

148 FERC ¶ 61,199
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

City of Banning, California

Project No. 14520-001

ORDER DENYING REHEARING

(Issued September 18, 2014)

1. The City of Banning, California (Banning), has filed a request for rehearing of a June 5, 2013 Commission staff order dismissing Banning's application for a license for the proposed Whitewater Flume Water Power Project No. 14520-000 (Whitewater Flume Project).¹ Banning proposes to use project facilities currently licensed to Southern California Edison (Edison) for its San Gorgonio Hydroelectric Project No. 344 (San Gorgonio Project) and for which Edison's license surrender application is pending before the Commission. As discussed below, we deny rehearing.

I. Background

2. The 2.27-megawatt (MW) San Gorgonio Project was first licensed in 1923 and relicensed in 1983, with an expiration date of April 26, 2003.² The project is located along the San Gorgonio River in Riverside and San Bernardino Counties, California, and occupies approximately 246 acres of the San Bernadino National Forest, which is administered by the U.S. Forest Service (Forest Service). The project as licensed consists of two diversion dams on the East and South Forks of the Whitewater River, a smaller diversion structure on Black Wheel Creek, two concrete lined canals (flowlines)

¹ *City of Banning, California*, 143 FERC ¶ 62,170 (2013).

² See Third Annual Report of the Federal Power Commission, 1923, at 95-97, 262-63 (issuing original 50-year license to Edison's predecessor San Gorgonio Power Company); *Southern California Edison Co.*, 23 FERC ¶ 61,240 (1983) (issuing new license).

totaling almost 8 miles in length, two steel forebay tanks, two penstocks totaling more than 2.5 miles in length, two powerhouses, and transmission lines.

3. Prior to 1923, the diversion structures, canals, and flowlines were operated as a water supply system to deliver water from the Whitewater River to Banning Heights Mutual Water Company (Banning Heights) for domestic and agricultural purposes. In 1923, the water conveyance system was licensed and facilities were added to use the water to produce hydropower and then deliver it to Banning Heights' water conveyance facilities.

4. In April 1998, Edison filed a notice of its intent to file a relicense application for the project. The application was due April 2001.

5. In September 1998, Edison ceased generation after the project's two forebay tanks and a portion of one of the canals were damaged. In December 1999, Edison informed the Commission that it no longer intended to file a relicense application for the project. Subsequently, in 2000 and 2001, storms and landslides badly damaged the project's flowlines, and Edison was unable to make repairs due to the hazardous conditions of the hillside and the significant cost of the repairs.

6. When Edison did not file a relicense application by the statutory deadline, the Commission, on July 9, 2001, issued a notice soliciting applications from potential applicants other than the existing licensee.³ When no entity filed a timely application, the Commission required Edison to file a surrender application.⁴

7. In 2002, Edison re-routed water through private and Forest Service lands by constructing a temporary, non-project water conveyance system to bypass the damaged project facilities so that water could still be conveyed to Banning Heights.⁵

³ See 18 C.F.R. § 16.25(b) (2014). 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.

Two entities, the San Gorgonio Pass Water Agency and L & S Energy, filed timely notices of intent to file an application for a new license, but neither subsequently filed an application.

⁴ 18 C.F.R. § 16.25(c) (2014).

⁵ The new facilities consisted of a new diversion structure and an 8-inch diameter,

(continued...)

8. Currently, the San Gorgonio Pass Water Agency (a California special district), Banning Heights, and Banning (collectively known as, the participating entities) are responsible for water delivery from the Banning Heights water tank to the local communities. On June 30, 2010, the participating entities signed a settlement agreement (the 2010 Transfer Agreement) with Edison, detailing the transfer of the water conveyance facilities from the San Gorgonio Project after license surrender.⁶ Edison or the other participating entities would need to obtain authorization from the Forest Service for any facilities to remain on national forest system lands after surrender.⁷

9. Edison submitted a surrender application on September 28, 2010.⁸ The San Gorgonio Project has been subject to an annual license since 2003, and remains under license during the surrender proceeding.⁹

5,600 ft long pipe/flowline. The new diversion structure, located in Burnt Canyon, is on property owned by Banning, and most of the new flowline is located on private lands, with a portion crossing Forest Service lands. Water is now diverted from Burnt Canyon into the temporary flowline and is delivered to the tailrace of powerhouse No. 1. Thereafter, the existing project flowline conveys the water through powerhouse No. 2, without generating power, to an existing tank owned by Banning Heights.

⁶ The 2010 Transfer Agreement deals with the private transfer of facilities after the project license is surrendered. Accordingly, it is a matter among the participating entities and is not a transfer that requires Commission approval under section 8 of the Federal Power Act.

