

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

California Department of Water Resources

Project No. 2100-138

ORDER REJECTING REHEARING REQUEST

(Issued April 21, 2006)

1. This order rejects the January 20, 2006 request of the County of Butte, California (County) for rehearing of a December 22, 2005 letter issued in the relicense proceeding for the 762-MW (MW) Oroville Facilities Project No. 2100 (Oroville Project), located on the Feather River in Butte County, California.<sup>1</sup> The letter declined the County's request that staff request the licensee, California Department of Water Resources (California DWR), to provide information concerning the methodology it used to develop recreation studies in connection with its relicense application.

**Background**

2. California DWR prepared its relicense application for the Oroville Facilities Project No. 2100 under the Commission's alternative licensing procedures (ALP),<sup>2</sup> and filed the application on January 26, 2005.<sup>3</sup> As part of the relicense application, it filed:

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<sup>1</sup> The Oroville Project, located in the foothills of the Sierra Nevada Mountains, occupies 41,100 acres, 6,175 acres of which are on federal land. The U.S. Forest Service and the U.S. Bureau of Land Management have primary management responsibility for these federal lands.

<sup>2</sup> 18 C.F.R. § 4.34(i).

<sup>3</sup> Pursuant to the protocols adopted for relicensing under the ALP, DWR conducted settlement negotiations with federal and state resource agencies, Indian tribes, local governments, non-governmental organizations, and other stakeholders. These negotiations led to an agreement in principle. After the application for a new license was filed, the settlement parties continued a series of drafting meetings to finalize a written settlement agreement, and filed the settlement with the Commission on March 24, 2006. The County was amongst the parties who participated in the settlement negotiations during the ALP period, but it did not support the agreement in principle, and is not a signatory to the settlement agreement.

(1) a final existing recreation use report, dated February 2004 (R-9 Report); (2) a recreation activity, spending, and associated economic impacts final report, dated May 2004 (R-18 Report); and a fiscal impacts final report, dated May 2004 (R-19 Report).

3. On September 12, 2005, the Commission issued a notice accepting the application and an applicant-prepared Environmental Assessment for filing, and soliciting motions to intervene, protests, and comments.<sup>4</sup> The County had already intervened on April 21, 2005.

4. On November 14, 2005, the County filed a petition arguing that there are gaps in information on the methodology used as well as gaps in the information supplied by the R-9, R-18, and R-19 reports, that California DWR has repeatedly rejected the County's attempts to obtain the information, and that it was therefore requesting that the Commission require California DWR to provide answers to nine questions about the reports.<sup>5</sup> The County argued that answers to its questions are needed: (1) to permit the Commission to conduct an objective assessment of the reports' reliability; and (2) to permit the County to complete its own comments and studies, and effectively participate in the proceeding. California DWR filed a timely answer opposing the petition, arguing that the questions constituted an attempt to conduct discovery.

5. In a letter dated December 22, 2005, Commission staff declined the request, stating that the information the County sought is not necessary for the Commission to do its analysis under the National Environmental Policy Act (NEPA).<sup>6</sup> The letter also noted that the studies were drafted in the Alternative Licensing Process (ALP) workgroups, and

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<sup>4</sup> The notice required motions to intervene and protests; comments; final recommendations, terms and conditions, and prescriptions to be filed by January 30, 2006, and reply comments to be filed by March 16, 2006. By letter, issued January 13, 2006, the deadline for submission of final terms and conditions was extended to March 31, 2006.

<sup>5</sup> The County asks for information such as the formulae and deviations used to calculate the average number of visitors to the recreation area; any adjustments made to compensate for unusual water levels during the chosen study period; estimates of visitors at non-peak periods; how data from different sources were merged to create Table 5.1-1 of the R-9 Report; any adjustments made to traffic counted in order to account for the percentage of non-recreational traffic; the annual total indirect population figure; and identification of the individuals who "made professional judgments" in preparing the reports.

<sup>6</sup> 42 U.S.C. § 4321, *et seq.* (2000).

that the results were reviewed and approved by the work groups before the studies were released.

