

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Project No. 606-027 (Kilarc-Cow
Creek)

**MOTION REQUESTING SETTLEMENT PROCESS
AND FOR PROMPT ACTION**

Pursuant to Rules 212, 601, and 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.601, and 385.603, Tetrick Ranch, Evergreen Shasta Power, LLC, Shasta County, Sierra Pacific Industries, Inc., and the Abbott Ditch Users (hereafter collectively "the Settling Parties") hereby submit this Motion requesting the Commission to establish a settlement process to resolve the matter of Pacific Gas and Electric Company's ("PG&E") License Surrender Application and Proposed Decommissioning Plan, in the above-captioned docket, and for prompt action. Tetrick Ranch, Shasta County, and the Abbott Ditch Users filed timely, unopposed Motions to Intervene.¹ As of this date, Evergreen Shasta, Inc., and Sierra Pacific Industries, Inc., are filing separate Motions to Intervene Out-of-Time in this proceeding. This Motion is being filed by counsel for Tetrick Ranch, who is authorized by the principals for the other Settling Parties to state that that they concur with and support this Motion.

I. BACKGROUND

On March 12, 2009, PG&E, the licensee for Project No. 606, submitted a License Surrender Application for the 5-MW Kilarc-Cow Creek Project, which license expired in

¹ Available at eLibrary Accession No. 20090714-5093.

March 2007; in addition, it has filed a Proposed Decommissioning Plan setting out its plan to remove the Project No. 606 facilities, which include both power and water conveyance facilities. Subsequently, the Commission requested comments and held Scoping Meetings in October 2009, regarding the filing.

It is apparent to the Settling Parties, all of whom reside or do business in the affected Project community, that PG&E's Proposed Decommissioning Plan would create significant, adverse impacts upon the Whitmore and Shasta County communities, individuals, and businesses. These local concerns have been expressed to both the Licensee and the Commission Staff and have resulted in numerous correspondence and filings to the Commission, both before and after PG&E's March 2009 filing.

After the October 2009 Scoping Meetings, Commission Staff issued a series of questions to various parties and entities seeking answers to certain questions. In response to some of those questions, the Commission was informed that no information existed; in other instances, the party that received the question withheld the requested information on the grounds that it was proprietary.

According to the tentative schedule provided in Commission Staff's Scoping Document 1,² the Staff plans to make the Draft Environmental Assessment ("DEA") for the License Surrender and Proposed Decommissioning Plan available to the public at the end of this month. To better inform the Commission and to assist Staff's preparation of the DEA, the Settling Parties have this day submitted an Offer of Settlement that explains with more detail the Settling Parties' proposal, which, if adopted by the Commission,

² Scoping Document, Kilarc-Cow Creek Hydroelectric Project – California, Application for License Surrender, FERC Project No. 606-027 (Sep. 16, 2009), *available at* eLibrary Accession No. 20090916-3009.

would produce a complete and viable resolution of the communities' concerns, leave intact an operating renewable resource, save the consumers of PG&E over \$14.5 million, and meet the objectives and goals of the Federal Power Act.

II. SPECIFIC RELIEF SOUGHT

The filing of the Offer of Settlement and complete responses to the requests for information earlier sent by Staff should serve to broaden the public discourse as to PG&E's License Surrender Application and Proposed Decommissioning Plan. However, the success of any resolution depends upon the concurrence of the resource agencies and an open discussion among all affected entities regarding the merits of the various alternatives. Moreover, all parties, as well as the Commission, need to know before any settlement proceeding begins what minimum flows the resource agencies would require if the Project No. 606 facilities were to continue to operate, and why. Without this vital information, there is simply no way for parties to know whether they are engaged in a fruitless task because nothing less than decommissioning will ever be regarded by the resource agencies as adequate. Accordingly, to seek the support of the resource agencies and the public in reaching a satisfactory decision, the Settling Parties request a FERC settlement process.

