

151 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Sabine River Authority of Texas
Sabine River Authority, State of Louisiana

Project No. 2305-044

ORDER ON REHEARING AND CLARIFICATION

(Issued April 16, 2015)

1. On August 29, 2014, Commission staff issued a new license (August 29 Order) to the Sabine River Authority of Texas and Sabine River Authority, State of Louisiana (collectively, the Authorities) to continue operation and maintenance of the 82.3-megawatt (MW) Toledo Bend Hydroelectric Project No. 2305 (Toledo Bend Project or project).¹ The project is located on the Sabine River on the Texas-Louisiana border in Panola, Shelby, Sabine, and Newton Counties in Texas, and Desoto, Sabine, and Vernon Parishes in Louisiana. On September 29, 2014, the Authorities filed a request for clarification and rehearing of the August 29 Order.

2. We grant in part and deny in part the Authorities' request for clarification and rehearing, as discussed below.

I. Background

3. The Toledo Bend Project was originally licensed by the Federal Power Commission on October 14, 1963.² The original license expired on September 30, 2013, and the Authorities operated the project under an annual license until the August 29 Order.

¹ *Sabine River Auth. of Texas and Sabine River Auth., State of Louisiana*, 148 FERC ¶ 62,171 (2014).

² *Sabine River Auth. of Texas and Sabine River Auth., State of Louisiana*, 30 F.P.C. 1009 (1963).

4. The project includes a reservoir, a dam, saddle dikes, a powerhouse containing two 40.5-MW Kaplan turbines and associated intake and tailrace channels, a spillway and associated spillway channel, and a transmission line. The reservoir shoreline is approximately 1,130 miles, while the entire project boundary encompasses approximately 204,097 acres of land, including 3,650 acres of federal land in the Sabine National Forest and 147 acres in the Indian Mounds Wilderness Area. Toledo Bend Reservoir is a major site for recreation, including fishing, swimming, camping, hiking, and sightseeing.³ The reservoir has an active storage capacity of 4,477,000 acre-feet of water at a normal maximum elevation of 172 feet above mean sea level (msl) and provides a dependable firm yield of 2,086,000 acre-feet of water per year. The project was designed to generate hydropower between a minimum reservoir elevation of 162.2 feet and a maximum reservoir elevation of 172 feet, and has historically been operated within that range.⁴

5. The waters of the Sabine River Basin are allocated between Texas and Louisiana according to the Sabine River Compact (Compact), an interstate compact between the states approved by Congress in 1954.⁵ The project was developed and licensed primarily as a water supply facility in accordance with the Compact, with recreation and power generation as secondary uses. There are currently eighteen intakes on the reservoir, eleven intakes upstream of the reservoir, and three intakes downstream of the reservoir, which enable the Authorities to provide water to a variety of customers.

6. The Authorities filed an application for a new license on September 30, 2011. The new license application included a proposal to install a new 1.3-megawatt (MW) horizontal Francis minimum flow turbine-generator downstream of the northernmost spillway. The proposed new facilities will increase the project's total generating capacity from 81 MW to 82.3 MW.

7. On August 1, 2012, the Authorities filed an Offer of Settlement (settlement agreement) that included two agreements: (1) a Relicensing Settlement Agreement for the Sabine National Forest, signed by the Authorities and the Forest Service; and (2) a

³ See Commission Staff, *Final Environmental Impact Statement (FEIS), Toledo Bend Hydroelectric Project No. 2305* (December 2013) at 137. The reservoir receives an estimated 200,000 recreation days (visits) of daytime use and 60,000 recreational days of nighttime use annually, with a peak weekend average of 10,000 recreation days. *Id.* There are 28 public recreation sites at the reservoir. *Id.* at 133-35.

⁴ See *Sabine River Auth. of Texas & Sabine River Auth., State of Louisiana*, 39 F.P.C. 215 (1968).

⁵ Sabine River Compact, Pub. L. No. 83-578, 68 Stat. 690 (1954).

Relicensing Settlement Agreement for Lower Sabine River Water Quality and Aquatic Resources, signed by the Authorities, the U.S. Fish and Wildlife Service, the National Marine Fisheries Services, the Texas Commission on Environmental Quality, the Texas Parks and Wildlife Department, the Texas Water Development Board, and the Louisiana Department of Wildlife and Fisheries (Aquatic Resources Agreement). The Authorities requested that the Commission approve the settlement agreements, which they stated constituted their relicensing proposal, and that the Commission include in the license, without modification, proposed license articles set forth in the settlement agreement.

