

153 FERC ¶ 61,200
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company

Project No. 2106-068

ORDER DENYING REHEARING

(Issued November 19, 2015)

1. On May 26, 2015, Pacific Gas and Electric Company (PG&E) filed an application, seeking authorization to convey certain property rights at the McCloud-Pit Project No. 2106, located on the McCloud and Pit Rivers in Shasta County, California. On August 3, 2015, Commission staff issued a letter stating that PG&E's application was premature and would not be considered until after the conclusion of the pending proceeding to relicense the McCloud-Pit Project.¹ On September 2, 2015, PG&E requested rehearing. For the reasons below, the Commission agrees that PG&E's application was premature and denies rehearing.

I. Background

2. The Commission issued PG&E an original license to construct and operate the project on August 18, 1961.² Project works include the McCloud Reservoir, which has a surface area of 520 acres, and a maximum surface elevation of 2,680 feet and normal minimum surface elevation of 2,635 feet.³ PG&E-owned lands and portions of the Shasta-Trinity National Forest form a boundary between the reservoir and the

¹ Letter from Robert J. Fletcher (Division of Hydropower Administration and Compliance) to Mr. Randal S. Livingston (PG&E).

² *Pac. Gas & Elec. Co.*, 26 FPC 399 (1961).

³ Rehearing Request at 3.

surrounding private holdings of two Hearst Corporation subsidiaries: Wyntoon Timberlands, a logging company, and Wyntoon Estate, a real estate holding company.⁴

3. The project's original license expired on July 31, 2011, and since that date, the project has operated under an annual license.⁵ PG&E's application for a new license is currently pending before the Commission.⁶

4. On November 29, 2010, in the course of the relicensing proceeding, the U.S. Department of Agriculture's Forest Service (Forest Service) submitted, pursuant to section 4(e) of the Federal Power Act,⁷ mandatory conditions, including Condition No. 30, which directs PG&E to develop a 50-person campsite facility at the McCloud reservoir.⁸ In developing this facility, PG&E must:

[A]cquire rights, by any means necessary, but not including by condemnation pursuant to Section 21 of the Federal Power Act or any other law, for purposes of overnight public recreational use, a portion of the Star City Creek parcel . . . If Star City cannot be acquired as described above, [I]icensee [PG&E] shall instead construct overnight camping facilities

⁴ *Id.* at 3, 6; *see also* May 26, 2015 Easement Application at 3, Attachment A, 1-2; *Pac. Gas & Elec. Co.*, 7 FERC ¶ 62,109 (1979) (approving McCloud Reservoir exhibits submitted between Nov. 6, 1968 and Dec. 6, 1977).

⁵ Notice of Authorization for Continued Project Operation at 1 (Aug. 4, 2011). PG&E's annual license contains the same terms as its expired license. *See* 16 U.S.C. § 808(a)(1) (2012).

⁶ On July 16, 2009, PG&E filed an application to relicense the project. The Commission issued its Final Environmental Impact Statement (FEIS) for the project in February 2011, but the project is currently awaiting Clean Water Act section 401 certification from the State of California.

⁷ 16 U.S.C. § 797(e) (2012). Pursuant to section 4(e), the license for a project that occupies lands that are part of a reservation of the United States (defined to include national forests) must include "such conditions as the Secretary of the department under whose supervision the reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

⁸ Forest Service Final Section 4(e) Conditions, Section 10(a) Recommendations and Comments for McCloud-Pit Hydroelectric Project FERC. No. 2106, at Enclosure 1, 29-30 (Nov. 29, 2010).

on NFS [Forest Service] lands near Tarantula Gulch within the [p]roject boundary.⁹

The Star City Creek parcel is owned by Wyntoon Timberlands and is adjacent to the Forest Service's existing Star City Creek recreational area, an undeveloped dispersed recreation site adjacent to the reservoir.¹⁰ PG&E currently operates no public recreation facilities at the project. The Forest Service's Tarantula Gulch boat launch and day use area is the only developed facility on the reservoir and is located on the opposite side of the reservoir from the Star City Creek site.¹¹ However, members of the public engage in kayaking, boating, camping, and other recreational activities along portions of the project shoreline.

