

UNITED STATES OF AMERICA  
before the  
FEDERAL ENERGY REGULATORY COMMISSION

Brett Harding Duxbury,  
Complainant,

v.

Southern California Edison,  
Respondent.

Docket No. \_\_\_\_\_

NOTICE OF COMPLAINT

Take notice that on December \_\_\_\_, 2012, Brett Harding Duxbury filed a formal complaint against Southern California Edison pursuant to section 206 of the Federal Power Act (16 U.S.C. § 824(e)) and Federal Energy Regulatory Commission Rule 206 (18 C.F.R. 385.206) alleging that Southern California Edison violated the whitewater recreational flow conditions of its license to operate the Kern River No. 3 Hydroelectric Plant, FERC Project No. 2290 (77 FERC 61, 313 [1996 License]; 81 FERC 61, 162 [1997 Order on Rehearing]; 107 FERC 62, 136 [2004 Order Amending License]) on four occasions during the year of 2012.

Brett Harding Duxbury certifies that copies of this complaint have been served on the two official contacts for Southern California Edison as listed by the Secretary — Stephen E. Pickett & Henry H. Romero — as well as all other parties with valid contact information on the FERC Online Service List. (18 C.F.R 385.206 & 385.2010; see Certification of Service, *infra*.)

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 C.F.R.

385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Respondent's answer and all interventions, or protests must be filed on or before the comment date. Respondent's answer, motions to intervene, and protests must be served on the Complainant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, D.C. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket. For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on \_\_\_\_\_.

Magalie Roman Salas  
Secretary

UNITED STATES OF AMERICA  
before the  
FEDERAL ENERGY REGULATORY COMMISSION

Brett Harding Duxbury,  
Complainant,

v.

Southern California Edison,  
Respondent.

Docket No. \_\_\_\_\_

COMPLAINT OF BRETT HARDING DUXBURY ALLEGING FOUR VIOLATIONS  
IN 2012 BY SOUTHERN CALIFORNIA EDISON OF ITS LICENSE TO OPERATE  
THE KERN RIVER NO. 3 HYDROELECTRIC PLANT, FERC PROJECT NO. 2290

1. BACKGROUND OF THE CONTROVERSY

On December 10, 1991, Southern California Edison [hereinafter “SCE”] applied to the Federal Energy Regulatory Commission [“the Commission”] for a reissuance of its license to operate the Kern River No. 3 Hydroelectric Plant [“KR3”], FERC Project No. 2290. (See FERC ISSUANCE 20040512-3014 at p. 1; Appendix at p. 37<sup>1</sup>.)

On May 17, 1996, as part of the relicensing process that addressed, among other things, recreational interests affected by the license, the United States Forest Service [“USFS”] submitted a draft list of conditions pursuant to Section 4(e) of the Federal Power Act to be included in the new license. (See FERC ISSUANCE 19961227-3115 at pp. 57-72; Appendix at pp. 4-7 [“1996 USFS 4(e) Conditions”].)

---

<sup>1</sup> Complainant will cite to both the FERC Online eLibrary and the attached Appendix, which is comprised of excerpted documents from that library.

On December 24, 1996, the Commission issued SCE a new license to operate KR3. (FERC ISSUANCE 19961227-3115; Appendix at pp. 1-7 [“1996 License”].) The license incorporated the draft 1996 USFS 4(e) Conditions, but reserved the right to amend them pending USFS submission of final 4(e) conditions. (See FERC ISSUANCE 20040512-3014 at p. 1; Appendix at p. 37.)

The Commission incorporated without change the 1996 USFS 4(e) Conditions related to whitewater recreational flows into Article 422 of the 1996 License. Those conditions provided for augmented flows in the diverted stretch of the North Fork Kern River between May 15 and July 15 of each year. The augmented flow regime provided that “all flow between 700 cfs and 1,100 cfs shall remain in the river channel” during that time for recreation, and that the determination would be “based on the previous days [*sic*] average flow.” (See FERC ISSUANCE 19961227-3115 at pp. 50-51; Appendix at pp. 2-3.)