8. In the new license, Commission staff included a number of measures to protect reservoir resources and enhance recreation, most of which mirrored the proposed license articles, but some of which modified the measures included in the settlement agreement. In its rehearing request, the Authorities object to components of articles 201, 206, 301, 302, 405, and 406. Articles 201 and 206 deal with the payment of annual charges, including increased charges based on the addition of the new turbine. Articles 301 and 302 set forth pre-construction requirements. Article 405 requires implementation of seasonal powerhouse operations to enhance downstream aquatic habitat and improve recreational boating opportunities. Article 406 requires the Authorities, with certain enumerated exceptions, to maintain the project reservoir's surface elevation between 168 and 172 feet msl. The license also includes, as Appendix B, fishway prescriptions filed by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

II. Discussion

9. On rehearing, the Authorities request the Commission to (1) revise articles 201 and 206 to require payment of increased annual charges upon the commencement of operation—rather than construction—of the new minimum flow generating facility; (2) clarify that Article 301 requires submission of contract plans and specifications only for construction of the new minimum flow generating facility; (3) clarify that Article 302 requires the submission of cofferdam and deep excavation construction drawings only for major construction projects and not for routine maintenance; (4) revise the seasonal powerhouse operations set forth in Article 405 to reflect the negotiated terms of the Aquatic Resources Agreement; (5) revise Article 406 to clarify that it establishes a “power pool” applicable only to hydroelectric operations, and not an absolute reservoir level requirement; and (6) restore language in the fishway prescription to reflect the prescription as set forth in the Aquatic Resources Agreement and prescriptions submitted under FPA Section 18. We discuss these issues below.

A. Revision of Articles 201 and 206

10. Article 201 requires the Authorities, pursuant to section 10(e) of the Federal Power Act (FPA), to pay annual charges to the Commission beginning the first day of the month in which the license is issued. The article states that, for the purpose of calculating

the annual charges, the authorized installed capacity will be 81,000 kilowatts until the date construction of the new capacity begins, at which point the charge will be based on an authorized installed capacity of 82,300 kilowatts. Article 206 reiterates that the Commission will use the date that construction of the new capacity begins to revise the annual charges. The Authorities assert that the increased annual charges should begin upon commencement of the operation of the new minimum flow generating facility, rather than upon commencement of construction of the facility. They are correct.

11. Under section 11.1(c)(5) of the Commission's regulations, licensees other than state and municipalities must commence payment for new authorized capacity "on the date of commencement of construction of such new capacity."⁶ Under section 11.1(d)(6), which applies to state and municipal licensees, annual charges "commence on the date of commencement of project operations."⁷ Given that the Authorities are state entities, the latter provision applies here, and we will grant rehearing and revise Articles 201 and 206 to provide that increased annual charges will begin on the date of commencement of operations of the new turbine.⁸

B. Modification of Articles 301 and 302

12. Articles 301 and 302 require the Authorities to submit construction plans and drawings prior to beginning construction. Article 301 dictates that the Authorities must submit contract plans and specifications "[a]t least 60 days prior to the start of any

⁶ 18 C.F.R. § 11.1(c) (2014).

⁷ 18 C.F.R. § 11.1(d) (2014).

⁸ On March 20, 2015, the Division of Hydropower Administration and Compliance granted the Authorities' request for an exemption from payment of annual charges for use of federal lands, pursuant to Pub. L. 113-291, signed into law on December 19, 2014. *See Sabine River Auth. of Texas & Sabine River Auth., State of Louisiana*, 150 FERC ¶ 62,184 (2015). Section 3088 of Pub. L. 113-291 exempted the Toledo Bend Hydroelectric Project from paying annual charges under section 10(e)(1) of the FPA for use of federal land within the Sabine National Forest and Indian Mounds Wilderness Area. The March 20 order revised part (b) of Article 201 to reflect the exemption from payment of annual charges for use of 3,797 acres of federal land. The March 20 order also added part (c) to Article 201 to reflect section 24 lands affected by the project. However, section 3088 of Pub. L. 113-291 states that federal land within the Sabine National Forest shall not be considered land of the United States for purposes of section 24. Therefore, in ordering paragraph (B) of this order we remove subparts (b) and (c) of Article 201 which are unnecessary.

construction.” Article 302 requires submission of construction drawings 30 days prior to the start of construction, “[s]hould construction require cofferdams or deep excavations.”

13. The Authorities are concerned that Articles 301 and 302 are overbroad and will potentially require them to submit plans and supporting design documents for minor construction activities unrelated to the minimum flow generating facility. In particular, the Authorities object to the language “any construction” in Article 301 and “construction” in Article 302. The Authorities believe this broad language could be interpreted to require them to submit contract plans and specifications for projects such as end-of-life replacement of recreation facilities, authorized non-project uses of project lands, dredging of recreational boat channels, and construction of bulkheads and seawalls. They argue that such an interpretation would be unnecessarily burdensome to both the Authorities and Commission staff.

14. The Authorities contend that their original license did not contain any comparable obligation and, moreover, that recent Commission license orders have taken a narrower approach, requiring submission of plans only for the construction of new project works. In support of this assertion, the Authorities cite three license orders that specify either the project name or the new facility being constructed.⁹ Additionally, the Authorities argue that the language of Articles 301 and 302 conflicts with the Standard Land Use article, Article 415, which gives the licensee the authority to grant permission for certain types of use and occupancy of project lands and waters.

15. We disagree and will not revise Articles 301 and 302. Articles 301 and 302 are standard articles designed to give the Commission’s Division of Dam Safety and Inspections the ability to examine plans for any significant construction that takes place during a license term, not just the specific measures that are envisioned when a license is issued. In the absence of these articles, licensees might undertake construction without Commission staff first determining that the proposed action is safe and will not adversely impact project purposes and project works. However, we agree with the Authorities that Articles 301 and 302 are not intended to require, as a general matter, extensive documentation and Commission approval of all construction activities.¹⁰ The Authorities

⁹ Request for Rehearing at 36 (citing *Sacramento Mun. Util. Dist.*, 148 FERC ¶ 62,070 (2014); *Eric Jacobson*, 128 FERC ¶ 62,159 (2009); *PPL Montana*, 121 FERC ¶ 62,198 (2007)).

