164 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
and Richard Glick.

Utah Board of Water Resources	Docket No. EL18-56-000
Washington County Water Conservancy District	Project No. 12966-005

ORDER DENYING PETITION FOR DECLARATORY ORDER ON JURISDICTION

(Issued September 20, 2018)

1. On December 27, 2017, the Utah Board of Water Resources (Utah Board), license applicant for hydroelectric generating facilities to be located on the proposed Lake Powell Pipeline Project No. 12966, and the Washington County Water Conservancy District, the principal beneficiary of the project, filed a petition for a declaratory order on jurisdiction, asking the Commission to find that the Commission's licensing jurisdiction under the Federal Power Act (FPA) extends to all of the project facilities identified in the license application as the "Hydro System," including not only the generating facilities but also some 89 miles of connecting water delivery pipeline. In addition to the hydropower projects, a primary purpose of the proposed project would be to deliver water from Lake Powell in Arizona 140 miles to southwestern Utah for municipal and industrial use. For the reasons discussed below, we deny the petition and clarify that the Commission would license only the hydroelectric power generating facilities.

Background

A. Project Description

2. The proposed 140-mile long Lake Powell Pipeline Project would convey up to 100,000 acre-feet of water per year from the Bureau of Reclamation's Lake Powell[1] in northwestern Arizona through a buried 69-inch diameter pipeline to southern Utah.

[1] Lake Powell, located on the Colorado River in Arizona and Utah, is part of Reclamation's Glen Canyon Dam Hydroelectric Project and accordingly is not regulated by the Commission.

Water would be pumped uphill about 50 miles to a high point within the Grand Staircase-Escalante National Monument, after which it would flow downhill for nearly 90 miles through four small inline hydroelectric turbines, each with a capacity of 1 to 1.7 megawatts (MW), a 35-MW flow-through peaking project at Hurricane Cliffs, a future phase of the Hurricane Cliffs development which would add a 300-MW pumped-storage project, and a 5-MW generating facility at the Sand Hollow reservoir, where the project terminates. As described in the license application, the "Hydro System" proposed for licensing would include not only the generating facilities but also a regulating tank at the highest point of the pipeline, the entire 89 miles of pipeline that would deliver water from the regulating tank to the generating units, and associated primary transmission lines.[2]

3. In addition to a Commission license for the hydroelectric generating facilities, the proposed Lake Powell Pipeline Project will also require permission to access and use lands and resources under the jurisdiction of three different agencies within the U.S. Department of the Interior (Interior): Bureau of Land Management (BLM), Bureau of Reclamation (Reclamation), and National Park Service.[3] Under the State of Utah's Lake Powell Pipeline Development Act of 2006, the State of Utah is the direct sponsor of the project and Utah Board is authorized to obtain the necessary license for the hydro facilities and rights-of-way for the pipeline project. The beneficiaries of the project are the Water Conservancy Districts of Washington and Kane Counties, which are required by the act to reimburse the state for the costs of developing the project. Project power would be supplied to the interstate grid to help meet summer peaking demands, regional power demands, and demands associated with the water conveyance facilities.[4]

---

[2] The first generating unit is 1.16 miles from the regulating tank at the high point, which Utah Board proposes to be the start of the Hydro System. The second unit is 53.4 miles from the afterbay of the first unit. There are 10.32 miles of pipeline separating the second and third units, and 16.9 miles of pipeline separating the third and fourth units. The Sand Hollow Reservoir is about 4.4 miles from the Hurricane Cliffs afterbay. Together, the connecting water delivery pipeline sections equal about 87 miles, and the remaining two miles are made up of the Hurricane Cliffs forebay, waterway, and afterbay, and the length of the four in-line units.

[3] Some of the generating facilities, as well as parts of the connecting pipeline, are located on U.S. lands, regardless of the route option chosen.

[4] *See* Lake Powell Pipeline Purpose and Need Statement at 3, attached to letter from Eric Millis, Utah Division of Water Resources, to Kimberly Bose, Commission Secretary (filed Feb. 23, 2018).

B. Procedural History

4. On February 7, 2008, Commission staff issued a preliminary permit to Utah Board for the hydroelectric development on the pipeline under Project No. 12966. Staff issued a successive permit for the project on May 20, 2011, and granted a two-year extension of that permit on May 14, 2014.

5. On March 3, 2008, Utah Board filed a Notification of Intent and Pre-Application Document (PAD) to begin the integrated licensing and environmental scoping process. On May 5, 2008, the Commission issued public notice of the filing and requested comments on the PAD, environmental scoping document, and related study requests. The scoping document stated that the "Commission has jurisdiction with regard to the Hydro System" and would act as lead agency and work with all involved federal agencies to prepare a single environmental impact statement (EIS) for the entire project.[5]

6. As described in the applicant's PAD, the entire pipeline project comprised four systems: (1) a Water Intake System, (2) a Water Conveyance System (identified as the uphill portion of the pipeline), (3) a Hydro System (identified as the hydroelectric generating units and the downhill portion of the pipeline), and (4) the Cedar Valley Pipeline System (which was later removed from the project). The scoping document described the Hydro System as including "large diameter penstocks" and attached a copy of Figure 1 from the PAD showing the Hydro System as a red line on the map of the project.[6] However, the scoping document did not expressly adopt the applicant's definition of the Hydro System or otherwise address the Commission's licensing jurisdiction over the parts of the pipeline that the applicant included in the proposed Hydro System.

7. To facilitate the environmental review process, Commission staff granted the three Interior agencies' requests to participate as cooperating agencies for preparing the EIS. In late 2008 and early 2009, staff entered into a memorandum of understanding (MOU) with each agency, outlining procedures for participating in the Commission's integrated licensing process, sharing information, and preparing a draft and final EIS.[7] Staff had agreed in a revised scoping document that the EIS would include an alternative route supported by the Kaibab Band of Paiute Indians (Tribe) that would cross the Kaibab Indian Reservation along Arizona State Highway 389, as well as a second alternative

[5] Scoping Document 1 at 3 (May 5, 2008).

[6] *Id*. at 4-5.

[7] *See* MOU with Reclamation (filed Oct. 8, 2008); MOU with National Park Service (filed Feb. 19, 2009); MOU with BLM (filed March 9, 2009).

route that would cross only the southeastern corner of the reservation.[8] Depending on the Commission's jurisdiction over the pipeline segments, these alternative routes could potentially be subject to either mandatory conditions issued by the Secretary of the Interior under FPA section 4(e)[9] (if the Commission took jurisdiction) or the Tribe's authority (if the Commission did not). Staff therefore granted the Tribe's request for cooperating agency status and entered into a similar MOU with the Tribe.[10] These MOUs all referred to the Hydro System and listed its components, including "large diameter penstocks," but did not expressly address the amount of pipeline to be included in the system.

8. Utah Board filed a proposed study plan on August 21, 2008, and a revised study plan on December 22, 2008. Commission staff issued a study plan determination on January 21, 2009. The study plans and determination were based on the applicant's description of the components of the Hydro System, including the intervening pipeline segments. Utah Board proceeded to conduct studies on that basis, including all areas affected by the hydroelectric generating facilities and the 89 miles of intervening pipeline, but excluding the area from the intake at Lake Powell to the high point of the pipeline system.

9. In 2012, in *Wyco Power and Water Inc.*,[11] the Commission issued an order denying rehearing concerning a different proposed hydropower and water supply project, for which Commission staff had dismissed a permit application, noting, among other things, that the Commission would license only the hydropower portions of the project. In doing so, the Commission responded to arguments that the project was similar to the Lake Powell Project. The Commission found that argument unpersuasive, stating: "It is for [the hydropower developments] alone, and not for the Lake Powell Pipeline, which is a state water supply project authorized under state law, that a preliminary permit was issued to the Utah Board. Any eventual license issued by the Commission would be

[8] Scoping Document 2 at 8-9, 25 (Aug. 21, 2008), *see also* Study Plan Determination at 3 (Jan. 21, 2009).