SCE and a number of recreational interests including American Whitewater appealed the 1996 USFS 4(e) Conditions, and the matter remained a subject of controversy until December 24, 2002, when SCE and “Whitewater Interests” — a group comprised of American Whitewater, Friends of the River, and National Heritage Institute — arrived at a settlement of the issues surrounding the whitewater recreational flow regime. (FERC SUBMITTAL 20030106-0377; Appendix at pp. 12-32 [“2002 Settlement Agreement”].)

In the 2002 Settlement Agreement, SCE agreed to abide by a new whitewater recreational flow regime wherein SCE would release 700 cfs into the diverted stretch below Fairview Dam when flows at the dam were between 1,000 cfs and 1,300 cfs, and would release 1,400 cfs into the diverted stretch when flows were above 1,700 cfs. This new regime would only be in effect on the following days of the year: “Fridays and Weekends Between April 1st and the Weekend before Memorial Day Weekend,” “Daily Between the Weekend Before the Memorial Day Weekend and July 4th,” and “Weekends

After July 4th and Up to July 31st.” The 2002 Settlement Agreement made no mention that the regime would be based on the previous day’s average flow. (FERC SUBMITTAL 20030106-0377, Exhibit A; Appendix at pp. 25-26.)

In its cover letter to USFS accompanying the 2002 Settlement Agreement, SCE requested that USFS “adopt as a 4(e) Condition for submittal to FERC the whitewater recreational flow schedule” it had agreed to. (FERC SUBMITTAL 20030106-0377, Cover Letter, at p. 2; Appendix at p. 13.)

On December 19, 2003, USFS filed revised final 4(e) conditions with the Commission. (FERC SUBMITTAL 20031223-5088; Appendix at pp. 33-35 & 39-58 [“2003 USFS 4(e) Conditions”].) In so doing, USFS announced that that the “enclosed [Final] 4(e) conditions have been revised from [the 1996 USFS 4(e) Conditions] to reflect the changes requested in the Settlement Agreement . . . .” (FERC SUBMITTAL 20031223-5088, Cover Letter, at p. 1; Appendix at p. 33.) USFS pointed to the 2002 Settlement Agreement as “rationale and support” for the 2003 USFS 4(e) Conditions. (FERC SUBMITTAL 20031223-5088, Cover Letter, at p. 2; Appendix at p. 34.) USFS provided a “crosswalk” table to point out changes between the 1996 USFS 4(e) Conditions and the 2003 USFS 4(e) Conditions. In the “crosswalk,” USFS underlined regarding the whitewater recreational flow regime that it had: “Modified language of Whitewater Recreation section to reflect Settlement Agreement language.” (FERC ISSUANCE 20040512-3014, USFS Crosswalk, at p. 4; Appendix at p. 40.)

On January 16, 2004, American Whitewater wrote USFS that it “appreciate[d] the fact that your staff honored the language contained in the Settlement Agreement in your 4(e) conditions.” American Whitewater sent a copy of this letter to, among other entities, SCE. (Appendix at p. 36<sup>2</sup>.)

---

<sup>2</sup> Complainant obtained this letter pursuant to a September 26, 2012 Freedom of Information Act request with USFS.

On May 12, 2004, the Commission ordered that the 2003 USFS 4(e) Conditions be incorporated into the KR3 license. (FERC ISSUANCE 20040512-3014 at pp. 1-2.; Appendix at pp. 37-38 [“2004 License Amendment”].) In so doing the Commission stated: “The Section 4(e) conditions have been revised from those in the 1996 filing to reflect the requested changes in the Settlement Agreement . . . .” (FERC ISSUANCE 20040512-3014 at p. 1.; Appendix at p. 37.) And: “The Regional Forester has incorporated changes in the Section 4(e) conditions pursuant to those points agreed upon by [SCE] and Whitewater Interests.” (FERC ISSUANCE 20040512-3014 at p. 2.; Appendix at p. 38.) And: “The Regional Forester has made revisions concurrent with those requested by [SCE] and various stakeholders in the [2002] Settlement Agreement.” (*Ibid.*)

It is complainant’s position that SCE remains presently obligated to comply by the specific terms of the whitewater recreational flow regime it agreed to in the 2002 Settlement Agreement, as those terms were incorporated into its license by mean of the 2003 USFS 4(e) Conditions and the Commission's 2004 License Amendment Order.