¹⁰ In addition, we note with respect to Article 302 that—contrary to the Authorities’ concern that the article would be unduly burdensome because it would require the filing of construction drawings regarding matters such as dredging of recreational boat channels and the constructions of bulkheads and seawalls—construction involving cofferdams or deep excavation is typically not a minor, routine matter, and
(continued ...)

can contact Commission staff at any time to determine what, if any, documentation staff requires with respect to proposed activities.¹¹

16. Furthermore, the requirements of Articles 301 and 302 do not conflict with the authority granted to the Authorities under Article 415. Article 415 gives the Authorities the power to convey interests and grant permission, without prior Commission approval, for certain types of use and occupancy of project lands and waters, as well as the responsibility to supervise such uses and occupancies. Article 415 requires that “the licensees must also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article.” That article does not envision major construction by the licensee.

C. Revision of Article 405

17. Article 405 requires the Authorities to implement seasonal powerhouse operations to enhance downstream aquatic resources and improve recreational boating opportunities.¹² The Authorities argue that the license’s modifications to the Aquatic Resources Agreement’s proposed articles are unsupported by evidence in the record and that the Commission failed to analyze the effects of the modifications on downstream fisheries, recreation, and water supply, in violation of the National Environmental Policy Act (NEPA).

therefore merits review by Commission staff in order to ensure public safety.

¹¹ To the extent that the Authorities have found instances in which language in particular licenses differs from that in the license at hand, those instances are not consistent with our general policy and do not dictate that we revise Articles 301 and 302 here. Moreover, other recent cases contain language similar to that used here. *See, e.g., Andrew Peklo III*, 149 FERC ¶ 61,037, at Articles 301 and 302 (2014); *BOST3 Hydroelectric LLC*, 147 FERC ¶ 62,035, at Articles 301 and 302 (2014); *Oswegatchie River Hydroelectric Project*, 141 FERC ¶ 62,125, at Articles 301 and 302 (2012).

¹² Request for Rehearing at 48.

1. Modification of 1,450 Acre-Feet Limit of Flow Releases from Powerhouse under Article 405(b)

18. Article 405(b) contains provisions for weekend operations during March through June. Specifically, “[o]n each Saturday and Sunday in March and April, the licensees must provide a minimum volume of 1,450 acre-feet/day of flow releases from the powerhouse to enhance downstream aquatic habitat. Such flows will be releases in the range of 4,000 to 7,000 cfs, after approval of the weekend operations plan by the Commission under this article.”

19. The Authorities object to the insertion of a “minimum” requirement and the deletion of language from the proposed article providing that “[t]he licensees shall not be required to provide powerhouse flow releases greater than 1,450 acre feet/day, but may provide greater weekend powerhouse flows at their discretion.” The Authorities argue that the insertion of a minimum requirement is arbitrary and capricious because the Commission did not analyze the impact of flows greater than 1,450 acre feet/day. The Authorities assert that 1,450 acre feet/day strikes the appropriate balance between water supply and enhancement of aquatic resources and that there is no evidence in the record demonstrating that additional releases would protect or enhance aquatic resources.

20. We do not consider the language in article 405(b) to be a significant departure from the proposed articles. It is standard Commission practice to impose minimum flow requirements in licenses, using language similar to that in Article 405(b).¹³ These requirements establish the licensee’s obligations under the license. The Commission does not anticipate requiring weekend releases greater than 1,450 acre-feet/day; however, we do not believe the license should preclude the Commission from requiring greater flows in the event that changed circumstances, such as the need to protect environmental resources, necessitate doing so. However, the Commission cannot simply order the licensee to increase minimum flows. If the Commission in the future sees a need to alter

¹³ The term “minimum flow” is routinely used in licenses.

minimum flows, it can only do so to the extent that it has retained authority to reopen the license under specified circumstances,¹⁴ and it must first provide the licensee and other affected entities with notice and the opportunity for hearing.¹⁵ Moreover, in such a case, the Commission would have to conduct an analysis of any environmental impacts of changes it proposed in project operations, so the Authorities' concerns regarding such analyses are premature. It has never been Commission practice to include license provisions, like that proposed by the Authorities, which appear to guarantee that minimum flow or other license requirements can in no circumstances be altered. The Commission's FPA responsibility to protect all aspects of the public interest precludes us from providing concrete guarantees such as the Authorities seek.

21. The insertion of the word "minimum" into article 405(b) is also intended to convey that the Authorities may release greater volumes of water at their discretion, consistent with the settlement agreement. In order to clarify this intent, we will add a portion of the language that the Authorities request, specifying that they may provide greater weekend powerhouse flows at their discretion. The Commission believes that retaining the minimum requirement and adding this language is sufficient to eliminate any doubt surrounding the volume of weekend releases. Accordingly, Article 405(b) will be revised to read, in relevant part:

(b) Weekend Operations during March through June

March and April: On each Saturday and Sunday in March and April, the licensees must provide a minimum volume of 1,450 acre-feet/day of flow releases from the powerhouse to enhance downstream aquatic habitat. Such flows will be released in the range of 4,000 to 7,000 cfs, after approval of the weekend operations plan by the Commission under this article. The licensees may provide greater weekend powerhouse flows at their discretion.

