

114 FERC ¶61,152
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Fall River Rural Electric Cooperative, Inc.

Project No. 11882-003

ORDER DENYING REHEARING

(Issued February 16, 2006)

1. On June 28, 2005, the Commission issued an order dismissing the application of Fall River Rural Electric Cooperative, Inc. (Fall River) for an original license for the Hebgen Dam Hydroelectric Project No. 11882.¹ The proposed project would be located at an existing dam that is included in the license for the Missouri-Madison Project No. 2188. That project is licensed to PPL Montana, LLC (PPL). The June 28 Order found that the proposed project is barred by Federal Power Act (FPA) section 6² because it entails a substantial alteration of the Missouri-Madison Project and PPL does not consent to the alteration. We affirm that finding and deny rehearing.

Background

2. On May 27, 2004, Fall River filed an original license application, in which it proposes to build a new powerhouse with one 6.7-megawatt generating unit at the existing Hebgen Dam, which is located on the Madison River in Gallatin County, Montana, and within the Gallatin National Forest. Hebgen Dam is part of the Hebgen Development, the uppermost of nine developments included in the Missouri-Madison Project. Hebgen Dam has no power generating facilities. Rather, it is used by PPL for storage, with releases providing head and flow downstream to the project's other developments, which have power generating facilities. A new license for Missouri-Madison was issued to PPL in 2000.³

¹ *Fall River Rural Electric Cooperative, Inc.*, 111 FERC ¶ 62,333 (2005) (*Fall River*).

² 16 U.S.C. § 799 (1994).

³ *PPL Montana, LLC*, 92 FERC ¶ 61,261.

3. The Hebgen Development includes an earth-filled, concrete-core dam with outlet works through the dam, a side-channel spillway, and an impoundment with a storage capacity of about 387,000 acre-feet. Releases from Hebgen Reservoir are made through the outlet works, *i.e.*, a concrete intake tower, a conduit through the dam, and an outlet structure near the downstream toe of the dam. The intake tower has four gates, two of which are used and two of which are currently closed with timber stoplogs. The conduit, which is woodstave-lined, is buried in the earth-fill dam, except for the outlet structure.

4. In order to deliver water to its proposed powerhouse, Fall River would: (1) install new gates and screens in the two currently blocked intake tower openings; (2) install a new valve house in the outlet conduit about 50 feet back from the existing outlet structure; and (3) bifurcate the conduit inside the valve house, with one branch being the existing conduit leading to the existing outlet structure and the other being a new 40-foot-long penstock to the new powerhouse. The new powerhouse would be about 80 feet below the toe of the dam. Fall River would also reline the conduit with steel and pressure grout it. Installation of the valve house and bifurcated conduit would require excavation of the earth fill covering the conduit.⁴

5. The proposed project would be operated in run-of-river mode, using the flows released by PPL through the outlet works for operation of the Missouri-Madison project. Fall River would have no control over the releases.⁵

6. The Commission accepted Fall River's application and issued a public notice requesting motions to intervene and protests.⁶ PPL did not intervene or comment.⁷ PPL attended scoping meetings and a technical conference in Montana on April 13 and 14, 2005.

7. On July 7, 2004, the Commission staff sent Fall River a letter requesting additional information for processing the license application. Staff stated that:

⁴ A more detailed description of the proposed project facilities and affected existing facilities is set forth in the June 28 Order. *See Fall River*, 111 FERC ¶ 62,333.

⁵ Rehearing request at 6.

⁶ 70 Fed. Reg. 10,397 (March 3, 2005).

⁷ PPL also did not intervene or comment when, in 2001, Fall River applied for and received a preliminary permit to study development of the proposed project.

Your application also proposes to modify the licensed works of Project No. 2188. . . Section 6 of the Federal Power Act (FPA) provides that “[l]icenses. . . may be altered. . . only upon mutual agreement between the licensee and the Commission.” See also *Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78, 89 (D.C. Cir. 1983). This means that the Commission cannot, without the licensee’s concurrence, approve a development proposal that would materially affect or modify the licensed project. Without PPL’s consent to your proposed modifications to Project No. 2188, your application would be precluded by the requirements of FPA section 6 and therefore would be subject to rejection under 18 C.F.R. § 4.32(e)(2). . . . In light of the evidence of your negotiations with PPL, we will continue to process your application, conditioned on your filing, by 30 days following the issuance date of this letter, additional information showing that PPL has not ruled out an agreement to the modifications to its Project No. 2188. If you file the additional information showing that PPL has not ruled out an agreement, you will then be required to file by 60 days following your initial filing, and by the end of each subsequent 60-day period thereafter, information showing the status of your negotiations with PPL.