It is SCE’s position that it is not bound by the terms of the 2002 Settlement Agreement. SCE’s maintains (1) that USFS did not incorporate the complete terms of the 2002 Settlement Agreement into the 2003 USFS 4(e) Conditions; rather, USFS unilaterally altered those conditions in a significant manner when it comes to the week before Memorial Day weekend. SCE also takes the position (2) that the 2003 USFS 4(e) Conditions did not replace the 1996 USFS 4(e) Conditions; rather, the 1996 USFS 4(e) Condition regarding the augmented whitewater recreational flow regime being based on “the previous day’s average flow” — a condition absent from the 2002 Settlement and the 2003 USFS 4(e) and the 2004 License Amendment Order — still applies.

SCE’s position caused it to violate its license to operate KR3 on at least four occasions in 2012.

## 2. VIOLATIONS ONE THROUGH THREE: THE WEEK BEFORE MEMORIAL DAY WEEKEND

SCE violated its license to operate KR3 on May 21, 22 & 23 of 2012 by failing to provide whitewater recreational flows below Fairview Dam. On each of those days, incoming flows at Fairview Dam were above 1,000 cfs, but SCE failed to release 700 cfs into the diverted stretch below.

In a meeting between complainant and an employee of SCE on May 23, 2012, the employee admitted that incoming flow levels at Fairview Dam from May 21 to May 23 would otherwise have triggered an obligation for SCE to release 700 cfs. The employee averred, however, that the flow regime did not apply to those three days. The days in question were a Monday, a Tuesday, and a Wednesday, all falling on the week before Memorial Day weekend. The employee explained it was SCE's position that the flow regime did not apply to any weekdays on the week before Memorial Day weekend, including the Friday before that weekend. (Declaration of Complainant, Appendix at p. 66.)

SCE's present position is in direct conflict with the 2002 Settlement Agreement it entered into.

Under both complainant's and SCE's interpretations, there are three phases of the KR3 whitewater recreation flow regime throughout any given year: The regime begins covering Fridays-through-Sundays on April 01, then it shifts in late May to every day of the week ["Daily"], and ends with Saturdays-and-Sundays after July 04.

Under the 2002 Settlement Agreement, the Friday-through-Sunday phase applies "Between April 1st and the Weekend before Memorial Day Weekend." The Daily phase applies "Between the Weekend Before the Memorial Day Weekend and July 4th." The Saturdays-and-Sundays phase applies to the balance of the month of July. (FERC SUBMITTAL 20030106-0377, Exhibit A; Appendix at pp. 25-26.)

In 2012, “the Weekend Before the Memorial Day Weekend” was on May 19 & 20. That is when the Daily phase begins according to the 2002 Settlement Agreement. Thus SCE was obligated under the Settlement to provide whitewater recreational flows on May 21, 22 & 23 of 2012. But it didn’t.

SCE’s position is that the Daily phase did not begin until the following weekend, and instead started on May 26, 2012. SCE finds support for its position in the following chart [“USFS Chart”] that was crafted by USFS and included in the 2003 USFS 4(e):

Dates	Boating Days	River Flow at Fairview Dam (cfs)	Whitewater Release (cfs)
April 1 up to the weekend prior to Memorial Day Weekend	Fridays and Weekends	1,000 to 1,300	700
		More than 1,700	1,400
Weekend prior to Memorial Day until July 4	Daily	1,000 to 1,300	700
		More than 1,700	1,400
July 5 up to July 31	Weekends	1,000 to 1,300	700
		More than 1,700	1,400

(FERC ISSUANCE 20040512-3014 at p. 11; Appendix at p. 47.)