5. In its application, PG&E stated that it began efforts to comply with this condition by entering into a "master agreement" with Wyntoon Timberlands and Wyntoon Estate.¹² Under the agreement, Wyntoon Timberlands would convey to PG&E the Star City Creek parcel in exchange for PG&E granting an easement to Wyntoon Estate on 19.31 acres along the upper reach of the McCloud Reservoir shoreline in the Section 34 parcel maps of Shasta County (Section 34 Shoreline).¹³

6. Wyntoon Estate is located along the upper end of McCloud Reservoir. The project boundary in this area is established by metes and bounds and is generally 200 feet horizontally from the high-water mark. Wyntoon owns in fee the lands in this area upland of the reservoir's maximum surface elevation of 2,680 feet, and PG&E holds a flowage easement on the Wyntoon Estate lands that lie within the project boundary, i.e., lands that lie between 2,680 feet and the project boundary. PG&E owns in fee the Section 34 Shoreline, i.e., all the lands up to 2,680 feet.¹⁴

⁹ *Id.*

¹⁰ Easement Application at 3.

¹¹ FEIS at 231.

¹² Easement Application at 6.

¹³ *Id.*

¹⁴ *Id.* at Attachment A, 1.

7. The proposed easement, which will apply to those PG&E Section 34 Shoreline lands between 2,680 and 2,635 feet that are exposed from time to time when the reservoir is drawn down below the maximum elevation,¹⁵ would grant Wyntoon Estate access to this area “for health and safety reasons,” and “for the purpose of managing the security of the [Section 34 Shoreline], including, without limitation, the right and ability to prohibit and exclude use of the [Section 34 Shoreline] by the general public”¹⁶ In other words, Wyntoon Estates will have the authority to manage a portion of the project’s shoreline and to prevent public recreational access to it.

8. On May 26, 2015, PG&E filed an application seeking authority to convey the easement to Wyntoon Estate. PG&E argued that the easement would facilitate its acquisition of the Star City Creek parcel called for in the proposed Forest Service 4(e) condition. With regard to the alternative campsite location near Tarantula Gulch, PG&E indicated this site “would be far less desirable,” because it cannot accommodate a 50-person campsite, and PG&E would then have to construct multiple small overnight camping facilities on other Forest Service lands.¹⁷

9. PG&E also urged the Commission to approve its application because the easement would rectify public health and safety concerns on Wyntoon Estate lands. According to PG&E, kayakers, boaters, and campers who use the Section 34 Shoreline create health, safety, trespass, and privacy concerns for Wyntoon Estate.¹⁸ PG&E argued that the Section 34 Shoreline was never intended for public recreational use, where the private Wyntoon Estate lands bordering the shoreline are “covered with heavy brush and trees” and the shoreline “is steeply sloped.”¹⁹ The easement agreement would eliminate public access at the Section 34 Shoreline, but PG&E argues that the proposed exchange will, on balance, enhance project recreation.²⁰

¹⁵ Thus, the lands as to which the easement applies will vary depending on reservoir operations.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 8-9.

¹⁸ *Id.*

¹⁹ *Id.* at 9.

²⁰ *Id.* at 8.

10. On August 3, 2015, Commission staff issued the August Letter concluding that PG&E's request was premature when it was made to comply with an as-yet ineffective mandatory condition. Although the application was premature, Commission staff explained that the company could refile the request after the Commission acted on the relicense application.

11. On September 2, 2015, PG&E filed a timely request for rehearing.

II. Discussion

12. On rehearing, PG&E argues that the August Letter was improper because it did not address PG&E's request under Article 26 of its existing license.²¹ PG&E explains that it only invoked the pending Forest Service 4(e) condition as a partial justification for the request, asserting that the transfer would also eliminate conflicts between the public and the Wynton Estate, and on balance, improve recreation at the reservoir.²²

13. In fact, PG&E clearly stated in its application that “[t]his request is being made in order to allow PG&E to comply with the requirements of mandatory condition that the United States Forest Service . . . has submitted to the Commission . . . for inclusion in the new License for the project.”²³ Article 26, which is simply a standard requirement that licensees retain necessary project property and obtain Commission approval before disposing of it and does not include any suggestion as to when such a matter is appropriate for consideration, does not obviate staff's conclusion that it would be premature to act on steps needed to carry out an as-yet ineffective mandatory condition. Accordingly, Commission staff's conclusion that the application was premature was appropriate, given that a section 4(e) condition has no force and effect until a license that includes it is issued. In addition, as discussed below, there are several alternative grounds for declining to consider PG&E's application.

A. PG&E has not shown that the Section 34 Shoreline does not have recreational value.

14. License Article 26 requires PG&E to retain sufficient property rights to accomplish all project purposes and obtain Commission approval before disposing of any

²¹ Rehearing Request at 1.

²² *Id.* at 10.