¹⁴ For example, standard license article 15, appended to the project license, requires the license to construct and operate facilities and comply with reasonable modifications of project structures and operations to protect fish and wildlife resources. See 148 FERC ¶ 62,171 at 64,596.

¹⁵ FPA section 6, 16 U.S.C. § 799 (2012), provides that licenses may be altered only upon mutual agreement between the licensee and the Commission after 30 days' public notice.

2. Modification of Commission's Reservation of Authority under Article 405(c)

22. Article 405(c) requires the Authorities to conduct flow testing prior to implementing weekend operations and provides information on what must be included in the weekend operations plan. The article requires the Authorities to cooperate with resource agencies, consistent with Appendix D to the Aquatic Resources Agreement, *Flow Testing to Optimize Weekend Operations Benefits*. The Authorities have no objection to the first paragraph of subsection (c) of article 405, but are concerned about the language of the second paragraph, which provides:

Not later than 4 months prior to initiating weekend operations under this article, the licensees must file with the Commission for approval, a weekend operations plan for implementing weekend operations as provided under this article. The plan must include a provision specifying that the project's powerhouse operations under the plan will not require the licensees to operate either turbine-generator unit at flows considered by the licensees to be unsafe, potentially damaging to the unit, or at very low efficiency. The plan must also specify that the licensees must support any such determination with appropriate documentation of the unfavorable conditions. The Commission reserves the right, based on review of the licensees' documentation or other information, to require the licensees to initiate the weekend operations under this article during unfavorable conditions.

23. The Authorities are primarily concerned that the Commission's reservation of authority in the last sentence could be interpreted to require the Authorities to provide flows in circumstances they conclude to be unsafe or potentially damaging to project facilities. The Authorities believe the reservation of authority upsets the settlement provisions that expressly recognize the performance limitations of the turbine generator units. The Authorities further argue that any determination of "unfavorable conditions" could be addressed in the plan submitted for Commission approval under Article 405(c).

24. The Commission has no intention to require the Authorities to operate the turbines at flows that are unsafe, potentially damaging to the unit, or at very low efficiency. However, as currently drafted, Article 405(c) does not require the Authorities to define "unfavorable conditions" in the weekend operations plan. Instead, the plan must "include a provision specifying that the project's powerhouse operations under the plan will not require the licensees to operate either turbine-generator unit at flows considered by the licensees to be unsafe, potentially damaging to the unit, or at very low efficiency." Thus, without the Commission's reservation of authority, the Authorities would theoretically be able to suspend weekend operations at their discretion. The Commission is not willing to convey blanket authority to the Authorities to cease weekend operations without

Commission oversight. The Commission can allow a reasonable amount of flexibility, but must retain the ultimate authority to ensure that the terms of the license are followed and that the public interest is protected.

25. In order to more accurately reflect the Commission's intent, and to clarify the article's requirements, we will revise Article 405(c) to provide more detail about the required weekend operations plan. We will delete the last sentence of the second paragraph of Article 405(c), so that it does not appear that the Commission will be micromanaging each decision by the Authorities to cease weekend operations. Nonetheless, Commission staff has the ability to review any cessation of weekend operations and to determine whether any such cessations were appropriate.

26. As stated in the revised Article 405(c), the Authorities must define in the weekend operations plan the unfavorable conditions under which operations will be suspended. The Commission will review the plan, and maintain the authority to make changes to it. The Article still provides the Authorities with the discretion to temporarily suspend or modify operations due to operating emergencies or for short periods of time (not to exceed two weeks) upon mutual agreement with the resource agencies. We believe these revisions strike the appropriate balance between Commission oversight and licensee discretion.

3. Deletion of 10-Year Cycle for Review

27. The proposed article for the weekend operations plan contained in the Aquatic Resources Settlement included a 10-year limitation on revisions to the flow rate and duration of weekend releases. In issuing the license, the Commission did not include such a limitation on revisions. Arguing that the settlement language was agreed to by the parties and that the Commission has not analyzed the environmental impacts of changing the flow rate more frequently than once every 10 years, the Authorities request the Commission to include the following paragraph from the proposed article into Article 405(c):

Subject to the total 1,450 acre-feet daily volume under this article, which will remain unchanged during the license term, the flow rate and duration of weekend releases in the Commission-approved plan are subject to change, but no more frequently than once every ten years. If, after ten years of implementation, the resource agencies elect to reconduct flow testing and, based on such flow testing, seek to adjust the Commission-approved plan, the licensees shall consult with the resource agencies as provided in the Flow Testing to Optimize Weekend Operations Benefits. Any proposed changes to the Weekend Operations Plan must be approved by the Commission.

