

150 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

KC Pittsfield, LLC

Project No. 14512-001

ORDER DENYING REHEARING

(Issued January 22, 2015)

1. KC Pittsfield, LLC (KC Pittsfield) has filed a request for rehearing of a November 4, 2014 Commission staff order dismissing KC Pittsfield's application for a preliminary permit to study the feasibility of developing the proposed Old Cow Creek Open-Channel Turbines Hydro Project No. 14512 (Old Cow Creek Project).¹ KC Pittsfield proposes to use project facilities currently licensed to Pacific Gas and Electric Company (PG&E) for its Kilarc-Cow Creek Project No. 606, and for which PG&E's license surrender application is pending before the Commission. As discussed below, we deny rehearing.

I. Background

2. PG&E's 4.4-megawatt (MW) Kilarc-Cow Creek Project is located on Old Cow Creek and South Cow Creek near the town of Whitmore in Shasta County, California. The project comprises two developments, Kilarc and Cow Creek. KC Pittsfield proposes to use facilities associated with the Kilarc development, which operates as a run-of-river facility and 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 North and South Canyon Creek Canals and the 3.65-mile-long Kilarc Canal; (4) a 4,801-foot-long penstock (Kilarc Penstock); (5) a powerhouse (Kilarc

¹ *KC Pittsfield, LLC*, 149 FERC ¶ 62,076 (2014).

Powerhouse) containing two generating units with a total rated capacity of 3.23 MW; and (6) a short 60-kilovolt transmission line.

3. On March 31, 2005, two years before its license was due to expire, PG&E notified the Commission of its intent to surrender its license and partially remove the project facilities. This decision was the result of consultation among PG&E, state and Federal resource agencies, and non-governmental organizations as part of the *Kilarc-Cow Creek/P-606 Hydroelectric Project Decommissioning Agreement* (Decommissioning Agreement). The settling parties concluded that, based on the small amount of power produced by the project and the potential improvements to the local fishery that would result from removal of some project works, decommissioning was in the public interest.²

4. On April 7, 2005, the Commission issued a notice soliciting development applications from entities willing to take over the Kilarc-Cow Creek Project from PG&E. No entity filed a timely license application, and on March 13, 2009, PG&E filed its license surrender application with the Commission. In that application, PG&E proposes to remove the Kilarc Canal Diversion Dam (in addition to the North and South Canyon Creek Diversion Dams), dewater the Kilarc Canal, remove the Kilarc Dam, and fill in the Kilarc Forebay in order to allow for the free passage of streamflow, fish, and sediment in project-affected streams. The surrender proceeding is pending before the Commission.³

5. On July 13, 2012, KC Pittsfield filed an application for a preliminary permit to study the feasibility of developing the Kilarc Open-Channel Turbines Hydro Project No. 14434-000. The proposed project would use the existing Kilarc Canal Diversion Dam, as well as the Kilarc Canal, Forebay, Penstock, and Powerhouse.

6. On January 17, 2013, Commission staff dismissed the preliminary permit application, explaining that it would not issue a preliminary permit for a project that

² March 22, 2005 Decommissioning Agreement (filed in Project No. 606 docket on March 31, 2005) at 1-3.

³ See PG&E's March 13, 2009 Filing in Project No. 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. The Commission is awaiting a water quality certification from the California Water State Resources Control Board, a prerequisite to Commission action on the application.

would use facilities proposed to be surrendered and removed.⁴ 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. KC Pittsfield sought rehearing of the dismissal, which the Commission denied on April 18, 2013.⁵ The Commission explained that “whether the water resource proposed for development by [the] applicant would actually be available for development” was “wholly dependent on the outcome of PG&E’s surrender proceeding.”⁶

7. On April 18, 2013, the same day the Commission issued its rehearing order affirming the dismissal of KC Pittsfield’s July 2012 preliminary permit application, KC Pittsfield filed another preliminary permit application, which it amended May 6, 2013.⁷ The amended application is similar to KC Pittsfield’s dismissed application in Project No. 14434, with modifications to its characterization of the proposed water resource and the utilized infrastructure. KC Pittsfield states that its proposed project would use flows “that exceed the flows utilized by the [PG&E] project,” and that it proposes to install new infrastructure, including a diversion, canal, and powerhouse containing two 3-MW conventional turbines, parallel to PG&E’s existing project facilities “unless and until those facilities are decommissioned without being dismantled.”⁸ The application states that “[t]he discharge to Old Cow Creek would most likely be located at existing overflow sites along the PG&E’s Kilarc Canal and Forebay.”⁹ KC Pittsfield also proposes to install up to 20 kW of open-channel turbine capacity in its proposed canal.