8. Fall River thereafter filed several updates on the status of its negotiations with PPL in this regard. On April 29, 2005, PPL filed a copy of a letter from itself to Fall River’s consultant⁸ stating its decision to terminate negotiations regarding the proposed project. On May 6, 2005, Fall River filed a letter stating its intent to continue pursuing an acceptable financial arrangement with PPL notwithstanding the April 29 letter, and requesting that the Commission continue to move forward with its license application.⁹ On June 15, 2005, PPL filed a supplement and clarification to its April 29 letter, stating that its principal reason for terminating negotiations was differences regarding compensation to PPL for the use of the Hebgen Development.¹⁰

⁸ Letter to Brent L. Smith from Peter J. Simonich, PPL, dated April 29, 2005.

⁹ Letter to Magalie R. Salas, Commission Secretary, from Brent L. Smith, dated May 4, 2005.

¹⁰ Letter to Commission Secretary Salas, from Dave Kinnard, Associate General Counsel, dated June 14, 2005.

9. The June 28 Order found that Fall River's proposed project would substantially alter PPL's licensed project works and, therefore, require PPL's consent pursuant to FPA section 6. It also found that, since PPL has indicated it has no interest in further negotiations with Fall River regarding the proposed project, no purpose would be served by further processing the application or holding it in abeyance.¹¹

10. Fall River timely requested rehearing. We consider its request below.

Discussion

11. FPA section 6 provides that a license "may be altered . . . only upon mutual agreement between the licensee and the Commission after 30 days public notice." Thus, if the license does not reserve the Commission's authority with respect to a particular matter, then any changes in the license conditions on that matter require the licensee's consent. This prohibition applies only to "substantial alterations" of the license. The Commission may permit "such small encroachments on a license, comparable in their adverse impact to variations in conditions that investors might expect from other causes, such as, for example, annual fluctuations in water supply" that do not interfere with the existing licensee's expectations under the license.¹² If the existing licensee opposes a proposed substantial alteration, the Commission will reject the associated preliminary permit or license application.¹³ Where it is not clear that a proposed project at the preliminary permit stage would effect a substantial alteration, the Commission will issue the permit.¹⁴ If the alteration is not substantial, the existing licensee's consent is not required.¹⁵

¹¹ *Fall River*, 111 FERC ¶ 62,333 at 64,733.

¹² *PG&E v. FERC*, 720 F.2d 78, 90 (D.C. Cir. 1983) (*PG&E*). See also *Central Nebraska Public Power & Irrigation District*, 52 FERC ¶ 61,339 at 62,348-49 (1990) ("Section 6 was not meant to be a bar to the licensing of new projects where they might minimally interfere with existing projects, lest the mere fact that a project exists prevent all other new project development.").

¹³ *North Kern Water Storage District*, 16 FERC ¶ 61,082 at 61,152 (1981) (*North Kern*).

¹⁴ *Kamargo Corporation*, 53 FERC ¶ 61,411 at 62,439-40 (1990) and orders cited therein; *Universal Electric Power Corp.*, 92 FERC ¶ 61,242 (2000) (*Universal*).

¹⁵ *North Kern*, *supra*.

12. The degree of encroachment that makes an alteration “substantial” is a case-specific determination, based on consideration of: (1) physical alterations to existing project works; and (2) impacts on the operation of the project.¹⁶ Instances where no substantial alteration was found include: (1) tailwater encroachment resulting in a reduction in the existing project's generating capacity of approximately 0.3 percent;¹⁷ (2) tailwater encroachment requiring modifications to the upstream project's fish passage facilities;¹⁸ (3) use of water from a fish water release pipe that would not affect generation at the licensed project;¹⁹ and (4) installation of a penstock under the existing project's power canal requiring minimal construction time and no interference with the existing project once constructed.²⁰ In such cases, the affected project operator is entitled to compensation for economic impacts.²¹

13. Instances of substantial alterations include: (1) *Niagara Mohawk Power Corp., et al.*,²² involving a proposed project that would require modifications to the existing project's headgate structure, dam abutment repairs, and construction of a powerhouse and penstock that would temporarily curtail generation at the existing project; (2) construction of a new powerhouse adjacent to the existing powerhouse that would require substantial modifications to the latter, and modification of about 75 feet of the

¹⁶ *Gas and Electric Department of the City of Holyoke, MA*, 21 FERC ¶ 61,357 at 61,927 (1982); *Universal*, 92 FERC ¶ 61,242 at 61,768.