28. We recognize that the resource agencies agreed to a 10-year cycle for review and that it is unlikely that changes will need to be made more frequently; however, we will not preclude resource agencies from requesting changes before that time if they deem it necessary,¹⁶ or limit our authority to require changes if we deem them necessary. Removal of the 10-year limitation has no NEPA implications, because any potential impacts resulting from changes to the plan would be properly analyzed at such time as a change is considered.¹⁷ Removing language that precludes the Commission from considering updates to the weekend operations before ten years have passed has no effect on downstream fisheries or water supply.¹⁸

29. In addition to the matters discussed above, the revised Article 405 proposed by the Authorities raises two minor issues.

30. The Authorities do not object to Article 405(a), which addresses powerhouse releases during seasonal peaking operations. However, without explanation, the revised version of the article proposed in the request for rehearing deletes the word “or” between two instances in which the Authorities are excused from the otherwise applicable limitation on peaking operations. Given the lack of explanation of why this is a concern, and because the “or” appears to distinguish between two disparate scenarios, we will not change this part of Article 405.¹⁹

31. The proposed Article 405(c) revision in the rehearing request also includes, again without explanation, removal of language in the third paragraph that would require the Authorities to consult with American Whitewater and the Sabine Whitewater Club (as well as with the relevant resource agencies) in developing a weekend operations plan.²⁰

¹⁶ As a general matter, the Commission does not approve hydropower settlement provisions that purport to preclude parties from making future filings. *See, e.g., Consumers Energy Company*, 95 FERC ¶ 61,394 at p. 62,467 (2001) (declining to include in license language barring licensee from filing license amendments).

¹⁷ Indeed, it would not be possible for us to consider the environmental implications of unspecified changes to project operations.

¹⁸ We also decline to insert in the license the proposed statement that the 1,450 acre-feet daily volume referenced in Article 405 “will remain unchanged during the license term.” Again, the Authorities seek absolute certainty that is inconsistent with our need to retain enough flexibility to deal with future events that impact the public interest.

¹⁹ Request for Rehearing at 46.

²⁰ *Id.* at 48.

We decline to make the requested change because of the Authorities' lack of explanation and because it seems reasonable to require the licensee to consult with two non-governmental organizations whose members have interests in weekend operations.

D. Revision of Article 406

32. The Authorities object to Article 406 of the license, which would require that the licensee maintain the surface elevation of the Toledo Bend Reservoir between 168 feet and 172 feet msl. They assert that meeting all project obligations often entails periods when reservoir levels drop significantly below 168 feet msl,²¹ that the article does not specify how the Authorities should manage the reservoir in the event of drought,²² and that Article 406 as drafted does not accommodate present or future water supply operations.²³ The Authorities also contend that there is no evidence in the record supporting the reservoir elevation requirements or showing that the specified levels would protect recreation or the reservoir shoreline "because the Commission did not require the [licensees] to study the effects of any proposed changes to project reservoir operations."²⁴ They argue that the Commission did not analyze the impact of required reservoir elevation levels on present and future water supply operations, downstream flood control, or fish spawning.²⁵

²¹ *Id.* at 50.

²² *Id.* at 52.

²³ *Id.* at 51, 68-73. The Authorities also argue that the reservoir level requirement is so broad that it abrogates Congress' intent under the Compact, in that it asserts control over the resources that the Compact delegated to Louisiana and Texas. However, a license issued under the FPA does not dictate water allocations or grant water rights. *See* FPA section 27, 16 U.S.C. § 821 (2012). Contrary to the Authorities' argument, a reservoir level requirement in and of itself does not interfere with water allocations under the Compact. As the Authorities recognize, the Compact does not affect the Commission's authority over the waters of the Sabine River Basin. *See* Article X of the Compact, 68 Stat. 690, 697 (1954). ("Nothing in this Compact shall be construed as affecting, in any manner, any present or future rights or powers of the United States, its agencies, or instrumentalities in, to and over the waters of the Sabine River Basin.")

²⁴ Request for Rehearing at 53-59.

²⁵ *Id.* at 59-65.

33. We agree with the Authorities that there is limited information in the record to support a requirement for an absolute minimum reservoir elevation of 168 feet msl. While it may be true, as the Authorities state, that the Commission did not require them to study, during the relicensing process, the impacts of varying lake levels on specific environmental resources, it is also the case that the Authorities themselves and the other parties to the settlement chose not to study the subject, and provided little information on this issue in either the relicense application or explanatory statement accompanying the settlement.²⁶

34. We fully recognize the importance of Toledo Bend Reservoir for water supply, and have no intent to interfere unduly with water supply operations. At the same time, we recognize that the reservoir has other purposes, including protection of fish and wildlife,²⁷ as well as boating, fishing, and other recreation activities.²⁸ In fact, in 2003

²⁶ The Authorities separately argue that the Commission erred in not accepting the settlement agreement, which they state reflects the intent of the settling parties. Request for Rehearing at 74-77. However, the Commission must independently review settlement agreements to ensure they are consistent with the public interest. *See Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270, at P 4 (2006) (“[I]n reviewing settlements, the Commission looks not only to the wishes of the settling parties, but also at the greater public interest, and whether settlement proposals meet the [FPA’s] comprehensive development/equal consideration standard.”). Here, although the Authorities and the other settling parties appear to have focused on the water supply capabilities of the Toledo Bend Reservoir, the Commission, as discussed above, must take a broader view and consider all aspects of the public interest.

²⁷ *See* FEIS at 66-73, 107-18.