[9] 16 U.S.C. § 797(e) (2012). Where a hydropower project is located on a federal reservation, section 4(e) authorizes the Secretary of the department that manages the lands to impose mandatory license conditions for the protection and utilization of the reservation.

[10] *See* MOU with the Kaibab Tribe (filed Jan. 7, 2009).

[11] 139 FERC ¶ 61,124 (2012) (*Wyco*).

limited to the discrete hydropower developments along the Lake Powell Pipeline, and would not encompass the entire pipeline."[12]

10. Utah Board filed its preliminary licensing proposal on December 2, 2015, and its final license application on May 2, 2016. The Commission issued a tendering notice on May 6, 2016. On July 25, 2016, staff requested additional information on the application.

11. On December 11, 2017, after staff had received the majority of the additional information, the Commission issued a notice that the project was ready for environmental analysis (REA notice), soliciting motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions. The notice listed the proposed hydroelectric generating facilities subject to the Commission's licensing jurisdiction, without including the 89 miles of water delivery pipeline connecting those facilities, and stated: "The Commission has not yet determined whether these water delivery pipelines will be included as part of the licensed hydro facilities."[13]

12. In response, on December 27, 2017, Utah Board and Washington County Water Conservancy District (Petitioners) filed a petition for a declaratory order on jurisdiction, asking the Commission to find that its licensing jurisdiction under the FPA includes all of the project facilities identified in the license application as the "Hydro System," including the 89-mile downhill portion of the water delivery pipeline connecting the hydroelectric generating facilities. Petitioners also requested that the Commission expedite action on the petition and suspend processing the license application until the Commission issues the declaratory order.

13. On January 2, 2018, American Rivers filed an early answer to the petition, supporting the request to suspend the procedural schedule. Western Resource Advocates filed a similar answer on January 9, 2018.

14. On January 10, 2018, the Commission issued notice of the petition, establishing February 12, 2018, as the deadline for filing protests, interventions, and comments. On January 11, 2018, the Commission issued a notice suspending the procedural schedule for processing the license application until the Commission acts on the petition.

15. On January 22, 2018, Petitioners filed a request for leave to answer and an answer to Western Resource Advocates' January 9, 2018 answer.

---

[12] *Id.* P 11 (footnotes omitted).

[13] REA Notice at 2.

16. No one intervened in support of the petition. However, on January 23, 2018, Senators Orrin Hatch and Mike Lee, together with Members of Congress Rob Bishop, Chris Stewart, Mia Love, and John Curtis, filed comments supporting the petition. On February 6, 2018, the Center for Biological Diversity filed comments urging the Commission to disregard the January 23, 2018 letter. On February 7, 2018, BLM filed a memorandum suggesting that its MOU with the Commission took a broad view of the Hydro System.

17. American Rivers, Western Resources Advocates, Center for Biological Diversity, and Utah Rivers Council filed timely motions to intervene and comments opposing the petition.[14] Central Arizona Water Conservation District filed a timely motion to intervene to protect its potential interests but took no position concerning the Commission's licensing jurisdiction.

18. On February 21, 2018, Petitioners filed a second motion for leave to answer and answer to comments filed by Western Resource Advocates, American Rivers, and Center for Biological Diversity.

19. Commission rules generally prohibit the filing of an answer to an answer.[15] However, in the interest of full consideration of the jurisdictional issues, we address the parties' arguments in these additional filings.

C. Petition for Declaratory Order and Supporting Comments

20. Petitioners seek a determination that the Commission's licensing jurisdiction extends to the entire Hydro System as described in the license application. They argue that Commission staff has recognized the downhill portions of the pipeline as jurisdictional facilities in various documents since 2008 and the applicant and other parties have relied on that determination. They maintain that the pipeline segments are "large diameter penstocks" that are fully integrated with and create the head that enables the inline units to generate electricity and that, as a result, they are necessary and appropriate for hydroelectric generation. They contend that these penstocks are therefore project works that are part of a complete unit of development as those terms are used in the FPA.

[14] Although the motions of Western Resource Advocates and Center for Biological Diversity were first received on February 13, 2018, they were assigned a filing date of February 12, 2018, due to filing difficulties confirmed by IT Support and eLibrary staff.

[15] *See* 18 C.F.R. § 385.213(a)(2) (2018).

21. The Senators and Members of Congress express similar concerns that, since 2008, the State of Utah has invested over $34 million preparing and submitting its license application and other permitting information, and the Commission has made multiple statements that the portions of the water pipeline that are also the penstocks for the generating facilities are subject to the Commission's jurisdiction. They conclude that "[r]eversing that position after proponents have conducted planning in reliance on it for the last ten years is legally and factually unjustified."[16]

22. BLM states that in 2009, it executed an MOU with Commission staff for the pipeline project that defines the Hydro System to include the large diameter penstocks, and notes that it found nothing in its administrative records to indicate that the Commission intended to reserve the right to not assume jurisdiction over the entire Hydro System. BLM adds that, regardless of the Commission's jurisdictional determination, it will issue separate authorizations for any parts of the pipeline project that affect BLM-managed lands, pursuant to its authority under the Federal Land Policy and Management Act.

D. Comments Opposing the Petition

23. Utah Rivers Council points out that Utah Board's definition of the Hydro System is not conclusive, noting that the Commission has explained that "[t]the mere fact that various facilities are proposed for licensing by an applicant is not sufficient reason to assume that all of such facilities are properly the subject of a license."[17] It contends that hydroelectric generation is secondary to the purpose or water delivery, and questions the Commission's role in permitting the water conveyance facilities.

24. American Rivers, Western Resource Advocates, and Center for Biological Diversity argue that the Commission should deny the petition. They maintain that Utah Board has not demonstrated that all 89 miles of water delivery pipelines are jurisdictional. They contend that the Commission's approach to water delivery projects in previous cases has been to license only the generating facilities, and not the water delivery pipeline itself. They argue that in *Wyco* the Commission clarified that any eventual license for the Lake Powell Project "would be limited to the discrete hydropower developments along the Lake Powell Pipeline, and would not encompass the

[16] Letter from Senators Orrin Hatch and Mike Lee to Chairman McIntyre at 1 (Jan. 23, 2018).

[17] Utah Rivers Council's Motion to Intervene at 1, quoting *Dep't of Water Resources of the State of California*, 51 F.P.C. 529, 533 (1974) (*California Aqueduct*).

entire pipeline."[18] They also maintain that more facts may be needed to differentiate between the water conveyance system and the so-called penstock alignments.

Discussion

A. Federal Power Act Provisions

25. FPA section 4(e) authorizes the Commission to license the construction, operation, and maintenance of "dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission, and utilization of power" on certain U.S. waters and lands.[19] FPA section 23(b)(1) makes it "unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto" on those U.S. waters and lands, and requires a declaration of intent for projects located on certain non-navigable streams, to allow the Commission to determine whether the project would affect commerce and would therefore require licensing.[20]

---

[18] *Wyco,* 139 FERC ¶ 61,124 at P 11.

[19] Section 4(e) provides, in pertinent part:

> The Commission is hereby authorized and empowered— . . . (e) To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and development, transmission, and utilization of power across along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States . . . , or for the purpose of utilizing the surplus water or water power from any Government dam . . . .

16 U.S.C. § 797(e) (2012).

[20] Section 23(b)(1) provides, in pertinent part:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct,

(continued ...)

