

128 FERC ¶ 61,068
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

County of Butte, California

Docket No. EL09-55-000
Project No. 2100-165

v.

California Department of Water Resources

ORDER DENYING COMPLAINT

(Issued July 16, 2009)

1. On May 22, 2009, the County of Butte, California (Butte County) filed a formal complaint pursuant to Rule 206 of the Commission's Rules of Practice and Procedure¹ against the California Department of Water Resources (California DWR), licensee for the Oroville Project No. 2100, located in Butte County, California. The complaint alleges ongoing violations of the recreation and public safety requirements of the project license.
2. For the reasons discussed below, the complaint is denied. The facts alleged do not constitute any past or present violation of the license terms. Our denial here is without prejudice to full consideration of all relevant recreation and public safety issues in the ongoing relicensing proceeding for the Oroville Project.

Background

3. The Oroville Project was originally licensed in 1957.² The 762-megawatt project is located on the Feather River, in Butte County, California, in the immediate vicinity of the City of Oroville, approximately 130 miles northeast of Sacramento, California. The project includes the Oroville Reservoir, the Thermalito Forebay, the Thermalito Afterbay, and the Thermalito Diversion. The project occupies 41,540 acres of land, including

¹ 18 C.F.R. § 385.206 (2008).

² *California Department of Water Resources*, 17 FPC 262 (1957) (1957 license).

1,620 acres of federal lands managed by the U.S. Department of Agriculture's Forest Service and the U.S. Department of the Interior's Bureau of Land Management.

4. On January 26, 2005, California DWR filed an application for a new license. On March 24, 2006, California DWR filed a comprehensive settlement agreement with the Commission on behalf of itself and 53 settling parties. Butte County, which is a party to the relicensing proceeding, is not a party to the settlement agreement. On January 31, 2007, the license for the project expired. The project has been operating on an annual license since February 1, 2007.³ The relicensing proceeding is currently pending before the Commission.

5. On May 22, 2009, Butte County filed its complaint. Butte County alleges violations of Articles 7, 14, and 37 of the Project No. 2100 license and of the recreation and public safety requirements of section 2.7(f)(1) of the Commission's regulations.⁴ Butte County also argues that the Commission has authority to adopt interim conditions pending relicensing of the project.

6. Butte County contends that the licensee has failed to "comply with the requirements of its license to provide for public safety and recreational opportunities" at the project.⁵ Butte County states that California DWR has failed to provide safe access to public recreational facilities, to construct and maintain recreational facilities, and to properly maintain the dam,⁶ thus allowing the project to be a danger to public safety.⁷

7. Butte County states that to meet the demand for public protection at the project, it provides police and first responder services,⁸ but that, unlike other users of Butte County's services, under state law California DWR is exempt from the payment of

³ See *Notice of Authorization for Continued Project Operation*, issued February 1, 2007 in Project No. 2100.

⁴ 18 C.F.R. § 2.7(f)(1) (2008).

⁵ Complaint at 1.

⁶ Butte County states that the State of California has designated the project as a "Tier 1" security asset. As a result, Butte County claims California DWR must provide Butte County with additional monies for law enforcement personnel.

⁷ Complaint at 19.

⁸ Butte County estimates that it spends approximately \$5.8 million per year to provide essential governmental and first responder services to the project. Complaint at 3.

property taxes and fails to make payments in lieu of taxes to compensate Butte County for the costs of providing these services.⁹ Butte County avers that the licensee is ultimately responsible for ensuring the public safety at the project. Thus, Butte County contends, by failing to pay Butte County for the costs it incurs for police, fire, and other essential public protection services, California DWR is violating its recreational and public safety obligations at the project.¹⁰

8. Specifically, Butte County alleges that California DWR is in contravention of section 2.7(f)(1) of the Commission's regulations and Articles 7, 14, and 37 of the 1953 Form L-6, made requirements in the 1957 license. Butte County states that California DWR must provide for safe recreational opportunities pursuant to section 2.7(f)(1) of the Commission's regulations. Likewise, under Article 7, Butte County asserts that the licensee must provide for "full public utilization of such lands and waters for navigation and recreational purposes," except for reserved areas "as necessary for the protection of life, health, and property."¹¹ Finally, Butte County disputes the California DWR's compliance with the terms of Articles 14 and 37, which Butte County claims requires adequate provisions for fire suppression.¹² Butte County states that by failing to provide or fund these services, California DWR has breached its duties under the license.

