

167 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Southern California Edison

Project No. 2290-117

ORDER DENYING REHEARING

(Issued June 20, 2019)

1. On January 30, 2019, Commission staff issued a delegated order¹ granting a request by Southern California Edison to amend the license for the Kern River No. 3 Hydroelectric Project No. 2290 (Kern River No. 3 Project), to incorporate the U.S. Forest Service's (Forest Service) final section 4(e) condition 6(f), filed with the Commission on March 3, 2015, and to revise Article 422 of the project license (both dealing with recreational whitewater flow releases). Subsequently, on March 1, 2019, Mr. Brett Harding Duxbury² filed a request for rehearing of the 2019 Amendment Order. For the reasons discussed below, we deny rehearing.

I. Background

2. The Kern River No. 3 Project, located on the North Fork of the Kern River, and Salmon and Corral Creeks, in Tulare and Kern counties, California, includes three dams along the North Fork of the Kern River: (1) the Fairview Dam; (2) the Salmon Creek Diversion; and (3) the Corral Creek Diversion. It occupies, in part, lands of the United States within the Sequoia National Forest.

3. Section 4(e) of the Federal Power Act (FPA) provides that the Commission can issue a license for a project located within a federal reservation only if it finds that “the

¹ *Southern California Edison*, 166 FERC ¶ 62,049 (2019) (delegated order) (2019 Amendment Order).

² Mr. Duxbury is a whitewater kayaker and states that he “resides in Kernville[,] [California] specifically for the opportunity it provides to paddle on nearby whitewater, including the North Fork of the Kern River.” Brett Harding Duxbury Motion to Intervene at 1.

license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired[.]”³ Section 4(e) further requires that Commission licenses for projects located within federal reservations include all conditions that “the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation[.]”⁴ The U.S. Department of Agriculture’s Forest Service administers the Sequoia National Forest.

4. On December 24, 1996, the Commission issued a new license authorizing Southern California Edison to continue operation of the Kern River No. 3 Project.⁵ The Forest Service submitted section 4(e) conditions for inclusion in the license on May 17, 1996, including conditions related to the timing and amount of whitewater flow releases.⁶ Because an appeal of the 4(e) conditions was pending before the Forest Service at the time the 1996 License Order issued, the 1996 License Order clarified that any valid revisions to the section 4(e) conditions would be incorporated into the license by amendment.⁷

5. In 2002, American Whitewater, Friends of the River, Natural Heritage Institute, and Southern California Edison entered into a settlement agreement setting forth an agreed-upon whitewater flow schedule to be adopted by the Forest Service as a final 4(e) condition.⁸ The Settlement Agreement included a whitewater flow schedule, requiring

³ 16 U.S.C. § 797(e) (2012).

⁴ *Id.*

⁵ *Southern California Edison Co.*, 77 FERC ¶ 61,313 (1996) (1996 License Order) (issuing the license for a 30-year license term), *order on reh’g*, 81 FERC ¶ 61,162 (1997) (1997 Rehearing Order). The Commission issued the original license for the Kern River No. 3 Project in 1964. *Southern California Edison Co.*, 32 FPC 553 (1964).

⁶ *See* 1996 License Order, 77 FERC at 62,445.

⁷ *Id.* *See also* 2019 Amendment Order, 166 FERC ¶ 62,049 at PP 3-7 (detailing history of the 4(e) conditions).

⁸ *Southern California Edison, Settlement Agreement*, Project No. 2290-000 (filed December 30, 2002) (stating that the purpose of the settlement agreement is to resolve, among the parties to the settlement agreement, issues related to the whitewater recreation flow releases) (2002 Settlement Agreement).

the licensee to release whitewater flows into the project bypass reach daily “Between the Weekend Before the *Memorial Day Weekend* and July 4th[.]”⁹

6. Pursuant to the 2002 Settlement Agreement, on December 23, 2003, the Forest Service filed with the Commission final section 4(e) conditions including, as relevant to this proceeding, condition 6(f), which set forth the whitewater flow schedule. As filed, condition 6(f) provided that the licensee shall release whitewater flows into the project bypass reach daily the “Weekend prior to *Memorial Day* until July 4[.]”¹⁰

7. By order dated May 12, 2004, the license was amended to incorporate verbatim the Forest Service’s 2003 final section 4(e) conditions.¹¹ Consequently, revised requirements did not include the word “weekend” after “Memorial Day.”