26. The Commission has two types of licensing jurisdiction under the FPA: permissive under section 4(e) and mandatory under section 23(b)(1).[21] Briefly, licensing is both authorized and required for hydroelectric projects using navigable waters, government dams, and federal lands. For projects using non-navigable waters that are subject to the jurisdiction of Congress under the Commerce Clause, the Commission is authorized to license some projects under section 4(e) that would not require licensing under section 23(b)(1).[22]

27. Although there are differences between permissive and mandatory licensing, Petitioners do not address them. Petitioners cite only section 4(e) as the source of the Commission's licensing jurisdiction, perhaps to suggest that the Commission should exercise its permissive authority in this case. They argue that the Commission should find that the connecting pipeline segments are "subject to its licensing jurisdiction"

> operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States . . . , or utilize the surplus water or water power from any Government dam, except under and in accordance with . . . a license granted pursuant to this Act. Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, . . . and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. . . .

16 U.S.C. § 817(1) (2012).

[21] *See Cooley v. FERC*, 843 F.2d 1464, 1471 (D.C. Cir. 1988).

[22] *See, e.g.*, *Swanton Village, Vermont*, 70 FERC ¶ 61,325 (1995) (pumped storage project using only groundwater, with no connection to a surface stream, could qualify for voluntary licensing under FPA section 4(e) but would not require licensing under FPA section 23(b)(1)).

without indicating whether such licensing is simply authorized or would be required under the FPA.[23]

28. In that regard, Petitioners' approach is similar to that of the Commission in some of its earlier cases, before the differences between permissive and mandatory jurisdiction were judicially recognized in *Cooley v. FERC*.[24] Because, for most bases of jurisdiction (i.e., navigable waters, government dams, and federal lands) licensing is both authorized and required, the Commission often found that projects were subject to its jurisdiction under FPA section 4(e) without making the corresponding finding that licensing was required under FPA section 23(b)(1). Later cases have focused more specifically on whether licensing is authorized or required.

29. In any event, any possible differences between permissive and mandatory licensing are not relevant in this case, for two reasons. First, the water for the generating facilities is obtained through a lengthy, artificially-constructed conduit that is neither navigable nor a typical surface stream. However, the water source for the project is Lake Powell, which impounds water from the Colorado River, a navigable river of the United States.[25] The Commission has long required licensing of project works located on water delivery systems using water from navigable streams.[26] Second, the jurisdictional issue in this case turns not on whether licensing is permissive or mandatory, but rather on whether the pipeline segments connecting the generating facilities are project works that are part of a complete unit of development. The same definitions of "project" and "project works" would apply in either case.

---

[23] Petition at 2.

[24] 843 F.2d at 1471.

[25] *See Metropolitan Water District of Southern California*, 4 FERC ¶ 61,064 (1978) (*Metropolitan Water District*).

[26] *Id*. at 61,135 (finding licensing required for hydroelectric generating facilities proposed to be constructed on existing aqueduct systems obtaining water from the Sacramento-San Joaquin Delta and the Colorado River, both navigable streams); *California Aqueduct*, 51 FPC 529 (finding licensing required for hydroelectric generating facilities to be located on the proposed California Aqueduct system, which would obtain water from the Delta of the navigable Sacramento and San Joaquin Rivers, but not the aqueduct itself).

30. FPA section 3(12) defines "project works" as "the physical structures of a project."[27] FPA section 3(11) defines "project" as

> a complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures including navigation structures, which are part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interests in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.[28]

31. The definition of a "project" in FPA section 3(11) expressly includes "water conduits." Thus, it is not surprising that many licensed projects include various types of water conveyance structures, including canals, ditches, flumes, penstocks, and pipelines. Depending on where they are located and how they are used, these conveyance structures could be considered "a part of" the unit of development, structures that are "used and useful in connection with said unit," or structures that are "necessary or appropriate in the maintenance and operation of such unit." However, neither the FPA nor its legislative history provides guidance on how to interpret these requirements.[29] Thus, the Commission has broad discretion to determine, on the facts of each case, the scope of the project that is to be licensed.

B. Prior Commission Orders

32. Concerning water conduits, cases addressing what structures are included as part of a complete project fall into roughly two groups: those requiring that all parts of a complete unit of development must be licensed, and those finding that the Commission's licensing jurisdiction does not extend to water conveyance structures that are not directly related to and necessary for hydroelectric power generation. To some extent, these two groups of cases reflect differing approaches to jurisdiction and suggest that different facts lead to different results. Most cases do not provide extensive discussion of why certain project works are or are not part of the complete unit of development. Instead, they tend

[27] 16 U.S.C. § 796(12) (2012).

[28] 16 U.S.C. § 796(11) (2012).

[29] *City and County of Denver, Colorado*, 94 FERC ¶ 61,313, at 62,157 (2001) (*Denver Water*).

to cite the statutory provisions and then state which facilities are or are not included as part of the complete project.

33. If all parts of a project operate together for power production and are not too distantly located from one another, the Commission has generally licensed them as a complete project, notwithstanding that they may also operate for other purposes, such as water delivery for irrigation or municipal or industrial use.[30] However, when large water delivery projects that transport water many miles away from the water source include hydroelectric generating facilities along or in the water conveyance structures, the Commission has generally concluded that the water delivery structures are not necessary or appropriate for operation and maintenance of the hydroelectric generating facilities and need not be included as part of the licensed hydroelectric developments.[31] In our

[30] *See, e.g.*, *Escondido Mutual Water Co.*, 6 FERC ¶ 61,189, at 61,377 and ordering para. (B)(2) (1979) (*Escondido*) (finding that the complete unit of development included a diversion dam, the 13.5-mile Escondido Canal used for domestic and irrigation purposes, two powerhouses along the canal, a dam and storage reservoir then under construction, and an upstream dam and storage reservoir that had been used for many years for power generation), *aff'd in pertinent part*, *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223 (9th Cir. 1983), *reh'g denied*, 701 F.2d 826 (1983), *rev'd on other grounds*, *Escondido Mutual Water Co. v. La Jolla Indians*, 466 U.S. 765 (1984); *Holyoke Water Power Co.*, 8 F.P.C. 471, 485 (1949) (finding that the complete project includes the Holyoke Canal System (a three-tier, 4.5-mile system of canals that provides water for industrial use and hydropower generation) and six hydroelectric generating stations located along the canal system, which operated together as a complete system for the production of water power); *Sheldon Jackson College*, 101 FERC ¶ 61,334 (2002) (finding that a concrete conduit delivering water from an existing powerhouse to a bay was part of the complete unit of development and requiring licensing because the conduit occupied navigable waters).

[31] *See, e.g.*, *California Aqueduct*, 51 FPC at 533 (finding licensing require for only the dams, reservoirs, power plants, and other facilities related to power production, referred to as "power drops" in the order, and not the entire 475-mile water delivery system); *Metropolitan Water District*, 4 FERC at 61,136 (finding that the Commission had jurisdiction over five discrete hydroelectric generating facilities proposed to be installed in the existing Colorado Aqueduct, but not the entire water conveyance system); *Denver Water*, 94 FERC at 62,158 (licensing the project's dam, reservoir, and power-generating facilities, but denying a request to include an extensive system of canals, pipes and tunnels used to gather and deliver water got consumptive use), *on reh'g*, 95 FERC ¶ 61,222 (2001); *Wyco*, 139 FERC ¶ 61,124 (affirming denial of a preliminary permit for a 501-mile water supply pipeline with several proposed hydropower facilities along the

(continued ...)

view, as discussed in more detail below, the Lake Powell Pipeline Project fits squarely within the second group of cases.