⁷ Once the surrender of the license takes effect, the Commission lacks jurisdiction to regulate facilities remaining on these lands, and it is expected that the ex-licensee (or whatever entity holds the facilities) would obtain a Forest Service special use permit to ensure there is no trespass. *See Public Utility District No. 1 of Pend Oreille County, Washington*, 122 FERC ¶ 61,249, at PP 16, 20 (2008).

⁸ Edison's Surrender Application, filed on September 28, 2010 (Project No. 344-023). In April 2003, the Commission directed Edison to file a schedule for submitting a surrender application for the San Gorgonio Project. Edison responded that, because the project was no longer operable, it believed the project was no longer under the Commission's jurisdiction. In October 2003, the Commission issued an order affirming its jurisdiction over the project and requiring Edison to file a schedule for submitting a surrender application. *Southern California Edison Co.*, 105 FERC ¶ 61,046 (2003), *reh'g denied*, 106 FERC ¶ 61,212 (2004). Edison submitted its proposed schedule, which the Commission approved on January 14, 2004. Under the approved

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10. Edison's surrender application explains that it was economically infeasible to continue to operate and maintain the project for power generation.¹⁰ Edison cannot restore generation at powerhouse No. 1, due to the failed section of canal upstream of the powerhouse and the difficult nature of any repairs. While restarting power production at powerhouse No. 2 was physically possible, the total project generating capacity would then be only about 650 kilowatts (kW), substantially less than the 2.27 megawatts (MW) capacity of the original licensed project.

11. Edison proposes to remove of all generating equipment and associated hydropower equipment from both powerhouses (leaving the powerhouses in place), and to remove forebay tank No. 2 and the tailrace of powerhouse No. 1. Edison proposes to repair the East Fork and the South Fork diversion dams, as well as the Black Wheel Creek diversion structure. Part of flowline No. 1 would be removed and flowline No. 2 would be repaired. Generally, most of the facilities that Edison proposes to repair and abandon in place are facilities still needed for water conveyance. Under the 2010 Transfer Agreement, after the license surrender is complete, Edison would transfer the water conveyance facilities to the participating entities, who would continue to use the facilities to convey water for municipal use.

12. The Forest Service proposes its own alternatives for the disposition of the San Gorgonio Project works on Forest Service lands.¹¹ As described in more detail below, under Alternative 1, the Forest Service requests the removal of the above-ground project works on National Forest Service lands. The Forest Service's Alternative 2 is similar to Edison's surrender proposal in that it allows for the water conveyance facilities to remain in place as long as Edison or the participating entities obtain a special use permit.

schedule, Edison would submit its surrender application within 90 days after reaching an agreement with the San Gorgonio Water Pass Agency regarding the transfer of the water conveyance facilities to the Agency after the license was surrendered.

⁹ See section 15(a)(1) of the Federal Power Act, 16 U.S.C. § 808(a)(1) (2012).

¹⁰ Edison's Surrender Application, filed on September 28, 2010, at 2 (Project No. 344-023).

¹¹ Section 6.2 of the Commission regulations states, "where project works have been constructed on lands of the United States the licensee will be required to restore the lands to the condition satisfactory to the Department having supervision over such lands [...]." 18 C.F.R. § 6.2 (2014).

Alternative 2 also proposes certain site-specific mitigation measures, including instream flow releases from the project's diversion structures.

13. On December 8, 2011, Banning applied to the Forest Service for a special use permit that would allow it to operate the water conveyance facilities on forest lands after the license surrender is effective. On January 15, 2013, the Forest Service denied Banning's application to operate the facilities for water supply only, stating that the proposal was not consistent with the land management plan for the San Bernardino National Forest.¹² Moreover, according to the Forest Service, any request from Banning for a special use authorization must provide for instream flows from the East Fork and South Fork diversion dams to enhance the Whitewater River watershed.¹³ Banning opposes the instream flow requirement.¹⁴

14. On May 7, 2013, Banning filed a license application for the Whitewater Flume Project, proposing to use Edison's licensed project facilities, including some that Edison or the Forest Service are proposing to be removed.¹⁵ With the denial of its special use permit application, Banning asserts that it needs a hydropower license to protect the water conveyance facilities; it presumes that a hydropower proposal would be deemed consistent with the forest's land management plan.¹⁶ Banning's license proposal assumes that Edison will carry out the repairs to the various project facilities, as proposed in Edison's surrender application, and requests Edison to amend its surrender proposal to also include the repair of powerhouse No. 2 and forebay tank No. 2.

