

150 FERC ¶ 61,101
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.

Cameron Gas and Electric Company

Project No. 11150-101

ORDER DENYING REHEARING

(Issued February 19, 2015)

1. On November 26, 2014, Commission staff issued an order requiring Cameron Gas and Electric Company (Cameron), d/b/a Grand River Power Company, to cease all generation at its 702-kilowatt (kW) Smithville and Mix Project until it comes into compliance with the requirements of its license.¹ On December 5, 2014, as supplemented on December 11, 2014, Cameron filed a request for rehearing of the Cease Generation Order. As discussed below, we deny the request for rehearing.

Background

2. On August 23, 2001, Commission staff issued a minor license to Cameron for the Smithville and Mix Project No. 11150, located on the Grand River, in the City of Eaton Rapids, in Eaton County, Michigan.² The project consists of two developments: Smithville and Mix. The Smithville Development is located two miles upstream of Eaton Rapids on the Grand River and contains a 167-foot-long, 14-foot-high dam that creates an 80-acre reservoir with a storage capacity of 300 acre-feet. Power is produced at a concrete powerhouse that is integral with the dam and contains three turbines with a total installed capacity of 500 kW. The Mix Development is located within Eaton Rapids' city limits and contains a 188-foot-long, 7-foot-high diversion dam that creates a 150-acre reservoir with a storage capacity of 500 acre-feet. A 35- to 100-foot-wide, 500-foot-long canal bypasses the dam to a power storage pond that leads to a powerhouse containing

¹ *Cameron Gas and Electric Company*, 149 FERC ¶ 62,140 (2014) (Cease Generation Order).

² *Cameron Gas and Electric Company*, 96 FERC ¶ 62,182 (2001).

two turbines with a total installed capacity of 202 kW. The Mix Development creates a 2,000-foot-long bypassed reach.

3. Article 402 of Cameron's license requires Cameron to operate the Smithville and Mix Project in run-of-river mode to protect water quality, aquatic, and recreational resources.³ The Smithville impoundment elevation must be within ± 0.25 foot of 883.30 feet National Geodetic Vertical Datum (NGVD) and the Mix impoundment elevation must be within ± 0.25 foot of 870 feet NGVD. At all times, Cameron must act to minimize the fluctuation of the impoundments' surface elevations by maintaining a discharge from the project so that flows downstream of the project tailrace are equal to the inflows at the project's impoundment. Article 402's elevation requirements benefit fish and aquatic resources by minimizing the disturbance of spawning activities and providing for more stable habitats for rearing and foraging.⁴ Cameron may temporarily modify the run-of-river operations for emergencies beyond Cameron's control and for short periods of time upon mutual agreement between Cameron, the U.S. Fish and Wildlife Service, and the Michigan Department of Natural Resources. If project operations are temporarily modified, Cameron must notify the Commission as soon as possible, but no later than 10 days after each incident. Additionally, Cameron's Gage and Flow Compliance Plan pursuant to Article 403 of its license requires Cameron to notify the Commission of any deviations of Article 402's requirements within 30 days of the date that the data become available regarding the incident.⁵

4. On July 27, 2012, Commission staff issued a Compliance Order stating that Cameron was in violation of Article 402 of its license.⁶ The order explained that, between January 1, 2010, and June 30, 2012, Cameron had reported deviations from the impoundment elevation requirements of Article 402 for approximately 355 days at the Mix Development and 44 days at the Smithville Development. The order concluded that, not only had Cameron failed to control fluctuations of the reservoirs' surface elevations, it also had not fulfilled the reporting requirements of Article 402 of its license and the

³ *Id.* at 64,361.

⁴ *Id.* at 64,384.

⁵ *Cameron Gas and Electric Company*, 117 FERC ¶ 62,132, at P 8 (2006) (Order Modifying and Approving Gage and Flow Compliance Plan).

⁶ *Cameron Gas and Electric Company*, 140 FERC ¶ 62,086 (2012) (Compliance Order).

Gage and Flow Compliance Plan. The order directed Cameron to fully and timely comply with the reporting requirements, required it to conduct annual testing during 2012 and 2013, and file annual reports that included detailed analyses and a narrative summary of all incidents in the deviation reports.

5. On August 10, 2012, Cameron filed a letter in response to the Compliance Order. Cameron disagreed with the finding that it was out of compliance with its license. It stated that it operates the project in run-of-river mode and that any deviation from the impoundment elevation limits of Article 402 is due to normal flood control operations. Cameron also contended that the reporting requirements of Article 402 result in unproductive and burdensome reporting on normal run-of-river operations during weather-driven flood control events.⁷

6. Between August 2012 and the beginning of July 2014, Cameron filed 15 reports showing deviations in reservoir surface elevations that occurred on at least 111 days during that time.⁸ On April 2, 2013, and May 1, 2014, Cameron also filed the annual reports required by the Compliance Order.