C. Our Response to the Petition for Declaratory Order

34. Petitioners seek a determination that the Commission's licensing jurisdiction extends to the entire Hydro System as described in the license application. Referring to the downhill portions of the pipeline as "penstock alignments," Petitioners argue that the Commission has recognized these structures as jurisdictional facilities since the beginning of this proceeding in 2008. In support, they point out that Utah Board's notification of intent and pre-application document included the downhill portions of the pipeline, described as "large diameter penstocks," as part of the Hydro System. They note that Commission staff's initial scoping document included a copy of the applicant's map of the project, depicting the Hydro System as a red line that included the pipeline from its highest point down to the last and lowermost hydroelectric generating facility at Sand Hollow Reservoir. They add that staff's initial and revised scoping documents both state that the Commission has jurisdiction with regard to the Hydro System. Petitioners further maintain that Utah Board's proposed and revised study plans, as well as Commission staff's study plan determination and MOU with BLM, are all based on Utah Board's definition of the scope of the Hydro System.

35. Petitioners assert that the REA notice's "startling departure" from these prior filings and documents "creates an unnecessary state of confusion with regard to the Commission's jurisdiction."[32] They contend that this in turn creates confusion about whether the pipeline will be subject to mandatory conditions under FPA section 4(e) and eligible for a hearing on alternative conditions under FPA section 33 for the parts of the pipeline that would cross BLM lands or the Kaibab Indian Reservation under the alternative routes to be analyzed in the EIS.

36. Concerning the matter of Utah Board's asserted reliance on Commission staff's apparent acceptance of the Hydro System as defined in the application, we cannot resolve the legal issue before us based on an equitable argument.[33] Rather, we must base our

---

pipeline, distinguishing the Lake Powell Pipeline Project and stating any license for the latter project would be limited to the discrete hydropower developments along the pipeline and would not encompass the entire pipeline).

[32] Petition at 5.

[33] We also note that it is difficult for Utah Board to argue convincingly that it had clear direction that the Commission always intended that the entire 89 miles of water pipeline that are the subject of its petition be part of the licensed project in the face of *Wyco* issued six years ago in 2012, which dictates the opposite result.

jurisdictional determination on the requirements of the FPA, as informed by our interpretation of those requirements in prior Commission orders. As we have pointed out, "[t]he mere fact that various facilities are proposed for licensing by an applicant is not sufficient reason to assume that all of such facilities are properly the subject of a license."[34] In addition, to the extent that staff may have accepted the applicant's definition of the Hydro System in various documents, those determinations would not bind the Commission. Moreover, all of the environmental information gathered by the Commission as lead agency would be needed for an analysis of the entire project, regardless of how we resolve the issue of our licensing jurisdiction under the FPA and of which agency has authority for permitting particular project facilities and conducts the analysis.

37. Petitioners argue that "the penstock alignments are project works in a complete unit of development for the generation of hydroelectric power and therefore subject to the Commission's licensing jurisdiction."[35] They maintain that "[t]he penstock alignments are fully integrated with and create the head that enables the in-line units' turbines to generate electricity" and that, as a result, they are "beyond any doubt 'necessary' to the development of, and used and useful in connection with a 'complete unit of development' as those terms are used in the FPA."[36]

38. As discussed in more detail below, Petitioners fail to adequately address cases establishing that the Commission's longstanding practice is to license only discrete hydropower developments on or along large water conveyance systems, and not to license the entire water conveyance system itself.[37] When viewed in this context, the fact that the pipeline provides the water needed for hydroelectric power generation is not, in itself, sufficient to support a conclusion that the connecting pipeline is a project work and that large portions of the water delivery pipeline must be licensed under the FPA. Rather, the Commission has consistently regarded these lengthy water delivery pipelines to be outside the purposes of the FPA and unrelated or only incidental to the purpose of power production. Similarly, the Commission has not attributed any jurisdictional significance in these cases to the fact that the downward slope of these pipelines would provide the head used for power generation. Logically and legally, if we were to accept Petitioners' argument that the downhill pipeline segments are necessary to power generation because they supply water to the generating facilities, we would necessarily have to include the

[34] *California Aqueduct*, 51 FPC at 533.

[35] Petition at 5.

[36] Petition at 7.

[37] *See* note 31, *supra*, and cases there cited.

uphill parts of the pipeline as well, because without them, no water could reach the turbines. Although we find no basis in the FPA for such an expansive view, we also find no basis for Petitioners' suggestion that only the downhill portions should be considered jurisdictional.

39. Petitioners assert that the Commission has consistently required licensing of all project works that are necessary or convenient to power generation and are therefore part of a complete unit of development. In support, they cite a number of Commission cases listing various water conduits as project works, including:

- San Gorgonio Project No. 344 (2.25 MW), which operated for domestic and irrigation water supply and power generation and included approximately seven miles of flowlines and penstocks;[38]

- Escondido Project No 176 (760 kilowatts (kW)), originally constructed for municipal and irrigation water supply and including a 13.5-mile-long canal, a tunnel nearly one mile long, and over a mile of pipeline;[39]

- El Dorado Project No. 184 (21 MW), originally constructed for mining operations and including multiple dams and reservoirs, as well as a 22.3-mile-long canal, and a diversion from the canal into a 2.8-mile-long pipeline and penstock;[40]

- Upper Mountain Project No. 2761 (110 MW), which included two diversion dams and seven small creek diversions, as well as a 5.4-mile-long tunnel to a reservoir, which discharged into a 2.5-mile-long pipeline connected to a 3.3-mile-long tunnel, which led to a 3.8-mile-long conduit to a powerhouse, which discharged into a 3.5 mile conduit conveying water to a second powerhouse, which discharged into an 8-mile-long conduit system conveying the water to a third powerhouse.[41]

---

[38] *Southern California Edison Co.*, 106 FERC ¶ 61,212 (2004) (requiring a surrender application for the complete project).

[39] *Escondido,* 6 FERC at 61,377 and ordering para. (B)(2).

[40] *Pacific Gas & Electric Co.*, 13 FERC ¶ 62,269, at 63,335 (1980).

[41] *See El Dorado Irrigation District*, 29 FERC ¶ 61,375, at 61,788 n.2 and ordering para. (B)(2) (1984) (including these facilities as project works and distinguishing a downstream water supply reservoir).

40. Petitioners argue, without elaboration, that "[a]ll of these water conveyance facilities were determined to be jurisdictional and included in the project license."[42]

41. Although these cases are examples of projects that include water conduits as part of a complete project, they do not resolve the jurisdictional issue in this case. Except for the Escondido Project, which we consider in more detail below, these cases do not discuss why the various water conduits were included as parts of these projects.[43] They also fail to address later cases, which we discuss in detail below, specifically excluding water delivery conduits and licensing only the facilities needed for power generation.[44]

42. Initially, the Commission took an expansive view of its jurisdiction under the FPA and the 1920 act that preceded it, and required licensing of all parts of a complete project. *Escondido*[45] is an example. It stands for the proposition that all parts of a complete project must be licensed, and if any project works are located on federal lands the entire project must be licensed. When the Commission initially licensed the Escondido Project in 1924, the project included a diversion dam, the 13.5-mile Escondido Canal used for domestic and irrigation purposes, two powerhouses along the canal, and a dam and storage reservoir then under construction. At relicensing, an administrative judge found that the project did not require licensing, because its primary purpose was water delivery and it generated only a small amount of power. The Commission disagreed, finding that the project works all operated as a unit to generate hydroelectric power, and the project's primary purpose was not relevant to a jurisdictional determination under the FPA. The Commission also determined that an upstream dam and storage reservoir that had been

[42] Petition at 12.