6. On rehearing, the County argues that: (1) the December 22, 2005 Staff letter erred by finding that the information it seeks is not necessary to do a NEPA analysis when what is at issue is whether the information is needed to improve the record in the proceeding (that is, would the information would improve the record by enabling a determination of the reports' reliability); and (2) the staff letter failed to address the County's need for the information.<sup>7</sup>

7. California DWR filed an answer to the request for rehearing, arguing that the County's submission is not one for rehearing but for discovery and therefore that an answer is permissible. Regardless of the nature of the County's November 14, 2005 petition, its request concerning the staff letter denying that petition clearly is a request for rehearing, to which answers are not permitted.<sup>8</sup> We therefore do not accept California DWR's answer.

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<sup>7</sup> The County also challenges the staff letter's statement that the reports, drafted in ALP work groups, were approved by the work groups (and in particular, by the Recreation and Socioeconomic workgroup) before they were released. It maintains that, as a member of that workgroup, it consistently questioned the validity of certain data in the reports, and was denied information to which it was entitled under the ALP protocols. It suggests that its rights under the ALP protocols constitute an additional reason for granting its request.

The ALP is intended to facilitate greater participation by and improve communication amongst the applicant, resource agencies, Indian tribes, the public, and Commission staff in pre-filing consultation. But here, where the license application has been filed and accepted, the pre-filing consultation period has ended. The communication protocols associated with the pre-filing period expired on September 12, 2005, and therefore are not a basis for maintaining a right to the information. Because the ALP is merely a process intended to facilitate greater participation in pre-filing consultation, whether or not the reports completed by the ALP work groups were reviewed and approved by those groups does not give the reports any greater or lesser weight in the Commission's NEPA analysis. Regardless of the work groups' review and approval, the Commission must do an independent analysis of material submitted to it.

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<sup>8</sup> 18 C.F.R. § 385.213(a)(2) (2005).

## Discussion

8. The County's request for rehearing, asking that the Commission require the licensee to answer questions about its R-9, R-18, and R-19 reports, is interlocutory.<sup>9</sup> As noted above, the recreation reports at issue were filed as part of the relicense application for the project. The application was accepted for filing, and Commission staff is now engaged in the process of performing the NEPA analysis necessary to develop an Environmental Impact Statement (EIS) for the project. In conducting that analysis, Commission staff will determine what information it will rely upon, and the weight to be given particular parts of the record. While a party may file comments stating its views at this stage, issues regarding the adequacy of the environmental record will not be ripe for review until that analysis is completed and an order has been issued.

9. In any event, the County will have an opportunity to raise its concerns in a timely manner. The draft EIS, when issued, will identify what staff relies upon—the bases for its conclusions. At that time, parties, including the County, will have an opportunity to comment. If the draft EIS relies on the reports, and if the County believes that the reports are deficient, and/or the methodology used to develop them are deficient, it will have an opportunity, in its comments on the EIS, to raise those alleged deficiencies. Should the County be unsatisfied with staff's response, and should the order disposing of California DWR's application rely on the studies, the County may seek rehearing from the Commission.

10. The County has argued that it did not base its request solely on the Commission's need for the information, but also on its own need to obtain answers and information in order to prepare studies and comments on the application. The Commission does not provide for discovery in hydro-electric licensing proceedings. Nevertheless, the County is free to submit comments analyzing the studies and pointing out any alleged deficiencies based on the perceived missing information. It is also free to develop and submit studies which it feels are more reliable.<sup>10</sup>

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<sup>9</sup> See *Duke Energy Corporation*, 111 FERC ¶ 61,489 (2005) (appeal of staff decision to issue scoping document is interlocutory).

<sup>10</sup> Indeed, the County has filed such studies. See the County's submission filed February 15, 2006, containing a report on the socio-economic impacts of the Oroville Project on Butte County, and a report on the operational impacts of the Oroville Project on Butte County.

The Commission orders:

(A) The request of California Department of Water Resources to file an answer to the County of Butte, California's request for rehearing is denied.

(B) The request for rehearing filed by the County of Butte, California in Project No. 2100-138 on January 20, 2006, is rejected.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.