

141 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Pacific Gas and Electric Company

Project No. 2479-012

ORDER DENYING REHEARING AND STAY
AND AMENDING LICENSE

(Issued November 15, 2012)

1. On July 18, 2012, Commission staff issued a subsequent license for a transmission-line-only project to Pacific Gas and Electric Company (PG&E),¹ pursuant to Part I of the Federal Power Act (FPA).² On August 16, 2012, PG&E filed a request for rehearing and a request to stay the effectiveness of the July 18 license order. On August 17, 2012, Placer County Water Authority (PCWA) filed a request for rehearing of the July 18 license order. As discussed below, we deny the requests for rehearing and stay.

I. Background

2. On February 18, 2011, PG&E filed an application for a subsequent license for continued operation and maintenance of the 13.27-mile-long French Meadows Transmission Line Project No. 2479.³ The project is located in the Middle Fork American River drainage in Placer County, California, and occupies 32.78 acres of land managed by the U.S. Department of Agriculture's Forest Service (Forest Service) in the Eldorado and Tahoe National Forests. PG&E's French Meadows Transmission Line

¹ *Pacific Gas and Electric Co.*, 140 FERC ¶ 62,062 (2012). A "subsequent" license is a license issued after expiration of a minor license that was not subject to sections 14 and 15 of the FPA. 18 C.F.R. § 16.2 (2012).

² 16 U.S.C. §§ 791(a)-825(r) (2006).

³ PG&E's previous license, issued on June 30, 1965, will expire on February 28, 2013. 33 F.P.C. 1308 (1965).

Project serves as the primary transmission line for PCWA's separately-licensed Middle Fork American River Project No. 2079.

3. Section 4(e) of the FPA requires the Commission to include in licenses located within reservations such as national forests "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."⁴ On May 27, 2011, the Forest Service timely filed, for inclusion in the license, 30 section 4(e) conditions that it found necessary for the protection and utilization of the Eldorado and Tahoe National Forests.

4. Section 241 of the Energy Policy Act of 2005 (EPAAct 2005) added new section 33 to the FPA.⁵ That section provides that licensees and other parties to licensing proceedings may propose alternatives to section 4(e) conditions promulgated by the relevant Secretaries, and establishes standards under which the relevant Secretary shall consider such alternatives.

5. As required by EPAAct 2005, the Secretaries of Agriculture, Commerce, and the Interior issued regulations establishing procedures for, among other things, the consideration of alternative section 4(e) conditions.⁶ The regulations provide that, in the case of licensing proceedings where the relevant Secretary had submitted section 4(e) conditions, the deadline for a party to the licensing proceeding to propose alternative conditions is 30 days from the deadline set forth in the Commission's notice soliciting agency terms and conditions.⁷

6. The regulations further provide that within 60 days after the close of the comment period for the Commission's environmental document, the relevant Secretary must analyze the alternatives it has received, and file with the Commission its modified conditions, and a written statement demonstrating that the Secretary gave equal consideration to the effects of the modified condition and any alternative not adopted on

⁴ 16 U.S.C. § 797(e) (2006).

⁵ 16 U.S.C. § 823d (2006).

⁶ 70 Fed. Reg. 69,804 (November 17, 2005). As relevant here, the Forest Service's regulations are found in the Department of Agriculture's regulations at 7 C.F.R. §§ 1.670-1.674 (2012).

⁷ 7 C.F.R. § 1.671 (2012). The party submitting alternative conditions must include a description of the alternative and an explanation of how the alternative meets the criteria set forth in FPA section 33.

energy supply, distribution, cost, and use; flood control; navigation; water supply; air quality; and the preservation of other aspects of environmental quality.⁸

7. On June 29, 2011, PG&E submitted into the Commission's record a copy of its filing with the Forest Service requesting consideration of alternative conditions for eight of the 30 section 4(e) conditions.⁹ PG&E's principal argument supporting its proposed alternative conditions is that they would provide equivalent resource protection as the Forest Service's conditions, but at a lower cost. PG&E specifically objects to seven conditions because each would require PG&E to prepare new management plans, even though, PG&E argues, it submitted proposed management plans as part of its license application. In addition, with respect to Condition 6, Pesticide Use Restrictions, PG&E objects to "new" language (relative to previous standard conditions issued by the Forest Service for transmission line licenses) that would require prior Forest Service written approval for pesticide use to treat pole rot and infestation.