It is the belief of the Settling Parties that a settlement proceeding, led by a FERC Administrative Law Judge and held in Sacramento, which is close to most if not all of the resource agencies, would be conducive to gaining the support of the resource agencies, both state and federal, as well as non-governmental parties, for a resolution that is consistent not only with the Federal Power Act but also with current national and state energy policies. Moreover, the proposed resolution in the Offer of Settlement meets

PG&E's objective to surrender its Project No. 606 license, and the Whitmore and Shasta County communities' desires to maintain the power and recreational facilities at the Kilarc and Cow Creek Developments. Finally, the settlement process should provide an opportunity for the parties to resolve the one issue that has not been discussed in any detail by the Licensee at all: the satisfactory disposition of the water rights of the agricultural users that are intertwined with the disposition of the hydro facilities.

III. REASONS IN SUPPORT OF RELIEF SOUGHT

More specifically, the reasons in support of a settlement process, preceded by the disclosure of the agencies' minimum instream flow recommendations,³ are:

A. Absent Disclosure of Minimum Instream Flow Recommendations by the Agencies, There Is No Basis for Evaluating Whether PG&E's Decision to Surrender Its License Is in the Public Interest, Especially When There Is a Willing and Able Developer.

Key to PG&E's decision to decommission the Project and surrender its license was apparently its perception of what the resource agencies would demand of PG&E for minimum instream flow. As PG&E and the resource agencies stated in their 2005 Project Agreement, "[t]his evaluation [that the Project would not be an economic source of energy] was only possible once the relicensing work had proceeded to the point where potential conditions of a new license could be identified by the Parties." Project

³ As to this specific issue, Settling Parties note that the Commission Staff asked PG&E what requirements were placed on their relicensing in the way of minimum flows. PG&E did not respond with any specifics, except to note that after two years of consultation, "the resource agencies had not yet proposed specific protection, mitigation, and enhancement measures for inclusion in a new license." PG&E AIR Response at 6-7. Tetrick Ranch has suggested to the Commission Staff that the agencies should be asked to respond directly. Response of Tetrick Ranch to Comments of California Department of Fish and Game, filed December 30, 2009, at 2 (*available at* eLibrary Accession No. 20091230-5103).

Agreement at 1.⁴ It is thus clear that in order to evaluate both PG&E's proposal and alternatives to it, the parties and the Commission need the information on which PG&E relied in making its evaluation of Project economics. The Commission should require the resource agencies to disclose the minimum instream flows that they would request if the Kilarc and Cow Creek facilities were to continue to operate, and the justification for those recommendations.

It is unclear whether PG&E's assessment took into consideration any limits on such instream flow recommendations to accommodate the water users' rights. Nor does the record reflect: (1) what flow recommendations the agencies made; and (2) the scientific basis and support for the agencies' recommendations. Nevertheless, the primary (and perhaps exclusive) benefit alleged for decommissioning the Project is that the Project can no longer be sustained economically if it were to be re-licensed by PG&E subject to the agencies' minimum instream flow recommendations.

The Commission Staff sought answers to the very relevant question of what instream flows the agencies would request, and it received no answer from the resource agencies or PG&E. Accordingly, prior to accepting PG&E's conclusion that the project is not viable, the Commission ought to obtain more information about the minimum instream flow recommendations, and their bases. Otherwise, it should simply declare that for purposes of moving forward in this proceeding, any claims for minimum flows that are unsupported are without merit, and absent substantial information from either PG&E or the resource agencies to support decommissioning, the Commission cannot

⁴ Kilarc-Cow Creek Project Agreement (Mar. 30, 2005), *available at* eLibrary Accession No. 20050401-0139.

accept as valid an unsupported recommendation for instream flows that would render uneconomic the continued operation of the Project No. 606 facilities. An unsupported request that is enough to kill a project is not in the public interest and cannot meet the “substantial evidence” test.

By giving fair notice of this position, the Commission should enable the parties to proceed directly with settlement negotiations.⁵

B. Taking the Water Users’ Rights Into Consideration

A portion of the facilities of the Cow Creek Development is also used for the delivery of water to the Abbott Ditch Users, who hold consumptive water rights that have been established by judicial decree. In addition, Tetrick Ranch uses Hooten Gulch as a source of water for livestock. If the PG&E decommissioning is implemented, there will be no facilities in place to divert and transport a continuous flow of water from South Cow Creek to either the Abbott Ditch or Hooten Gulch. Both PG&E and the resource agencies have been aware of this issue for some time; nevertheless, nothing concrete in the way of a remedy has been proposed by PG&E, and discussions between PG&E and the water users have been fruitless.