7. On July 8, 2014, Commission staff issued an order to show cause why Cameron should not be required to cease generation at the project until further order of the

⁷ At the end of the August 10, 2012 letter, Cameron included a single sentence purporting to request rehearing of the Compliance Order. Cameron now argues that the Commission failed to address this request. We disagree. Cameron's letter was not a request for rehearing of the Compliance Order. The letter's heading failed to state it was a request for rehearing, as required by section 385.2002(d) of the regulations, 18 C.F.R. § 385.2002(d) (2014). In addition, the letter did not mention the rehearing provisions of the Federal Power Act, 16 U.S.C. § 825l(a) (2012), and did not cite to or comply with the requirements for rehearing requests established by the Commission's regulations, 18 C.F.R. § 385.713(c)(2) (2014). In any event, if Cameron's letter had been a request for rehearing, it would have been deemed denied by operation of law. 18 C.F.R. § 385.713(f) (2014) (“[u]nless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.”). Cameron did not seek appellate review with respect to the matter, which is therefore now final.

⁸ See Licensee's filings of August 9, October 11, and November 9, 2012; March 14, April 9, May 3, August 15, September 10, and November 20, 2013; February 11, March 12, April 9, May 8, June 5, and July 9, 2014.

Commission.⁹ The order found that Cameron continued to be in violation of Article 402 of its license because it failed to operate the project to control fluctuations in reservoir surface elevation.¹⁰

8. Cameron filed a response to the Order to Show Cause on August 7, 2014. Cameron asserted that it operates the project in a run-of-river mode and that due to the design of both developments, the project cannot be operated in any other way. Cameron also argued that Article 402 is poorly written and does not take into account significant design differences between the Smithville and Mix Developments. Cameron stated that the deviations are largely due to weather-driven flows and releases from an upstream dam and that Cameron has worked with resource agencies to amend the impoundment elevation limits in Article 402. Finally, Cameron noted that, although it is not perfect, it believes that it has fulfilled its reporting requirements.

9. On August 11, 2014, Cameron filed a report showing deviations on five days in July. On September 9, 2014, Cameron filed a report showing a deviation on August 22, 2014; and on October 9, 2014, Cameron filed a report showing deviations on two days in September.

10. On November 26, 2014, Commission staff issued an order requiring Cameron to cease generation at the Smithville and Mix Project. The Cease Generation Order found that Cameron has a long-term and persistent pattern of non-compliance with its license and with Commission orders designed to bring Cameron back into compliance. The order also found no merit to Cameron's argument that the language of Article 402 is poorly written and does not take into account the project's design. Specifically, the order stated that if Cameron felt there was conflicting or ambiguous language in its license, it should have sought clarification or rehearing at the time the license was issued. The order further stated that Cameron had yet to file an amendment to its license to modify the requirements of Article 402 and had no consultations with resource agencies after December 2012.

⁹ *Cameron Gas and Electric Company*, 148 FERC ¶ 62,025 (2014) (Order to Show Cause).

¹⁰ The order also found that Cameron failed to file several reports detailing the project's deviation from Article 402 and failed to file annual flow compliance reports in the format required by the Order Modifying and Approving Gage and Flow Compliance Plan and the Compliance Order.

11. On December 1, 2014, Cameron asked the Commission to hold in abeyance the Cease Generation Order and allow Cameron to continue to generate power at the project. On December 8, 2014, Commission staff denied Cameron's request to hold in abeyance the requirements of the Cease Generation Order, stating that since receiving the Order to Show Cause, Cameron had made no efforts to remedy its noncompliance.¹¹ Cameron did not seek rehearing of the denial.

12. On December 5, 2014, Cameron sought rehearing of the Cease Generation Order, and supplemented its rehearing request on December 11, 2014.¹²

13. On February 6, 2015, Cameron filed a report showing deviations on two days in January 2015.

Discussion

14. On rehearing, Cameron reiterates its earlier arguments. It argues that it has continually operated the project in run-of-river mode, any deviations from the license requirements are due to weather-driven flood control events (which it has reported), and it has pursued an amendment to its license to ensure future compliance. Specifically, Cameron contends that its license fails to consider the unique operating and design differences of the Smithville and Mix dams and that Cameron operates in compliance with its license.

15. The surface elevation limits of Article 402 of Cameron's license benefit fish and aquatic resources by minimizing the disturbance of spawning activities and providing for more stable habitats for rearing and foraging. Cameron's license allows for deviations from Article 402's run-of-river requirements only for emergencies beyond Cameron's control and for short periods of time upon mutual agreement between Cameron, the U.S. Fish and Wildlife Service, and the Michigan Department of Natural Resources.¹³ Additionally, Cameron's Gage and Flow Compliance Plan pursuant to Article 403 of its

¹¹ *Cameron Gas and Electric Company*, 149 FERC ¶ 62,170 (2014).