8. Commission staff issued public notice of KC Pittsfield’s application, and the National Marine Fisheries Service’s West Coast Region (NMFS) and PG&E filed timely

⁴ *Fall River Valley Community Service District*, 142 FERC ¶ 62,042 (2013), *order on reh’g*, 143 FERC ¶ 61,047 (2013) (*Fall River*). Fall River Valley Community Service District and KC Pittsfield jointly sought rehearing of the January 2013 order.

⁵ *Fall River*, 143 FERC ¶ 61,047 (2013).

⁶ *Id.* P 9.

⁷ On April 22, 2013, four days after KC Pittsfield filed its permit application, the Fall River Valley Community Service District filed an identical application for the same project at the same site. However, the District withdrew its application on April 15, 2014.

⁸ KC Pittsfield April 18, 2013 Application at 2.

⁹ *Id.* at 3.

motions to intervene. Timely notices of intervention were filed by California Department of Fish and Wildlife (California DFW) and the U.S. Department of the Interior, Office of the Solicitor (Interior). The Department of the Interior's Office of Environmental Policy and Compliance submitted comments without intervening. All of the intervenors and commenters are signatories to the Decommissioning Agreement.

9. NMFS, California DFW, and Interior oppose the proposed project and support the decommissioning of the Kilarc-Cow Creek Project as the most favorable outcome for the fish and wildlife resources of the state. PG&E opposes the proposed project because it is nearly identical to proposals previously dismissed by the Commission and is conditioned on the future occurrence of an event or circumstance (i.e., the decommissioning of the Kilarc-Cow Creek Project). PG&E maintains that KC Pittsfield ignored the Commission's January 2013 order and notes that KC Pittsfield had the opportunity to file a permit or license application to take over the Kilarc-Cow Creek Project when the Commission issued notice soliciting potential applicants on April 17, 2005.

10. On November 4, 2014, Commission staff issued an order dismissing KC Pittsfield's preliminary permit application.¹⁰ The order explained that, although KC Pittsfield proposed in its April 18 application to install new infrastructure adjacent to the existing Project No. 606 facilities, it would still use structures that are part of the Kilarc-Cow Creek Project, namely PG&E's Kilarc Canal and Forebay. The order concluded that the Commission will not accept any future applications that include the possibility of studying an alternative that includes any of PG&E's Kilarc-Cow Creek Project facilities.¹¹

11. On November 12, 2014, KC Pittsfield filed a timely request for rehearing.

II. Discussion

A. Preliminary Permit Applications on Sites Subject to Surrender

12. 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

¹⁰ *KC Pittsfield, LLC*, 149 FERC ¶ 62,076 (2014).

¹¹ *Id.* P 15.

project. Thus, for example, in *City of Banning, California*¹² the Commission recently affirmed the dismissal of a license application to use facilities that were 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.¹³

13. This logic fully applies here, where KC Pittsfield has filed a permit application that contemplates the use of certain project works that PG&E may ultimately dismantle as part of its surrender proceeding. As in *Fall River* and *Banning*, the application here came, not during the time that the Commission established for filing of development and permit applications as alternatives to surrender, but only after the surrender proceeding was well underway.

14. Although KC Pittsfield's proposed project would include mostly new project facilities adjacent to PG&E's existing facilities, and although KC Pittsfield maintains that its proposed project would neither be located on, nor use structures that are or may be a part of PG&E's surrender proceeding, its May 6, 2013 application states that the project would discharge at existing overflow sites along PG&E's Kilarc Canal and Forebay, which PG&E proposes to dewater and fill in, respectively, as part of its surrender proceeding.¹⁴ As noted in the January 17, 2013 order dismissing KC Pittsfield's initial permit application, the April 18, 2013 order denying rehearing, and the November 4 order, the canal and forebay are among the project works that are currently licensed as part of PG&E's Kilarc-Cow Creek Project and addressed in its surrender proposal. Accordingly, we will not accept preliminary permit or development applications for

¹² 148 FERC ¶ 61,199 (2014) (*Banning*) (citing *Fall River*, 143 FERC ¶ 61,047 (2013)).

¹³ *Id.* P 18.

¹⁴ KC Pittsfield also argues that it is the state, not the Commission, that should dictate the allocation of water rights in the project area. We note that the allocation of water rights is not at issue in this order. While the state may dictate the allocation of water that flows through the project facilities, only the Commission is tasked with regulating the licensed project facilities and their ultimate disposition on license surrender. *See* 16 U.S.C. § 821 (2012).

projects proposing to use any of the structures licensed as part of the Kilarc-Cow Creek Project No. 606.¹⁵

15. On rehearing, KC Pittsfield claims that Commission staff erred in recommending, in the Kilarc-Cow Creek Final Environmental Impact Statement (FEIS),¹⁶ PG&E's proposal to dismantle its project facilities rather than leave them in place, which it claims is the "environmentally superior alternative," and now urges the Commission to take the unprecedented step of directing PG&E to leave the project facilities in place so it can alter its proposed project to use them, instead of constructing new facilities.¹⁷ KC Pittsfield may raise whatever issues it chooses in the surrender proceeding, but arguments regarding the scope or merits of that proceeding are not germane here.