²⁸ *See* FEIS at 132-40. *See, e.g.,* http://www.toledo-bend.com/toledo_bend/index.asp?request=tolbendlake (accessed Mar. 26, 2015) (“Toledo Bend Reservoir is the largest man made body of water in the south and the fifth largest in surface acres in the United States, . . . [which] offers an almost unlimited opportunity for recreational development and is a major element in serving the growing demand for water oriented outdoor recreation. Both private and public facilities are available for swimming, boating, picnicking, fishing, camping, hunting and sightseeing.”).

the Commission addressed the issue of water levels at Toledo Bend and their effect on a variety of resources and concluded that the current reservoir operations were sufficient to meet the overall public recreation needs of the area.²⁹

35. The FPA requires the Commission to give equal consideration (although not necessarily equal treatment) to not only water supply, but also power development; recreation; flood control; the protection, mitigation of damages to, and enhancement of, fish and wildlife; and the preservation of other aspects of environmental quality.³⁰ To the extent that the Authorities have elected to use the reservoir for hydroelectric purposes, they become subject to the FPA's requirements. As we explained in similar circumstances in *East Texas Cooperative, Inc.*,³¹ while we respect the importance of water supply, the Commission is bound by its statutory obligations under the FPA to promote the greatest public interest possible at each project. We cannot give the Authorities the blanket authority they seek to operate the reservoir, based not only on current water supply contracts, but also based on any agreements they may enter into the future. We must establish an operating regime for the reservoir that will give appropriate weight to all public interest considerations.

36. Accordingly, we are revising Article 406 by establishing a normal reservoir level range for hydroelectric power production between 168 and 172 feet msl, with a minimum reservoir level elevation of 162.2 feet msl. Article 406 allows the Authorities to operate outside the normal operating range, but no lower than 162.2 feet msl, during storm or high water events, as a result of reservoir drawdowns for inspection of public works or maintenance, to meet continuous flow release requirements at the spillway, to avoid an insufficient supply of firm or non-interruptible power to the licensees' wholesale customers, and to satisfy downstream water supply or other obligations. As stated in the Final Environmental Impact Statement (FEIS), and acknowledged by the Authorities, current reservoir operations have successfully balanced power generation, environmental protection, and recreational use of the reservoir.³² Only rarely has the reservoir elevation

²⁹ See Letter from J. Mark Robinson, Director, Office of Energy Projects, November 24, 2003, *Final Analysis of Required Reservoir Level Change, see Sabine River Auth. of Texas, Sabine River Auth. of Louisiana*, 106 FERC ¶ 61,173 (2004) (order rejecting request for rehearing and finding that Commission staff's final analysis on reservoir level changes was reasonable).

³⁰ See FPA sections 4(e), 16 U.S.C. § 797(e) (2012), and 10(a)(1), 16 U.S.C. § 808(a)(1) (2012).

³¹ 140 FERC ¶ 61,228 at P 12 (2012).

³² See FEIS at 86-87.

fallen below 162.2 feet msl since the Project was licensed in 1963; the lowest elevation was 159.51 feet in 2011.³³ We believe that a minimum reservoir level of 162.2 feet msl appropriately balances the Authorities' stated need for flexibility in maintaining the reservoir and the Commission's public interest obligations under the FPA.

37. The Authorities object to a minimum reservoir elevation requirement because it does not allow reservoir levels to drop below the minimum during a drought.³⁴ To address this concern, we are adding to the license Article 416, which requires the Authorities to file, for Commission approval, a drought contingency plan, developed in consultation with stakeholders. This will allow the Authorities to develop water conservation and reservoir public access measures to be put in place in the event of drought.

38. The Authorities, as with the comparable rights held by other licensees, may use the water resources they control, provided that those uses are consistent with the terms of the license. The combination of the 162.2 feet msl minimum elevation and the drought contingency plan should give the Authorities the ability to meet current water supply needs. The Authorities may enter into future water supply contracts, subject to license requirements including maintenance of the required lake level and satisfaction of minimum flow obligations. However, we note that if the Authorities wish to engage in future actions that will affect their ability to comply with their license, such as the incurrence of substantial water supply obligations, they must seek permission from the Commission, at which time the Commission will examine the impacts of their proposal on project purposes.

E. Correction of Section 18 Prescription

39. The Authorities request clarification that the omission of the phrase "deployed, based on eel capture rates" from section 6 of the Upstream Passage Plan included in the fishway prescription attached to the license as Appendix B was inadvertent. The Authorities are correct, and, accordingly, Appendix B, section 6 is revised to read as follows:

³³ See FEIS at 42-43 (Table 3-2); see also Letter from J. Mark Robinson, Director, Office of Energy Projects, November 24, 2003, *Final Analysis of Required Reservoir Level Change* (noting that during Brown & Root's 28-year (1969-1997) study, the reservoir elevation varied from a low of 164.77 feet msl to a high of 173.73 feet msl; prior to 1986, the reservoir reached a low elevation of 165.90 feet msl in 1977).

³⁴ Request for Rehearing at 65-66.

Beginning with the 5th annual report, and every fifth year thereafter, the annual report will address whether to reduce or increase the number of ramp traps deployed, based on eel capture rates.