8. On September 28, 2011, Commission staff issued an environmental assessment (EA) for the French Meadows Transmission Line Project.

9. The Forest Service did not make any filings with the Commission regarding the Forest Service's consideration of PG&E's alternative conditions.

⁸ 7 C.F.R. §§ 1.672-1.673 (2012). Based on the information available to it, the Secretary could adopt as a modified condition its original preliminary condition, an alternative, or a new condition. In deciding whether to adopt a proposed alternative, the Secretary must consider all available evidence, including information from any license party and the Commission, comments received on the Secretary's preliminary condition and on the Commission's environmental document, and the information provided in support of the alternative by its proponent. 7 C.F.R. § 1.673(a) (2012). Consistent with FPA section 33, the Secretary must adopt a proposed alternative if it will either cost significantly less to implement or result in improved operation of the project works for electricity production, and if it will provide for the adequate protection and utilization of the reservation under FPA section 4(e). 7 C.F.R. § 1.673(b) (2012).

⁹ Based on the date of PG&E's Filing with the Commission, and PG&E's assertions in that filing and in a later July 15, 2011 Filing, it appears that PG&E timely submitted its alternative conditions to the Forest Service, and we will assume the filing date with the Forest Service was indeed June 29, 2011. PG&E submitted alternatives for the following conditions: (1) Condition 6, Pesticide Use Restrictions; (2) Condition 19, Aviation Collision and Electrocution Hazards; (3) Condition 21, Protect Special Status Species and Habitat; (4) Condition 22, Invasive/Noxious Weed Management Plan; (5) Condition 25, Fire Prevention, Response, and Investigation; (6) Condition 26, Fuel Treatment Plan; (7) Condition 27, Road Management Plan; (8) Condition 28, Heritage Resources.

10. On July 18, 2012, Commission staff issued to PG&E a 30-year license, effective March 1, 2013, for continued operation and maintenance of the French Meadows Transmission Line Project. The license included the 30 terms and conditions as submitted by the Forest Service.

11. On August 16, 2012, PG&E filed a request for rehearing, arguing that the July 18 license order violates section 33 of the FPA¹⁰ because the order was issued before the Forest Service completed the alternative conditions process. PG&E also requests a stay of the effectiveness of the license order until such time as the Forest Service completes the section 33 alternative conditions process.

12. On August 17, 2012, PCWA filed a request for rehearing of the July 18 license order, seeking to modify Article 401 to include PCWA as an entity to be consulted concerning any plans or agreements required by the section 4(e) conditions, an additional obligation that PG&E notify PCWA of post-licensing proceedings related to the license for the French Meadows Transmission Line Project, and to clarify that PCWA may participate as a party in any post-licensing proceedings affecting PCWA's ability to reliably and economically transmit power.

13. On September 14, 2012, PG&E filed an answer to PCWA's request for rehearing, asserting that the Commission should deny the rehearing.¹¹

II. Discussion

A. PG&E Request for Rehearing and Stay

14. On rehearing PG&E argues that the Commission violated section 33 of the FPA because the July 18 license order was issued before the Forest Service completed the alternative conditions process. PG&E contends that this eliminated the benefits to PG&E of the alternative conditions process, and removed any incentive for the Forest Service to complete the alternative conditions process.

15. The Commission is not required to delay issuance of an otherwise complete license order until a mandatory conditioning agency submits its determination on proposed alternative conditions. Ideally, a mandatory conditioning agency would complete its process and submit its determination to the Commission before the

¹⁰ 16 U.S.C. § 823d(a) (2006).

¹¹ Answers to requests for rehearing are generally not allowed pursuant to the Commission's regulations. 18 C.F.R. § 385.213(a)(2) (2012). However, because the issues raised by PCWA in its request for rehearing are being raised for the first time, it is appropriate that PG&E have some opportunity to comment.

Commission takes action on a license application. There is, however, no requirement for agencies to do so.

16. We also do not believe that, by issuing the license, the Commission removed the Forest Service's incentive to complete the alternative conditions process. The Forest Service is directed by FPA section 33 to make a written determination on the alternative conditions proposed by PG&E. As noted, the agency's own regulations establish a deadline for it to do so. Neither the statutory nor the regulatory requirements are altered by the issuance of the license. If a licensee or other party has an issue with the timing or progress towards completion of the process, it must attempt to resolve such issues with the mandatory conditioning agency, not the Commission.¹²

17. PG&E further contends that the issuance of the license order is inconsistent with Congress' intent in enacting FPA section 33. PG&E argues, without citation or support, that Congress clearly envisioned that the alternative conditions process and creation of its attendant record would occur before the Commission acted on the license application.