¹² Forest Service's January 15, 2013 Special Use Permit Application Denial Letter, filed on July 1, 2014. *See also* FERC September 12, 2013 Technical Conference Transcript, filed on October 4, 2013, at 8-9.

¹³ September 12, 2013 Technical Conference Transcript, filed on October 4, 2013 at 8-9.

¹⁴ Banning's May 1, 2013 Comments on the Draft Environmental Assessment for the San Gorgonio Surrender at 9 and 11 (Project No. 344-023).

¹⁵ Banning's license application includes the diversions on the East and South Forks of the Whitewater River and Black Wheel Creek, portions of the No. 1 and No. 2 flowlines, powerhouse No. 2, the tailrace of powerhouse No. 1, and forebay tank No. 2.

¹⁶ Request for Rehearing at PP 9-10.

15. On June 5, 2013, Commission staff issued an order dismissing Banning's license application. The order explained that, consistent with Commission policy, until such time as the Commission acts on Edison's surrender application, the Commission will not accept applications for projects proposed to be located on, and use, structures that are part of the San Geronio Project.¹⁷ The order stated that such applications may be filed after the surrender proceeding is complete.

16. On July 1, 2013, Banning filed a timely request for rehearing.¹⁸

17. On September 12, 2013, Commission staff convened a Technical Conference with Edison, the Forest Service, and the participating entities, including Banning, to attempt to resolve the growing confusion surrounding the interplay between Edison's surrender proposal, the requirement for a Forest Service special use permit for the water conveyance facilities post-surrender, and Banning's filing of a license application. Banning reiterated its concerns about the future of the water conveyance facilities. The Forest Service clarified that it is not opposed to the water conveyance facilities remaining on national forest lands, but would require instream flow releases from the diversions.¹⁹ Edison remained neutral; it stated that it is committed to working with the participating entities but will act in accordance with both Forest Service and Commission regulations.²⁰

II. Discussion

18. The Commission will not accept preliminary permit or development applications that involve a project that is subject to a licensing or surrender proceeding. This is because, until the ongoing proceeding is complete, the Commission cannot know with any certainty what facilities, lands, and waters will be available for the new proposed

¹⁷ *City of Banning*, 143 FERC ¶ 62,170 at P 6.

¹⁸ On July 31, 2014, Banning filed information to supplement its request for rehearing. We do not permit supplements or amendments to requests for rehearing filed, as is the case here, more than 30 days after the date of the order at issue. Banning has not demonstrated why we should deviate from this policy. *See The Electric Plant Board of the City of Paducah, Kentucky*, 121 FERC ¶ 61,091, at P 6 (2007).

¹⁹ September 12, 2013 Technical Conference Transcript, filed on October 4, 2013, at 16.

²⁰ *Id.* at 31.

project. Thus, for example, in *Fall River Valley Community Service District*,²¹ the Commission affirmed the dismissal of permit applications to study projects that would be located on a canal that was part of a licensed project with respect to which the licensee had filed a surrender application that proposed the removal of some project features. The Commission explained that the resources that would ultimately be available for development would be wholly dependent on the outcome of the surrender proceeding, given that the licensee was proposing to remove and alter various project works.²²

19. This logic fully applies here, where Edison has filed a surrender application that contemplates the removal of certain project works and alterations to others, while Banning suggests a significantly different scheme. As in *Fall River*, the application here came, not during the time that the Commission established for filing of development applications as alternatives to surrender, but after the surrender proceeding was well underway.

20. Banning's proposal, the Forest Service's proposal for removal of certain project facilities, and Edison's surrender application all call for different actions. Banning's license application presumes Edison will rehabilitate and repair certain San Gorgonio Project facilities that Banning wants to use for hydropower and then transfer those facilities to Banning after surrender.²³ And in its request for rehearing, Banning now asks Edison to amend its surrender application to include, "leaving equipment in place in the Pine Powerhouse (powerhouse No. 2), repairing existing tank No. 2, and leaving the powerhouse tailrace in place instead of removing it."²⁴ Nothing in the record shows that

²¹ 143 FERC ¶ 61,047 (2013) (*Fall River*).

²² *Id.* P 9 (citing *Thermalito Afterbay Hydro, LLC*, 133 FERC ¶ 61,053 (2010) (*Thermalito*) (affirming dismissal of permit application to study project that might use same resources as existing project that was in relicensing proceeding). *See also* *Marseilles Land and Water Co.*, 129 FERC ¶ 61,140 (2009); *Skokomish Indian Tribe*, 71 FERC ¶ 61,023, at 61,100, *reh'g denied*, 72 FERC ¶ 61,268 (1995), *aff'd*, *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303 (9th Cir. 1997) (permit application filed after filing of relicense application rejected)).