9. Finally, Butte County asserts that the Commission has authority to adopt interim conditions pending relicensing of the project. According to Butte County, the Commission has the obligation to ensure that the licensee is meeting its safety obligations pursuant to Articles 3 and 9 of the license.¹³ Butte County avers that the Commission

⁹ As a municipality, California DWR is exempt from the payment of property taxes. As a result of this tax exempt status, Butte County states that it loses \$6.9 million per year in property taxes. Complaint at 5.

¹⁰ Complaint at 2.

¹¹ Complaint at 14. *See* Standard Article 7, Form L-5, published at 16 FPC 1121, 1123 (1953), and incorporated into the license at 17 FPC 262, 265, Ordering Paragraph (B).

¹² Complaint at 15. *See* Standard Article 14, Form L-5, published at 16 FPC 1121, 1124 (1953), and incorporated into the license at 17 FPC at 265, Ordering Paragraph (B); 17 FPC at 267 (Article 37, Ordering Paragraph (B)).

¹³ *See* Standard Article 3 and 9, Form L-5, published at 16 FPC 1121 (1953), and incorporated into the license at 17 FPC 262, 265, Ordering Paragraph (B).

may reevaluate a license condition when there are changed circumstances, such as those at issue in this proceeding.¹⁴

10. Butte County's request for relief asks that the Commission require California DWR to: (1) provide an annual reimbursement of \$5.8 million to Butte County for its costs incurred in providing law enforcement and public safety services to the project from the date that the license expired on January 31, 2007 through the pendency of the relicensing proceeding; and (2) make annual payments in lieu of taxes in the amount of \$6.9 million to reimburse Butte County for the essential infrastructure needed to provide public services and for the use of county land and natural resources.

11. The Commission issued public notice of the complaint on May 26, 2009, with a deadline of June 11, 2009, for comments, motions to intervene, and the licensee's response.¹⁵

12. On June 10, 2009, California DWR filed an answer to the complaint. In its answer, California DWR disputes any alleged violation of its license or the Commission's regulations. California DWR states that Butte County failed to cite any specific instances of misconduct. California DWR states that the project undergoes periodic operations and environmental and public use inspections and that the Commission has never found the project to be in noncompliance with license requirements.¹⁶ California DWR states that Butte County's allegations are unfounded, as Butte County cannot cite to a specific "federal, state, or local health, sanitation, and public safety regulation to which [California] DWR is not adhering or any instance of [California] DWR failing to cooperate with law enforcement authorities in the development of such regulations."¹⁷ Thus, California DWR contends that Butte County's allegations are unfounded.

13. California DWR also asserts that the Commission does not have the authority to adopt interim conditions. California DWR states that Butte County misunderstands the purpose of Articles 3 and 9. Article 3 states that the licensee must construct the project works in conformity with the license and Article 9 requires the licensee to remove or deposit dredged or excavated materials so they will not interfere with navigation as

¹⁴ Complaint at 23.

¹⁵ 74 Fed. Reg. 26,393 (June 2, 2009).

¹⁶ Answer at 4.

¹⁷ *Id.*

directed by the U.S. Army Corps of Engineers.¹⁸ Therefore, California DWR argues that these provisions do not permit the Commission to reevaluate the terms of the license.

14. On June 11, 2009, the State Water Contractors (Water Contractors) and the Metropolitan Water District of Southern California (Metropolitan) filed a joint motion to intervene and comments.¹⁹ Water Contractors and Metropolitan state that the issues raised in Butte County's complaint have been repeatedly raised in the Oroville Project's relicensing proceeding, and thus a complaint proceeding is an improper forum. Regardless, Water Contractors and Metropolitan assert that the complaint fails to allege any violation of a statute, regulation, or license term by California DWR. Finally, Water Contractors and Metropolitan argue that the Oroville Project license does not contain any clause which would permit the Commission to order any remedy to the complaint.

15. On June 30, 2009, Butte County filed an answer to California DWR's answer and Water Contractor's and Metropolitan's protest.

Discussion

A. Preliminary Matters

16. Unless otherwise ordered by a decisional authority, Commission regulations do not permit a filing of an answer to an answer.²⁰ Therefore, the Commission does not generally allow for further filings in response to a licensee's answer to a complaint. The Commission may find good cause to waive this rule, if the answers provide additional information to assist in our decision-making. We do not find good cause to waive this provision, since Butte County's answer did not provide the Commission with any additional information. Therefore, the June 30, 2009 answer is rejected.

B. Recreation and Public Safety

17. The Commission's regulations provide that a complaint may be filed against a person alleged to be "in contravention or violation or any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction" and must "[c]learly identify the action or inaction

¹⁸ *Id.* at 9-10.