¹⁷ *Fluid Energy Systems, et al.*, 24 FERC ¶ 61,298 (1983), *reh'g denied*, 25 FERC ¶ 61,404 (1983), *aff'd*, *PG&E*, 720 F.2d 78. *See also P.U.D. No. 1 of Douglas County, WA*, 28 FPC 128, 132 (1962).

¹⁸ *P.U.D. No. 2 of Grant County, WA*, 28 FPC 718, 720 (1962) (*Grant County*).

¹⁹ *Howard W. Blair*, 20 FERC ¶ 61,092 (1982).

²⁰ *Weber Basin Water Conservancy District*, 50 FERC ¶ 61,409 at 62,263, n.13 (1990) (*Weber Basin*).

²¹ *See, e.g., PG&E*, 720 F.2d at 91; *Douglas*, 28 FPC at 132; *Grant County*, 28 FPC at 720.

²² 29 FERC ¶ 61,005 at 61,010 (1984) (*Niagara Mohawk*).

existing dam,²³ and (3) a proposed project that would require decommissioning of an existing, operating project.²⁴

14. The June 28 Order found that refitting the existing blocked openings of the intake tower with gates and screens, and bifurcation of the conduit and installation of the valve house with its attendant excavation would, together, constitute a substantial alteration of existing project facilities similar to the alterations in *Niagara Mohawk*. Fall River argues that *Niagara Mohawk* is different because it would have involved a temporary halt to generation at Niagara Mohawk's project and because Fall River's proposed facility modifications are not, as found in *Niagara Mohawk*, fundamental alterations to the existing project.²⁵

15. We will deny rehearing. The proposed project requires alterations of the existing project's facilities that are much greater than the kind of physical alterations the Commission has previously found to be insubstantial, as discussed above. The proposed project here involves installation of new gates and screens on the intake tower, excavation of a large area of the dam in order to reconfigure and reline the outlet conduit, and installation of a valve house and a new penstock at the dam. Although construction activity will be temporary, the physical changes to the existing structures are not minor. Construction of the proposed project would also require PPL to enter into an agreement with Fall River regarding coordination of activities, and responsibility for operation and maintenance of jointly used facilities. Such obligations may not be insurmountable, but neither are they insubstantial.

16. Fall River also asserts that the June 28 Order does not accurately or completely describe the physical relationship of PPL's project and the Hebgen Dam development and that it summarily concludes that the proposed modifications to Hebgen Dam would substantially modify that development without considering the operational relationship.²⁶ Even if we assumed that Fall River's project would not have any negative effect on the

²³ *JDJ Energy Co.*, 41 FERC ¶ 61,354 (1987).

²⁴ *Green Island Power Authority*, 110 FERC ¶ 61,034 at P 15 (2005), *reh'g denied*, 110 FERC ¶ 61,331 (2005).

²⁵ Rehearing request at 8-9.

²⁶ Rehearing request at 6-8.

operation of Missouri-Madison -- and the only evidence to support this is Fall River's conclusory assertions -- a substantial alteration may result, as here, from significant alterations to project works.

17. In any event, we do have concerns that the joint use of the intake structure and conduit, as well as operation of Fall River's penstock and powerhouse, could significantly interfere with PPL's ability to operate its project, as discussed below.²⁷

18. First, the estimated eight-month construction period would require the intake gates and conduit to be closed for approximately three months during the spring or fall. During this period all flows would have to be released via the spillway, which is controlled by six manually-operated slide gates. Should circumstances interfere with the operation of these gates, PPL's ability to meet its flow requirements for maintaining water quality and other habitat characteristics, minimizing erosion, and maintenance of normal full pool reservoir elevation during the summer could be compromised.

19. Second, the existing conduit outlet is located well above the level of the tailwater at the base of the dam, with the result that the flow passing out of the conduit drops to the tailwater below. This reaerates any low dissolved oxygen (DO) water withdrawn from the reservoir through the project's low-level intake. Under the Fall River proposal, the water would be diverted from the conduit into a turbine and released below the tailwater surface, reducing or eliminating the aeration effect currently achieved as the water spills from the outlet and comes into contact with air. Maintaining appropriate DO levels is an important condition of PPL's Missouri-Madison license because the upper Madison River is an outstanding trout fishery.

20. Third, Hebgen Reservoir supports a significant salmonid fishery.²⁸ Water released from Hebgen Reservoir currently passes through eight-inch screens at the intake structures.²⁹ If a license for the Hebgen Dam Project were issued, the releases would also pass through Fall River's turbines. In order to guard against turbine entrainment mortality, it might be necessary to require finer screening at the intakes, which would

²⁷ At the technical conference on April 14, 2005, Fall River indicated its understanding that the intake and conduit would be facilities in its license. Fall River subsequently confirmed its understanding in this regard by filing a revised Exhibit F.

