 (2002); *Montana Power Co.*, 69 FERC ¶ 61,124 (1994); *Montana Power Co.*, 50 FERC ¶ 62,139 (1989).

¹¹ *See* Appendix 1 to the Company's letter to George Taylor, FERC (filed October 16, 2003). The letter provides information concerning water quality compliance; a copy of the certificate is attached as Appendix 1.

¹² *See Confederated Tribes of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984).

¹³ Conservation League also takes issue with our regulation, which provides that a new water quality certification is required for a license amendment only if the amendment will have a "material adverse impact on the water quality in the discharge from the project." *See* 18 C.F. R. §4.34(b)(5)(iv) (2004). Because we conclude that the
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20. Carolina Department requests that, if we do not require certification, we should require that the Company implement plans such that all applicable water quality standards will be maintained before the extension begins. In support, Carolina Department attaches a copy of its earlier comments in this proceeding. Those comments, which we reviewed in connection with our prior order, indicate that the Department has raised concerns in the past about the project's adherence to dissolved oxygen standards and has informed the Company that it will be required to meet applicable water quality standards at relicensing. They also indicate that, since 1999, the Company has been providing water quality data and reporting information on its efforts concerning this issue, and that the Department is in the process of revising its site-specific dissolved oxygen standard for the lower Saluda River.

21. In response to an offer of settlement, we recently dismissed a complaint alleging that the Company was violating the terms of its license by operating the project in a manner such that the dissolved oxygen standard for the Saluda River below the project was not being met. In connection with that dismissal, we amended the license for the Saluda Project to require that the Company, in cooperation with conservation groups and resource agencies (including Carolina Department), develop and file, for Commission approval, operating plans to enhance water quality in the lower Saluda River.¹⁴ In light of this amendment, we find nothing in the Carolina Department's comments to indicate that there is an ongoing water quality problem that requires further current action, and we will consider water quality issues during relicensing.

22. Conservation League renews its argument that the Commission must prepare an environmental assessment before the term of the license can be extended. In our prior order, we concluded that an environmental assessment is not needed because extending the license term would not involve any ground-disturbing activity or changes to project works or operation, and thus would not have any environmental effects. For this reason, license amendments of this type are categorically excluded under our regulations from the requirement to prepare either an environmental assessment or an environmental impact statement.¹⁵

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license extension will not result in any discharge, the certification requirement of CWA section 401(a)(1) is not triggered, and we need not consider the applicability of this regulation.

¹⁴ See *South Carolina Electric & Gas Company*, 108 FERC ¶ 61,064 (2004).

¹⁵ See 18 C.F.R. § 380.4(a)(13) (2003).

23. Conservation League acknowledges that this provision of our regulations applies on its face, but nevertheless argues that a license extension changes project operations because it allows a three-year delay of the schedule for relicensing. As we have seen, this is not the case. Although the extension will delay the filing of a relicense application, it will have no practical effect on the overall timing of relicensing because, absent an extension, there would still be a need to conduct studies and obtain additional information after the reservoir has been refilled and conditions have returned to normal. Accordingly, we conclude that, in these circumstances, no environmental effects can be attributed to the license extension.

24. Conservation League and Interior argue that our granting of a license extension rewards the Company for delaying its seismic reevaluation of the project. They maintain that, because the Commission authorized the dam remediation in 2002, the Company effectively waited until the end of the license term to implement the requirements of Article 27 of its license. They further argue that the Commission should not reward this delay by granting an extension of the license term. This view reflects a misunderstanding of the complex and controversial history of the seismic reevaluation for the project.

25. When the Commission issued the new license in 1984, the prior seismic analysis for the project indicated that the dam was safe but might require reevaluation. Article 27 of the license required the Company to file, within one year, a report defining the near-field and far-field earthquakes at the project using state-of-the-art theories and methodology. If that report showed that the earthquake loading used in the prior analysis should be increased, the Company was required to file a revised dynamic stability analysis of the project structures using the updated earthquake data. The Company filed its initial report in 1985, and discussions began among the Commission staff, the Company, and consultants on both sides to determine what earthquake value should be used for a revised analysis. No agreement was reached, and in 1995, the Commission staff directed that the analysis be done using specified values and records. Once the reevaluation was completed, the Commission staff and the Company began considering options for remediating the dam. This analysis ultimately led to the Commission's authorization of the remediation in 2002. The Commission's records show that the Commission staff and the Company were actively involved in meetings, discussions, and conducting and reviewing various analyses and reports over a period of many years. We find no basis for concluding that an extension should be denied because the Company delayed implementing Article 27 of its license.

The Commission orders:

The requests for rehearing filed in this proceeding on December 18, 2003, by the South Carolina Coastal Conservation League and American Rivers, the U.S. Department of the Interior, and the South Carolina Department of Health and Environmental Control's Bureau of Water, are denied.

By the Commission.

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Magalie R. Salas,
Secretary.