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January 16, 2019

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

Electronic Filing

Re: Request for Rehearing and/or Clarification – Poe Hydroelectric Project.

Dear Ms. Bose:

Enclosed for filing in the above referenced proceeding is **American Whitewater's Request for Rehearing and/or Clarification of the New License Issued for the Poe Hydroelectric Project.**

Copies of this filing have been served on all parties of record to these proceedings. Thank you for the opportunity to provide comments on this project.

Sincerely,

A handwritten signature in cursive script that reads 'Theresa Simsiman'.

Theresa Simsiman
California Stewardship Director
American Whitewater
916-835-1460

power generation while requiring only 50 cfs of minimum release into the Poe bypassed reach. Lack of recreational facilities and access have adversely affected American Whitewater's members use of the North Fork Feather River.

American Whitewater is a party to the relicensing proceeding, *see* eLibrary no. 20040428-5024. It participated actively, filing recommended license conditions and comments on the draft Environmental Assessment. *See* "Amended Comments of Butte County and American Whitewater on Draft Environmental Assessment," eLibrary no. 200609195052 (Sept. 19, 2006), p. 34.

II. BACKGROUND

The Project occupies lands and waters of the North Fork Feather River within Butte County. The North Fork Feather River is one of the region's most valuable natural resources.

The Project originally was licensed on October 26, 1953. That license expired on September 30, 2003. PG&E has been operating on annual licenses since then.

PG&E filed its license application on December 16, 2003, *see* eLibrary no. 20031223-0471 et seq. Commission Staff noticed its acceptance of the application on March 24, 2004, *see* eLibrary no. 20040324-3049.

Commission Staff issued the draft Environmental Assessment (EA) on August 2, 2006, *see* eLibrary no. 20060802-3036, and the final EA on March 29, 2007, eLibrary no. 20070329-3045.

The Commission issued the final license on December 17, 2018, eLibrary no. 20181217-3018. This request for rehearing and/or clarification follows.

III.
STATEMENT OF ISSUE AND AUTHORITIES

Whether the License Order Erred In Omitting the Specific Requirements for the “Bardee’s Bar Trail.”

American Whitewater intends to rely upon the following authorities for this issue.

Statute

16 U.S.C. § 799

16 U.S.C. § 803(a)(1)

Regulations

18 C.F.R. § 2.7

Judicial Decision

Clifton Power Corp. v. FERC, 88 F.3d 1258 (1996)

IV.
STANDARDS FOR REHEARING AND CLARIFICATION

On any petition for judicial review following rehearing, the court will review the Commission’s orders to determine whether they are arbitrary and capricious. An order that is arbitrary and capricious shall not be upheld when the Commission has failed to exercise its discretion in a reasonable manner. 5 U.S.C. § 706(2)(A). FPA section 313(b) further provides that “the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.” 16 U.S.C. § 8251(b). The Commission has discretion to clarify a previous order on rehearing when it determines such clarification is in the public interest. *Gustavus Elec. Co.*, 111 FERC ¶ 61,424 (2005); *Alaska Power & Tel. Co.*, 101 FERC ¶ 61,191, 61,775 (2002).

V.
ARGUMENT

The License Order Should Specify the Requirements for “Bardee’s Bar Trail.”

License Article 203 requires that the project boundary be expanded to include “the recreational enhancements to be made at ... the Bardee’s Bar trail” However, the License Order does not define “Bardee’s Bar trail” or specify PG&E’s obligations with respect to such trail.

Under FPA section 10(a)(1), any new license must be based on the Commission’s finding “[t]hat the project as adopted ... will be best adapted to a comprehensive plan for improving or developing a waterway ... for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife ..., and for other beneficial public uses, including irrigation, flood control, water supply, and *recreational and other purposes ...*” 16 U.S.C. § 803(a)(1) (emphasis added).

The Commission has adopted a recreation policy consistent with its obligations under FPA section 10(a)(1), which provides that, “the Commission will evaluate the recreational resources of all projects under Federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project.” 18 C.F.R. § 2.7.

