

143 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Fall River Valley Community Service District
KC Pittsfield LLC

Project No. 14433-001
Project No. 14434-001

ORDER ON REHEARING

(Issued April 18, 2013)

1. On January 17, 2013, Commission staff issued an order dismissing competing preliminary permit applications submitted by Fall River Valley Community Service District (Fall River) and KC Pittsfield LLC (KC Pittsfield) for the Kilarc Open-Channel Turbines Hydro Project No. 14433-000 and the Kilarc Open-Channel Turbines Hydro Project No. 14434-000, respectively.¹ These applications proposed to study the feasibility of developing hydropower on Kilarc Canal, a feature of Pacific Gas and Electric Company's (PG&E) licensed Kilarc-Cow Creek Project No. 606, located near the town of Whitmore in Shasta County, California. On February 19, 2013, KC Pittsfield filed a timely request for rehearing of Commission staff's dismissal.²

Background

2. The Commission issued a license for PG&E's 4.6-megawatt Project No. 606 in 1980, with an expiration date of March 27, 2007.³ The project includes two developments, Kilarc and Cow Creek. As pertinent to this order, the Kilarc

¹ *Fall River Valley Cmty. Serv. Dist.*, 142 FERC ¶ 62,042 (2013).

² KC Pittsfield seeks rehearing of Commission staff's dismissal of both Fall River's and KC Pittsfield's applications. However, under section 313(a) of the Federal Power Act, a request for rehearing may be filed only by a party to a proceeding. 16 U.S.C. § 8251 (2006). KC Pittsfield is not a party to Fall River's proceeding. Therefore, its request for rehearing of the dismissal of Fall River's permit application for Project No. 14433-000 is rejected.

³ *See Pacific Gas and Electric Co.*, 10 FERC ¶ 62,112 (1980).

Development consists of: (1) three small diversion dams (North Canyon Creek, South Canyon Creek, and Kilarc Canal Diversion Dams); (2) a 13-foot-high earthfill dam (Kilarc Dam) impounding a 4.5-acre forebay (Kilarc Forebay); (3) 4.7 miles of canal, including the 3.65-mile-long Kilarc Canal; (4) a 4,801-foot-long penstock (Kilarc Penstock); (5) a powerhouse (Kilarc Powerhouse) containing two generating units with a total rated capacity of 3.23 megawatts; and (6) a short 60-kilovolt transmission line.

3. As licensed, Kilarc Canal, which has a capacity of about 50 cubic feet per second (cfs), receives water from three sources. At the head of Kilarc Canal, the Kilarc Canal Diversion Dam diverts water from Old Cow Creek into Kilarc Canal. In addition, water from North Canyon Creek diverts at the North Canyon Creek Diversion Dam into the North Canyon Creek Canal, which carries water to South Canyon Creek. Water from South Canyon Creek diverts at the South Canyon Creek Diversion Dam into the South Canyon Creek Canal, which flows into the South Canyon Creek Siphon and then into the Kilarc Canal downstream of the Kilarc Canal Diversion Dam. The Kilarc Canal delivers these aggregated water supplies to the Kilarc Forebay, where the impounded water flows through the Kilarc Penstock to the Kilarc Powerhouse. From the powerhouse, water discharges into Cow Creek about four miles downstream from the Kilarc Canal Diversion Dam.

4. The deadline to file applications to relicense the project was March 27, 2005. On March 31, 2005, PG&E notified the Commission that it would not seek a new license for the project based on its determination that decommissioning the project was a viable and cost-effective alternative to relicensing.⁴ On April 7, 2005, the Commission solicited applications from potential applicants other than the licensee.⁵ When no one timely filed a license application,⁶ PG&E submitted its surrender application, proposing to remove the North Canyon Creek, South Canyon Creek, and Kilarc Canal Diversion Dams and

⁴ See March 31, 2005 letter filed by PG&E in Project No. 606-000. In 2002, PG&E had filed a notice of intent to file an application for a new license for the Kilarc-Cow Creek Project. However, following consultations with stakeholders, PG&E decided to surrender its license and partially remove the project facilities. This decision was the result of an agreement between PG&E, state and federal resource agencies, and non-governmental organizations.

⁵ See 18 C.F.R. § 16.25 (2012). That section provides that an applicant must file, within 90 days, a notice of intent to submit a relicense application and must file its relicense application no later than 18 months after filing its notice of intent. 18 C.F.R. § 16.25(b) (2012).