¹⁹ Timely, unopposed motions to intervene are automatically granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2008).

²⁰ 18 C.F.R. § 385.213(a)(2) (2008).

which is alleged to violate applicable statutory standards and regulatory requirements.”²¹ Allegations made by a complaint must establish a violation of the license.²²

18. Here, Butte County alleges that by failing to reimburse it for the public services it provides on project lands, California DWR is unable to satisfy the recreation and public safety requirements of its license. Butte County’s assertions are without merit.

19. The Commission’s policy statement on recreation development at licensed projects provides that the licensee must “comply with federal, state, and local regulations for health, sanitation, and public safety, and to cooperate with law enforcement authorities in the development of additional regulations for such purposes.”²³ Butte County has failed to show that either this general policy requires the specific remedies it seeks or that California DWR is in any way out of compliance with the policy.

20. Moreover, contrary to Butte County’s allegations, there is no evidence in the record that California DWR has violated the requirements of Standard Articles 7,²⁴ 14,²⁵ and 37²⁶ of the license or the Commission’s regulations. Butte County has not shown

²¹ 18 C.F.R. § 385.206(a) and (b) (2008).

²² *City of Tacoma, Washington*, 85 FERC ¶ 61,315 (1998), *reh’g. denied*, 86 FERC ¶ 61,076 (1999), *aff’d*, *Friends of the Cowlitz v. FERC*, 253 F.3d 1161 (9th Cir. 2001).

²³ 18 C.F.R. § 2.7(f)(1) (2008).

²⁴ Standard Article 7 requires the licensee to allow the public access to project waters and lands for navigation and recreational purposes. However, the licensee may prevent public access on project waters and lands in order to protect life, health and property. Standard Article 7, Form L-5, published at 16 FPC 1121, 1123 (1953), and incorporated into the license at 17 FPC at 265, Ordering Paragraph (B).

²⁵ Standard Article 14 requires the licensee to do everything reasonably within its power to require its employees and contractors to do everything within their power to prevent and suppress fires. *See* Standard Article 14, Form L-5, published at 16 FPC 1121, 1124 (1953), and incorporated into the license at 17 FPC at 265, Ordering Paragraph (B).

²⁶ Article 37 requires the licensee to relocate or replace U.S. Forest Service, state, county, and local roads, bridges, and communication facilities existing when the license was issued and which were used by the Forest Service for prevention of fires on Forest Service lands. *See* 17 FPC at 267. California DWR states that this requirement was completed nearly 50 years ago; therefore, the article is non sequitur to Butte County’s

(continued)

that California DWR is not allowing appropriate public access to project lands and works or that it is not taking proper action to prevent and suppress fires. The Commission conducts inspections of the dam facilities every five years, pursuant to Part 12 of our regulations to ensure compliance with license requirements and our regulations.²⁷ In our most recent inspection, conducted in May 2008, Commission staff determined that the “overall project is in good condition and is properly maintained.”²⁸ Likewise, in Commission staff’s most recent environmental inspection, conducted in June 2008, only a few minor action items were identified and these were remedied by California DWR.²⁹ Therefore, we find no evidence of licensing or regulatory violations by California DWR.

21. As a general matter, it is our policy to require our licensees to implement necessary license conditions and not to fund personnel at local agencies.³⁰ Consistent with this policy, nothing in California DWR’s license requires an agreement between the licensee and Butte County to pay for law enforcement on project lands or waters.³¹ The Commission looks to the licensee to ensure compliance with all of the license requirements on project lands and waters.³² Should a licensee choose to contract with local entities to provide for law enforcement and safety services through an “off-license”

argument. We agree.

²⁷ 18 C.F.R. Part 12. There is no evidence that California DWR is not in compliance with its Emergency Action Plan, Project Safety Plan, Project Security Plan, and Dam Safety Surveillance and Monitoring Plan. Therefore, we find no violation of our dam safety requirements.

²⁸ See Letter from Ron Adhya, Regional Engineer, to Raphael Torres, State Water Project Deputy Director, issued August 28, 2008.

²⁹ See Letter from George Taylor, Division of Hydropower Administration and Compliance, to Raphael Torres, State Water Project Deputy Director, issued July 30, 2008.

³⁰ *Avista Corp.*, 127 FERC ¶ 61,265, at P 193 (2009); *Public Utility District, No. 2*, 123 FERC ¶ 61,049, at P 79 (2008); *Portland General Electric, Co.*, 117 FERC ¶ 61,112, at P 83 (2006). See *Settlement Policy*, 116 FERC ¶ 61,270, at P 24 (2006).