8. Neither the 2002 Settlement Agreement nor the Forest Service’s final condition 6(f) specified the methodology for determining the flow amounts. Similarly, the 2004 Amendment Order was silent on the methodology to be used. In comparison, the 1997 Rehearing Order, which revised the language of the 1996 License Order’s condition 6(f) and Article 422, provided that “[b]etween May 15 and July 15, the use of water under the above regime will be based on the *previous day’s average flow* from preliminary gauge data obtained at the diversion tunnel and the gauge below Fairview dam.”¹²

9. On December 14, 2012, Mr. Duxbury filed a complaint asserting that Southern California Edison had violated its license in May 2012 because it failed to provide whitewater recreational flows in a manner that he alleged was required by the license.¹³

⁹ 2002 Settlement Agreement at 13 (emphasis added).

¹⁰ Forest Service’s December 23, 2003 Final Section 4(e) Conditions, at Condition 6(f) (emphasis added). In comparison, the 2002 Settlement Agreement called for daily flow releases to occur daily between the weekend before the *Memorial Day weekend* and July 4th.

¹¹ *Southern California Edison Co.*, 107 FERC ¶ 62,136 (2004) (delegated order) (2004 Amendment Order).

¹² 1997 Rehearing Order, 81 FERC at 61,717 (emphasis added) (stating that the methodology to be used is based on the previous day’s average flow).

¹³ Brett Harding Duxbury Complaint, Docket No. P-2290-108 (filed December 14, 2012) (Duxbury Complaint). As is Commission practice with respect to allegations of non-compliance by hydropower licensees, the complaint was referred to the Commission’s Office of Energy Projects, Division of Hydropower Administration and Compliance (DHAC), which is charged with ensuring compliance. *See PPL Montana*,

Highlighting the “Memorial Day weekend” language inconsistency between condition 6(f), as incorporated in the license by the 2004 Amendment Order, and the language of the 2002 Settlement Agreement,¹⁴ Mr. Duxbury asserted that the licensee was required to release flows daily on weekdays the entire week before Memorial Day weekend.¹⁵ Mr. Duxbury also argued that the methodology the licensee used to determine flows, i.e. the previous day’s average flow, conflicted with the license.¹⁶

10. On January 17, 2013, Southern California Edison filed an answer to the complaint (2013 Southern California Edison Answer), denying that its conduct violated the project license.¹⁷ However, Southern California Edison acknowledged that the flow schedule in the 2004 Amendment Order was inconsistent with the flow schedule in the 2002 Settlement Agreement,¹⁸ and on May 1, 2013, filed a request to amend license Article 422 to include the omitted “weekend” in the daily flow schedule.

11. Southern California Edison also argued that its use of the previous day’s average inflow to determine flows was permitted since the 2004 Amendment Order was silent regarding the methodology for monitoring and releasing recreational flows.¹⁹ Southern

LLC, 139 FERC ¶ 61,231, at P 28 & n.87 (2012), *aff’d sub nom. Anderson v. FERC*, 583 F. App’x 747 (9th Cir. 2014).

¹⁴ Duxbury Complaint at 8.

¹⁵ *Id.* at 7-16. The Duxbury Complaint alleges that Southern California Edison failed to provide recreational whitewater flows on Monday, Tuesday, and Wednesday, May 21, 22, and 23 of 2012, where incoming flows were above 1,000 cfs, and Southern California Edison failed to release 700 cfs into the bypass reach. *Id.* at 7.

¹⁶ *See id.* at 17-21. Specifically, Mr. Duxbury asserts that the license, as amended by the 2004 Amendment Order, required an instantaneous methodology and argues that Forest Service would have included the previous day’s average flow methodology in the section 4(e) conditions filed on December 23, 2003 if it intended that methodology to continue to apply. *See id.* at 19, 21. In Southern California Edison’s Answer to the Duxbury Complaint, filed on January 17, 2013 (Accession No. 20130117-5151), Southern California Edison states reasons that an instantaneous methodology would be infeasible, including the need for modifications to the project structure. *See* 2013 Southern California Edison Answer at 11-12.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 10.

