

in this docket seeking to increase the firm billing determinants for EPE seems to directly contradict Section 6 of the 1999 Settlement and limit Phelps Dodge's delivery rights to the Clint Junction Meter Station. El Paso needs to clarify and explain further these apparent inconsistencies between the instant filing and the 1999 Settlement.

The Commission therefore suspends the filing and requires El Paso to supplement its proposal with a filing within 20 days of issuance of this order that: (1) provides further explanation of how El Paso plans to provide the requested service to EPE without conflicting with or undermining the terms and conditions of the 1999 Settlement; and (2) details the total volume of capacity rights at the Clint Junction Meter Station, including who has rights under existing TSAs and agreements at this point. Additionally, the Commission requires El Paso to submit a copy of EPE's full requirements contract, including Exhibit B and the proposed revisions, for review.

Suspension

Based upon a review of the filing, the Commission finds that the proposed tariff sheets have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission shall accept the tariff sheets for filing and suspend their effectiveness

for the period set forth below, subject to the conditions set forth in this order. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards. See *Great Lakes Gas Transmission Co.*, 12 FERC ¶61,293 (1980) (five-month suspension). It is recognized, however, that a shorter suspension period may be warranted in the circumstances where suspension for the maximum period may lead to harsh and inequitable results. See *Valley Gas Transmission, Inc.*, 12 FERC ¶61,197 (1980) (one-day suspension). No such circumstances are present in this proceeding which would warrant a shorter suspension period. We shall accept El Paso's tariff filing, subject to refund and suspension, to be effective the earlier of November 1, 2001, or the date specified in a subsequent Commission order.

The Commission orders:

Fourth Revised Sheet No. 117 and Third Revised Sheet No. 314 to FERC Gas Tariff, Second Revised Volume No. 1-A are accepted and suspended to become effective November 1, 2001, subject to refund and subject to El Paso's supplementing its filing within 20 days of issuance of this order, as discussed above.

¶ 61,363

PPL Montana, LLC, and Confederated Salish and Kootenai Tribes of the Flathead Nation, Project No. 5-062

Order Denying Request for Temporary Amendment of License and Issuing Stay

(Issued June 11, 2001)

Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, Linda Breathitt, and Pat Wood, III.

On May 8, 2001, PPL Montana, LLC (PPL Montana) filed a request for a temporary amendment of its license for the Kerr Project No. 5, located on the Flathead River in Lake and Flathead Counties, Montana, and partially on lands within the Flathead Indian Reservation. PPL Montana seeks the amendment to prevent being held in violation of either of two of the project's license articles that, due to a current drought, are mutually exclusive. For the reasons discussed below, we are denying the amendment request, but we are addressing the license article conflict by issuing a stay, as described below.

Background

A new license for the Kerr Project was issued in 1985 to Montana Power Company and the Confederated Salish and Kootenai Tribes of the Flathead Nation. Pursuant to the terms of the licensee, Montana Power was to operate the project for the first 30 years of its 50-year term, after which the Tribes could elect to have the project conveyed to them. The license provides that Montana Power "shall control, operate, and maintain and have exclusive right to, and interest in, the project" during its period of project ownership and "shall have all the rights and obligations of the licensee under this li-

license" during that term.¹ Subsequently, Montana Power's interest was conveyed to PPL Montana,² which is therefore in essence the sole licensee of the project at this time.

Article 43 of the 1985 license provides, as pertinent here, that the licensee may regulate Flathead Lake, the project impoundment.³

between elevations 2883 and 2893 in such manner as will make not less than 1,219,000 acre feet of storage capacity available to the Licensee. Unless otherwise ordered by the Commission after notice and opportunity for hearing, . . . such regulation shall be in accordance with the Memorandum of Understanding between [Montana Power] and the [U.S. Army] Corps of Engineers dated May 31, 1962, as amended on October 15, 1965, and approved by the Federal Power Commission in *Montana Power Co.*, 35 FPC 250 (1966).

Subparagraph (f) of the Memorandum of Understanding (MOU) provides:

The level of the Flathead Lake shall be raised to elevation 2890 feet by Memorial Day. The lake will then be raised as rapidly and early thereafter as possible to reach 2893 feet taking into account the flood potential still existing in the river basin above the lake as determined by the Corps of Army Engineers. Should the potential flood condition subside then the filling of the lake will be accelerated so that the lake reaches the 2893 foot level by June 15.

Under Section 4(e) of the Federal Power Act (FPA), if a project is located on a reservation of the United States, the license must contain "such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of the reservation." Article 56, implementing a mandatory Interior condition,⁴ provides for the licensee to release certain minimum flows, measured in cubic feet per second (cfs), downstream of Flathead Lake. As relevant here, the following minimum flows apply:⁵

May 1 to May 15—Increased from 5,000 cfs to 12,700 cfs at 510 cfs per day

May 16 to June 30—Continuous at 12,700 cfs

July 1 to July 15—Reduced from 12,700 cfs to 6,400 cfs at 420 cfs per day

Article 56 provides that these flows may be temporarily modified by operating emergencies beyond the control of the licensee, or for short periods upon prior written approval from the Secretary of the Interior.