¹² Cameron's December 11, 2014 filing also indicated that deviations occurred on two days in early December.

¹³ *Cameron Gas and Electric Company*, 96 FERC at 64,361.

license requires Cameron to describe the corrective measures taken or proposed to ensure that deviations do not recur.¹⁴

16. We disagree with Cameron's assertion that it was in compliance with its license requirements because all the deviations in reservoir elevation were caused by "weather-driven flood control events." Article 402 requires the project to be operated in run-of-river mode and sets specific elevation limits for each reservoir.¹⁵ Article 402 does, however, provide for an exception to its requirements in the case of an operating emergency outside Cameron's control. Although under certain circumstances, particular weather-related deviations, such as deviations resulting from temporarily increased streamflows caused by heavy rainfall, may be considered emergency operations, such deviations are rare and short-term in nature, and the persistent deviations by Cameron do not fall within Article 402's exception. Cameron's filings indicate that between January 2010 and January 2015, deviations in reservoir elevation occurred on at least 478 days.¹⁶ The 2012 Compliance Order found that data do not support Cameron's assertion that all deviations were the result of "weather-related events."¹⁷ Moreover, Cameron has repeatedly stated that the deviations in impoundment elevation were not the result of emergency conditions¹⁸ and that Cameron was therefore not required to report them to

¹⁴ See Order Modifying and Approving Gage and Flow Compliance Plan, 117 FERC ¶ 62,132 at P 8.

¹⁵ *Cameron Gas and Electric Company*, 96 FERC at 64,361.

¹⁶ Compliance Order, 140 FERC ¶ 62,086 at P 13 (stating that elevations exceeded the Article 402 limits on at least 355 days between January 1, 2010, and June 30, 2012); Cease Generation Order, 149 FERC ¶ 62,140 at P 7 (stating that elevations exceeded the Article 402 limits on at least 109 days between July 2012 and May 2014); Licensee's filings of July 9, August 11, September 9, October 9, and December 11, 2014, and February 6, 2015.

¹⁷ Compliance Order, 140 FERC ¶ 62,086 at P 10 (stating that weather data submitted by Cameron for deviations that occurred in May 2010 shows no precipitation events occurred in the four days preceding a deviation).

¹⁸ See, e.g., Licensee's Letter Responding to the July 2012 Compliance Order (filed August 8, 2012) ("[Cameron] has not had emergencies, and therefore reporting to the state agencies was unnecessary"); Licensee's filings of August 8, September 10, 2013; June 5, July 9, August 11, September 9, and October 9, 2014; and February 6, 2015.

the Commission within 10 days of the deviation.¹⁹ It is clear from the record that Cameron has been in repeated violation of Article 402, which only allows for deviations (1) *in emergency circumstances* or (2) for short periods *upon mutual agreement* between Cameron, the U.S. Fish and Wildlife Service, and the Michigan Department of Natural Resources.

17. The 2012 Compliance Order specifically cited Cameron for failing to operate the project to control fluctuations of the reservoir elevation at the Smithville and Mix Project on at least 355 days between January 1, 2010, and June 30, 2012.²⁰ Since that time, Cameron's filings indicate that from July 2012 through January 2015, deviations in reservoir elevation occurred on at least 123 days — approximately 13 percent of all days during that period.²¹ Thus, we agree with Commission staff that Cameron's long-term and persistent failure to control fluctuations of the reservoir elevation at the Smithville and Mix Project, without evidence that such fluctuations occurred during emergencies beyond Cameron's control or that Cameron consulted with and obtained the agreement of the specified resource agencies for short-term deviations, is a violation of the requirements of Article 402 of Cameron's license.

¹⁹ In addition to Article 402's requirement to report to the Commission, within 10 days, any deviations due to emergency situations or short-term deviations agreed to by the agencies, Cameron's Article 403 Gage and Flow Compliance Plan requires Cameron to report to the Commission any other deviations from Article 402's requirements within 30 days of the date that the data become available regarding the incident. Cameron's report must include (1) operational data necessary to determine the reason for the deviation; (2) a description of any corrective measures implemented at the time of occurrence and the measures implemented or proposed to ensure that similar incidents do not recur; and (3) comments or correspondence, if any, received from the resource agencies regarding the incident. 117 FERC ¶ 62,132, at 8 (2006). The Article 403 plan was modified in 2009 to also require Cameron to provide this information to the U.S. Fish and Wildlife Service and the Michigan Department of Natural Resources within 10 days of a request from those agencies. *Cameron Gas and Electric Company*, 127 FERC ¶ 62,215 (2009). Additionally, the 2012 Compliance Order required Cameron to file with the Commission annual reports for 2012 and 2013. Compliance Order, 140 FERC ¶ 62,086 (2012).