16. KC Pittsfield maintains that Commission staff decided to dismiss its preliminary permit application and then later found a policy that it could claim had been violated to justify that decision. It alleges that Commission staff and other parties that support PG&E's proposed surrender continue to rely on the Decommissioning Agreement as

¹⁵ 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) (2014), 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." This rationale is equally applicable here. *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. KC Pittsfield's application, which depends on PG&E leaving some project works in place, clearly is the type contemplated by this regulation.

¹⁶ August 16, 2011 FEIS, issued in Project No. 606 surrender proceeding, n.2, *supra*.

¹⁷ In fact, Ms. Sackheim has repeatedly stated that her goal is for PG&E to leave its project facilities in place, rather than dismantle them as part of the surrender proceeding. In a February 3, 2014 email from Ms. Sackheim to Commission staff, Ms. Sackheim stated that, "I became involved in the P-606 Kilarc license surrender process of PG&E with the intention of re-commissioning and possibly augmenting the hydroelectric generating facilities, subject to preventing PG&E from destroying them." See *February 3 email from Kelly Sackheim to Joseph Hassell*; see also KC Pittsfield April 21, 2014 Rebuttal to Misleading Allegations of Protestors at p. 2 (stating that, "I ... seek to prevent the dismantling of PG&E's facilities at Kilarc...a License Surrender Plan for decommissioning could be accepted without dismantling the facilities.")

justification for the “foregone conclusion” that decommissioning is a viable and cost-effective alternative to relicensing, and that the California State Water Resources Control Board (Water Board), which must issue water quality certification for the project, has “renounced its blind commitment to limiting its analysis.”¹⁸

17. We disagree. The FEIS is a staff analysis of PG&E’s decommissioning proposal, and not a statement of the Commission’s support or approval of it, as KC Pittsfield suggests. In any case, the FEIS is a staff document and does not bind the Commission, which will base a decision on PG&E’s surrender application on the record of that case. We also disagree with KC Pittsfield’s claim that Commission staff decided to dismiss its preliminary permit application, and only then found a policy that it could “claim had been violated” to justify that decision. As discussed above, the Commission’s policy against issuing preliminary permits for projects proposed to be located on, and use, structures that may be subject to a surrender or relicensing proceeding is well-established.¹⁹

18. As discussed in the November 4 order and above, until we act on PG&E’s application, we will not know which facilities will remain in place following surrender.²⁰ Rather than further confusing and delaying the surrender proceeding, our policy calls for the more sensible approach of first completing the surrender proceeding and then considering any timely applications for preliminary permits or development that may be filed.²¹

B. Timeliness of Application

19. Another ground for rejecting KC Pittsfield’s application is that it was untimely. In 2005, when PG&E notified the Commission that it would not seek to relicense its project, the Commission issued a notice (with a deadline of July 6, 2005) soliciting development applications from entities willing to take over the Kilarc-Cow Creek Project from PG&E. KC Pittsfield did not respond to that notice during the period that the Commission established for doing so and did not express any interest in developing a project at the Kilarc-Cow Creek site until July 2012, some seven years too late.

¹⁸ November 12 Rehearing Request at 6.

¹⁹ See *Banning*, 148 FERC ¶ 61,199; *Fall River*, 143 FERC ¶ 61,047.

²⁰ See also section 4.32(j) of the Commission’s 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).

²¹ See *Banning*, 148 FERC ¶ 61,199 at P 22.

20. On rehearing, KC Pittsfield states that it is “irrelevant” that it did not exercise the option to file to take over the project before the license surrender proceeding began, but notes that Synergics Energy Services, LLC “exercise[d] such option but was thwarted by the parties who continue to advocate demolition of the facilities.”²²

21. We disagree. On April 7, 2005 the Commission’s Secretary issued a notice soliciting development applications from entities willing to take over the project and setting a deadline of 90 days from issuance of the notice for interested parties to file a Notice of Intent (NOI) to file a development application. On June 27, 2005, Synergics filed a timely NOI to file an application for the project. Commission regulations require potential applicants to file an application within 18 months of their NOI filing date, in this case by December 27, 2006. On December 18, 2006, Synergics filed a motion for a one-year extension of time to file its license application, which Commission staff denied on January 8, 2007. Staff found that Synergics had not conducted resource agencies’ requested studies necessary for the preparation of a draft application, as required by section 4.38 of the Commission’s regulations. Rather, staff found that Synergics made virtually no progress since July 2005, when it circulated an information package and held public meetings. As a result, Synergics’ request for an extension of time was not “thwarted” as KC Pittsfield claims, but properly denied for a lack of diligence in preparing its application.