The Commission orders:

- (A) The Authorities' request for rehearing and clarification of the Director's August 29, 2014 order issuing an original license for the Toledo Bend Project is granted and clarified to the extent set forth in this order and is otherwise denied.
- (B) Article 201 of the license issued August 29, 2014 for Project No. 2305 is revised to read:

Article 201. Administrative Annual Charges. The licensee must pay the United States annual charges, effective the first day of the month in which the license is issued, and as determined in accordance with provisions of the Commission's regulations in effect from time to time, for the purpose of reimbursing the United States for the cost of administration of Part I of the Federal Power Act. The authorized installed capacity for that purpose is 81,000 kilowatts, until the operation of the new capacity authorized by this license, after which time the authorized installed capacity for that purpose is 82,300 kilowatts.

- (C) Article 206 of the license issued August 29, 2014 for Project No. 2305 is revised to read:

Article 206. Administrative Annual Charge Notification. Within 30 days of operation of new project facilities as authorized in this order, the licensees must file with the Commission notification of the date of project operation. The Commission will use the start of project operation date to revise the project's annual charges under Article 201.

- (D) Article 405 of the license issued August 29, 2014 for Project No. 2305 is revised to read:

Article 405. Seasonal Powerhouse Operations. Upon the earlier of: (1) the scheduled April 30, 2018 expiration of the current power sales agreement; or (2) the effective date of any new or extended power sales agreement, the licensees must implement seasonal powerhouse operations to enhance downstream aquatic resources and improve recreational boating opportunities as specified by the following components.

(a) *Powerhouse Releases during Seasonal Peaking Operations*

During the months of March, April, May, and June, the licensees must limit the maximum powerhouse flow during peaking operations at the project to 12,000 cubic feet per second (cfs). This limitation on peaking operations shall not apply to: (1) any call from either the Midcontinent Independent System Operator (MISO) or the Southwest Power Pool (SPP) on the portion of the project's generation capacity that is held in reserve, as spinning or non-spinning reserve, or is needed to respond to unanticipated changes in scheduled system generation; or (2) any emergency call on power from either MISO or SPP that requires the licensees to respond to an unexpected transmission system upset or anomaly, including such issues as congestion, frequency or voltage anomalies, or grid disturbances, including brown-outs or black-outs.

(b) Weekend Operations during March through June

March and April: On each Saturday and Sunday in March and April, the licensees must provide a minimum volume of 1,450 acre-feet/day of flow releases from the powerhouse to enhance downstream aquatic habitat. Such flows will be released in the range of 4,000 to 7,000 cfs, after approval of the weekend operations plan by the Commission under this article. The licensees may provide greater weekend powerhouse flows at their discretion.

May and June: On each Saturday and Sunday in May and June, the March and April weekend operations scenario described above must apply if both the following conditions are met:

(1) The mean calculated inflow to the reservoir for the first 6 months of the current water year (October 1 to March 31) is greater than 80 percent of the mean calculated inflow of the water year for the same six-month period for the most recent 38-year period of record. The current water year must not be included in the most recent 38-year period of record.

(2) The licensees are able to safely operate at least one turbine-generator unit within its normal operating range of 4,000 to 7,000 cfs.

For purposes of the annual calculation of the inflow to the reservoir in (1) above, the licensees must perform such calculation in substantial conformance with the methods provided in section 3 of the final report entitled *Toledo Bend Project, Operations Model, Operations/Verification Report* dated October 2010 (filed on June 18, 2011). By April 10 of each year, the licensees must submit the required calculation described in (1) above and supporting documentation to the U.S. Geological Survey (USGS), U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), Texas Commission on Environmental Quality (Texas CEQ), Texas Parks and Wildlife Department (Texas Parks and Wildlife),

Texas Water Development Board (Texas Water Board), Louisiana Department of Environmental Quality (Louisiana DEQ), and Louisiana Department of Wildlife and Fisheries (Louisiana Wildlife and Fisheries) (collectively, resource agencies) for review and comment. The licensees must allow 10 days for the resource agencies to comment on the calculation and supporting documentation. No later than April 25, the licensees must file with the Commission their May/June weekend flow schedule and any comments received from the resource agencies.

Each tenth year following license issuance, the licensees must evaluate the frequency of May and June weekend powerhouse operations. If this evaluation demonstrates that weekend powerhouse operations in May and June occurred in fewer than 7 years of the prior 10-year period, the licensees must propose to adjust the 80-percent criterion described in (1) above, such that weekend powerhouse operations in May and June are expected to occur in approximately two-thirds of the years over the next 10-year period.

Any proposed adjustment to the criterion for triggering weekend powerhouse operations must be filed with the Commission for approval.

Prior to filing with the Commission, the licensees must provide any proposed adjustments to the criterion for triggering weekend powerhouse operations to the resource agencies for review and comment. The licensees must allow a minimum of 30 days for the resource agencies to comment and make recommendations before filing the proposal with the Commission. The licensees must include with the proposal filed with the Commission documentation of consultation, copies of comments and recommendations from the resource agencies, and specific descriptions of how the resource agencies' recommendations are accommodated by the proposal. If the licensees do not adopt a recommendation, the filing must include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed criterion for triggering weekend powerhouse operations. Implementation of the criterion for triggering powerhouse operations must not begin until the licensee is notified by the Commission that the proposal is approved. Upon Commission approval, the licensees must implement the proposal, including any changes required by the Commission.