[43] The other cases that Petitioners cite do not provide much discussion of the water delivery conduits included in the projects. The San Gorgonio and El Dorado Projects were initially licensed in 1923 and 1922, respectively, and thus are examples of the Commission's early, expansive view of its jurisdiction. They are also considerably smaller than the Lake Powell Pipeline Project, did not include large amounts of water delivery pipeline, and preceded the Commission's authority to issue conduit exemptions, as discussed later in this order. The Upper Mountain Project was a new project proposed to be constructed, operated, and maintained for water supply, power generation, and stream flow maintenance. It was not a large water delivery project. Three of the included conduits led directly to the powerhouses and none were longer than 8 miles, in contrast with the 89 miles of water delivery pipeline proposed to be included in the Lake Powell Project Hydro System.

[44] *See* note 31, *supra*.

[45] *Escondido,* 6 FERC at 61,390.

used for many years for power generation required licensing as part of the complete unit of development.

43. Later, however, the Commission considered a series of cases involving hydroelectric developments proposed to be located in or along conduits used for large water delivery projects; specifically, *California Aqueduct*, *Metropolitan Water District*, *Denver Water*, and *Wyco*. In these cases, the Commission concluded that its jurisdiction was limited to the hydroelectric developments and determined that the water delivery structures were not part of the licensed units of development.

44. In *California Aqueduct*,[46] the Commission found licensing required for only the dams, reservoirs, power plants, and other facilities related to power production to be located along the proposed aqueduct, referred to as "power drops" in the order, and not the entire water delivery system. As initially proposed in the license application, the California Aqueduct Project would have included an aqueduct beginning northeast of San Francisco and carrying water to the outskirts of Los Angeles, about 475 miles overall, together with five hydroelectric generating facilities proposed to be located along the aqueduct system. Jurisdiction was contested, and an administrative judge initially found that the entire project, including the aqueduct, required licensing under the FPA. On review, the Commission determined that its jurisdiction was limited to only the parts of the project involving power-generating facilities, stating, "it is neither required nor necessary under the Federal Power Act that we extend our jurisdiction beyond those facilities actually constructed for power purposes so as to include hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power."[47] The Commission later licensed only the hydroelectric generating facilities, including tunnels and canals that conveyed water from the aqueduct to the generating facilities, but not the aqueduct itself.[48]

---

[46] 51 FPC at 533.

[47] *Id*. The Commission identified the facilities requiring licensing as three power drops to be located along the aqueduct – Devil Canyon, Castaic, and Pyramid – and two additional power developments to be constructed later – Cottonwood and San Luis Obispo. The details of the latter two developments are not provided in the order. The first three are described as follows: Devil Canyon included a dam and lake, power plant, and associated facilities; Castaic was a pumped storage facility using the Pyramid Dam and Lake as its upper reservoir; and the Pyramid development included a regulation pool, canal, pipeline, tunneled penstock, and power plant. *Id*. at 534-35.

[48] *Dep't of Water Resources of Calif.*, 2 FERC ¶ 61,258, at 61,606 (1978).

45. Opponents argue that this case is similar to the Lake Powell Pipeline Project, because it involved hydroelectric generating facilities proposed to be located along a large water delivery system. Petitioners acknowledge the Commission's *California Aqueduct* decision but maintain, without further explanation, that this decision is consistent with including the water conveyance pipelines of the Hydro System in a complete unit of development, because these structures are "penstock alignments" that are directly related to power production.[49]

46. We disagree with Petitioners' view. Both the California Aqueduct and the water delivery pipeline in the proposed Lake Powell Pipeline Project are water delivery structures that convey water for municipal and industrial use, and incidentally also supply water to the hydroelectric generating facilities located in and along the water delivery system. We find no discernible basis for distinguishing these two projects.

47. Petitioners further maintain that "*California Aqueduct* did not limit the Commission's licensing jurisdiction for that project to power generating equipment,"[50] pointing out that the Commission later licensed the Devil Canyon development, which Petitioners describe as including a 4-mile long, 13-foot-diameter tunnel; the Pyramid (now Warne) development, described as including a 2-mile-long canal and a 5.5-mile pipeline; and the Castaic development, described as including a 7.2-mile-long, 30-foot tunnel conveying water to the powerplant.[51] Petitioners assert, again without further explanation, that "[s]everal of these water conveyance facilities are less directly related to the generating equipment than the penstock alignments in the Hydro System."[52]

48. Again, we disagree. The fact that the Commission later licensed power-generating facilities that included some water delivery structures is not dispositive. These structures were necessary to convey water from the aqueduct to the generating facilities, and were therefore part of the licensed project. In the case of the Lake Powell Pipeline Project, the Commission could license any similar structures taking water from the pipeline itself and conveying it to the generating facilities, but would not license the connecting pipeline segments, whose sole purpose is to convey water along the pipeline route between the respective in-line generating units.

---

[49] Petition at 13.

[50] *Id*. at 14.

[51] *Id.* (citing *Dep't of Water Resources of California*, 2 FERC at 61,065 and ordering para. (B)(ii)).

[52] *Id.*

49. *Metropolitan Water District*[53] provides further support for licensing only the generating facilities, and not the connecting pipeline segments of the Lake Powell Pipeline Project. In that case, the Metropolitan Water District of Southern California (District) proposed to construct five hydroelectric generating facilities with a total capacity of 27 MW on its existing Colorado River Aqueduct system. The District asked the Commission to find that the proposed new generating facilities did not require licensing, because they would simply bypass existing pressure control structures located along the aqueduct, thus allowing the District to generate power while also relieving water pressure in the water delivery system. Relying on *California Aqueduct*, the Commission disagreed, finding that although the water delivery system was beyond its FPA authority, the Commission had jurisdiction over the five proposed hydropower developments.

50. Opponents assert that this case supports their argument that the Commission should license only the generating facilities on the Lake Powell Pipeline, and not the entire Hydro System as defined in the application.[54] We agree. The inline generating units proposed for the Lake Powell Pipeline Project are essentially the same type of generating units that were proposed to be added to the existing aqueduct system in that case.

51. Petitioners address this case only tangentially, citing it in support of their argument that the Commission does not use a "primary purpose" test for jurisdiction.[55] They point out that in *Metropolitan Water District*, the Commission described the *California Aqueduct* case as follows: "The FPC in that case rejected the argument that because the primary purpose of the project was conveyance of water for nonpower purposes, it was beyond the jurisdiction of the Commission."[56] They also maintain that the "assertion that the Commission rejected jurisdiction over anything but the electric generating equipment reads far too much into that order" and contend that "whether any

[53] *Metropolitan Water District*, 4 FERC at 61,136.

[54] Western Resource Advocates' Motion to Intervene and Comments at 9 n.29 (Feb. 12, 2018); American Rivers' Motion to Intervene and Comments at 5-6 (Feb. 12, 2018); Center for Biological Diversity's Motion to Intervene and Answer in Opposition to petition at 7-8 (Feb. 12, 2018).

[55] Petitioners' Motion for Leave to Answer and Answer at 7 n.30 (Feb. 21, 2018).

[56] *Id.* (citing *Metropolitan Water District*, 4 FERC at 61,137).

other facilities in the water supply system would also be jurisdictional was not addressed or raised."[57]

52. We agree that the Commission does not use a primary purpose test for jurisdiction. Although FPA sections 4(e) and 23(b)(1) specifically refer to the use of project works for the development of power,[58] there is no requirement that power generation be a project's primary purpose. *California Aqueduct* and *Metropolitan Water District* both establish that, if project works will be used to generate hydroelectric power, they can require licensing notwithstanding that they are located on a larger water delivery system which has as its primary purpose the conveyance of water for nonpower purposes. However, we disagree with Petitioners' suggestion that this lack of a primary purpose test would support a conclusion that the pipeline segments in this case are project works. Because the water delivery function of the pipeline in these large water delivery projects is unrelated and only incidental to power production, the Commission does not regard the water delivery structures as project works necessary or appropriate for the generation of power.