18. As the Commission has stated previously, Congress' expressed intent in passing section 241 of EAct 2005 was that all parties to licensing proceedings would receive the benefits of the new procedures mandated in EAct 2005, including the consideration of alternative conditions; however, Congress did not specify the timing or manner of that consideration.¹³

19. PG&E asserts that it is unclear how the Commission could have proceeded to issue a license order until the final content of the section 4(e) conditions became available because the Commission must consider the content of mandatory conditions in acting on a license application.

20. Should the Forest Service complete its alternative conditions process and submit its determination and supporting record to the Commission, the Commission would at that time take appropriate action to include the modified conditions in the license.¹⁴ This order modifies Ordering Paragraph D of the license order to make clear that the Commission has reserved authority to do so.

¹² See *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006) (holding that Commission cannot dictate when agencies must submit section 4(e) conditions).

¹³ *Pacific Gas and Elec. Co.*, 115 FERC ¶ 61,320, at P 11 (2006).

¹⁴ See, e.g., *Southern Calif. Edison Co.*, 127 FERC ¶ 62,033 (2009) (amending license to incorporate revised section 4(e) conditions filed by the Forest Service at the completion of its alternative conditions process).

21. Finally, PG&E contends that it is unfair to entities proposing alternative conditions if the Commission issues a license order before the mandatory conditioning agency has completed its process.

22. As explained above, the Commission is not required to wait until the mandatory conditioning agency has completed the alternative conditions process before issuing a license. In any event, Commission staff issued the license order ten months after issuing its environmental assessment for the project, which considered the section 4(e) conditions submitted by the Forest Service on May 27, 2011, as part of the recommended proposal. Throughout this time, neither PG&E nor the Forest Service informed the Commission of the status of any ongoing alternative conditions process at the Forest Service.

23. For the above reasons, we deny PG&E's request for rehearing.

24. PG&E also requests a stay of the effectiveness of the July 18 license order until the alternative conditions proceeding is completed. PG&E argues that the Commission must act to provide an incentive for the Forest Service to complete the alternative conditions process, and the only way to restore this incentive is for the Commission to stay the effectiveness of the license order until the process is completed.

25. We deny PG&E's request. The Commission's standard for granting a stay is whether justice so requires.¹⁵ The most important element of the stay standard is a showing that the movant will be irreparably injured without a stay. PG&E makes no attempt to argue that it meets this standard.¹⁶ Moreover, as described above, the Commission has no ability to compel the Forest Service to comply with its alternative conditions process, and has no control over the timing of the Forest Service's process. Therefore, we deny the request for a stay of the effectiveness of the license order.¹⁷ The

¹⁵ 5 U.S.C. § 705 (2006); *Duke Energy Carolinas*, 124 FERC ¶ 61,254, at P 8 (2008). Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

¹⁶ In fact, the license order is not even effective until the expiration of PG&E's prior license, which will occur on February 28, 2013. Therefore, PG&E's request for stay is also premature.

¹⁷ As noted, this license is not effective until March 1, 2013. The section 4(e) conditions, for which PG&E submitted proposed alternative conditions to the Forest Service, require action to be taken or plans to be submitted to the Commission "within one calendar year," or January 1, 2014, or "within one year of license issuance," or February 28, 2014. Should resolution of PG&E's proposed alternative conditions with the Forest Service require more time, PG&E may file with the Commission at that time a

administrative proceeding before the Forest Service is the proper venue for challenging a lack of action by that agency.

B. PCWA Request for Rehearing

26. PCWA's request for rehearing asks the Commission to take three actions:

(1) modify Article 401 of the license order to include PCWA as an entity to be consulted concerning any plans or agreements required by the section 4(e) mandatory conditions; (2) require PG&E to provide notification to PCWA of post-licensing proceedings relating to PG&E's subsequent license; and (3) clarify that PCWA may participate as a party in any post-licensing proceedings affecting PCWA's ability to reliably and economically transmit power.