A concrete resolution of the water users’ rights is necessary, and that concrete resolution must be a part of any public interest finding made by the Commission prior to authorizing PG&E’s surrender of the license for Project No. 606. The participation of an administrative law judge may be needed to assist the parties in addressing this issue as it relates to PG&E’s Proposed Decommissioning Plan and alternatives to that plan.

⁵ Moreover such an assumption by the Commission is perfectly consistent with its policy of favoring settlements. *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 122 F.E.R.C. ¶ 61,009, P 13 (2007).

C. *Quantifying the Relative Benefits of Decommissioning and Retaining the Project Facilities*

Where a proposed decommissioning is disruptive and destructive of local interests, but is argued to be in the public interest, the record should contain documentation of the actual benefits that are believed to warrant overriding those individual and community interests. In this case, the Proposed Decommissioning Plan would destroy the livelihood and homesteads of up to a dozen families, dismantle the major local recreational resource, wipe out a 100-year-old ecologically-balanced habitat, and create potential release of toxic sediments locally with no plans for safe disposition. The record in this proceeding, however, simply does not contain evidence of benefits adequate to justify these large negative impacts. There is a Project Agreement signed in 2005, between the resource agencies and the Licensee, that lists “[d]esired [c]onditions” including “[s]afe, timely, and effective passage up/downstream for fish” and “[o]ther water right holders [sic] rights are preserved,” Project Agreement Attachment A, 2(a), 7(b), but does not explain how those desired conditions are to be achieved.

An informed and structured settlement discussion among all of the affected entities will allow the parties to determine whether PG&E’s proposed decommissioning would in fact be beneficial, whether other alternatives are feasible, and how best to address not only the obvious adverse impacts on the local community, but also those impacts that have not been discussed in any detail, despite their importance. In this regard, we note that the disposition of toxic sediments that may lie behind the dams and require removal in a safe manner has not been addressed, but has instead been deferred.

Yet, the potential risks to the community could be great and should be considered before, not after, the decommissioning has begun.⁶

The community has explained the benefits of retaining the Project facilities, even under the current PG&E license, in communications with FERC and also in public meetings. The Offer of Settlement improves on these benefits in substantial ways. However, the core question that must be answered before the Commission makes its public interest determination is whether decommissioning the Project is more or less protective of the public interest than retaining the Project would be.

Particularly in light of the failure of PG&E and the resource agencies to present any evidence of significant environmental benefits from the decommissioning, and the apparent unwillingness of the resource agencies to discuss the scientific merits of the proposed decommissioning in a public forum,⁷ a properly guided settlement proceeding is an appropriate way to proceed. Such a settlement proceeding would provide an opportunity for the parties to make available further information relevant to determining the relative benefits of decommissioning and leaving the Project facilities in place, and to craft a proposal that will protect the public interest and be acceptable to all parties.

D. Discussion of Alternatives to Decommissioning

The Settling Parties have developed a more detailed description and support of an alternative to decommissioning in the short time period available to them in order to present it in a timely fashion to be useful to the Commission Staff in its preparation of the

⁶ See PG&E Application for Surrender of License, Ex. E, at E.2-34 to E.2-36.

⁷ Transcript of October 22, 2009 Resource Agency Meeting at 63:25 to 64:21, 121:15-17, available at eLibrary Accession No. 20091022-4010.

Draft Environmental Assessment. It may well be that the proposal can be improved or modified, but the Settling Parties have not had an opportunity to discuss the alternative with the resource agencies and are concerned that the resource agencies have not viewed such discussions as within the scope of the present license surrender and decommissioning proceedings. With the assistance of an Administrative Law Judge, it may well be possible to resolve the issue.