California Edison consulted with the Forest Service, American Whitewater, Friends of the River, and Mr. Duxbury to resolve what methodology should be used to determine whitewater flow releases when implementing condition 6(f).²⁰

12. On March 3, 2015, the Forest Service filed with the Commission amended section 4(e) conditions. Specifically, the Forest Service revised condition 6(f) to require daily flows on the “[w]eekend prior to Memorial Day Weekend until July 4.” Revised condition 6(f) also required the flow schedule to be based on the previous day’s average inflow to the project, and noted that the whitewater flows could be reduced to allow a continuous 300 cubic feet per second (cfs) to the powerhouse. On June 4, 2015, Southern California Edison filed an application to amend Article 422 and to incorporate the Forest Service’s revised condition 6(f).

13. On January 30, 2019, Commission staff issued a delegated order incorporating the Forest Service’s revised condition 6(f), as amended in 2015, and amending license Article 422 to be consistent with revised condition 6(f).²¹ The order also concluded, in response to Mr. Duxbury’s complaint, that Southern California Edison had not violated its license in May 2012.²² Subsequently, on March 1, 2019, Mr. Duxbury filed a request for rehearing of the 2019 Amendment Order, arguing that Southern California Edison had violated its license by: (1) not providing whitewater flows during the week before Memorial Day in 2012; and (2) not utilizing an instantaneous flow methodology.

II. Discussion

14. In Mr. Duxbury’s request for rehearing, he challenges the findings in the 2019 Amendment Order that Southern California Edison made a good faith effort to comply with its license in regard to the methodology used to determine whitewater flows; and that Southern California Edison did not violate its license in May 2012.²³ First, Mr. Duxbury argues that the 2004 Amendment Order required an instantaneous flow methodology and alleges that because Southern California Edison provided flows based

²⁰ See 2019 Amendment Order, 166 FERC ¶ 62,049 at P 11.

²¹ See *id.* at Ordering Paragraph (A).

²² *Id.* at P 22 (finding that the licensee had complied with the plain meaning of the whitewater flow requirements, as set forth in the 2004 Amendment Order).

²³ Duxbury Rehearing Request at 2. Notably, Mr. Duxbury does not challenge on rehearing the manner in which the requirements pertaining to whitewater flow releases in condition 6(f), contained in Appendix A of the 2004 Amendment Order, and license Article 422 were amended in the 2019 Amendment Order.

on the previous day's average, it violated its license.²⁴ Next, Mr. Duxbury argues that although the word "weekend" was omitted from the flow schedule, the 2004 Amendment Order required Southern California Edison to provide whitewater flows during the week before Memorial Day, and he therefore argues that it was error for Commission staff to conclude that Southern California Edison did not violate its license when it did not provide flows the week before Memorial Day in 2012.²⁵

15. Commission staff has the responsibility to ensure that a licensee complies with the terms and conditions of its license and investigate complaints of violations.²⁶ In discussing the Commission's authority to require actions by a licensee absent a specific license requirement, the D.C. Circuit stated in *Clifton Power Corp. v. FERC*²⁷ that "[s]ection 6 of the [FPA] provides that all terms or conditions of a license for a hydroelectric power project must be accepted by the licensee, and the conditions and the licensee's acceptance of those conditions must be expressed in the license[.]"²⁸ Here, because neither of the requirements that Mr. Duxbury alleges were violated were

²⁴ *Id.* at 3-5.

²⁵ *Id.* at 6-9.

²⁶ See 16 U.S.C. § 823b(a) (2012) ("The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter and with each exemption granted from any requirement of this subchapter."); see also *Duncan's Point Lot Owners Ass'n Inc. v. FERC*, 522 F.3d 371, 378 (D.C. Cir. 2008) (recognizing that the FPA requires the Commission to "'monitor and investigate compliance' with its licenses.") (citation omitted).

