

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

Pacific Gas and Electric Company

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

**ANSWER AND SUPPLEMENTAL COMMENTS OF
TETRICK RANCH AND ABBOTT DITCH USERS
AND IF NECESSARY, MOTION SEEKING LEAVE
TO FILE ANSWER AND SUPPLEMENTAL
COMMENTS**

Pursuant to Rules 207, 212, 213, and 215 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.207, 385.212, 385.213 and 385.215 (2009), and Section 309 of the Federal Power Act, 16 U.S.C. § 825h, Tetrick Ranch and Abbott Ditch Users (“ADU”) seek to file an answer to what amounts to a new motion by Pacific Gas and Electric Company (“PG&E” or “Licensee”) that the Commission reject the request of Tetrick Ranch and ADU “to require PG&E to provide information as to whether and how it will supply them with water after the Project is decommissioned ... or otherwise compensate them for the loss of the water.” PG&E’s Reply to Motion to Intervene, etc. at 2 (August 20, 2009) (“PG&E Filing”)¹. In addition, Tetrick Ranch and ADU submit these Supplemental Comments on the process to be followed by the Commission and to

¹ Pacific Gas and Electric Company’s Reply to Motions to Intervene; Comments Opposing Surrender and Decommissioning of Project as Proposed; Motion for Imposition of Terms and Conditions Necessary for Surrender Approval and to Allow Continued Operation of the Kilarc-Cow Creek Project, or in the Alternative, for Full Evaluation of the Decommissioning Alternatives, Including Retention of the Existing Kilarc-Cow Creek Hydroelectric Project Facilities as a Reasonable and Preferred Alternative, in the Public Interest; and Recommendations for the Terms and Conditions of License Surrender of Tetrick Ranch, Abbott Ditch Users, and Shasta County (Aug. 20, 2009).

clarify certain issues raised to date. To the extent necessary, Tetrick Ranch and ADU also seek such waivers as are necessary to permit their filing in the event that the Commission views this Answer as a prohibited Answer to a Reply, for the reasons stated herein.

I. PG&E'S MOTION, IN FACT, IS INTENDED TO CUT OFF THE DEVELOPMENT OF A PROPER RECORD TO DETERMINE THE PUBLIC INTEREST.

There is no factual issue between any of the parties, including PG&E, that the decommissioning of the Cow Creek portion of Project 606 will eliminate the only facility that delivers water from the source of their water, South Cow Creek, to both Tetrick Ranch and to the ADU, by drying up Hooten Gulch. *See* PG&E Filing at 10.

Accordingly, Tetrick Ranch and ADU asked the Commission to require PG&E to provide more specific information about how PG&E's proposed surrender of license and decommissioning plan for the Cow Creek Plant might affect their water supply and in particular, what specific mitigation measures would be pursued by PG&E to mitigate this loss of essential water if the Commission approved the PG&E license surrender and proposed decommissioning plan. Tetrick Ranch and ADU have sought information and answers from PG&E on this issue since 2004, but to no avail. In 2007, the attorney for both the ADU and Tetrick Ranch sent a letter to PG&E anticipating further discussions. *See* Aff. of Steve Nevares in Support of Pacific Gas and Electric Company's Reply to Motions to Intervene, Exs. A, C (Letter of September 26, 2007, and Letter of April 13, 2004, respectively) (July 18, 2009).

Despite PG&E's suggestions to the contrary, an express statement by PG&E of its willingness to resolve the water supply issue, and the lapse of at least three years, ADU

and the Tetrick Ranch have received no concrete proposal as to how their access to their water rights will be resolved by PG&E.²

The crux of PG&E's argument that the Commission cannot and should not obtain more information from PG&E about how flows to ADU and Tetrick will be maintained for purposes of establishing a complete record in this case stems from its arguments that (1) the Commission has no jurisdiction over water rights, PG&E Filing at 5, and (2) ADU and Tetrick have no water rights that will be impacted by decommissioning, *id.* Insofar as PG&E is concerned, it views the matter of ADU and Tetrick's receipt of their own water as a "dispute[] arising under California state water law," *id.* at 6. That fact alone, according to PG&E, bars the Commission's receipt of information on the topic for purposes of completing its record in this proceeding. This is not correct. Elementary to the existing water conveyance system used by ADU and the Tetrick Ranch is the fact that it is part and parcel of the authority that PG&E has requested that the Commission grant it authority to decommission. See Notice, issued May 12, 2009, page 2, par. K(1), in this proceeding. Accordingly, the Commission is as entitled as ADU and Tetrick and any other party to this proceeding to complete information about what PG&E itself has conceded will be the impacts of PG&E's proposed surrender of its license and decommissioning proposal.