²⁸ See Final Environmental Impact Statement (FEIS), Project No. 2188-030, September 14, 1999, at Section 3.5.1.

²⁹ FEIS at 2-2.

increase the likelihood of clogging, and potentially compromise PPL's ability to satisfy the flow release requirements of its license. Moreover, under Fall River's proposal, PPL would be responsible for ensuring the proper operation of any screens installed to prevent harm from Fall River's turbines.

21. We conclude that the potential for such joint-use operational problems would be a substantial alteration of the existing license and therefore requires the consent of the existing licensee.

22. Fall River also faults the June 28 Order's alleged reliance on PPL's statement that it and Fall River had only sporadically discussed Fall River's proposal over the years. In fact, the frequency of communications between Fall River and PPL played no role in the June 28 Order. The order relies on the only relevant communications in this regard, the letters from PPL stating that it does not intend to continue negotiations with Fall River regarding the proposed project.³⁰

23. Fall River charges that the June 28 Order erroneously bases the dismissal on the fact that Fall River does not yet have the necessary property rights to construct its project. In this regard, it notes that Standard Article 5³¹ gives licensees five years from license issuance to obtain all necessary rights. The order, however, makes no mention of property rights. It relies solely on grounds applicable to a section 6 issue -- the nature of the proposed alteration and the consent of the existing licensee.

24. Fall River notes that the overarching purpose of the FPA is to promote comprehensive development of the nation's waterways by private investment³² and that it has an efficient, environmentally-benign proposal that is fully consistent with that purpose. It states that the purpose of section 6 is to protect project investors from unilateral actions resulting in reductions in revenue,³³ and that its project would have no impact on PPL's revenues. So, it suggests, the comprehensive development standard alone applies.

³⁰ *Fall River*, 111 FERC at 64,734.

³¹ Rehearing request at 15. *See, e.g.*, Form L-5, Constructed Major Project Affecting Navigable Waters and Lands of the United States, Article 5, 54 FPC 1792, 1842 (1975).

³² *Citing PG&E*, 720 F.2d at 80.

³³ Rehearing request at 9, *citing PG&E*, 720 F.2d 78, n.32.

25. There is no inconsistency between the comprehensive development standard and section 6. Section 6 reflects the comprehensive development standard by protecting the legitimate expectations of licensees.³⁴ Those expectations encompass more than protection against alterations that would diminish revenues; they include protection against significant interference “with operations already licensed, whether the interference will adversely affect the prior licensee’s physical plant, its “project works,” or its supplies of water.”³⁵ Here, we have concluded that the proposed project will substantially alter the project works and operations.

26. Fall River also asserts that if section 6 was applicable, the Commission should have, consistent with its policy set forth above, dismissed Fall River’s preliminary permit application instead of issuing it a preliminary permit.³⁶ However, a permit is issued with the recognition that, at the preliminary permit stage, the plan of the applicants must be considered to be both flexible and speculative.³⁷ In recognition of this, the Commission will issue a permit unless a permanent legal barrier precludes issuance of a license.³⁸ Fall River has clearly been on notice, at least since the issuance of the July 7, 2004 letter, of the significant concerns posed by its application. It failed to obtain PPL’s consent and cannot be surprised that, as it was warned, its application has now been dismissed.

27. Fall River next asserts that section 6 does not bar its proposed project because the license contains reserved authority to require PPL to modify the project consistent with the public interest.³⁹ In this regard, it references Standard Article 9, which reserves the Commission’s authority to require the licensee, after notice and an opportunity for hearing, to “install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to

³⁴ *PG&E*, 720 F.2d at 86-87.

³⁵ *PG&E*, 720 F.2d at 83 and n.31.

³⁶ Rehearing request at 13-14.

³⁷ *City of Dothan, Ala. v. FERC*, 684 F.2d 159, 164 (D.C. Cir. 1982).

³⁸ *Town of Summersville, W.V. v. FERC*, 780 F.2d 1034, 1038-39 (D.C. Cir. 1986). See also *North Kern; Kamargo Corporation, et al.*, 53 FERC ¶ 61,411 at 62,439-40; and *Universal*.