E. Allowing a Full Discussion of the Issues By All Affected Parties

In authorizing the surrender of the Project No. 606 license and the Proposed Decommissioning Plan, the Commission is required to make a public interest finding. Such a finding must balance the interests of various entities, both supporting and opposed to the surrender and decommissioning. The present record contains an alternative,⁸ which Commission Staff will presumably consider in its NEPA analysis,⁹ but criticism has been raised by one resource agency that the alternative is not viable. The Offer of Settlement is an attempt to respond to that criticism and to make the record more complete. If the agencies provide the additional information requested by the Commission Staff, and if the parties involved are provided an opportunity to meet in a supervised manner and discuss the merits of the various proposals, any scientific evidence, and how other alternatives might meet the public's concerns as well as the

⁸ Scoping Comments of Tetrick Ranch, at 18-19 (Oct. 16, 2009), *available at* eLibrary Accession No. 20091016-5088.

⁹ NEPA requires the Commission to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” NEPA, § 102(2)(E), 42 U.S.C. § 4332(E). The regulations of the Council on Environmental Quality direct the Commission to, “to the fullest extent possible...[,] [u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. §§ 1500.2, 1500.2(e) (emphasis added).

concerns raised by private landowners, affected water users, and the County, (including the as yet unknown but potential impacts from the decommissioning due to toxic materials backed up behind the diversion dams), the parties may be able to develop a solution that is acceptable to all parties and that satisfies the Commission's public interest requirement. At this stage, there is little hard evidence, other than PG&E's disinclination to remain a licensee, to support the decommissioning proposal. The Offer of Settlement would resolve PG&E's problem by transferring the Project and its attendant responsibilities to another entity. However, as noted before, the viability of any proposal to continue to operate Project No. 606 depends to a great extent on the position of the resource agencies as to required minimum flows and what other conditions they view as necessary. There has been ample time to produce this evidence as the agencies and PG&E have been consulting with each other for at least seven years on the relicensing of, and proposed license surrender for, Project No. 606.¹⁰ Yet, that information has not been presented into this record.

The question is whether a viable solution can be found that will satisfy the public interest and respect the needs and rights of all affected parties. What is needed is an opportunity for the affected parties to "work it out" and the FERC settlement process seems most likely to accomplish that. Reasonable time constraints should be established; the proceeding should be held in a reasonably convenient time and place for the resource agencies and the affected parties; and an expedited schedule should be set. Expedition is the most efficient way to resolve this long-standing issue and is, moreover, necessary for

¹⁰ See, e.g., Comments of NMFS and CDFG on First Stage Consultation Document, both filed October 7, 2002 in the above-captioned docket.

the Settling Parties' interests, which simply cannot afford to remain in limbo. The County must be able to plan its budget and incoming revenues; the water users must know soon whether they must initiate other state court action to establish a separate diversion to supply their water or to block curtailment of existing deliveries; and Tetrick Ranch and Evergreen Shasta must be able to conclude the business aspects of their proposal as set out in the Offer of Settlement.

F. Urgency of Request

In light of both the Commission's proposed schedule, under which a Draft Environmental Assessment would issue later this month, and the Settling Parties' need for certainty as to their water rights, expected tax revenue, and other interests, expedited settlement procedures are appropriate in this case. Expedition will also serve PG&E's interest in ceasing to be the licensee for Project No. 606 and the resource agencies' interests in habitat protection and improvement.

IV. CONCLUSION

For all the reasons stated above, the Settling Parties request that the Commission (1) promptly request the resource agencies to provide to the Commission Staff and the parties to this proceeding, their response to the Staff's inquiry to PG&E as to the minimum instream flow recommendations for Project No. 606 to continue its operations; (2) if no such response is forthcoming, adopt a position that will permit the settlement proceeding requested to proceed in any event, in a fair and responsible manner; (3) promptly grant the Settling Parties' Motion for a settlement process; and (4) request the Chief Administrative Law Judge to appoint a Settlement Judge to assist in settlement

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negotiations and to report back to the Commission within a prompt and reasonable period of time.

Respectfully submitted,

/s/ Frances E. Francis

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January 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 22nd day of January, 2010.

/s/ Katharine M. Mapes

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