³¹ Moreover, “[t]he Commission is not a taxing authority . . . Should the state see fit to require [the licensee] to pay taxes, it may do so. The Commission will not usurp this function or establish a tax regime in addition to those provided for by state and federal law.” *New York Power Authority*, 120 FERC ¶ 61,266, at P 33 (2007).

³² *Portland General Electric, Co.*, 117 FERC ¶ 61,112, at P 84 (2006).

agreement, it is free to do so. However, we do not require our licensees to subsidize local services.³³

C. Interim Conditions

22. Pursuant to section 6 of the Federal Power Act,³⁴ a license “may be altered . . . only upon mutual agreement between the licensee and the Commission after 30 days public notice.” Thus, if the license does not reserve the Commission’s authority with respect to a matter, then any changes in the license conditions on that matter require the licensee’s consent.³⁵

23. Butte County alleges that the Commission has the authority under Articles 3 and 9 of the license to impose interim conditions, thus enabling the Commission to require California DWR to reimburse Butte County for its costs associated with providing public services to the project. Butte County relies on *Platte River II*,³⁶ stating that the “purpose of a reservation of authority . . . is to enable the Commission to deal – at any time during the license term – with environmental concerns that may have been unforeseen when the project was originally licensed.”³⁷ We disagree.

24. Article 3 of the license requires the licensee to construct project works in conformance with approved exhibits, and, except in emergencies, this article prohibits the licensee from altering the approved project facilities without prior Commission approval. Article 3 also requires compliance with the Commission’s rules regarding construction, operation, and maintenance of the projected works in order to protect life, health, and

³³ *Id.* Butte County cites to New York Power Authority’s (NYPA) Niagara Project No. 2000-036, 105 FERC ¶ 61,102 (2003), and St. Lawrence Project No. 2216-066, 118 FERC ¶ 61,206 (2007). In each project, NYPA agreed to compensate the host counties for lost tax payments and other costs through off-project agreements, not by Commission direction.

³⁴ 16 U.S.C. § 799 (2006).

³⁵ *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 473 (9th Cir. 1984) (notwithstanding a reopener clause in a license, the Commission cannot amend a license without the licensee’s consent).

³⁶ *Platte River Whooping Crane Habitat Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992).

³⁷ *Central Nebraska Public Power & Irrigation District*, 50 FERC ¶ 61,180, 61,530-31 (1990), *aff’d*, *Platte River Whooping Crane Habitat Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992).

property.³⁸ Article 9 of the license requires that any material dredged or excavated during the work authorized by the license be removed so it does not interfere with navigation, as directed by the U.S. Army Corps of Engineers.³⁹

25. Neither of these articles reserves authority for the Commission to impose license requirement for the provision of payments in lieu of taxes or annual reimbursements for law enforcement and public safety to Butte County. Therefore, we could not amend the license without California DWR's consent, which it clearly has not given. We also note that a complaint, which involves an allegation of violation of statute, rule, or order, is not an appropriate vehicle for seeking to reopen a license. A complaint must demonstrate violations of law or Commission rule or regulation. In a reopener proceeding, the petitioner must show that the terms of the license are no longer adequate to deal with current conditions.⁴⁰ Butte County has failed to allege or demonstrate facts sufficient to support reopening the license.

26. Butte County has failed to show that California DWR has in any way violated its license or our regulations. To the extent that Butte County seeks for us to impose on California DWR a requirement to make payments to Butte County over the term of a new license, this request has been raised and is being addressed in the relicensing proceeding. We see no need to address it separately here.

27. In light of the foregoing, Butte County's complaint is denied.

The Commission orders:

(A) The complaint filed on May 22, 2009, by County of Butte, California is denied.

(B) The motion to intervene filed on June 11, 2009, by the State Water Contractors and the Metropolitan Water District of Southern California is granted.

³⁸ See Standard Article 3, Form L-5, published at 16 FPC 1121 (1953), and incorporated into the license at 17 FPC 262, 265, Ordering Paragraph (B).

³⁹ See Standard Article 9, Form L-5, published at 16 FPC 1121 (1953), and incorporated into the license at 17 FPC 262, 265, Ordering Paragraph (B).

⁴⁰ See *PacifiCorp*, 126 FERC ¶ 61,236, at P 14 (2009).

(C) The answer filed on June 30, 2009, by County of Butte, California is rejected.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.