²³ Easement Application at 1.

such property.²⁴ In considering requests under Article 26, the Commission must confirm that the disposal will not conflict with the current and potential recreational needs and purposes for such lands.²⁵ The Commission makes this determination by examining whether the proposal is consistent with an approved recreation management plan.²⁶ In the absence of such a plan, the Commission will not authorize a licensee to dispose of any interest in project lands unless a showing is made that the lands do not have recreational value.²⁷ As a general matter, the Commission's Policy Statement on recreational development at licensed projects states that the Commission will seek "the ultimate development" of recreational resources, consistent with the needs of the project area and the primary purpose of the project.²⁸ Licensees are to "make provisions for adequate public access to [project recreation] facilities and waters"²⁹

15. Further, under PG&E's existing license Article 7, PG&E must allow the public access to all project waters and lands unless it reserves such lands from public access for the protection of life, health, and property.³⁰ PG&E never developed a recreation plan for the McCloud Reservoir or requested to reserve the Section 34 Shoreline from public use.³¹ Although PG&E now claims that the Section 34 Shoreline is unsuitable for

²⁴ 26 FPC at 404-05 (incorporating portions of Form L-6, 16 FPC 1,117, at 1,126 (1953)).

²⁵ See *California Dep't of Water Res.*, 61 FERC ¶ 61,001, at 61,002 (1992).

²⁶ See *id.*; *Recreational Development at Licensed Projects*, Order No. 313, 34 FPC 1,546, at 1,550-51 (1965); 18 C.F.R. § 2.7 (2015).

²⁷ Order No. 313, 34 F.P.C. at 1,550-51.

²⁸ 18 C.F.R. § 2.7.

²⁹ *Id.* § 2.7(b).

³⁰ 16 FPC at 1,123.

³¹ License article 48 required that PG&E develop a recreation management plan for the project's Iron Canyon Reservoir but not the McCloud Reservoir. *Pac. Gas & Elec. Co.*, 31 FPC 206, at 207 (1964). Neither the Iron Canyon Reservoir Recreation Management Plan nor any other approved plan indicates that the Section 34 Shoreline is closed to the public. In fact, PG&E acknowledges that PG&E must "maintain public access to the Reservoir Area, and the Section 34 Shoreline . . . [and that] PG&E cannot restrict access . . . without the approval of FERC." Easement Application at Attachment A, 2.

recreation due to its steep topography,³² its filings contradict this finding. Some areas of the Section 34 Shoreline are relatively flat,³³ and kayakers, boaters, and campers use the shoreline for passive recreation.³⁴

16. While none of the foregoing prejudices either the ongoing licensing proceeding or action on any amendment application that PG&E may file at an appropriate time, it supports staff's conclusion that the application at issue should be not be considered in a hasty manner and without a thorough examination of public recreational needs at the project.

B. PG&E's request would be more appropriately examined in the context of relicensing.

17. Under section 10(a) of the FPA, the Commission balances the various, and often competing, interests affected by a project, including power and non-power values for new licenses.³⁵ In order to ensure that the Commission is able to consider all aspects of a project during the relicensing process, the Commission generally does not favor the consideration of significant amendments close to, or during, relicensing.³⁶ Doing so would detract from our ability to consider at one time the many issues that surround licensing a hydropower project. Here, we conclude that it would make more sense to consider a proposal to remove public access to lands that are currently used for recreation in the context of all recreation and other issues surrounding the project, rather than on a piecemeal basis.

³² Rehearing Request at 12; Easement Application at 5.

³³ Easement Application at Attachment A, Exhibit B.

³⁴ Rehearing Request at 4 (describing the Wyntoon Estate's concerns "from campfires, smoking, and other actions of the public *on* the [Section 34 Shoreline].") (emphasis added); Easement Application at 9 (discussing the "loss in public recreation resulting from closing the [Section 34 Shoreline] to public access.").

³⁵ 16 U.S.C. § 803(a) (2012).

³⁶ See, e.g., *PUD No. 2 of Grant County*, 89 FERC ¶ 61,177 (1999), *aff'd*, *Crescent Bar Homeowners Association, et al. v. FERC*, 2 Fed. Appx. 722 (9th Cir. 2001) (unpublished).

18. During this relicensing process, the Commission must evaluate and seek the ultimate development of project recreational resources, including the reservoir's shorelines.³⁷ The Commission generally presumes reservoir shorelines have recreational value and, to the extent consistent with other objectives of the license, may require licensees to obtain sufficient property rights to lands adjacent to the exterior margin of the reservoir for recreational purposes.³⁸ The Commission does allow exceptions to this requirement, but only when it is shown that the area has low recreational potential or that the recreational objectives of section 10(a) of the Federal Power Act are not consistent with the economic well-being of the project.³⁹ A comprehensive balancing process considering recreation and other matters is currently underway in PG&E's McCloud-Pit relicensing proceeding.