²⁰ Compliance Order, 140 FERC ¶ 62,086 at P 2.

²¹ Cease Generation Order, 149 FERC ¶ 62,140 at P 7; Licensee's filings of July 9, August 11, September 9, October 9, and December 11, 2014, and February 6, 2015.

18. Cameron is required to operate the project in accordance with the requirements of its license. If the licensee felt that it was not possible to comply with the terms and conditions of its license, it should have sought rehearing or clarification of the license when it was issued. It did not do so. Cameron has failed to maintain reservoir elevations since as early as November 2009.²² Between November 2009 and the July 2012 Compliance Order, Cameron filed 28 reports, each detailing the reservoir elevation deviations that occurred within a particular month. During that time, there were only five months where no deviation report was filed, presumably because no deviation occurred. As early as April 2011, Cameron asserted that a modification to the reservoir limits may be necessary to prevent future noncompliance with its license.²³ Moreover, while in February 2012, at the urging of Commission staff, Cameron engaged the appropriate resource agencies to modify Article 402's requirements,²⁴ Cameron's consultations with resource agencies stopped in December 2012 and Cameron did not provide the resource agencies a draft license amendment application until September 19, 2014, after the Order to Show Cause.²⁵ Cameron filed its application to amend its license on December 4, 2014,²⁶ after Commission staff's order requiring it to cease generation.²⁷

²² See Licensee's November 2009 Article 402 Deviation Report (filed May 20, 2010).

²³ See Licensee's March 2011 Article 402 Deviation Report (filed May 20, 2010).

²⁴ Licensee's Letter Responding to the July 2012 Compliance Order (filed August 8, 2012).

²⁵ See Cease Generation Order, 149 FERC ¶ 62,140 at P 10 n.11. On August 20, 2013, Cameron provided Commission staff with a draft license amendment application. *Id.*

²⁶ Specifically, Cameron requests to change Article 402's impoundment elevation limits during flood conditions.

²⁷ Without any reference to the record, Cameron avers that the delay in filing the license amendment for the Smithville and Mix Project was due to Commission staff advising Cameron to prioritize a license amendment application of another project owned by Cameron's affiliate in New York. As a licensee, Cameron is required to operate its projects in accordance with the requirements of its license. Cameron's inability to take action to bring the Smithville and Mix Project into compliance with its license cannot be ignored because of an affiliate's noncompliance at another project.

On January 29, 2015, Commission staff determined the amendment application to be deficient and has given Cameron 60 days to correct the deficiencies, after which it will be processed.

19. Last, Cameron avers that the Commission's failure to communicate with Cameron between the 2012 Compliance Order and the 2014 Order to Show Cause properly led Cameron to believe that it was in compliance with its license. Cameron's belief is misplaced. As detailed in the 2012 Compliance Order, Cameron has a long history of noncompliance with Article 402.²⁸ After issuance of the Compliance Order, Cameron has continued to operate the project outside the limits required by Article 402,²⁹ and continued to file reports acknowledging these deviations.³⁰ Cameron had no reason to believe that the Commission was satisfied that Cameron was meeting the requirements of its license.

20. An order to cease generation is an exceptional remedy. However, the Commission is authorized to issue orders as may be necessary or appropriate to ensure that projects licensed by the Commission are best adapted to the comprehensive development of the waterway, taking into account all beneficial uses of the waterway, including the adequate protection, mitigation, and enhancement of fish and wildlife.³¹ Here, we find that Cameron's long history of noncompliance and failure to take action to remedy its noncompliance justifies such an exceptional remedy. We anticipate that the order will be lifted at such time as Cameron comes into compliance,³² and we remain willing to work

²⁸ Compliance Order, 149 FERC ¶ 62,140 at PP 7-11.

²⁹ See Licensee's filings of April 2, 2013, and May 1, 2014.

³⁰ See Licensee's filings of August 9, October 11, and November 9, 2012; March 14, April 9, May 3, August 8, August 15, September 10, and November 20, 2013; February 11, March 12, April 9, and May 8, 2014.

³¹ See 16 U.S.C. §§ 803(a)(1), 825h (2012).

³² On February 6, 2015, Cameron filed a report indicating that deviations occurred on two days in January 2015.

with Cameron to bring the project into compliance.³³ In the meantime, we expect the licensee to maintain compliance with other aspects of its license.

The Commission orders:

Cameron Gas and Electric Company's December 5, 2014 request for rehearing, as supplemented on December 11, 2014, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³³ As noted above in Paragraph 18, Cameron has also filed an application to amend its license, and Commission staff has given Cameron 60 days to address the deficiencies identified in its application.