²³ Banning states that "this application for a license includes the operation and maintenance of the facilities as they are currently configured, but after several damaged and/or deteriorated facilities are repaired by Edison per the Commission's surrender order." Banning's May 7, 2013 License Application, Initial Statement, at 4.

²⁴ Request for Rehearing at P 14.

Edison supports Banning's license proposal, and Edison has not taken any steps to modify its proposed surrender action in order to accommodate Banning's license proposal.

21. In addition to the differences between Edison's proposed surrender action and Banning's license proposal, the Forest Service recommends its own surrender options for the disposal of Edison's project facilities, neither of which is consistent with Banning's proposal. Forest Service Alternative 1 would be the removal of the above-ground project facilities that are located on National Forest System lands, and flowline No. 2 and penstocks No. 1 and No. 2, which would be sealed and abandoned in place. According to the Forest Service, this alternative would apply if Edison or the participating entities fail to obtain a special use permit from the Forest Service to allow for the continued presence of any remaining water-conveyance facilities on its lands. The other alternative, Forest Service Alternative 2, would be similar to Edison's proposed action in that it leaves the water conveyance facilities in place; however, Forest Service also proposes to remove both powerhouses and appurtenant facilities, flowline No. 1, and forebay tanks No. 1 and No. 2. Alternative 2 also recommends that Edison provide additional protection and enhancement measures, including the provision of minimum in-stream flows at the primary diversion structures.

22. Until we act on Edison's application, we will not know which facilities will remain in place following surrender.²⁵ Accepting Banning's application, which presumes that certain facilities remain in place (and that Edison will voluntarily repair them) would to a large extent predetermine the result of the surrender proceeding and would require us to take the unprecedented step of ordering Edison to involuntarily repair facilities for the benefit of a third party. Rather than taking these steps and further confusing and delaying the surrender proceeding, it appears more sensible to complete the surrender proceeding and then consider any timely license application that may be filed, in a manner consistent with our precedent.

²⁵ See also section 4.32(j) of the Commissions regulations, which provides, "Any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected." 18 C.F.R. § 4.32(j) (2014). *Fall River*, 143 FERC ¶ 61,047; see also *Thermalito*, 133 FERC ¶ 61,053; *Skokomish Indian Tribe*, 71 FERC ¶ 61,023, *reh'g denied*, 72 FERC ¶ 61,268, *aff'd*, *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303. Banning's application, which depends on Edison repairing certain project works, as to which Edison has not spoken on the record, clearly is the type contemplated by this regulation.

23. Another ground for rejecting Banning's application is that it was untimely, given that the city did not file a license application during the period that the Commission established for doing so. As noted above, on July 9, 2001, the Commission solicited applications from potential applicants other than the existing licensee. Banning did not express any interest in filing a license application until May 2013, some 12 years too late.

24. Banning asks the Commission to disregard the untimeliness of its license application, stating that it could not file a license application until Edison agreed to make facility repairs before transferring facilities to Banning.²⁶ We recognize that circumstances have changed during the pendency of the surrender, particularly given the Forest Service's refusal to grant authorization for the water supply facilities, but this is not a sufficient reason to derail the surrender proceeding by allowing a late license application. Had we received a timely license application, we would have proceeded to consider that, rather than requiring Edison to file for surrender. Thus, the appropriate course of action is for us to act on Edison's surrender application, and only then to consider any license applications that might be filed. Given the circumstances, we cannot accept Banning's untimely application.

25. Banning argues that the San Gorgonio Project facilities are city assets that the Commission cannot order removed,²⁷ citing to the 2010 Transfer Agreement between Edison and the participating entities that outlines the transfer of ownership for the water conveyance facilities post-surrender. Additionally, Banning asserts that it has preexisting water rights to the San Gorgonio Project's water, and that no one, including the Commission, can interfere with any facilities necessary to convey the municipal water supply.²⁸

26. The 2010 Transfer Agreement does not by its terms transfer any of Edison's assets to the city until after surrender has occurred. So long as the project facilities are licensed, the Commission (not the city) has exclusive jurisdiction over the project facilities, and a private contract cannot override that authority. Assuming that Banning has the rights to the water that flows through the San Gorgonio Project, those rights are to the water itself,

²⁶ Request for Rehearing at P 12.

²⁷ *Id.* P 5.