According to Commission Staff’s analysis in the final EA, new hiking opportunities within the project area are needed to meet recreational demand at the Project over the license term, and comply with the Commission’s obligations under FPA section 10(a)(1) and its

recreation policy. Staff specifically recommended that PG&E provide a hiking trail near Bardee's Bar following further study of trail alternatives:

Several entities recommend development of hiking trails in the vicinity of the project. Table 36 summarizes these recommendations. [¶] We recognize the need to develop opportunities for hiking in the project area but have obtained limited information on the trail recommended by Michael Taylor. Therefore, we recommend conducting a feasibility study on improving the trail between Bardee's Bar and the Poe powerhouse road and comparing the results of this study with the information provided in PG&E's September 2006 feasibility report on modifying the abandoned construction road for use as a trail. We estimate the cost of conducting this study would be approximately \$10,000 (annualized cost of \$1,450), but the information obtained through this study would allow the Commission to make an informed decision on the best option for providing hiking opportunities in the project area. Based on the results of the study, we recommend developing an all-weather hiking trail in one of the locations, if feasible. The capital cost of developing a hiking trail is estimated to be \$50,000, with an annualized cost of \$9,270; however, a new trail would address the need to increase hiking opportunities in the project area, which justifies the costs.

Final EA, pp. 249-251. The License Order does not reference or incorporate Staff's analysis or recommendations.

Under FPA section 6, 16 U.S.C. § 799, all the terms or conditions for a hydroelectric project, and the licensee's acceptance of those conditions, must be expressed in the license order.

In *Clifton Power Corp. v. FERC*, 88 F.3d 1258 (1996), the licensee challenged a compliance order requiring it to gage the project dam's run-of-river mode of operation. The licensee argued that, "because its license [did] not contain a specific provision requiring it to operate in a run-of-river mode, the Commission had no authority to require it to gage or to verify operations in this mode." *Id.* at 1261. The Commission conceded that the license did not have any special article imposing a run-of-river mode of operation, but argued the licensee was bound to operate in that mode because that is what it had proposed in its license application. *Id.* The court disagreed, stating:

In our view, the Commission's finding that Clifton's license includes a run-of-river requirement is neither supported by substantial evidence nor consistent with the

hydroelectric licensing provisions of the Federal Power Act. Although Clifton's *license application* clearly stated that "[t]he project will be manually operated as a run-of-river project," ... Clifton's license does not expressly so require Under the Commission's reasoning, a licensee would be bound to operate in a mode merely described in its license application regardless of whether the license itself specifically imposed a condition requiring operation in that mode. We cannot square such a rule with the Federal Power Act's requirement that "[e]ach ... license shall be conditioned upon acceptance by the licensee of ... such further conditions, if any, as the Commission shall prescribe ... *which said terms and conditions and the acceptance thereof shall be expressed in said license.*" 16 U.S.C. § 799.

Id. at 1261-1262 (emphasis added).

As articulated by the court in *Clifton*, FPA section 6 requires that terms and conditions of licensing must be stated in the License Order itself. American Whitewater requests that the Commission clarify the License Order to expressly require PG&E to develop a hiking trail in the project area near Bardee's Bar following further feasibility study as recommended by Commission Staff in the final EA. Under Section 6, Staff's recommendations in the final EA are not binding on PG&E unless they are expressly required in the License Order.

CONCLUSION

American Whitewater requests that the Commission grant rehearing and/or clarification as stated above in order to assure that Poe Project under the new license is best adapted to a comprehensive plan of development for the North Fork Feather River.

Dated: January 16, 2019

Respectfully submitted,



Dave Steindorf
California Hydropower Specialist
American Whitewater

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Pacific Gas and Electric Company	
Poe Hydroelectric Project	FERC Project No. P-2107-016

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day caused the foregoing **Request for Rehearing and/or Clarification of the New License Issued for the Poe Hydroelectric Project of American Whitewater** to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 16th day of January 2019.



Theresa Simsiman
American Whitewater
California Stewardship Director


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