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Filed Electronically

May 20, 2022

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

**Subject: Rush Creek Hydroelectric Project (FERC Project No. 1389-059)
Response to Comments on Scoping Document 1**

Dear Secretary Bose:

On December 16, 2021, Southern California Edison Company (SCE) filed with the Federal Energy Regulatory Commission (Commission or FERC) a Pre-Application Document (PAD) and Notice of Intent (NOI) to seek a new license for the Rush Creek Hydroelectric Project, FERC Project No. 1389 (Project). On February 14, 2022, Commission staff issued Scoping Document 1 (SD1) for the Project's relicensing, in which it solicited comments from relicensing participants on staff's preliminary list of issues and alternatives to be evaluated in the National Environmental Policy Act (NEPA) document.¹

In response, a number of resource agencies and other relicensing participants filed comments on SD1 on a variety of topics. In particular, the U.S. Forest Service (USFS) filed comments on FERC's authority to renew a license within the Ansel Adams Wilderness (AAW) and consideration of project decommissioning as an alternative to relicensing, among other topics. SCE provides this limited response to address USFS's comments on these issues prior to FERC's issuance of SD2 on May 30, 2022.²

Relicensing Jurisdiction in the Ansel Adams Wilderness

USFS has questioned FERC's authority to relicense the Project because some of its structures lie within the AAW; in the USFS's view, this leaves FERC "without a clear pathway to authorization."³ SCE respectfully disagrees with this view. The legal basis for project

¹ Scoping Document 1 for the Rush Creek Hydroelectric Project, Project No. 1389-059 (issued Feb. 14, 2022) [hereinafter "SD1"].

² *Id.* at 30; *see also* 18 C.F.R. § 5.10 (providing for Scoping Document 2 to be issued within 45 days of the deadline for comments on Scoping Document 1).

³ Forest Service Comments on the Pre-Application Document, FERC Scoping Document 1, and New Study Requests for the Rush Creek Hydroelectric Project at 2 (Apr. 14, 2022) [hereinafter "USFS Comments"].



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authorization is clear from the text of the Wilderness Act and has long been recognized in the FERC record.

USFS notes that the Wilderness Act, 16 U.S.C. § 1133(c), generally prohibits “structure[s] or installation[s]” within designated wilderness.⁴ The Act recognizes two exceptions to this prohibition, however. The first exception authorizes structures or activities “necessary to meet minimum requirements for the administration of the area for the purpose of” the statute.⁵ The second exception makes the prohibition “subject to existing private rights.”⁶ For purposes of the scoping process, FERC need only consider this second exception as it alone supports relicensing jurisdiction.

When the Wilderness Act was enacted in 1964, it was well understood that the protection for existing private rights would extend to federally licensed hydropower projects. In a letter to the House Committee on Interior and Insular Affairs, the chairman of the Federal Power Commission, FERC’s predecessor, offered his views on the bills that formed the basis of the final Wilderness Act.⁷ The chairman praised those bills because they “specifically preserve[d] existing private rights in lands placed in the wilderness system,” and “clearly would protect a licensee’s right to continue the use of any such lands under authority of a license previously issued by the Commission.”⁸ To the same ends, the chairman recommended the bills because they would not “vacate or rescind any power withdrawal or power reservation created prior to its enactment.”⁹

FERC has consistently followed this original understanding in later exercises of its licensing authority. While FERC will deny licenses for *new* projects in wilderness areas,¹⁰ it has also consistently reauthorized projects licensed and constructed prior to the designation of the wilderness area.¹¹ FERC’s interpretation of the Wilderness Act aligns with USFS’s own policy to permit relicensing of projects that pre-date wilderness designation.¹²

⁴ See *id.* at 3 (quoting 16 U.S.C. § 1133(c)).

⁵ 16 U.S.C. § 1133(c).

⁶ *Id.*

⁷ H.R. Rep. No. 88-1538, 1964 WL 4863, (1964), *reprinted in* 1964 U.S.C.C.A.N. 3615, 3622.

⁸ *Id.* at 3629.

⁹ *Id.* The Federal Power Act’s “power site reservation” provision protects the rights of federal licensees in the use of federal lands. 16 U.S.C. § 818.

¹⁰ See *Premium Energy Holdings, LLC*, 167 FERC ¶ 62,162 at PP 1-7 (2019).

¹¹ See, e.g., *PPL Mont.*, 121 FERC ¶ 62,198 at PP 1-2, 14, 14 n.10 (2007); see also *Va. Elec. Power Co.*, 123 FERC ¶ 62,222, at P 18 n.12 (2008).

¹² See Forest Service Handbook 2709.15: Hydroelectric Handbook § 62.41 at 16-17 (2009), https://www.fs.fed.us/im/directives/fsh/2709.15/2709.15_60.doc.



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In this case, the existing private rights consist of the Commission's license, originally issued in 1939,¹³ and the accompanying power site reservation, which was created statutorily in 1936 when SCE's predecessor applied for the license¹⁴—both of which have existed, uninterrupted, well in advance of the Wilderness Act and Congress' establishment of the Minarets Wilderness (which in the area of the Project was subsequently redesignated as AAW). And SCE's emerging relicensing proposal for the Project is well within the scope of the license and the Federal Power Act itself.¹⁵

While these facts alone address USFS's relicensing concern, it bears noting that both the Commission and USFS were well aware during the prior relicensing process in the 1990s that the Project pre-dated designation of the AAW.¹⁶ Both agencies therefore "accepted" the project works "as non-conforming uses" "[b]ecause the project facilities were built before the establishment of the Minarets Wilderness," now known as the AAW.¹⁷ For decades now, SCE and numerous other stakeholders have relied on this interpretation of FERC's jurisdiction over the project,¹⁸ and suggestions to now disavow that interpretation represent an untimely collateral attack on FERC's prior decision.¹⁹

Finally, the *High Sierra Hikers* decision cited by USFS is simply inapposite in this case because it does not address the statutory protections for prior existing rights.²⁰ Nothing in that opinion

¹³ See *S. Cal. Edison Co.*, 78 FERC ¶ 61,109, at p. 61,380 (1997); Nineteenth Annual Report of the Federal Power Commission at 49-50 (1939).