²⁷ *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1261 (D.C. Cir. 1996) (concluding that the Commission erred in finding the license required the licensee to operate the project in a run-of-river mode, even though the licensee stated that it would operate as run-of-river in its license application, because the license order did not contain an explicit condition requiring the licensee to operate run-of-river). Accord *Trafalgar Power, Inc.*, 150 FERC ¶ 61,100, at P 19 (2015) ("Commission staff correctly declined to open a proceeding to implement the Secretary's fishway prescription because . . . the project license does not expressly include either a section 18 reservation or a fishway prescription.") (emphasis added); *Albany Eng'g Corp. v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174, at P 31 (2009) (*Albany Eng'g Corp.*) (stating that headwater benefit requirements that the license did not expressly provide could not be inferred).

²⁸ *Albany Eng'g Corp.*, 127 FERC ¶ 61,174 at P 31 (quoting *Clifton Power Corp. v. FERC*, 88 F.3d at 1261). See also 16 U.S.C. § 799 (2012).

expressed in the license, we affirm staff's determination that Southern California Edison did not violate its license.

16. As an initial matter, we note that the deadline for complaining of any errors or omissions in the 2004 Amendment Order was within 30 days of the date of that order, the time period established by section 313(a) of the FPA.²⁹ Because Mr. Duxbury did not seek rehearing of that order, his complaint regarding the required time period for the flow releases is barred as an untimely collateral attack on the order. For clarity, we nonetheless address that and the remainder of his arguments below.

1. Inconsistency of Memorial Day Weekend Language

17. Mr. Duxbury argues that Commission staff's conclusion that Southern California Edison did not violate its license is unsupported by substantial evidence and an abuse of discretion.³⁰ Specifically, Mr. Duxbury contends that the 2019 Amendment Order is incorrect in stating that Southern California Edison complied with the "literal, plain meaning" of the phrase "Weekend prior to Memorial Day[.]"³¹ We disagree.

18. We recognize that the omission by the Forest Service of the word "weekend" in Condition 6(f) resulted in confusion.³² Mr. Duxbury references an email correspondence between Forest Service employees stating that "[Southern California Edison] had agreed to the original language but has been taking advantage of our one word mistake from the original settlement agreement[.]"³³ Mr. Duxbury also cites examples of "uses of 'the weekend prior to Memorial Day' and 'the weekend before Memorial Day' that equate it with one weekend prior to the Commission's usage."³⁴ We considered this information

²⁹ 16 U.S.C. § 8251(a) (2012).

³⁰ Duxbury Rehearing Request at 2.

³¹ *Id.* at 6 (quoting 2019 Amendment Order, 166 FERC ¶ 62,049 at P 22).

³² *See* 2019 Amendment Order, 166 FERC ¶ 62,049 at P 18.

³³ Duxbury Rehearing Request at 9.

³⁴ *Id.* at 6. Specifically, in the example that Mr. Duxbury cites in footnote 23 of the Duxbury Rehearing Request, the Department of Interior's use of the phrase "weekend before Memorial Day (Canada's Queen Victoria [D]ay)" does not contain the ambiguity apparent in this case because the parenthetical referencing Victoria Day clarifies the intended meaning. We also note that this example provided by Mr. Duxbury is referencing Hozomeen, "a semi-primitive visitor use area situated in Ross Lake NRA on the U.S.-Canadian boundary." Environmental Assessment, Enhance Recreational Opportunities in Ross Lake National Recreation Area at 25 (Accession No. 20040506-

and find that it does not indicate a violation of the license in May 2012.³⁵ Rather, we find that the licensee acted in a manner consistent with and, as staff concluded, “made a good faith effort to comply with the literal, plain meaning of the provisions of the 2004 Amendment Order, which . . . omitted the word ‘weekend’ after ‘Memorial Day’ in the daily flow schedule.”³⁶

19. Mr. Duxbury states that a FERC Environmental Inspection Report, compiled after the issuance of the 2004 Amendment Order, underscored the obligation for Southern California Edison to provide whitewater flows “daily from [the] weekend prior to Memorial Day weekend to July 4.”³⁷ However, the ordering paragraphs in our license orders designate the authorizations and obligations of a licensee:³⁸ the Environmental Inspection Report does not supersede the license order.³⁹ Although it appears that the

