

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Pacific Gas and Electric Company

Project No. 77-144

ORDER DENYING REQUEST FOR REHEARING
AND LATE INTERVENTION

(Issued April 20, 2006)

1. This order denies the request of Friends of the Eel River (FOER) for rehearing of a notice rejecting FOER's request for rehearing of a Commission order modifying and approving summer water temperature and summer fish rearing monitoring plans submitted by Pacific Gas and Electric Company (PG&E), licensee for the Potter Valley Project No. 77.¹

Background

2. The Potter Valley Project is located on the Eel River in California. In January 2004, the Commission issued an order² amending the Potter Valley license to require various operational and physical modifications for the benefit of salmonids federally-listed as threatened under the Endangered Species Act (ESA)³ (amendment proceeding).

¹ *Pacific Gas & Electric Co.*, 113 FERC ¶ 61,316 (2005).

² *Pacific Gas & Electric Co.*, 106 FERC ¶ 61,065 (amendment order), *reh'g denied*, 107 FERC ¶ 61,232 (June 2, 2004), *reh'g denied*, 108 FERC ¶ 61,266 (September 21, 2004), *appeals filed*, *Friends of the Eel River v. FERC*, 9th Cir. No. 04-73862 (Aug. 5, 2004) and *Cal. Sportfishing Protection Alliance, et al. v. FERC*, 9th Cir. No. 04-73498, et al. (July 14, 2004) (*CSPA v. FERC*).

³ 16 U.S.C. § 1531, *et seq.* (2000).

These include a requirement for PG&E to submit for Commission approval plans to monitor summer water temperatures and salmonid summer rearing in the Eel River.⁴

3. In due course, PG&E submitted the two plans for Commission approval and, on November 9, 2005, the Commission issued an order modifying and approving the plans.⁵ (the compliance proceeding). On December 9, 2005, FOER timely filed a request for rehearing, asserting that the November 9 Order is inconsistent with the Potter Valley license, as amended, and violates the ESA, because it includes an agreement between PG&E and the National Oceanographic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) fixing the amount of PG&E's annual funding for the plans.

4. On December 27, 2005, the Commission issued a notice rejecting FOER's request for rehearing. On January 6, 2006, FOER timely filed a request for rehearing of the December 27 notice, along with a request for late intervention.

Discussion

5. We will deny FOER's requests for rehearing and late intervention. FOER's December 9, 2005 rehearing request was rejected for two reasons. First, while FOER was a party to the amendment proceeding, which has been terminated, it is not a party to the compliance proceeding.⁶ Only a party to a proceeding may seek rehearing.⁷ An entity becomes a party by filing a motion to intervene or a notice of intervention, as appropriate, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.⁸

⁴ The license, as amended, includes Reasonable and Prudent Measures (RPMs) to protect listed salmonids filed with the Commission by the National Oceanographic and Atmospheric Administration's National Marine Fisheries Service. 106 FERC at 61,236-8. RPM 8 includes the two plans. License Article 52 requires PG&E to submit for Commission approval a plan to implement and comply with the RPMs. *Id.* at 61,229.

⁵ *Pacific Gas & Electric Company*, 113 FERC ¶ 62,122.

⁶ A party to one proceeding involving a project does not automatically become a party to any other proceedings regarding that project, even proceedings involving arguably similar subject matter, until it has filed for, and been granted, intervention in such proceedings. *City of Nashville, Ark., et al.*, 41 FERC ¶ 61,045 (1987); *Bangor Hydro-Electric Co.*, 87 FERC ¶ 61,035 (1999).

⁷ Federal Power Act section 313(a), 16 U.S.C. § 313(a) (2000).

FOER's request for rehearing in the compliance proceeding should have been, but was not, accompanied by a motion to intervene. It was therefore properly rejected.

6. The December 27 rejection notice also stated that if FOER had filed a motion to intervene, it would have been denied, consistent with our long-standing practice of providing notice and an opportunity for public participation with respect to only certain types of post-license compliance filings. Specifically, to give rise to an opportunity to intervene, the filing must be one that: (1) entails a material change in the plan of project development or the terms of the license; (2) would adversely affect the rights of property holder in a manner not contemplated by the license; or (3) or involves an appeal by an agency or entity specifically give an consultation role by the license article under which the compliance filing is made.⁹ None of these bases for public participation exists here. The compliance plans entail no material change in project operations, no property rights have been affected, and FOER is not a consulted entity with respect to the plans.

7. FOER contends that PG&E's compliance filing should have been publicly noticed because the monitoring plans are subject to a cost cap, which violates Commission policy, and is therefore a material change in the terms and conditions of the license.¹⁰ The annual dollar amounts established in the monitoring plans¹¹ are the result of an agreement between NOAA Fisheries and PG&E. That agreement does not materially change the license terms. Indeed, it does not change the license terms at all, because the license does not specify any particular funding requirement on the part of PG&E. Rather, the plan imposes a requirement that PG&E comply with NOAA Fisheries' RMPs. NOAA Fisheries is evidently satisfied with the level of funding at this time.¹² Moreover, our acceptance of the monitoring plans at the current funding level in no way constrains

⁸ See 18 C.F.R. § 385.214 (2005).

