

151 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Soldier Canyon Filter Plant

Docket No. CD15-18-001

ORDER GRANTING REHEARING

(Issued June 18, 2015)

1. On February 20, 2015, Soldier Canyon Filter Plant (Soldier Canyon) filed a request for rehearing of Commission staff's January 23, 2015 determination that the proposed Soldier Canyon Micro Hydro Facility (Soldier Canyon Facility) does not meet the requirements of section 30(a) of the Federal Power Act (FPA) and thus is required to be licensed. As discussed below, we grant rehearing.

Background

2. Section 30 of the FPA authorizes the Commission to issue exemptions from the licensing requirements of Part I of the FPA for small conduit hydroelectric facilities. To qualify, a facility (existing or proposed) must:

- not include any dam or other impoundment;
- be constructed, operated, or maintained for the generation of electric power;
- use for such generation only the hydroelectric potential of a manmade conduit; and
- have an installed capacity that does not exceed 40 megawatts (MW).¹

¹ 16 U.S.C. § 823a(b) (2012), amended by the Hydropower Regulatory Efficiency Act of 2013 (2013 Act), Pub. L. 113-23, § 4, 27 Stat. 493 (2013). Section 30 was enacted in 1978 by the Public Utility Regulatory Policies Act, Pub. L. 95-617. As enacted, a small conduit facility could not exceed 15 MW and could not be located on federal lands. Section 30 was amended in 1986 by the Electric Consumers Protection Act, Pub. L. 99-495 to increase, from 15 to 40 MW, the maximum allowable capacity for small conduit facilities owned by state or local governments.

A “conduit” is “any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.”²

3. The Hydropower Regulatory Efficiency Act of 2013 (2013 Act)³ amended section 30 to create a subset of these small conduit facilities that are categorically excluded from the licensing and exemption requirements of the FPA.⁴ These “qualifying conduit hydropower facilities” must meet the requirements for a small conduit facility and in addition must:

- be located on a non-federally-owned conduit;
- have a proposed installed capacity that does not exceed 5 MW; and
- be proposed for construction and, as of the date of enactment of the 2013 Act, not be licensed under, or exempted from, the licensing requirements of Part I of the FPA.⁵

4. On January 23, 2015, Soldier Canyon filed a Notice of Intent for its proposed Soldier Canyon Facility, to be located on a water supply pipeline near Fort Collins, Colorado. The Notice of Intent sought a determination that the project meets the requirements of section 30(a) of the FPA and thus is excluded from the licensing requirements of the FPA.

5. The proposed facility would be located on the 36-inch-diameter Soldier Canyon Pipeline, which is connected to a secondary outlet of Horsetooth Reservoir through

² Section 30(a)(3)(A) of the FPA, 16 U.S.C. § 823a(a) (2012), as amended by the 2013 Act, Pub. L. 113-23, § 4, 27 Stat. 493 (2013).

³ Pub. L. 113-23, § 4, 127 Stat. 493 (2013).

⁴ To obtain this exclusion from licensing, an applicant must file a Notice of Intent to demonstrate that the proposed facility meets the statutory criteria. Commission staff then makes a preliminary determination on whether the proposal satisfies the requirements of section 30(a) and gives the public an opportunity to contest the preliminary determination. If Commission staff determines that the facility meets the qualifying criteria, it issues a letter stating that the facility is not required to be licensed under Part I of the FPA.

⁵ 16 U.S.C. § 823a (2012), amended by the 2013 Act, Pub. L. 113-23, § 4, 127 Stat. 493 (2013).

Soldier Canyon Dam. The pipeline draws water from the bottom of Horsetooth Reservoir and delivers it to the Soldier Canyon Filter Plant for treatment and distribution to water users. An existing pressure-reducing vault is located about 1200 feet downstream of the dam, and it dissipates the pipeline's water pressure before the water enters the Soldier Canyon Filter Plant for treatment. Soldier Canyon proposes to construct a 12-foot by 12-foot buried powerhouse adjacent to the pressure-reducing vault. The new powerhouse, which would contain one 100-kilowatt turbine-generator unit, would take water from the pipeline, bypassing the pressure-reducing vault, and return it to the pipeline downstream of the vault.