19. On rehearing, PG&E argues, given the certainty that that the Forest Service's Condition No. 30 would be included in the new license, Commission staff did not explain why waiting to act on PG&E's application was reasonable. According to PG&E, the easement is the only way to obtain the Star City Creek parcel from Wyntoon Timberlands and comply with Condition No. 30.⁴⁰ PG&E also points to a Forest Service letter as evidence that the easement application is the best way to meet the project's recreational requirements.⁴¹ The Forest Service stated that the easement will facilitate the Star City Creek parcel development and improve recreation near the reservoir.⁴²

20. As Commission staff explained in the August Letter, the application was premature when Condition No. 30 was not yet effective. The condition's plain language does not require either the easement or acquisition of the Star City Creek parcel. As PG&E acknowledged in its easement application, if PG&E cannot acquire the Star City Creek parcel, it can develop campsites at Tarantula Gulch and other Forest Service

³⁷ 18 C.F.R. § 2.7 (2015).

³⁸ *Alabama Power Co.*, 3 FERC ¶ 63,036, at 65,262 & n.7 (1978) (citing 18 C.F.R. § 2.7(a)) (“[T]o the extent consistent with the other objectives of the license, *such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.*”).

³⁹ 18 C.F.R. § 2.7(a).

⁴⁰ Rehearing Request at 8.

⁴¹ *Id.* at 9-10.

⁴² Forest Service filing of May 8, 2015, Easement Application, at Attachment C, 2.

sites.⁴³ The easement may help PG&E comply with the proposed condition, but it is not the only compliance option. Therefore, as Commission staff recognized in the August Letter, considering PG&E's application outside of the relicensing process was premature. With regard to the Forest Service's letter, the easement may serve Forest Service interests, but the Commission must still determine the full scope of the project's appropriate contribution to public recreation, as it will on relicensing, including a determination of which sites are needed to meet different forms of recreational use. While we will not prejudge action on the relicense application, we note that there are many choices open to us. We could, for example, require that PG&E acquire and develop the Star City Creek parcel and continue to allow public access to lands at issue, or we could require other recreational measures. We think it best not to take action now that would foreclose any option.

21. PG&E's other justifications do not change this conclusion. PG&E argues that the Star City Creek parcel and other recreational enhancements "planned by PG&E as part of the new license should offset any loss in public recreation resulting from closing the [Section 34 Shoreline] to public access."⁴⁴ However, PG&E's proposed recreational measures for its new license, which are not yet in effect, do not necessarily relieve recreational demands, such as passive day-use, at the Section 34 Shoreline, which is in the northernmost project area. PG&E proposes to develop campsites, two day-use areas, and several access areas, but these are all in the southern half of the McCloud reservoir. Recreation types, patterns, and amounts vary across the reservoir, where a recreation facility in one location may not alleviate demand in a different location. Contrary to PG&E's assertions, the recreational measures proposed for the new McCloud-Pit license have no bearing on the easement application.

22. According to PG&E, the Commission's "approval [of the easement] will alleviate a serious nuisance problem," and minimize illegal trespass on the Wyntoon Estate.⁴⁵ The Wyntoon Estate's private property concerns, even in combination with the enhanced public recreation opportunities in other project locations, do not require considering and granting the requested easement now. We have previously explained that the interests of private landowners cannot override the public's right to enjoy recreational resources.⁴⁶ Thus, the easement cannot be granted solely because of the conflicts between public

⁴³ Easement Application at 8-9.

⁴⁴ *Id.* at 9.

⁴⁵ Rehearing Request at 1, 12.

⁴⁶ *West Penn Power Co.*, 81 FERC ¶ 61,362 (1997), *reh'g denied*, 83 FERC ¶ 61,225 (1998).

recreational access and private landowner concerns. Whether or not the easement is, on balance, the best possible outcome for project recreation is more appropriately examined in the context of the relicensing proceeding or thereafter.

23. As a separate matter, we note that PG&E did not satisfy the procedural requirements for a request to amend its license. At a minimum, section 4.38(a)(7) of the regulations requires PG&E to consult with affected resource agencies, tribes, and members of the public on its proposal.⁴⁷ Where, as here, the proposed amendment is intended to allow a third party to bar recreation access to project lands which have hitherto been used by the public, it is particularly important that the licensee contact those who would be affected by this action.

Conclusion

24. As discussed above, we conclude that PG&E has not shown that Commission staff erred in declining to consider the easement application at this time, separated from the ongoing relicensing proceeding. Accordingly, we deny rehearing.

The Commission orders:

The request for rehearing filed on September 2, 2015, by Pacific Gas and Electric Company is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁷ 18 C.F.R. § 4.38(a)(2), (7) (2015).