³⁹ Rehearing request at 14-16. Section 6 does not bar reopener clauses. *Wisconsin Public Service Corp. v. FERC*, 32 F.3d 1165, 1169-70 (7th Cir. 1994); *U.S. Dept. of the Interior v. FERC*, 952 F.2d 538, 547 (D.C. Cir. 1992); *California v. FPC*, 345 F.2d 917, 924-25 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965).

do so.” It also points to Standard Article 10’s reservation of authority to require a licensee to “coordinate the operation of the project, electrically, and hydraulically, with other projects in the interest of power development and other beneficial public uses of waterways.”⁴⁰ Fall River urges that it is in the public interest to exercise this reserved authority here because the Commission and Congress support the installation of additional hydropower at existing dams, as evidenced by, among other things, hydroelectric energy production incentives in legislative proposals leading to the Energy Policy Act of 2005.⁴¹ It adds that PPL has impliedly consented by expressing no opposition to Fall River’s preliminary permit or filing no comments in response to its license application proposal.

28. The general reservations of authority in these standard articles have never been interpreted as a blanket agreement by the licensee to make, or suffer to be made, any changes to licensed project facilities and operations to accommodate new projects. Such an interpretation would read out of the FPA section 6, which has consistently been applied notwithstanding the presence of these standard articles.⁴²

29. Finally, Fall River states that PPL’s abrupt termination of discussions after expressing no objections to, and even encouraging, Fall River’s proposal for several years warrants Commission consideration in light of FPA Section 10(h),⁴³ which requires the

⁴⁰ Rehearing request at 14-15, citing Form L-5, Standard Article 10, 54 FPC 1792, 1832 (1975), included in the license at Ordering Paragraph (E), 92 FERC ¶ 61,261 at 61,844.

⁴¹ Pub. L. No. 109-58 § 1301, 119 Stat. 594, ____ (2005). This legislation, as pertinent here, amends the federal tax code to expand eligibility for an existing energy production tax credit to include: (1) incremental power production at existing projects from efficiency improvements or capacity additions; and (2) capacity additions at existing dams that currently have no generation. The credit applies to qualifying generation placed into service between August 8, 2005 and January 1, 2008.

⁴² For example, the existing license in *JDJ* included standard articles 9 and 10 (See *Arkansas Power and Light Co.*, 12 FERC ¶ 62,001 at 63,005). Likewise, the existing license in *GIPA* included the equivalent predecessor standard articles 10 and 11 effect when that license was issued in 1969 (See *Niagara Mohawk Power Corp.*, 41 FPC 772 at 774).

⁴³ 16 U.S.C. § 803(h) (2000).

Commission to take into account the policies of the anti-trust laws.⁴⁴ Specifically, Fall River invokes section 10(h)(2),⁴⁵ which provides that licenses are issued on condition:

that conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws, and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in Part II of this Act) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 15 of this Part.

30. Although the record indicates that PPL cooperated for several years with Fall River's development proposal and abruptly terminated that cooperation, section 10(h)(2) does not apply here. First, PPL's conduct does not appear to be "under the license" because the license imposes no obligation on PPL to cooperate with any other entity that may seek to develop additional capacity at project facilities.⁴⁶ The fact that the Commission has reserved authority in standard articles to require PPL to accommodate such proposals within the limits of section 6 does not create such an obligation. Second, Fall River has not identified any policy expressed in the antitrust laws which might apply to PPL's conduct. Third, even if the first two hurdles were surmounted, section 10(h)(2) provides no means of relief because it applies in the context of an original or new license proceeding and requires the Commission to prevent or minimize such conduct "by means

⁴⁴ See *Pacific Power & Light Co.*, 25 FERC ¶ 61,052 at 61,202 (1993). See also *Gulf States Utilities v. FPC*, 411 U.S. 747, 759 (1973) and *Northern California Power Agency v. FPC*, 514 F.2d 184 (D.C. Cir. 1975).

⁴⁵ 16 U.S.C. § 803(h)(2) (2000).

⁴⁶ See *Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194 at 61,597 (1999), *reh'g denied*, 90 FERC ¶ 61,250 (2000), *appeal dismissed*, *Fourth Branch v. FERC*, 23 F.3d 741 (D.C. Cir. 2001).

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of conditions included in the license prior to its issuance.”⁴⁷ The Missouri-Madison license was issued in 2000, and is administratively final.

31. In sum, Fall River has supplied no facts or arguments which would cause us to grant rehearing. Its request will therefore be denied.

The Commission orders:

The July 28, 2005 request for rehearing filed by Fall River Rural Electric Cooperative, Inc. is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁴⁷ See *Yakama Nation v. P.U.D. No. 2 of Grant County, WA*, 101 FERC ¶ 61,197 at 61,798, *reh'g denied*, 103 FERC ¶ 61,073 (2003), *appeal filed*, *Yakama Nation, et al. v. FERC*, 9th Cir. No. 03-71825 & 03-73428 (April 28, 2003).