27. PG&E filed an answer objecting to PCWA's requests, arguing that granting such requests would afford PCWA the rights, but none of the obligations, of the licensee of the French Meadows Transmission Line Project. PG&E also argues that it is inappropriate for PCWA to raise these issues for the first time on rehearing.

28. Various section 4(e) conditions in PG&E's license require it to prepare and implement plans approved by the Forest Service.¹⁸ Article 401 requires PG&E to submit each of these plans to the Commission for approval, and requires that these plans are implemented on all lands within the project boundary, not only on federal lands.¹⁹

29. To support its request to modify Article 401 to require that PG&E consult with PCWA on these plans, PCWA argues that such a requirement would give it a proactive role in the planning process, and allow PCWA to protect its interests in any relevant post-licensing proceedings. In support, PCWA cites the Commission's order in *Pacific Gas & Electric Company (PG&E)*.²⁰ However, that case is inapposite, and PCWA has not provided a compelling justification for modifying Article 401 of the license order. In *PG&E*, the licensee was required to consult with specific entities but failed to do so. To

request for an extension of time to comply with the section 4(e) conditions that are attached to the license order.

¹⁸ The following conditions require plans: (1) Condition 19, Avian Collision and Electrocutation Hazards Plan; (2) Condition 21, Monitoring Plan for Special-Status Species; (3) Condition 22, Invasive Weed Monitoring Plan; (4) Condition 25, Fire Prevention and Response Plan; (5) Condition 26, Fuel Treatment Plan; (6) Condition 27, Road Management Plan; and (7) Condition 28, Historic Properties Management Plan.

¹⁹ Article 401 however clarifies that Forest Service approval is not required for the portions of any plan that apply to non-federal lands.

²⁰ 40 FERC ¶ 61,035 (1987).

rectify this situation, the Commission required the licensee to consult with the necessary entities even though the studies at issue had been completed.²¹ In contrast, Article 401 does not require PG&E to consult with any entity in preparing its plans to satisfy the Forest Service's section 4(e) conditions. Article 401 simply requires PG&E to submit the relevant plans to the Commission for approval, and makes the plans applicable to all project lands, rather than only federal lands. Moreover, PCWA has not demonstrated that it has an interest in the development of these plans that would warrant a requirement that it be consulted, particularly since it did not make an effort to demonstrate an interest in plan development, nor comment on the specifics of the 4(e) conditions requiring resource management plans, during the license proceeding. In fact, the plans relate to safety and environmental concerns regarding the transmission line, and not to its operation.²²

30. PCWA also requests that PG&E be required to provide PCWA with notification of post-licensing proceedings relating to PG&E's obligations under the license, and asks the Commission to clarify that PCWA may participate as a party in any post-licensing proceedings affecting PCWA's ability to reliably and economically transmit power from its Middle Fork Project to the interconnected grid. PCWA asserts that in light of the open-ended requirements included in the subsequent license, it is appropriate to provide PCWA with assurance that it will have the opportunity to protect its interests going forward.

31. We deny PCWA's requests. PCWA had sufficient opportunity to comment on any issues of concern during the French Meadows Transmission Line license proceeding, including commenting on the section 4(e) conditions submitted by the Forest Service, and PCWA did not take the opportunity to do so. In the future, PCWA may avail itself of the Commission's e-subscription notification system to ensure it is notified of any filings placed in the record for the French Meadows Transmission Line Project. It may seek to intervene in any such proceeding, and we will determine on a case-by-case basis whether it has shown grounds to do so.

The Commission orders:

(A) Pacific Gas and Electric Company's request for rehearing and stay of the July 18, 2012 license order is denied.

(B) Placer County Water Authority's request for rehearing of the July 18, 2012 license order is denied.

²¹ *Id.* at 61,098-61,099.

²² PCWA's unsupported suggestion, that the plans could affect the project economics of its project, is speculative, and should have been raised during the licensing proceeding.

(C) Ordering Paragraph (D) in the July 18, 2012 license order is modified to read as follows:

This license is subject to the conditions submitted on May 27, 2011, by the U.S. Department of Agriculture under section 4(e) of the FPA to the extent that those conditions apply to reservation lands within the project boundary, as those conditions are set forth in Appendix A to this order. The Commission reserves the right to amend Appendix A to this order, as appropriate, in light of the Forest Service's ultimate disposition of the alternative section 4(e) conditions as filed under EPAct 2005, and to make whatever additional conforming changes in the license may be necessitated by any such amendment.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.