² states (PG&E Filing at 2) that it "remains hopeful that it can resolve the outstanding water rights issues outside of this proceeding," it remains the fact that "outside of this proceeding," nothing has occurred or shows promise of resolving the fundamental issue of how Tetrick Ranch and the ADU are to obtain water to maintain their livelihoods and properties if PG&E decommissions the only conveyance system to deliver water to the Ranch and to ADU, both of whom receive water at the diversion point for Hooten Gulch, where the Tetrick/ADU water is used by PG&E at the Cow Creek Plant, and then delivered to the ADU and Tetrick Ranch.

As noted, the issue of ADU's and Tetrick's receipt of water is intricately involved with the operations of the Cow Creek Plant, a FERC-licensed Project, and the surrender of that license and subsequent decommissioning of the Cow Creek Plant will not be in the public interest if FERC's approval of the license surrender and proposed Decommissioning Plan omits thoughtful consideration of all the impacts flowing from its approval. Whether or not ADU and Tetrick have rights to what PG&E now defines as "water service," *id.*, is irrelevant to the Commission's examination of the impacts of its approval of PG&E's proposed surrender of the license and proposed decommissioning might have. The proper and fundamental issue for FERC's inquiry in fulfilling its duties at this point is: What will happen to those affected by PG&E's proposal if the Commission grants the relief requested?

Indeed, the effect on Tetrick Ranch and ADU of PG&E's decommissioning of the Cow Creek Plant is not only a legitimate but a necessary part of making a proper record for the Commission's consideration of the impacts flowing from any Commission approval of PG&E's request to surrender its license and its proposed Decommissioning Schedule. Whether or not there are also other issues involving California law is not relevant here. If PG&E's motion to circumscribe the evidence needed in this case and to which it alone has knowledge leaves the Commission with less information than it might otherwise have to assess the impacts of granting the relief PG&E seeks, then the Commission cannot properly fulfill its duty to assess the impacts of its approval upon those factors constituting the public interest and the terms and conditions necessary to the surrender of the license and the Decommissioning Schedule. Moreover, obtaining complete information was the purpose of the Commission's Notice that led to the filing

of all these comments. See Notice issued May 12, 2009, at 2-3. PG&E's arguments, in essence, amount to a motion to prohibit the parties to this proceeding and FERC from obtaining relevant information directly relevant to the relief PG&E seeks and that is necessary for a complete record from the only party that can provide it, PG&E.

II. NONE OF THE CASES CITED BY PG&E OR ITS OWN LOGIC SUPPORTS ITS FLAWED ARGUMENT

The case cited by PG&E in support of its proposition that the Commission is without the authority to enforce water obligations, *Southern California Edison Co.*, 121 F.E.R.C. ¶ 61,154, P 88 is inapposite. In that case, the Commission viewed the motion before it as one which would require it to "begin exercising control over the powerhouse flows...." We ask for no such relief here. Furthermore, the fact situation here is quite different, as it involves a long-standing water diversion arrangement that benefitted the Licensee, and that the Licensee concurred in while it was to its advantage, but which it wishes to shuck off now that it wishes to decommission the Project. It is simply mind-boggling for PG&E to state that under these circumstances, neither ADU or Tetrick Ranch will be "impact[ed]" by PG&E's proposed decommissioning. PG&E Filing at 10.

PG&E also cites *Portland General Electric Co.*, 107 F.E.R.C. ¶ 61,158 (2004), which it describes as a case "in the analogous context" that supports its position. This is not correct. Footnote 21, to which PG&E refers (Filing at 8), discusses a provision in the settlement that transfers water rights. Because the Commission was not authorized to deal with the transfer of water rights, it held simply that this provision was "not within our jurisdiction" while it also noted that (1) there was no conflict with the surrender requirements and (2) Portland General Electric (the affected licensee) "remains bound to perform them." In short, it was a different situation inasmuch as all parties were express

in their description of the settlement terms and consequently, the Commission had the opportunity to review them for their consistency with the Commission's obligations and their consistency with the other terms of the Agreement being approved. As to the issue of the seniority of water rights in the same case that was referred to by PG&E (*id*), the Commission's deference was to a resolution of the interpretation of what senior rights in water entailed in the way of mitigation, which apparently had not been resolved and was thus regarded by the Commission as a "debate" to be resolved by the parties in a state court.

Whether or not the parties to this proceeding will ever have to reach a similar debate over the seniority of water is uncertain. Clearly, if the Cow Creek project remains in place, there will be no need to reach that issue. If the Cow Creek project is decommissioned, there may be other ways to resolve any issues of water rights under state law. The fact that some issues may ultimately be resolved in a state or other court is not a basis for the Commission to be denied information it needs for its jurisdictional obligations, namely, the assessment of the public interest in approving a surrender of the license and decommissioning schedule as proposed by PG&E.