In its May 8 filing, PPL Montana requests that we temporarily suspend any requirements imposed by Article 43 regarding the level of Flathead Lake, and that we amend the license to enable the project to be operated outside the limitations of Articles 43 and 56 for the remainder of 2001. PPL Montana explains that this action is required because, under current drought conditions, which are expected to continue for the rest of the year, it will not be able to meet the Article 43 lake level requirements if it maintains the minimum instream flow releases specified in Article 56. Relying on the most recent volume runoff forecasts for the Kerr Project and on the projected releases from the upstream Hungry Horse hydropower facility, PPL Montana asserts that adherence to the minimum flow requirements would enable it to achieve a maximum lake level elevation of only 2889.5 feet, approximately 3.5 feet lower than the June target elevation required by Article 43 and the MOU. PPL Montana states that failure to obtain relief from these conflicting requirements would put it in violation of its license.

PPL Montana proposes to modify the average monthly flows for May and June to enable it to fill the lake to a target elevation of 2892.5 feet, or 0.5 foot below the elevation required by Article 43. It calculates that it could meet and maintain this elevation by ramping up the flow releases beginning May 1, as required by Article 56, but then maintaining the discharges only at about 9,000 cfs from May 9 through the end of June. PPL Montana asserts that this reduction in minimum flows will have no adverse effect on fish located below the project, because springtime minimum flows above 8,000 cfs would provide substantial habitat. In PPL Montana's view, this proposal would balance the interests of recreational users of Flathead Lake and the need to provide adequate

¹ 32 FERC ¶ 61,070, at pp. 61,180-81.

² 88 FERC ¶ 62,010 (1999).

³ 32 FERC at p. 61,185.

⁴ Articles 45 and 46 of the 1985 license provided that, following the performance of certain studies, Montana Power would file resource mitigation and enhancement plans for fish and wildlife, respectively, and that the Secretary of the Interior could then impose "such reasonable license conditions with respect to [fish and wildlife] and related environmental

concerns as the Secretary would be empowered under Section 4(e) to require with respect to an initial license." The wording of Articles 45 and 46 was fashioned to avoid a dispute as to whether Section 4(e) applied to the relicensing of the project. Interior eventually submitted such conditions, which the Commission adopted and included in the license in a June 1997 Order. *Montana Power Company*, 79 FERC ¶ 61,376.

⁵ 79 FERC at p. 62,616.

river flows to sustain lower river aquatic resources during the drought.

PPL Montana requests that we approve a temporary license amendment that would authorize it to deviate from its lake level and minimum flow license requirements to the extent described above.⁶ In the same May 8 filing, it requests written authorization from Interior to allow it to modify the Article 56 flows, effective as of May 9 and continuing until we approve the temporary license amendment. PPL Montana seeks this Interior concurrence under the Article 56 provision allowing temporary modification of the flows for short periods upon prior written approval from the Secretary. However, it explains that, because flow releases, once increased, could not be decreased during spring spawning season without adverse environmental consequences, it will begin implementing its proposed limitation of releases to about 9,000 cfs no later than May 9, "subject to a determination by the Commission and Interior as to how the shortages of water caused by the drought are to be apportioned" between lake levels and downstream releases.

By letter of May 16, 2001, Interior responded to PPL Montana's request for a short-term modification of the flows. Although it agreed that some deviation from the Article 56 flow requirements was warranted in view of the prevailing drought conditions, Interior asserted that PPL Montana's flow proposal would place too much of the drought's burden on downstream fishery and habitat resources. Interior rejected PPL Montana's proposal and instead authorized a more modest flow release deviation. Specifically, Interior directed PPL Montana to begin immediately ramping up project operations, at the incremental rate of 510 cfs per day, until the level of 9,800 cfs is reached, and then to maintain a continuous flow of 9,800 cfs until the expiration of the authorization on May 29, 2001, at 5:00 P.M. Interior provided further that, if PPL Montana had not received a temporary license amendment from the Commission prior to expiration of the authorization, it would have to obtain Secretarial approval for an additional temporary modification, at which time Interior would again determine the appropriate modified minimum flows.⁷

By letter to the Commission and Interior, filed May 18, 2001, PPL Montana stated that, to comply with Interior's directive, it began on

May 17 to ramp up the flow releases, which would reach 9,800 cfs by May 18. PPL Montana estimated that, as a result of this action, lake levels on May 29, 2001, would be approximately 1.2 feet below the 2890-foot elevation that Article 43 and the MOU require be reached at that time. Concluding that there would be insufficient time to obtain Commission authorization to modify project operations before Interior's May 29 deadline expires, PPL Montana requested that Interior renew the temporary waiver of the Article 56 flow requirements, beginning on May 29, and grant written authorization to continue the modified flows of 9,800 cfs. By letter filed with the Commission on June 5, 2001, Interior agreed to extend its authorization of the 9,800-cfs flow release through 5:00 P.M. on June 19, 2001, and again indicated that PPL Montana would have to obtain Secretarial approval for any further extensions.