53. We also disagree with Petitioners' characterization of the scope of the *Metropolitan Water District* decision. The dispute in that case was whether the generating facilities proposed to bypass the existing pressure relief structures on the aqueduct would require licensing. The aqueduct itself was not at issue, and there is nothing in the decision to suggest that the Commission considered licensing anything other than the hydroelectric generating facilities. Moreover, the inline hydroelectric generating facilities located along the Lake Powell Pipeline would serve the same purpose as those proposed to be located on the Colorado Aqueduct; namely, allowing power generation while also reducing water pressure in the pipeline. The case is therefore directly on point.

54. In *Denver Water*,[59] the Commission relicensed the Gross Reservoir Project No. 2035, which was part of the City of Denver's municipal water supply system. The Commission determined that the project works to be included in the new license were the dam, reservoir, power-generating facilities, and primary transmission line, and specifically denied a request to include an extensive system of canals, pipes, and tunnels

[57] *Id*.

[58] FPA section 4(e) authorizes the Commission to license project works "for the development, transmission, and utilization of power." 16 U.S.C. § 797(e) (2012). FPA section 23(b)(1) requires a license for the construction, operation, and maintenance of project works "for the purpose of developing electric power." 16 U.S.C. § 817(1) (2012).

[59] 94 FERC at 62,158.

used to gather and deliver water for consumptive use. In doing so, the Commission explained:[60]

> Applied literally, the FPA's definition of 'project' could encompass any and all upstream reservoirs, diversions, and other controls on the flow of water reaching the project turbines. We find no indication of such intent in the legislative history of Part I of the FPA. It was doubtless for this reason that our predecessor, the Federal Power Commission, declined to include in a license the entire California Aqueduct, which was the source of water for the project there at issue. It is the Commission's responsibility to determine, on the facts of each individual case, the rational scope of the 'project' that is to be licensed. Here, we conclude that the features of Denver's municipal water supply system upstream of Gross Reservoir are not part of the project's unit of development and therefore will not be placed under the license.

55. Opponents rely on *Denver Water* as further support for their argument that the Commission should license only the power-generating facilities in and along the Lake Powell Pipeline.[61] Petitioners seek to distinguish the case, asserting that unlike here, the excluded facilities "were separated from the project reservoir by a stretch of free-flowing river and so contributed nothing to the generation of power."[62]

56. We disagree with Petitioners' interpretation. Although it is true that the dam and reservoir were located on South Boulder Creek, the creek was not the source of the water used for power generation. As part of its municipal water supply system, the city of Denver diverted water from the Williams Fork and Fraser Rivers in the Colorado River Basin, on the west slope of the Continental Divide, and conveyed it through the 6.1-mile-long Moffat Tunnel to the east slope of the Divide, to the headwaters of South Boulder Creek, for delivery to Gross Reservoir where it would be used power generation and then transported to Denver for municipal use. The Commission attributed no jurisdictional significance to the fact that the water for municipal use and power generation flowed into

[60] Center for Biological Diversity's Motion to Intervene and Answer in Opposition at 6 n.11, quoting *Denver Water*, 94 FERC at 62,158 (citations omitted).

[61] Center for Biological Diversity's Motion to Intervene and Answer in Opposition at 6 n.31 (Feb. 12, 2018).

[62] Petition at 14 n.53.

the creek before it was stored in the reservoir. Rather, the focus was on whether the structures used for collecting and transporting the water were a necessary part of the hydroelectric project's unit of development, and the Commission determined that they were not. *Denver Water* thus supports our conclusion that the pipeline segments delivering water to and from the generating facilities in and along the Lake Powell Pipeline do not require licensing as part of a complete unit of development.

57. Finally, in *Wyco*,[63] we affirmed staff's denial of a preliminary permit for a 501-mile water supply pipeline with several proposed hydropower facilities to be located along the pipeline. In doing so, we stated that "it is the Commission's longstanding practice to license only discrete hydropower developments within large water conveyance systems, and not to license the entire water conveyance system itself."[64] Further, in rejecting Wyco's argument that its proposal was "indistinguishable" from the Lake Powell Pipeline Project, which had received a permit, we distinguished the two projects and clarified that any eventual license for the Lake Powell Project "would be limited to the discrete hydropower developments along the Lake Powell Pipeline, and would not encompass the entire pipeline."[65]

58. Opponents contend that *Wyco* disposes of Utah Board's primary justification for the petition, because there is nothing "discrete" about the 89-mile stretch of water delivery pipeline that connects the hydropower developments.[66] They maintain that the

[63] 139 FERC ¶ 61,124.

[64] *Id*. P 14.

[65] *Id*. P 11. Wyco's proposed project boundary had included the entire 501-mile pipeline from the Green River in Wyoming to Pueblo, Colorado, and staff had clarified that because the Commission would license only the proposed hydropower developments, as discrete components of the 501-mile pipeline, construction of substantial portions of the project could require authorization form other federal agencies. *Id*. P 3. Staff later dismissed the permit as premature because the seven hydropower projects were dependent on water from a proposed pipeline that did not currently exist and Wyco had failed to provide information about its progress in obtaining the necessary authorizations for constructing the pipeline. In affirming staff's decision, the Commission noted that the Lake Powell Pipeline is a state water supply project authorized under state law, and stated that the permit was issued for the hydropower developments alone, and not for the pipeline. *Id*. P 11.

[66] Western Resource Advocates Motion to Intervene and Comments at 5 (Feb. 12, 2018); Center for Biological Diversity's Motion to Intervene and Answer in Opposition at 7 (Feb. 12, 2012).

obvious meaning of the analysis in the order is that the Commission has jurisdiction over only the seven discrete proposed hydro stations.

59. Petitioners acknowledge the statement in *Wyco* that any license for the Lake Powell Project would be limited to the discrete hydropower developments along the pipeline and would not encompass the entire pipeline.[67] However, they contend that this statement is "entirely consistent" with licensing the entire Hydro System, because the penstock alignments included in the Hydro System are necessary for power generation.[68] They assert that the existing record is sufficient and there is no need to develop additional facts to determine whether the pipeline segments are necessary for power generation. They further maintain that *Wyco* is not apposite, as it involved a different proceeding and different parties, and is therefore not controlling authority.

60. We disagree. The Hydro System as defined in the license application is a continuous 89-mile-long system of water delivery pipeline, with hydroelectric developments located in and along its 89-mile length. The ordinary meaning of "discrete" is "constituting a separate entity, individually distinct" or "consisting of distinct or unconnected elements, noncontinuous."[69] Thus, we read the Commission's characterization of the Lake Powell Pipeline's generating facilities as "discrete hydropower developments" in *Wyco* as meaning the separate and distinct generating facilities located in and along the pipeline, and not including the pipeline segments connecting those facilities. In addition, although the case involved a different proceeding and different parties, we view it as controlling, because the Commission expressly considered and explained the scope of its licensing jurisdiction concerning the Lake Powell Pipeline Project.

61. Both Petitioners and opponents cite another case, *Big Bear Area*,[70] in support of their respective arguments. In that case, a regional wastewater agency proposed to construct and operate two power plants, each with a rated capacity of 650 kW, on an outfall pipeline that delivered reclaimed water from its wastewater treatment plant to a disposal site, where the water was used for irrigation. As described in the order, about 5.8 miles of the 12-mile-long outfall pipeline would provide the head for generating

[67] Petitioners' Jan. 22, 2018 Request for Leave to Answer and Answer at 3.