PG&E's logic leaves something to be desired, too. PG&E argues that the Commission is denied jurisdiction because there is a "dispute" under state water law, but it also argues that state water law does not encompass "water service," in contrast to water rights. If that is so, then there is no basis for PG&E to refuse to provide the information requested, because under its own logic, the issue is **not** one of California water law. *See* PG&E Reply at 8, Sec. A.

III. PG&E'S ARGUMENT WOULD DENY OTHERS INFORMATION NEEDED TO ASSIST THE COMMISSION AS WELL

Tetrick Ranch and ADU note that they are not the only ones who desire more information and detail about the results. We note that the State Water Resources Control Board has stated that it "cannot issue terms and conditions until more complete Project decommissioning design plans are developed." Letter from Jeffrey Parks, Water Resource Control Engineer, Water Quality Certification Unit, Div. of Water Rights, State Water Resources Control Bd., to Kimberly D. Bose, Sec'y, FERC, at 1 (July 9, 2009). Absent these "more complete" plans which surely are not contained in the Application (and which PG&E says it will provide only upon approval of its proposal), not only Tetrick Ranch and ADU, but also the general public and other parties are deprived of the ability to respond fully to the Commission's public notice with respect to the impacts of the decommissioning proposed and their recommendations for terms and conditions.

IV. A COMPLETE RECORD IS ESSENTIAL TO THIS COMPLEX CASE

A. Clarification of State Water Law Concepts

Tetrick Ranch and ADU have requested that their California attorney familiar with the State's water law provide further explanation to the Commission on the points of state water law that might be relevant as to the definition of their water rights and how they might be impacted improperly by the PG&E/Agency MOU and other PG&E activities proposed, as well as addressing the arguments of PG&E that challenge the Abbott Diversion. Motion at 4. That information should be available in 30 days and at that time, Tetrick Ranch and ADU believe that the issue of the nature of the water rights held by Tetrick Ranch and ADU will be clarified in a helpful manner. Furthermore, while the Tetrick Ranch and ADU do not believe that the Commission is the appropriate venue

to dispute water right issues, we do believe that a complete, clear and accurate appreciation of the history and geography of the diversion scheme is critical to the Commission's ability to make a fair and impartial assessment of PG&E's claims as well as those of the Tetrick Ranch and ADU. Accordingly, Tetrick Ranch and ADU reserve the right to present this information to the Commission.

This information is critical, for if PG&E and the agencies signing the MOU have assumed that the water rights held by Tetrick Ranch and ADU can be converted, by virtue of denying them the use of the present conveyance system, into instream water rights (as to which PG&E has no entitlement and thus has no right to abandon in favor of the agencies, except for a small portion of flows to which it has consumptive rights), then the MOU is based on a faulty premise. In short, PG&E cannot unilaterally destroy other parties' consumptive rights in the guise of abandoning its own non-consumptive water rights.

PG&E acknowledges that absent the flows for the PG&E Cow Creek Plant, decommissioning the Cow Creek Project as it proposes will leave "minimal natural flow in Hooten Gulch," PG&E Reply at 10. What PG&E does not disclose in its comments, however, is the fact that the flows to Hooten Gulch are not "artificial flows" but flows that include, in significant part, the water rights to which both ADU and Tetrick Ranch are entitled, and those water rights cannot be redirected or assigned to the agencies, as seems to be assumed. In short, PG&E has enhanced whatever non-consumptive flows it has for the Cow Creek Plant for over 105 years with the *additional flows* being directed and conveyed to the Tetrick Ranch and ADU. In a California State Water Resources Control Board document dated May 1965, describing ADU's Diversion 73, the document

states that “water available for diversion (73) consists principally of water discharged into Hooten Gulch through the South Cow Creek Powerhouse tailrace...” *See* attachment hereto.

PG&E pays nothing to Tetrick Ranch and to the ADU for the use of these additional flows. Both Tetrick and ADU have their own facilities to take their share of their water from Hooten Gulch to their respective final delivery points; clearly, without the delivery at Hooten Gulch, these facilities would become useless, and alternative delivery systems would have to be developed, certificated and installed.

B. Other Useful Information

The procedural circumstances of this proceeding are a bit unusual, having proceeded from a relicensing case to a license surrender and decommissioning case. As a result, it is not clear what information is being relied upon, nor is the vintage of the information always clear. For example, Trout Unlimited and Friends of the River state that they have provided “scientific, economic and socioeconomic information,” and worked within a collaborative process. Motion to Intervene of Trout Unlimited and Friends of the River Request to Change Service List at 4 (July 9, 2009). It would be useful for the Commission and other parties to know specifically whether information from the relicensing case is to be a part of this record, and if so, for the parties relying on information from other proceedings to clearly identify those documents, studies and information so that the other parties could likewise rely on that information.