Discussion

Under the present hydrological conditions, we understand that PPL Montana cannot satisfy the requirements of both license articles. However, we cannot grant the temporary license amendment it seeks.

As discussed above, the minimum flow requirements of Article 56 were adopted pursuant to mandatory conditions submitted by Interior. The Commission cannot modify such license conditions, or authorize a licensee's deviation from them, without Interior's consent. Interior's insistence, in its May 16 letter, on the increase of flows to 9,800 cfs makes it clear that Interior opposes the proposed increase of flow releases to only 9,000 cfs and their maintenance at that level through June 30.

PPL Montana also requests that we authorize a temporary modification of the lake elevation, to the extent of allowing lake levels to fall about 0.5 foot below the levels prescribed in the MOU. Because PPL Montana's conformance with Interior's flows may preclude compliance with the Article 43 requirement to regulate the lake levels in accordance with the MOU, insofar as the MOU requires that a lake level of 2893 feet be attained, we will stay that requirement through 2001. This stay will serve to authorize any deviation from the prescribed lake levels that results from the release of flows directed by Interior.⁸ We will require PPL

⁶ PPL Montana requests a waiver of the 60-day prefiling consultation requirements of the Commission's regulations at 18 C.F.R. § 4.38(a)(5) (2000).

⁷ Interior also stated that it is reviewing its previously-issued biological opinion for bull trout, which is listed as endangered under the Endangered Species

Act (ESA), to determine whether any flow modifications undertaken by the licensee will require reinitiation of consultation under the ESA.

⁸ Article 43 requires the licensee to regulate the level of Flathead Lake in accordance with the Corps MOU unless otherwise ordered by the Commission

Montana, within 30 days of issuance of this order, to confer with the Corps as to whether its deviation from the prescribed lake levels during this drought period will have any effect on flood control or other matters under the authority of the Corps. PPL Montana shall file a report of such consultation with the Commission, within 60 days of the issuance of this order.

The Commission orders:

(A) The request for temporary amendment of license, filed May 8, 2001, by PPL Montana is denied.

(B) Article 43 of the license for the Kerr Project is stayed through December 31, 2001,

to the extent that it requires the licensee to raise the level of Flathead Lake to 2893 feet in accordance with the Memorandum of Understanding, referred to in that article, between the licensee and the U.S. Army Corps of Engineers.

(C) PPL Montana is required, within 30 days of issuance of this order, to consult with the U.S. Army Corps of Engineers as to the effects of the stay of the lake level requirement on flood control and other matters under the Corps' authority, and to file with the Commission a report on the results of that consultation within 60 days of the issuance of this order.

[¶ 61,364]

Southern Natural Gas Company, Docket No. RP01-205-002

Order on Rehearing

(Issued June 11, 2001)

Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, Linda Breathitt, and Pat Wood, III.

On May 10, 2001, the Alabama Municipal Distributors Group, the Austell Gas System, the Southeast Alabama Gas District and the Municipal Gas Association of Georgia (jointly, Municipals) filed a request for rehearing of the Commission's April 12, 2001 Letter Order in this proceeding (April 12 Order).¹ For the reasons appearing below, the request for rehearing is denied.

Background

On January 24, 2001, the Commission issued an order in this proceeding which conditionally accepted, effective February 1, 2001, tariff sheets filed by Southern Natural Gas Company (Southern) on December 29, 2000 that would govern Southern's negotiated rate agreements.² In that order, the Commission accepted Southern's proposal "subject to Southern filing a proposal to prevent cost-shifting from negotiated rate shippers to recourse rate shippers within thirty days from the date of this order."³

On February 23, 2001, Southern made its filing in compliance with the January 24 order.

The Commission, by its April 12 order, rejected Southern's proposal to prevent cost-shifting from negotiated rate shippers to recourse rate shippers. The Commission distinguished the *Northwest* case,⁴ cited by Southern as being the model for its proposal. The Commission stated that in *Northwest*, Northwest proposed only to be able to seek discount-type adjustments for negotiated rate contracts that had previously been discount rate agreements, and the Commission accepted that portion of Southern's proposal.

The Commission stated that it was not clear how Southern's proposal would protect its recourse rate shippers from inappropriate cost shifting. Southern proposed to demonstrate that it offered the negotiated rate shippers the alternative of using recourse rates, and that those shippers opted to use the negotiated rate. The Commission said that this was nothing which did not already exist, since all shippers have the right to use recourse rates. The second part of Southern's proposal—that it would show that it had received other discount bids providing revenues equal to or less than the

(Footnote Continued)

after notice and opportunity for hearing. Notice and opportunity for hearing would serve no purpose in this instance, since our obligation to respect the flow releases required by Interior precludes us from taking any action to alter the lake levels that would result from those releases.

¹ 95 FERC ¶ 61,038 (2001).

² 94 FERC ¶ 61,063 (2001).

³ *Id.* at p. 61,266.

⁴ *Northwest Pipeline Corporation*, 84 FERC ¶ 61,109 (1998).