¹⁴ See Seventeenth Annual Report of the Federal Power Commission at 33 tbl. 1 (1937); 16 U.S.C. § 818 ("Any lands of the United States included in any proposed project under the provisions of this subchapter shall *from the date of filing of application therefor* be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress." (emphasis added)); *id.* (establishing a power site reservation in which the licensee has the right "to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes.").

¹⁵ *E.g.*, 16 U.S.C. § 803(c) (requiring SCE as licensee to "maintain the project works in a condition of repair adequate . . . for the efficient operation of" the Project).

¹⁶ See *S. Cal. Edison Co.*, 78 FERC ¶ 61,109, 61,380 (1997) ("The Commission issued the original license for the Rush Creek Project in 1939.").

¹⁷ FERC, Environmental Assessment for Hydropower License: Rush Creek, FERC Project No. 1389-001, California at 28 (1992).

¹⁸ See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (agency action is arbitrary and capricious when it fails to account for serious reliance interests).

¹⁹ See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958); see also *Jeffrey Lake Dev., Inc.*, 161 FERC ¶ 61,184 at P 10 (2017).

²⁰ See USFS Comments at 1 ("As decided in *High Sierra Hikers v. U.S. Forest Service*, reauthorizing non-conforming structures, particularly dams, is prohibited in designated Wilderness except as specifically provided for in the Wilderness Act, or an amendment thereto.").



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indicates that the small dams at issue were ever licensed under the Federal Power Act; in fact, no one seemed responsible for the dams at all.²¹

Project Decommissioning

USFS has also asked FERC “to include a full Project decommissioning as an alternative in [its] environmental analysis.”²² USFS’s views appear predicated largely on its misunderstanding of the Wilderness Act as applied to the Project,²³ and, consequently, there is no basis to assess decommissioning once that misunderstanding is corrected.

Even if USFS’s request for the Commission to identify decommissioning as a reasonable alternative in Scoping Document 2 (SD2) is not wholly based on its Wilderness Act concerns, the Commission should not include Project decommissioning as a reasonable alternative to be analyzed in its NEPA process. SCE has stated its unequivocal intent to seek a new license for the Project.²⁴ This Project offers valuable carbon-free capacity and energy to SCE’s generation portfolio, supports local recreation, is strategically located, provides local reliable power and energy during islanding events, and will become more valuable as the electric grid continues to transition to non-emitting resources. SCE is firmly committed to continuing to operate and maintain the Gem Lake development of the Project through a new license term.

In addition, listing Project decommissioning as an alternative in the relicensing effort would run afoul of Commission precedent, which maintains that decommissioning is not an effect of project relicensing, but “is a separate action that may occur at some point in the future, with effects that can be described in hypothetical terms but cannot be analyzed absent more specific information about when and how the project may be decommissioned.”²⁵ For these reasons, the Commission has determined it is inappropriate to speculate about possible decommissioning measures during relicensing.²⁶ Rather, it has appropriately found that it is premature to undertake an environmental analysis of decommissioning absent a specific decommissioning proposal from the licensee.²⁷

²¹ See *High Sierra Hikers Ass’n v. U.S. Forest Serv.*, 436 F. Supp. 2d 1117, 1139 (E.D. Cal. 2006) (“the dam has no owner and no utility other than stream flow regulation”).

²² USFS Comments at 7.

²³ See *id.* at 6 (“It is unclear whether FERC possesses a pathway to resolve Gem’s operation absent congressional approval. Therefore, we believe it is appropriate . . . to consider all possible alternatives in FERC’s environmental analysis, including decommissioning all non-conforming elements within wilderness.”).

²⁴ Notice of Intent to File Application for New License at 1, Project No. 1389-059 (filed Dec. 16, 2021); see also 18 C.F.R. § 5.5(b)(4).

²⁵ See, e.g., *Eagle Crest Energy Co.*, 153 FERC ¶ 61,058 at P 67 (2015).

²⁶ See generally *Project Decommissioning at Relicensing: Policy Statement*, FERC Stats. & Regs., Regulations Preambles (1991–1996), ¶ 31,011 (1994); see also *City of Tacoma*, 110 FERC ¶ 61,140 (2005).

²⁷ *City of Tacoma*, 110 FERC ¶ 61,140 at P 12.



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For these reasons, Commission staff appropriately excluded Project decommissioning from consideration in SD1, and there is no basis for staff to identify these issues for NEPA analysis in SD2.

Conclusion

SCE looks forward to continuing to work with the Commission, USFS, other resource agencies and interested parties on the relicensing of the Project. SCE recognizes USFS's request for the Commission to "convene a technical conference prior to a Study Plan Determination" to address what it describes as "unique questions and considerations" raised by the Project's location within AAW.²⁸ While SCE welcomes the opportunity to engage with the Commission, USFS, and other interested parties, no such technical conference is needed to resolve this issue. As explained herein, the Commission's jurisdiction to relicensing this Project is well-established under the Wilderness Act and governing precedent.

Should there be any questions or concerns regarding this filing, please contact Matthew Woodhall, Rush Creek Relicensing Project Manager, by phone at (909) 362-1764 or via email at matthew.woodhall@sce.com.

Sincerely,

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²⁸ USFS Comments at 1.

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