(c) Flow Testing to Establish Weekend Operations and Weekend Operations Plan

Prior to implementing the weekend powerhouse operations under this article, the licensees must cooperate with the resource agencies' monitoring of flow conditions and hydraulic parameters on the lower Sabine River downstream of Toledo Bend dam. The licensees' obligations related to cooperating with the resource agencies on their monitoring and evaluation program must be consistent with the *Flow Testing to Establish Weekend Operations Benefits* contained in Appendix D to the Aquatic Resources Agreement filed on August 1, 2012.

Not later than 4 months prior to initiating weekend operations under this article, the licensees must file with the Commission for approval a weekend operations plan for implementing weekend operations as provided under this article. The weekend operations plan must be developed after consultation with the resource agencies. The licensees must consult with American Whitewater and Sabine Whitewater Club regarding the scheduling and timing of the weekend releases. The licensees must allow a minimum of 45 days for the resource agencies and other entities to comment and make recommendations before filing the plan with the Commission. The licensees must include with the plan documentation of consultation with the resource agencies and other entities, copies of comments and recommendations from the resource agencies and other entities, and specific descriptions of how the resource agencies' and other entities' recommendations are accommodated by the plan. If the licensees do not adopt a recommendation, the filing must include the licensees' reasons based on project specific information.

The weekend operations plan must include a provision specifying that the licensees may temporarily suspend operation of either turbine-generator unit when flows create conditions that are unsafe or potentially damaging to the unit, or when the turbines can only be operated at very low efficiency. The licensees must define in detail, and submit documentation to support, the flow levels they determine to create such unfavorable conditions. The flows required under the weekend operations plan may also be temporarily suspended or modified: (1) due to operating emergencies beyond the reasonable control of the licensees; or (2) for short periods of time, not to exceed two weeks, upon mutual agreement with the resource agencies.

The Commission reserves the right to require changes to the proposed plan. Implementation of the plan must not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensees must implement the plan, including any changes required by the Commission.

- (E) Article 406 of the license issued August 29, 2014 for Project No. 2305 is revised to read:

Article 406. Reservoir Levels. The licensees must at all times maintain a minimum reservoir surface elevation of 162.2 feet above mean sea level (msl). When operating the reservoir for hydroelectric generation, the license must maintain the reservoir surface elevation between 168 and 172 feet msl, except that the licensees may operate the project reservoir for hydroelectric generation outside this normal operating range, but at no lower than 162.2 feet msl:

- (1) due to storm or high water events;
- (2) due to reservoir drawdown necessary for inspection of public works or maintenance as required by the Commission;
- (3) for releases to meet continuous release requirements under Article 402;
- (4) for releases to satisfy the licensees' water supply or other downstream obligations; or
- (5) to avoid an insufficient supply of firm or non-interruptible power to the licensees' wholesale customers.

The licensees must maintain a log of operations that outlines the instances in which hydroelectric power production occurred under the exceptions provided by this article.

The licensees may operate outside of the operation requirements of this article if required by operating emergencies beyond the control of the licensees and for short periods upon agreement among the licensees and Texas Parks and Wildlife Department and Louisiana Department of Wildlife and Fisheries. If the limits are so modified, the licensees must notify the Commission as soon as possible, but no later than 10 days after each such incident.

- (F) The license issued August 29, 2014 for Project No. 2305 is revised to include new Article 416:

Article 416. Drought Contingency Plan. Within 18 months of the date of this order, the licensees must file with the Commission, for approval, a drought contingency plan identifying the water conservation and reservoir public access measures that the licensees will implement during drought conditions, as defined in the plan. The plan should include: (1) the lake level that would trigger the implementation of the plan; (2) deviations, if any, to minimum releases; (3) water supply conservation measures; and (4) measures designed to maintain public recreational access to the project during the drought.

The plan must be developed after consultation with the Texas Commission

on Environmental Quality, Texas Water Development Board, Texas Parks and Wildlife Department, Louisiana Department of Environmental Quality, Louisiana Department of Wildlife and Fisheries, U.S. Fish and Wildlife Service, U.S. Forest Service-Sabine National Forest, the Authorities' water supply customers, and the Toledo Bend Citizens Advisory Committee. The licensees must include with the plan documentation of consultation. The licensees must allow a minimum of 30 days for interested stakeholders to comment and to make recommendations before filing the plan with the Commission. If the licensees do not adopt a recommendation, the filing must include an explanation of the licensees' decision, based on project-specific reasons.

The Commission reserves the right to require changes to the plan. Implementation of the plan must not begin until the licensees are notified by the Commission that the plan is approved. Upon Commission approval, the licensees must implement the plan, including any changes required by the Commission.

- (G) The third paragraph of number 6 of the Upstream Passage Plan of the Section 18 Prescriptions for Fishways, of Appendix B of the license issued August 29, 2014 for Project No. 2305 is revised to read:

Beginning with the 5th annual report, and every fifth year thereafter, the annual report will address whether to reduce or increase the number of ramp traps deployed, based on eel capture rates.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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