⁹ See *Kings River Conservation District*, 36 FERC ¶ 61,635 (1986); *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035 (1987)

¹⁰ January 6 rehearing request at 4.

¹¹ \$60,000/year in 2004-2005, and \$75,000/year thereafter.

¹² FOER also contends that alleged price caps trigger a need for the Commission to reinitiate ESA consultation with NOAA Fisheries regarding the license amendment. January 6 rehearing request at 4. NOAA Fisheries evidently does not share FOER's views in this regard.

us from using our reserved authority to require PG&E to expend additional funds for these purposes at any time during the license term if the public interest so requires.¹³

8. FOER next argues that it should be granted late intervention because the compliance proceeding is closely related to the underlying amendment proceeding.¹⁴ This argument is essentially a collateral attack on our practice regarding post-license interventions set forth above. FOER offers no reason, let alone a compelling reason, why we should change our practice. In sum, FOER has advanced no facts or arguments that would cause us to grant rehearing of the notice rejecting its December 9 rehearing request.

9. FOER, however, insists that no motion to intervene in the compliance proceeding was required, because the compliance proceeding is merely a continuation or “extension” of the amendment proceeding. It suggests this is so because the issue of price caps for compliance requirements was left open in the amendment proceeding and it has raised the issue of price caps in the compliance proceeding.¹⁵ In fact, there was no unresolved issue concerning price caps for compliance requirements in the amendment proceeding. We simply reiterated our long-standing position that such costs are not subject to price caps.¹⁶

10. Moreover, as we explained in *Pacific Gas and Electric Company (PG&E)*,¹⁷ a proceeding terminates, and with it the party status of all intervenors, when the Commission has acted on rehearing and the time for seeking judicial review has expired. This is the case regardless of whether any issues remain unresolved. FOER argues, however, that the amendment proceeding was not terminated because judicial review has been sought by, among others, itself.¹⁸ However, once an appeal has been filed, the

¹³ For this purpose, we would use the standard reservation of authority to require whatever measures are necessary in the public interest for the benefit of fish and wildlife. See June 2, 2004 Order, 107 FERC at P 56, n.97.

¹⁴ January 6 rehearing request at 3.

¹⁵ January 6 rehearing request at 2, citing December 9 rehearing request at 2.

¹⁶ See June 2, 2004 Order, 107 FERC at ¶ 61,232 at P 54-6; September 21, 2004 Order, 108 FERC ¶ 61,266 at P 17.

¹⁷ 40 FERC ¶ 61,035 at 61,099 (1987) (*PG&E*).

¹⁸ January 6 rehearing request at 2. FOER is one of the appellants in *CSPA v.*

jurisdiction of the court over the matter is exclusive.¹⁹ In any event, FOER has missed the point. Even if the amendment proceeding were still open pending judicial review, it would be a separate proceeding from the compliance proceeding.

11. FOER next claims that we have previously held that an entity's party status "carries over to a series of interrelated order or subdockets." In support it cites *San Diego Gas & Electric Co., et al. (SDG&E)*,²⁰ in which we acted on requests for rehearing of four interrelated orders concerning the California bulk power market. There, we granted party status in one complaint proceeding to intervenors in a second complaint proceeding, although they did not file motions to intervene in the first proceeding.²¹ The situation in *SDG&E* was fundamentally different than this case. There, all of the related proceedings were still open because we had not yet acted on rehearing, some of the same issues were present in both proceedings, and we consolidated the related proceedings for reasons of administrative efficiency and to ensure consistent decision-making. Here, the amendment proceeding has been terminated, so there is no proceeding with which the compliance proceeding could be consolidated even if we were of a mind to do so.

12. FOER also contends it is a party to the compliance proceeding because it has remained on the Commission's service list for Project No. 77, has been actively involved in the compliance proceeding, including filing comments with the Commission on PG&E's filings.²² The appearance of an entity on the Commission's root service list for a docket (in this case, the service list for Project No. 77) or the filing of comments does not confer party status. As previously noted, such status is by the filing of a motion to intervene or notice of intervention, as appropriate.²³

13. Finally, FOER's motion for late intervention, as required by our regulations, addresses its reasons for filing late, the potential for disruption to the proceeding that would result from late intervention, and the prejudice to, or additional burdens on, the

FERC (see n. 2, supra).

¹⁹ See FPA section 313(a) and (b), 16 U.S.C. § 313(a) and (b) (2000).

²⁰ 97 FERC ¶ 61,275 (2001).

²¹ *Id.* at 62,179.

²² January 6 rehearing request at 3.

²³ See P 5 and n.7, *supra*.

existing parties to the proceeding.²⁴ Our decision to deny rehearing of the rejection notice makes FOER's assertions in these regards moot. In any event, FOER's justification for its untimely motion to intervene, that it did not understand that it needed to intervene in the compliance proceeding, does not meet the higher burden required to justify intervention after issuance of an order disposing of an application.²⁵

The Commission orders:

The request filed on January 6, 2006 by Friends of the Eel River (FOER) in Project No. 77-144 for rehearing of the notice issued December 27, 2005 in Project No. 77-138, is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁴ See 18 C.F.R. § 385.214(d) (2005).

²⁵ See, e.g., *Midwest Independent System Operator*, 110 FERC ¶ 61,383 at P 11 (2005).