6. On February 6, 2015, Commission staff rejected the Notice of Intent, concluding that the proposed facility would rely entirely upon the hydroelectric potential created by Horsetooth Dam rather than by the conduit, and thus does not comply with FPA section 30(a).

7. On February 20, 2015, Soldier Canyon requested rehearing of the rejection of its Notice of Intent, contending that Commission staff erred in its determination.

Discussion

8. On rehearing, Soldier Canyon contends that, though the FPA requires the exclusion of dams from qualifying facilities, it does not require the exclusion of facilities that use hydroelectric potential that is in part created by a dam, provided that the conduit is non-federally owned.⁶ It contends that the statutory requirement of FPA section 30(a) that a qualifying facility is "a facility (not including any dam or other impoundment)" that generates power using "only the hydroelectric potential of a non-federally owned conduit" requires only that the generation *facility* not include a dam. It does not exclude a hydro facility that uses the hydroelectric potential of a conduit, where the potential is in part created by the elevation of a dammed reservoir from which the conduit collects water, provided however that the conduit is *non-federally* owned. Soldier Canyon states that requiring a facility to use *solely* the hydroelectric potential of a conduit alone would restrict the application of this exemption to a very small number of projects, contrary to Congress' intent.⁷ Soldier Canyon concludes that, since the proposed Soldier Canyon Facility does not include a dam and uses the hydroelectric potential of a non-federally

⁶ Request for Rehearing at 11.

⁷ In essence, Soldier Canyon states that applying such a strict standard would require that, in every instance, any dam-related pipeline pressure would need to be dissipated (i.e., broken to atmospheric pressure) prior to the water being entrained in the conduit. *Id.* at 11-12.

owned conduit, regardless of whether it also derives potential from the elevation of a dammed reservoir, the facility satisfies the qualifying criteria.⁸

9. We agree. As noted above, in this key respect the statutory requirements are the same for qualifying conduit facilities (i.e., those excluded from the licensing requirements of the FPA) and small conduit facilities (i.e., those eligible for an exemption authorization from the Commission).⁹ The Commission has administered the small conduit exemption program for over 35 years, and a review of the Commission's implementation of the provisions at issue here supports Soldier Canyon's argument.¹⁰

10. As pertinent here, when promulgating the regulations implementing small conduit facility exemptions in 1980, the Commission defined an exempt facility as one that

utilizes for electric power generation the hydroelectric potential of a conduit; ... *is not an integral part of a dam*; and ... does not rely on construction of a dam which construction will create *any portion of the hydrostatic head* that the facility uses for power generation, *unless that construction would occur for agricultural, municipal, or industrial consumptive purposes even if hydroelectric generating facilities were not installed*. [Emphasis added.]¹¹

⁸ *Id.* at 11.

⁹ The differences, which are not relevant to this case, are (1) the maximum allowable size of the project (40 MW versus 5 MW), (2) whether the conduit is federally owned, and (3) whether the project is existing or proposed.

¹⁰ In September 2014, the Commission promulgated regulations, which became effective February 23, 2015, defining a "qualifying conduit hydropower facility" at section 4.30(b)(26) of the regulations. *See Revisions and Technical Corrections to Conform the Commission's Regulations to the Hydropower Regulatory Efficiency Act of 2013*, Order No. 800, FERC Stats. & Regs., Regulations Preambles ¶ 31,358 (2014). Although the definition is in pertinent respects similar to the Commission's definition of a "small conduit hydroelectric facility," we do not look to it in this case because it was not in effect when Soldier Canyon filed its Notice of Intent in January 2015.

¹¹ *See* 18 C.F.R. § 4.91(f) (1981), originating in 45 Fed. Reg. 28,085 (Apr. 28, 1980). The provisions were renumbered over the years, most recently in 2014 (effective February 23, 2015). *See id.* The definition is now found in 4.30(b)(30).

11. In promulgating these regulations, the Commission stated that, by requiring that a small conduit facility not be:

an integral part of a dam, ... a facility will not be disqualified unless the powerhouse [of the small conduit facility] and the dam together form a physically and functionally indivisible unit for the impoundment of water....