0026). As described in the Environmental Assessment, Hozomeen is located near the Canadian border, and therefore Victoria Day is an appropriate reference point to provide clarity as to the meaning. Whereas, the Kern River No. 3 Project is not located near the Canadian border, and we will not equate the “Weekend prior to Memorial Day” to mean the Victoria Day long weekend observed in Canada. Even if there are other references to Victoria Day in documents filed with the Commission, we do not consider a holiday observed in Canada to reconcile the inconsistency between the language used in the 2004 Amendment Order and the 2002 Settlement Agreement.

³⁵ See 2019 Amendment Order, 166 FERC ¶ 62,049 at P 22.

³⁶ *Id.*

³⁷ See Duxbury Rehearing Request at 9; see also Environmental Inspection Report for Southern California Edison Kern 3 Project at 5, conducted on August 25, 2004 (Environmental Inspection Report).

³⁸ See *Pacificorp*, 106 FERC ¶ 61,307, at n.7 (2004) (recognizing that “what governs is not the discussion preceding a license order's ordering paragraphs but rather the ordering paragraphs and the articles and other requirements they set forth or incorporate by reference.”).

³⁹ Ordering Paragraph (A) of the 2004 Amendment Order states: “The Forest Service Final Section 4(e) Terms and Conditions, filed December 30, 2003, . . . are approved and are incorporated into the Kern River No. 3 Hydroelectric Project license. The project is subject to the conditions submitted by the [Forest Service] under Section 4(e), as set forth in Appendix A[.]” Although the Environmental Inspection Report, referenced *supra* P 19, was consistent with the 2002 Settlement Agreement language, the obligation of the licensee in May 2012 was based on the Forest Service’s Final Section 4(e) Terms and Conditions filed December 30, 2003, as stated in the ordering paragraph. *Cf. Upper Peninsula Power Co.*, 79 FERC ¶ 61,138, 61,582 (1997)

Forest Service did not intend to omit the word “weekend” in condition 6(f),⁴⁰ we must judge the licensee’s actions based on the language of the license conditions as they existed at the time of the alleged non-compliance.

20. Thus, we find that Southern California Edison acted consistently with the plain meaning of the language in the 2004 Amendment Order. Additionally, we note that after receiving Mr. Duxbury’s complaint in December 2012, the licensee filed an application to amend its license to add the omitted word “weekend” to Article 422 to remedy the inconsistency identified by Mr. Duxbury, which amendment was approved by the 2019 Amendment Order.

2. Instantaneous Whitewater Flow Methodology

21. Mr. Duxbury asserts that the 2004 Amendment Order required an instantaneous flow at the Fairview Dam due to the language of the Forest Service’s final section 4(e) condition 6(f) “Whitewater Recreation Flow Schedule” which was incorporated into Southern California Edison’s license verbatim by the 2004 Amendment Order.⁴¹ Accordingly, Mr. Duxbury avers that Southern California Edison violated its license by providing recreation whitewater flows based on the previous day’s average, rather than instantaneously.⁴²

22. Condition 6(f) “Whitewater Recreation Flow Schedule,” as incorporated into the license in 2004 provided:

(recognizing that while the Environmental Assessment is a staff-prepared document and is a part of the record of a license proceeding, it “is not the decision document[,]” and therefore “[i]t is the terms of the license order that govern.”); *Wisconsin Elec. Power Co.*, 76 FERC ¶ 61,183, 62,018 (1996) (“[W]here there are differences between the [Environmental Assessment] and the license articles, the latter govern.”). Accordingly, the language of the 2004 Amendment Order is the basis on which we will assess the alleged non-compliance with the license.

⁴⁰ See March 3, 2015 Letter, U.S. Forest Service submits 4(e) Amendment for KR3 project 2290, at 1-2 (“The intent had been to incorporate the exact language from the Settlement Agreement in condition [6(f)], but, unfortunately, one word was inadvertently omitted, [resulting] in . . . misinterpretation of the license condition (the word ‘Weekend’ had been omitted after ‘Memorial Day’ in the daily section of the flow schedule).”) (Accession No. 20150303-5035).