⁶ On June 27, 2005, Synergics Energy Services filed a timely notice of intent to file a relicense application, but never submitted its application.

thus dewater Kilarc Canal. PG&E also proposes to remove Kilarc Dam and fill in Kilarc Forebay. The surrender proceeding is pending before the Commission.⁷

5. On July 13, 2012, KC Pittsfield filed an application for a preliminary permit to study the feasibility of the Kilarc Open-Channel Turbines Hydro Project No. 14434-000. The project would develop the energy potential of Kilarc Canal's 50-cfs flow by using up to five two-kilowatt (kw) open channel turbine generators, which would be placed in three segments of Kilarc Canal, for a total capacity of 10 kw. The proposed project would include the Kilarc Canal Diversion Dam and the Kilarc Canal and would operate on a run-of-release basis.

6. On January 17, 2013, Commission staff issued an order dismissing KC Pittsfield's permit application, explaining that it would not issue a preliminary permit for a project that would use facilities proposed to be surrendered and removed. Citing to the Commission's order in *Thermalito Afterbay Hydro, LLC (Thermalito)*,⁸ the order stated that the Commission would not accept preliminary permit or development applications for the site until after the Commission acts on the surrender proceeding.

7. On February 19, 2013, KC Pittsfield filed a timely request for rehearing.

Discussion

8. KC Pittsfield argues Commission staff erroneously relied on *Thermalito*. It contends that in *Thermalito* "the water resource itself would potentially be unavailable to the permit applicant" due to the licensee's potential future use of the water, whereas here it is the project facilities that carry the water that might not be available.⁹

9. We disagree. The facts in *Thermalito* support Commission staff's dismissal of KC Pittsfield's permit application. In both cases, whether the water resource proposed for development by a permit applicant would actually be available for development would depend on the outcome of pending proceedings (i.e., a relicense proceeding in *Thermalito* and a license surrender proceeding here). Because PG&E proposes to remove the dams, dewater Kilarc Canal, and fill in Kilarc Forebay, KC Pittsfield's proposal is wholly dependent on the outcome of PG&E's surrender proceeding, and we accordingly affirm

⁷ See PG&E's March 13, 2009 Filing in P-606-027. On August 16, 2011, Commission staff issued a Final Environmental Impact Statement (FEIS) for the surrender, recommending adoption of PG&E's surrender proposal. See FEIS at Section 4.4.

⁸ *Thermalito Afterbay Hydro, LLC*, 132 FERC ¶ 62,008 (2010), *reh'g denied*, 133 FERC ¶ 61,053 (2010).

⁹ Rehearing Request at 2-3.

the dismissal of KC Pittsfield's permit application.¹⁰ Should the outcome of the surrender proceeding result in the project facilities remaining in place, KC Pittsfield or any other applicant can file a preliminary permit application for the site.

10. Citing to *KW Sackheim Development*,¹¹ KC Pittsfield asks instead that the Commission issue a preliminary permit to it with a condition that if PG&E proposes to develop the same incremental capacity of the Kilarc Canal, then KC Pittsfield would lose its permit priority to develop that capacity. However, such a condition is inapplicable here as PG&E proposes to surrender the project facilities, not develop them.¹²

11. For the above reasons, we affirm the dismissal of KC Pittsfield's preliminary permit application for Project No. 14434.

The Commission orders:

(A) The request for rehearing filed by KC Pittsfield LLC in Project No. 14433 on January 17, 2013, is rejected.

(B) The request for rehearing filed by KC Pittsfield LLC in Project No. 14434 on January 17, 2013, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁰ See also *Skokomish Indian Tribe*, 71 FERC ¶ 61,023, at n.11 (1995). In that case, the Commission noted that section 4.32(j) of the Commission's regulations, 18 C.F.R. § 4.32(j) (2012), provided another possible basis for dismissing the permit application. That section provides that "any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected."

¹¹ 130 FERC ¶ 62,130 (2010) (issuing permit for project proposing to develop incremental hydropower of licensed project undergoing pre-filing stages of the Commission's relicensing process).

¹² KC Pittsfield also raises questions regarding the adequacy of Commission staff's analysis in the FEIS for the Project No. 606 surrender proceeding. However, those issues are not relevant to this proceeding, and to the extent they have been raised in the Project No. 606 proceeding, they will be addressed there.