²⁸ *Id.* PP 5-6.

not the project facilities, and do not in any way preclude the Commission from regulating licensed project facilities or their ultimate disposition on license surrender.²⁹

27. Finally, Banning argues that obtaining a hydropower license is its only option since the Forest Service denied its special use permit application to continue to operate the project for water-supply-only (non-power project).³⁰ We understand and appreciate Banning's concerns. However, the fact that the Forest Service appears unwilling to allow the city to operate the water conveyance facilities as the parties to the 2010 Transfer Agreement envisioned does not alter the issues posed by Banning's application. Moreover, we have no authority to resolve the disputes between the city and Forest Service, and the filing of a license application will not remove those difficulties. We note, however, that nothing in our holding here would prevent Banning from filing a license application after the conclusion of the surrender proceeding.

28. In addition to the issues previously discussed, Banning's application is so patently deficient that it could not have been accepted in any case. As an initial matter, Banning failed to file a Notice of Intent (NOI) and Preliminary Application Document (PAD) for the Whitewater Flume Project prior to preparing its license application, as required by sections 5.5 and 5.6 of the Commission's regulations.³¹ A potential applicant for a license must at the outset notify the Commission of its intent to file a license application, file a PAD, and distribute the PAD to appropriate federal, state, and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding.³² The purpose of the PAD is to provide the Commission and stakeholders with information relevant to the project proposal.³³ Failure to do so

²⁹ See 16 U.S.C. § 821 (2012).

³⁰ Request for Rehearing at PP 9-11.

³¹ A potential license applicant must file its NOI pursuant to 18 C.F.R. § 5.5 (2014) and its PAD pursuant to 18 C.F.R. § 5.6 (2014).

³² The regulations require an applicant to notify the agencies of its intent to prepare a license application and to provide agencies with sufficient information about the license application, including a copy of the PAD, which starts the consultation process. 18 C.F.R. § 5.6 (2014).

³³ The PAD includes a process plan and schedule for all pre-application activity that incorporates time frames for pre-filing consultation, information gathering, and studies, and specifies a proposed location and date for a scoping meeting and site visit

precludes the public from the transparent pre-licensing application process that we require. Potential applicants will also select a pre-filing process to use in preparing a license application, and must request the use of the traditional licensing process (TLP) or the alternative licensing process (ALP) if they do not want to use the default, integrated licensing process (ILP).³⁴ Banning did not do this.

29. Moreover, its application is patently deficient for a number of other reasons. Some of these are: (1) Banning provided no evidence that it consulted with resource agencies, Indian tribes, and other stakeholders before filing its application with the Commission;³⁵ (2) Banning submitted incomplete Exhibits A (project description), E (environmental report), F (design drawings), and G (project map), including no discernible project boundary in the Exhibit G map and no mention of a project transmission line;³⁶ and (3) Banning did not include a list of federally threatened,

(environmental site review). 18 C.F.R. § 5.6(d) (2014).

³⁴ The ILP is the default process potential applicants use to prepare a license application. *See* 18 C.F.R. §§ 5.1-5.31 (2014). *See* 18 C.F.R. §§ 5.1(f)(1) and 5.3 (2014). Applicants using the TLP must comply with the application requirements of 18 C.F.R. Part 4, Subparts D-H (2013), as appropriate. *See* 18 C.F.R. §§ 5.1(f)(2) and 5.3 (2014). Applicants using the ALP must comply with the requirements of section 4.34(i) of the regulations, 18 C.F.R. § 4.34(i) (2014).

³⁵ 18 C.F.R. § 4.38 (2014). Banning's record of consultation consists of agencies' and the public's 2002 comment letters responding to Edison's proposed surrender. Banning cannot submit Edison's consultation record on the surrender proposal as its consultation record for its proposed project. Banning states that agency and public review of its license application is not necessary because, during the surrender proceeding, "all interested parties have reviewed and commented multiple times on the same information and analyses contained in the City's license application." Request for Rehearing at P 15. We disagree. As discussed above, the surrender proposal and the licensing proposal do not request the same disposition of project facilities and are separate actions. Therefore, resource agencies and interested parties have not had an opportunity to review and comment on the possibility of restoring power generation to this project site.

³⁶ 18 C.F.R. §§ 4.61(c), (d), (e), and § 4.39 (2014).

endangered, candidate species, and other federally protected species, occurring or potentially occurring within the project area.³⁷

30. For the reasons discussed above, we deny rehearing.

The Commission orders:

The request for rehearing filed by City of Banning, California, on July 1, 2013, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁷ The application also lacks a discussion of project effects on Forest Service indicator species, state listed species, and federally listed threatened and endangered species and candidate species. Rather than providing a sufficient discussion as required by § 4.61(d)(2), Banning refers to “a substantial amount of additional information” contained in Edison’s application for license surrender and the Commission’s Draft Environmental Assessment on the license surrender in Project No. 344. 18 C.F.R. § 4.61(d)(2) (2014).