



STATEMENT

Dissent of Commissioner Neil Chatterjee on Utah Board of Water Resources

Date: September 20, 2018

Docket No.: EL18-56-000
Item No.: H-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.

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.

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 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

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).

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



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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.

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.

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.

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 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."

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.

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.



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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.