[68] Petitioners' Feb. 21, 2018 Motion for Leave to Answer and Answer at 8.

[69] *See* Merriam Webster online, https://www.merriam-webster.com/dictionary/discrete.

[70] *Big Bear Area Regional Wastewater Agency*, 33 FERC ¶ 61,115 (1985) (*Big Bear Area*).

power, including a 300-foot section located on federal lands. The agency argued that the project should include the facilities proposed to be added to the existing wastewater treatment system; that is, the two new turbines. The Commission disagreed, explaining that although it "does not license facilities that are unrelated and only incidental to the power generation facilities, it must license all project works that are related to, and necessary for, the generation of hydroelectric power."[71] The Commission concluded: "Therefore, while we would not consider Big Bear's wastewater treatment plant or the disposal site to be project works, because they are not related to the production of power, we would consider as project works, the 12-mile outfall pipeline, the proposed powerhouses, and all associated facilities, because they would be directly related to, and necessary for, the generation of hydroelectric power."[72]

62. American Rivers notes that in *Big Bear Area*, the Commission found it had jurisdiction over more than just the two turbines that the applicant proposed to add to its existing wastewater treatment system, and concludes that the Commission's review "is heavily dependent on the specific facts of the proposed project."[73] Petitioners contend that this case "directly supports" their petition.[74] They add that, consistent with the orders cited in their petition, the Commission stated that it "would consider as project works the 12-mile outfall pipeline, the proposed powerhouses, and all associated facilities, because they would be directly related to, and necessary for, the generation of hydroelectric power."[75] They note but do not otherwise address the fact that only about 6 miles of the outfall pipeline would have provided the head for the two power plants.

63. In our view, *Big Bear Area* does not support a different result in this case. Although the Commission included the entire outfall pipeline as a project work, it was only 12 miles long, unlike the 89 miles of Lake Powell Pipeline proposed for licensing as

[71] *Id*. at 61,246 (citations omitted, citing *California Aqueduct* and *Escondido*).

[72] *Id*. As a result, the project required licensing because 300 feet of the pipeline crossed federal lands. The order did not address whether the generating facilities could have qualified for a conduit exemption. Although not explained in the order, it appears that the Commission included the entire pipeline because it was necessary to transport the water to both hydroelectric generating units, as the second unit would be located at the end of the pipeline. *See Big Bear Area Regional Wastewater Agency*, 57 FERC ¶ 62,195, at 63,408 (1991).

[73] American Rivers' Motion to Intervene and Comments at 7 (Feb. 12, 2018).

[74] Petitioners' Feb. 21, 2019 Motion for Leave to Answer and Answer at 4.

[75] *Id*. at 5, quoting *Big Bear Area*, 33 FERC at 61,246.

part of the Hydro System in this case. In addition, Big Bear's wastewater treatment system was not a large water delivery project, like those at issue in *California Aqueduct*, *Metropolitan Water District*, *Denver Water*, and *Wyco*. Therefore, we believe the latter cases are controlling, and support licensing only the discrete hydroelectric developments in and along the Lake Powell Pipeline, and not the pipeline segments connecting those developments.[76]

64. We find further support for this conclusion in amendments to the FPA. In 1978, soon after the Commission decided *Metropolitan Water District*,[77] Congress authorized the Commission to grant exemptions from licensing under the FPA for hydroelectric generating facilities using the hydroelectric generating potential of a conduit for agricultural, municipal, or industrial consumption.[78] In 2013, Congress expanded the Commission's conduit exemption authority and also created a subset of small conduit facilities that are categorically excluded from the licensing and exemption requirements of the FPA.[79] Because the Commission's authority to issue an exemption stems from its licensing authority, the Congressional creation and expansion of the Commission's conduit exemption authority validates our interpretation that the project works requiring a license or exemption include only the generating facilities, and not the conduit itself.[80]

---

[76] American Rivers and Center for Biological Diversity argue that more facts may be needed to differentiate between the water conveyance system and the so-called penstock alignments. American Rivers' motion to intervene and comments at 7 (Feb. 12, 2018); Center for Biological Diversity's motion to intervene and answer in opposition at 10 (Feb. 12, 2018). We disagree. The existing record is sufficient to demonstrate that, consistent with the Commission's prior cases involving hydroelectric developments in and along large water delivery projects, the Commission's licensing jurisdiction is limited to the hydroelectric generating facilities and does not include the water delivery pipeline.

[77] 4 FERC ¶ 61,064.

[78] Section 213 of the Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (Nov. 9, 1978), adding FPA section 30, 16 U.S.C. § 823a (2012). Pursuant to that authority, the District applied for and received a conduit exemption for the five developments. *Metropolitan Water District of Southern California*, 8 FERC ¶ 61,175 (1979) (Project No. 2896). Conduit exemptions were initially authorized for projects of 15 MW or less. They are now available for projects up to 40 MW. *See* 16 U.S.C. § 823a(b) (2012) and 18 C.F.R. § 4.30(b)(30) (2018).

[79] Hydropower Regulatory Efficiency Act of 2013, Pub. L. 113-23, § 4, 127 Stat. 493 (2013), amending section 30 of the FPA, 16 U.S.C. 823a(a) (2012).

[80] In addition, the Commission has recently permitted eligible developments to *(continued ...)*

65. The Lake Powell Pipeline Project is, first and foremost, a large water conveyance system, whose primary purpose is not hydropower development but delivery of water from Lake Powell in Arizona 140 miles to southwestern Utah for municipal and industrial use. It is neither required nor appropriate under the FPA for the Commission to take jurisdiction over extensive amounts of water conveyance facilities, such as the proposed 69-inch water conveyance pipeline, that do not fit the traditional definition of project works.

66. Furthermore, there are sound policy reasons supporting this limited interpretation of our licensing jurisdiction. Large water delivery projects such as the Lake Powell Pipeline Project arguably present attempts to use the Commission's hydropower authority to construct large amounts of pipeline that are unrelated to power production, and perhaps to take advantage of the eminent domain authority and federal preemption of inconsistent state requirements that a Commission license provides. They could also involve the Commission in regional controversies that are not directly within the scope of its responsibilities. By not asserting jurisdiction over these large water delivery projects, the Commission leaves to other state and federal authorities decisions regarding the purpose of and need for the water delivery project, the preferred route for the pipeline, and its cost and financial feasibility; matters that are far removed from the limited purpose of the hydroelectric power developments to be located in and along the pipeline.

67. For all of these reasons, we find that the Commission's licensing jurisdiction is limited to the discrete hydroelectric facilities to be located in and along the water delivery pipeline of the Lake Powell Pipeline Project, and does not extend to the water delivery pipeline itself. We therefore deny the petition.

---

obtain conduit exemptions for generating facilities located on or along water delivery conduits. In 2012, the Commission issued a conduit exemption for continued operation of the remaining powerhouse of the Escondido Project No. 176, after the licensees surrendered the license for the other powerhouse located on a federal reservation. *City of Escondido and Vista Irrigation District*, 140 FERC ¶ 62,226 (2012). In 2014, the Commission amended the license for the California Aqueduct Project, now known as the State Water Project No. 2426, to remove two developments that were included in the initial license for the power drops. *Calif. Dep't of Water Resources*, 148 FERC ¶ 62,235 (2014). In separate orders, the Commission granted conduit exemptions for these developments. *Calif. Dep't of Water Resources*, 148 FERC ¶ 62,236 (2014) (Alamo Powerplant Project No. 14579); *Calif. Dep't of Water Resources*, 148 FERC ¶ 62,237 (2014) (Mojave Siphon Powerplant Project No. 14580). The remaining project is now in the pre-filing phase of the integrated licensing process for relicensing.