In addition to identifying the specific documents and information from other parties relied on by any party to this proceeding, the Commission should be advised of whether and how the respective agencies who signed the MOU in 2005 intend to conform

the effects of that MOU with other policy considerations, both state and national, as to the need for renewable resources and the reduction of the carbon footprint in all activities. Without this update, it is difficult for the parties to know just how these important public policies and interests have been updated in the agencies' recommendation to decommission these two operating hydroelectric plants in California, at a cost estimated to be in excess of \$14.5-million.³

Finally, ADU and Tetrick Ranch should be allowed to inform the Commission of the costs and time required for the planning, construction and implementation of an alternative water conveyance system, should the Commission approve the surrender of the license for the Cow Creek Plant and authorize PG&E to proceed with the decommissioning. To do this, ADU and Tetrick Ranch need not only the details of the decommissioning but also the timing of the decommissioning, so that they can prepare an alternative to exercise their water rights. The location of that alternative may also affect other considerations and assumptions made by PG&E and the resource agencies, as to the impacts of the license surrender and the decommissioning proposed. In any event, it would affect the recommended license terms and conditions that would and should be imposed upon the licensee.

C. The Role of the Resource Agencies

ADU and Tetrick Ranch assume that the Commission will shortly schedule a Scoping Meeting to provide the community and interested parties an opportunity to participate in the consultative process. The Comments to date strongly suggest that there

³ That figure may or may not include the costs associated with the replacement of the water conveyance system, among many other factors.

will be alternative proposals to PG&E's proposal as well as many questions about PG&E's proposals. Accordingly, ADU and Tetrick Ranch respectfully make two suggestions: (1) the FERC staff should schedule enough time for the community and the interested parties to have adequate time to present and discuss their positions with the FERC staff and to view the two separate locations at issue. Perhaps three days would be a reasonable time for such meetings, and would prevent the frustrating experience of many of these proceedings where parties are limited to five minutes and then told or asked to wind up. This kind of process is not friendly or useful. (2) the FERC staff should either participate independently or make sure that the resource agencies do not use their commitment to the MOU to dispense with fair consideration of the alternatives. Under the Commission's consultative procedures, the resource agencies are expected to provide the Commission with their respective evaluations as to the alternative filings. There is some concern, whether or not it is justified, that the commitment of the resource agencies to the MOU executed by them and the Licensee in 2005, could prejudice their fair consideration of whatever alternatives are presented. Assurance on this point would be welcome.

V. MOTION SEEKING LEAVE TO FILE THIS REPLY, IF NECESSARY

Under the Commission's regulations, parties may seek permission to file replies that would otherwise be prohibited, where there is good cause shown or where the information provided would assist the Commission in its decision-making process.⁴ As

⁴ Rule 101(e), 18 C.F.R. § 385.101(e). *See, e.g., Tenn. Gas Pipeline Co. v. Columbia Gulf Transmission Co.*, 116 F.E.R.C. ¶ 61,065, P 12 (2006) and *ISO New England, Inc.*, 118 F.E.R.C. ¶ 61,157, P 11 (where the Commission in each instance accepted an answer otherwise barred because the information assisted its decision-making process.)

noted above, this filing is occasioned by new relief sought by PG&E in the filing to which we reply. But even if that new relief were not sought, the assertions made in those filings are substantially off the mark and misleading, and the Commission is entitled to be aware of the errors, so that it does not rely upon them. It is also clear that the filing should not prejudice any of the parties involved, by delaying the proceeding.⁵ In this case, the proceeding is at an early stage and the filing made by ADU and Tetrick Ranch does not prejudice any party. Furthermore, it is critical to the efficacy of the Commission's own process that public participation be fair and the record is complete. This is especially the case here, where the license for two long-established hydro plants is proposed to be surrendered and decommissioned with dramatic, substantial and costly impacts upon individuals and communities in the Project areas. The costs of accomplishing the Licensee's proposal are substantial as well; at least \$14.5-million estimated without consideration of the potential mitigation measures that might be proposed in addition to what is now proposed by the Licensee, and in addition, the loss of recreation in Shasta County, and the additional costs to replace the 5 MW of renewable energy in California.

Tetrick Ranch and ADU believe the process at FERC can be made to work and that their suggestions and observations, including their own experience to date, with the location, the projects and the parties, may be of assistance to the Commission and its Staff. Accordingly, Tetrick Ranch and the ADU believe they have made an adequate showing of good cause and request that this filing be accepted and included in the record of this proceeding.

⁵ *N. Natural Gas Co.*, 113 F.E.R.C. ¶ 61,310, P 11 n.7 (2005).

Respectfully submitted,

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August 25, 2009

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 25th day of August, 2009.

/s/ Frances E. Francis

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