22. In any case, the proceedings involving Synergics’ application are not relevant here. That entity made a timely filing; KC Pittsfield did not. We find that granting KC Pittsfield’s late-filed preliminary permit application would undermine the administrative certainty established by the deadlines set concerning the surrender application. KC Pittsfield has not persuaded us that waiver of those deadlines is appropriate, particularly given the significant time and resources dedicated to the surrender application after the Commission did not receive a viable development application.

C. Other issues raised on rehearing

23. KC Pittsfield raises a number of additional issues in its request for rehearing. It alleges that Commission staff erred in the November 4 order by stating that its proposed project would use PG&E’s existing penstock, canal, and forebay, while the Notice of Preliminary Permit Application (issued February 19, 2014) makes no reference to using PG&E’s facilities. KC Pittsfield argues that, by dismissing the permit application in the November 4 order, Commission staff effectively admitted that it erred in “accepting the

²² November 12 Rehearing Request at 5.

preliminary permit application for filing,” and that “the conflict exists with the mis-stated project description in the [November 4] order.”²³

24. Staff’s decision to include more details when describing project facilities in the November 4 order than in the February 19 notice does not lead to the conclusion that the order’s description is inaccurate. The order correctly reflected KC Pittsfield’s April 18, 2013 application, which stated that the project would discharge to overflow sites along PG&E’s Kilarc Canal and Forebay. Moreover, KC Pittsfield misunderstands what it means for a permit application to be “accepted for filing.” The Secretary’s notice “accepting an application for filing” is merely an administrative step taken by staff once it has determined that the application contains all of the information required by the Commission’s regulations.²⁴ Its purpose is to notify potentially interested parties of the opportunity to file comments, motions to intervene, or competing applications and has no bearing on whether staff will issue the permit as requested in the application or reject, dismiss, or deny it.

25. KC Pittsfield also states that the fact that NMFS, Interior, and California DFW oppose its proposed project and support PG&E’s proposed surrender is irrelevant to whether the Commission should grant a permit to KC Pittsfield. KC Pittsfield maintains that there is a “lack of scientific evidence” to support dismantling the project and that, in any case, it is premature for those agencies to express any opinion on the matter whatsoever.

26. As an initial matter, it was neither irrelevant nor premature for NMFS, Interior, and California DFW to file comments opposing KC Pittsfield’s permit application. Section 4.32 of the Commission’s regulations requires that, upon receipt of a preliminary permit application that conforms with the requirements of the regulations, Commission staff issue public notice in order to solicit protests, motions to intervene, and competing applications.²⁵ Since NMFS, Interior, and California DFW all intervened within the 60-day comment period, their interventions and comments opposing the proposed project were proper. In any event, our decision here is based on Commission policy and the facts of the case, not on the positions taken by the commenters. Moreover, KC Pittsfield’s claim that Commission staff recommended PG&E’s proposal despite a “lack of scientific evidence” is beyond the scope of this proceeding. As noted above, this proceeding does

²³ November 12 Rehearing Request at 4-6.

²⁴ 18 C.F.R. § 4.32(f) (2014).

²⁵ 18 C.F.R. § 4.32(d) (2014).

not deal with PG&E's surrender applications and we will address arguments regarding that matter in that proceeding, not here.

27. KC Pittsfield states that, if it is unable to acquire a preliminary permit for the site, "any party could be granted a license to utilize this water resource once the license surrender has been approved, without compensating KC Pittsfield LLC for its efforts."²⁶ As discussed above, we will not entertain license or preliminary permit applications on the site until PG&E's surrender proceeding is complete. We note, however, that nothing in our holding would prevent KC Pittsfield from filing a permit or license application following the conclusion of the surrender proceeding. Any such application, and any competing applications, will be reviewed impartially, under the terms of our regulations and policies.

28. Commission staff and stakeholders have been required to deal with repeated permit applications for projects that involve facilities subject to the ongoing proceeding regarding PG&E's surrender application. This has resulted in the unnecessary expenditure of administrative resources, as well as those of parties to the surrender proceeding. To avoid the unnecessary expenditure of additional time and effort, we direct Commission staff not to accept any further applications for projects involving the project works of, or water resources used by, the Kilarc-Cow Creek Project No. 606 until after the conclusion of the pending surrender proceedings regarding that project.

The Commission orders:

The request for rehearing filed by KC Pittsfield, LLC, on November 4, 2014, is denied.

By the Commission. Commissioner Honorable is voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ November 12 Rehearing Request at 8.