D. Guidance and Implications for Licensing

68. By notice issued on January 11, 2018, the Commission suspended the licensing proceeding and extended the deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions to 60 days after issuance of a decision on the petition, and extended the deadline for filing reply comments to 105 days after issuance of that decision. We clarify that, consistent with this order, the Hydro System proposed for licensing in this proceeding is defined to include only the hydroelectric developments located in and along the pipeline (i.e., the generating facilities, primary transmission lines, and any necessary appurtenant structures, such as dams) and does not include the water delivery pipeline that connects those developments.

69. Any recommendations, terms and conditions, and prescriptions filed under the FPA are limited to those discrete hydroelectric developments, and may not include the water conveyance pipeline segments. To the extent that any of those hydroelectric developments are located on federal lands subject to the land managing agency's mandatory conditioning authority under section 4(e) of the FPA, that agency may file its preliminary mandatory conditions for those developments. For parts of the water delivery pipeline that would not be subject to our jurisdiction but are proposed to be located on federal land, or for the proposed alternative routes for the pipeline that would cross the Kaibab Indian Reservation, federal agencies should file their proposed rights-of-way conditions for the pipeline segments so that they can be analyzed in the EIS.

70. However, the Commission will not act as the ultimate decision maker for approving any portion of the overall project beyond the discrete hydropower facilities. In addition, the Commission will not be responsible for determining which alternative route for the water delivery pipeline should be chosen.

71. Unless the applicant requests otherwise, the Commission will consider whether and on what conditions to authorize the five hydroelectric developments proposed to be located in and along the water conveyance pipeline of the Lake Powell Pipeline Project. Although the applicant has not requested this approach, Utah Board has the option to amend its application to seek one or more separate licenses for these developments, or to request conduit exemptions or qualifying conduit status for any developments that meet the statutory requirements for those facilities.[81] Utah Board should let the Commission

[81] *See* FPA section 30, 16 U.S.C § 823a (2012). A "qualifying conduit hydroelectric facility" of 5 MW or less does not require either a license or an exemption if it meets certain criteria. *See* FPA section 30(a) and 18 C.F.R. § 4.30(b)(26) (2018). A "small conduit hydroelectric facility" of 40 MW or less can receive an exemption from licensing under the FPA. *See* FPA section 30(b) and 18 C.F.R. § 4.30(b)(30) (2018). Except for the two proposed developments at Hurricane Cliffs, all of the proposed *(continued ...)*

know as soon as possible if it would like to amend its application. Until then, the Commission will continue the licensing process as outlined in its January 11, 2018 notice.

The Commission orders:

The petition for declaratory order on jurisdiction, filed by the Utah Board of Water Resources and Washington County Water Conservancy District on December 27, 2017, in this proceeding is denied.

By the Commission. Commissioner Chatterjee is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

---

generating units are small enough to potentially qualify for a categorical exclusion from all licensing and regulation under the FPA. Although the peaking facility for the initial phase of the Hurricane Cliffs development would be under 40 MW, it would include construction of two dams, and thus would not appear to qualify for a small conduit facility exemption.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Utah Board of Water Resources	Docket No.	EL18-56-000
Washington County Water Conservancy District	Project No.	12966-005

(Issued September 20, 2018)

CHATTERJEE, Commissioner, *dissenting*:

1. I respectfully dissent from the majority's decision to deny the Utah Board of Water Resources' (Utah Board) and Washington County Water Conservancy District's petition for declaratory order regarding the Commission's jurisdiction with respect to certain facilities associated with the Lake Powell Pipeline Project.

2. Utah Board states that it has been developing this project since 2008 relying on the presumption that the facilities included in the "Hydro System" as delineated in the Utah Board's application and in FERC scoping documents are the FERC-jurisdictional "project" as defined in the Federal Power Act (FPA).[1] I believe that, in this case, the majority is misguided in its narrow interpretation of what facilities should be included in the hydroelectric facilities of the Lake Powell Project. A more expansive view is consistent with the FPA and Commission precedent and would provide the applicant with a predictable regulatory process.

3. The majority concludes that the Commission's licensing jurisdiction is limited to the discrete hydroelectric facilities to be located in and along the water delivery pipeline of the Lake Powell Pipeline Project, and does not extend to the water delivery pipeline

[1] Section 3(11) provides, in pertinent part:

> "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith . . . all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit".

16 U.S.C. § 796(11)(2012).

itself. However, FPA section 3(11) specifically includes water conduits in the definition of a project. As the majority noted, the Commission has certificated a number of projects which include water supply conduits as part of their jurisdictional facilities in cases such as the San Gorgonio, Escondido, and El Dorado Projects.[2] In other projects, such as the California Aqueduct and Gross Reservoir Projects, the Commission determined that only portions of the overall project were related to the production of power and therefore jurisdictional. Here, the majority finds that the Lake Powell Project includes five distinct hydroelectric facilities, despite the fact that those five projects are located along one conduit that serves as the penstock for all the in-line hydroelectric generation facilities.

4. The Commission's precedent on these issues is less than clear. I agree with the majority that, to some extent, the two groups of cases identified, *i.e.*, those requiring that all parts of a complete unit of development must be licensed, and those finding that the Commission's licensing jurisdiction does not extend to water conveyance structures that are not directly related to and necessary for hydroelectric power generation, "reflect differing approaches to jurisdiction and suggest that different facts lead to different results."[3] However, as the Commission explained in *Denver Water*, "[i]t is the Commission's responsibility to determine, on the facts of each individual case, the rational scope of the 'project' that is to be licensed."[4] This analysis has resulted in a variety of fact-specific determinations of project scope, which have varied considerably depending on the project concerned.

5. In this case, I find that the specific facts of this project weigh in favor of granting the petition. Specifically, the 89-mile section of the 140-mile Lake Powell Project that Utah Board seeks to include in the project's "Hydro System" clearly fits the FPA's definition of a "project." This section of pipeline serves as a necessary penstock, which enables the operation of the generation facilities.

6. Although the majority argues that the 2012 *Wyco Power and Water Inc.*[5] decision established what portions of a project were jurisdictional, *Wyco* did not give specific guidance on that matter. The order stated that "discrete hydropower developments," not the entire water conveyance system, would be included in the license.[6] The Utah Board's

---

[2] *Utah Board of Water Resources*, 164 FERC ¶ 61,203 at P 39 (2018).

[3] *Id.* P 32.

[4] *City and County of Denver, Colorado,* 94 FERC ¶ 61,313, at 62,158 (2001) (*Denver Water*).

[5] *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124 (2012) (*Wyco*).

[6] *Id.* P 11.

application only asked for 89 miles of the 140-mile Lake Powell Pipeline to be included in the license, which is not inconsistent with *Wyco*, as the majority suggests. Rather, in the context of the larger 140-mile Lake Powell Pipeline Project, it is reasonable to find that an 89-mile section could be considered "discrete hydropower developments."

7. Utah Board and the Bureau of Land Management (BLM) have, since 2008, been operating under the reasonable assumption that the "Hydro System" specified in Utah Board's application and included in Commission staff's scoping documents are jurisdictional to the Commission. Affirming Commission jurisdiction over these facilities would provide clarity on the procedures under which the proposal will be considered and the roles of state and federal agencies. I do not think that it is good policy for the Commission to disclaim jurisdiction at this late point in the process.

8. In sum, given that the statutory definition of project includes water conduits, that the Commission has included water supply conduits in some past projects, and that the state and BLM have been operating since 2008 under the reasonable assumption that the Commission's jurisdiction included the entire 89-miles penstock in the project, I believe the Commission should have granted the petition for declaratory order.

For these reasons, I respectfully dissent.

_____

Neil Chatterjee
Commissioner