⁴¹ Duxbury Rehearing Request at 3.

⁴² *Id.* at 3-5.

The Licensee shall provide the following whitewater recreation flows in the Kern River below Fairview Dam pursuant to the flow schedule set forth below The flow schedule is designed to allow the Licensee to continuously divert 300 [cfs] into the Project powerhouse. However, this 300 cfs does not take priority over the instream flow releases required by Condition 4 above.⁴³

23. Mr. Duxbury argues that the statement, “[t]he flow schedule is designed to allow the Licensee to continuously divert 300 [cfs] into the [p]roject powerhouse[,]” mandates using an instantaneous methodology.⁴⁴ In support of this, Mr. Duxbury claims that a flow schedule that is designed to allow the licensee to “continuously divert 300 cfs” could only work if based on an instantaneous methodology.⁴⁵ Relying on this assertion, Mr. Duxbury argues that licensee’s failure to use an instantaneous methodology to determine whitewater flows was a violation of the license.⁴⁶

24. As we previously determined,⁴⁷ there was no explicit license requirement that the licensee use an instantaneous methodology, and therefore the licensee cannot be found to have violated its license in this regard.⁴⁸ Notably, Mr. Duxbury does not claim that

⁴³ 2004 Amendment Order, 107 FERC at 64,288.

⁴⁴ Duxbury Rehearing Request at 3-4.

⁴⁵ *Id.* at 4.

⁴⁶ *See id.* at 5.

⁴⁷ *See generally* 2019 Amendment Order, 166 FERC ¶ 62,049 at PP 4-7 (noting that neither the 2002 Settlement Agreement nor the Forest Service’s final condition 6(f) “mention[ed] how flows would be determined”). This is underscored by the fact that by letter dated June 6, 2014, Commission staff suggested that Southern California Edison consult with Forest Service to clarify how flows were to be calculated and to include that information with the revised section 4(e) condition 6(f) and that the revised condition 6(f) filed on March 3, 2015, and incorporated verbatim into the 2019 Amendment Order, clarified that the previous average day’s flow is the methodology to be used in determining the whitewater flow releases. *See* June 6, 2014 Request for Additional Information regarding Southern California Edison’s License Amendment for Recreational Flow Releases at 2-3; *see also* 2019 Amendment Order, 166 FERC ¶ 62,049 at PP 19, 21 and Ordering Paragraph (B).

⁴⁸ *See Clifton Power Corp.*, 88 F.3d at 1261-62.

Southern California Edison failed to provide the mandated white water release amounts set forth in the condition 6(f) of the 2004 Amendment Order.

25. Because no methodology was specified in the 2004 Amendment Order, we reaffirm Commission staff's conclusion that Southern California Edison did not violate the terms of its license in providing flows based on the previous day's average.

III. Conclusion

26. Because the requirements that Mr. Duxbury alleges were violated were not clearly set forth as conditions in the 2004 Amendment Order, Southern California Edison did not violate its license.⁴⁹ Further, even if the license condition had been clear, we would not deem the alleged violation to warrant further action, particularly in light of its minor nature and the fact that the license condition has now been revised to make the licensee's obligations clear. For these reasons, Mr. Duxbury's request for rehearing is denied.

The Commission orders:

The request for rehearing filed in this proceeding by Brett Harding Duxbury on March 1, 2019 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁹ Mr. Duxbury is correct in stating that “[i]n the relicensing process, the Commission shall take into consideration the ‘existing licensee’s record of compliance with the terms and conditions of the existing license.’” Duxbury Rehearing Request at n.19 (quoting 16 U.S.C. § 808(a)(3)(A)). Mr. Duxbury also notes that the Kern River No. 3 Project is only licensed through 2026. *Id.* To the extent that Mr. Duxbury is concerned the finding that the licensee did not violate its license would affect the relicensing process, we note that Mr. Duxbury is welcome to participate in the relicensing process and to raise any concerns he may have at that time. Additionally, Mr. Duxbury's complaint regarding the licensee's compliance remains in the project's record.