The underlying reason for the exemption is to encourage development of power facilities associated with development of industrial, municipal, or agricultural water supply, where hydroelectric energy can be developed incidentally to the primary purpose of the conduit, i.e., water distribution.

There is no indication in the legislative history of PURPA that Congress intended to preclude an exemption unless the facility itself were structurally integrated with the dam or the dam created or enlarged an impoundment for hydroelectric generating purposes and this rule would not permit an exemption in those circumstances.¹²

12. In *Hy Power Energy Company* the Commission explained that “a conduit project can use the hydrostatic head of a dam so long as it does not rely upon the construction of a dam, which construction would create any portion of the hydrostatic head that the facility uses for power generation, unless that construction would occur for agricultural, municipal, or industrial consumptive purposes even if the hydroelectric generating facilities were not installed.”¹³

13. In determining whether a proposed qualifying conduit hydropower facility meets the requirement of FPA section 30(a) that it use “only the hydroelectric potential of a non-federally owned conduit” and (if it meets the other section 30(a) requirements) is thus excluded from the licensing requirements of the FPA, we see no reason to apply a different, more stringent standard than was established in 1980 for small conduit facility

¹² *Exemptions of Small Conduit Hydroelectric Facilities From Part I of the Federal Power Act*, Order No. 76, FERC Stats. & Regs., Regulations Preambles 1977-1985 ¶ 30,146, at 31,002 (1980). See, e.g., *North Side Canal Co.*, 67 FERC ¶ 61,040 (1994) (proposed project that included a power canal that created a headpond with over 100 acre feet of storage amounted to construction of a dam for hydropower generation purposes and thus did not qualify for a conduit exemption).

¹³ *Hy Power Energy Co.*, 79 FERC ¶ 61,060, at 61,273 n.6 (1997).

exemptions. We view small conduit facilities and qualifying conduits as simply generating hydroelectricity by using the water within a conduit operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. Whether, or in what proportion, the conduit's ability to generate hydropower is due to the conduit's gradient or the head from an upstream dam is not relevant.¹⁴

14. Soldier Canyon's proposed facility would be located adjacent to, and essentially replace, a pressure-reducing vault located about 1200 feet downstream of Horsetooth dam. A new buried powerhouse would take water from the pipeline, bypassing the pressure-reducing vault, and return it to the pipeline downstream of the vault. Under these facts, the Soldier Canyon facility meets the requirement of FPA section 30(a) that it not include a dam or other impoundment and that it use the hydroelectric potential of the conduit, which is not federally-owned.

15. For the above reasons, we grant rehearing and reinstate Soldier Canyon's Notice of Intent.¹⁵ In addition, it is our preliminary determination that the proposed project described in the Notice of Intent meets the criteria of FPA section 30(a) for a qualifying conduit facility. Commission staff will issue public notice of this preliminary determination, as required by section 30(a)(2)(B), and thereafter issue a final determination.

The Commission orders:

(A) Soldier Canyon Filter Plant's February 20, 2015 request for rehearing of the February 6, 2015 letter rejecting its Notice of Intent to Construct a Qualifying Conduit Hydropower Facility is granted, and the Notice of Intent is reinstated.

(B) It is preliminarily determined that Soldier Canyon Filter Plant's proposed Soldier Canyon Micro Hydro Facility meets the qualifying criteria of section 30(a) of the Federal Power Act and is not required to be licensed under Part I of the FPA.

¹⁴ If a conduit facility would rely on construction of a dam, which construction would create any portion of the hydrostatic head that the facility would use for power generation, the construction must be for agricultural, municipal, or industrial consumptive purposes even if hydroelectric generating facilities were not installed. *See* 18 C.F.R. § 4.30(b)(30)(v) (2014).

¹⁵ Because we are granting rehearing, we need not address Soldier Canyon's other arguments its raises on rehearing.

(C) Upon issuance of this order, Commission staff will issue public notice of the preliminary determination set forth in Ordering Paragraph (B).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.