SCE has seized on USFS’s use of the ambiguous phrase, “Weekend prior to Memorial Day” in the second row of the USFS Chart and interpreted that phrase to its advantage. In one sense, the phrase “the weekend before Memorial Day” could denote May 26 & 27 in 2012. But, as complainant will show, the phrase carries a second meaning in common usage that can denote May 19 & 20. Moreover, SCE’s interpretation of the phrase would lead to an absurd result in the whitewater recreational flow regime. Finally, SCE’s interpretation of the phrase completely thwarts the intentions of the parties to the 2002 Settlement Agreement, as well as the intentions of USFS and the Commission in implementing that settlement.

There is an obvious problem with SCE’s interpretation of the USFS Chart. In the 2002 Settlement Agreement, the parties — including SCE — “recommend[ed]” that USFS adopt the terms of the settlement in part because it “allows for boating

opportunities on Fridays [as opposed to weekends only] from April 1st” and “daily boating opportunities from the week prior to the Memorial Day weekend.” (FERC SUBMITTAL 2003-0106-0377, Rationale, at p. 6; Appendix at p. 32.) Those recommendations both envision the Friday before Memorial Day weekend to be included in the whitewater recreational flow regime.

However, under SCE’s interpretation of the USFS Chart, the Friday-through-Sunday phase terminates on “the weekend prior to Memorial Day weekend.” And the Daily phase does not begin until Memorial Day weekend. Thus, under SCE’s interpretation of the USFS Chart, the Friday before Memorial Day is not included in the whitewater recreational flow regime — even though the half-dozen or so Fridays immediately before Memorial Day and the half-dozen or so Fridays immediately after Memorial Day are included in the regime. That result is puzzling. The parties informed USFS that “Fridays tend to account for more recreational user days than other weekdays” in April and May and that the “peak recreational period” began in earnest around Memorial Day weekend. (FERC SUBMITTAL 2003-0106-0377, Rationale, at p. 4; Appendix at p. 30.) USFS cited the parties’ findings in support of the 2003 USFS 4(e) Conditions. (FERC SUBMITTAL 20031223-5088, Cover Letter, at p. 2; Appendix at p. 34.) It is unreasonable to interpret the USFS Chart in a manner whereby USFS provides for whitewater recreational releases on *every Friday from April 1st through July 4th except for one*: the Friday before Memorial Day. In 2012, there were seven Fridays before that Friday, and five Fridays after it, and all were protected by the whitewater flow regime. It defies common sense to think USFS would call for Friday boating opportunities on every Friday from April 1st to July 4th except for the Friday before Memorial Day. The parties to the 2002 Agreement, including SCE, recommended against such a result, and USFS provided no rationale for deviating from their recommendation. Absurd results are disfavored in the interpretation of language. SCE’s interpretation of the USFS Chart runs afoul of this principle.

To countenance the absurdity, SCE's position necessarily rests on the proposition that the phrase "Weekend prior to Memorial Day" as used by USFS in the USFS Chart is an unambiguous phrase subject to but a single interpretation — namely, as far as 2012 was concerned, the weekend beginning on May 26.

Not so. "Weekend prior to Memorial Day" is an ambiguous phrase, and, in 2012, very well could have meant in common usage the weekend commencing May 19.

Consider a hypothetical: On Christmas Day 2011, a beloved family member of a Commissioner said, "It was so great to spend the Holidays together. Come visit me this year. Are you free the weekend before Memorial Day?" First of all, if that family member meant the weekend starting May 26 in 2012, and wanted to be clear about it, he or she most likely would have asked, "Are you free Memorial Day weekend?" instead. That is an unambiguous question, and it is how most people would denote the weekend starting May 26. Think about it: Memorial Day weekend sales. Plans for Memorial Day weekend. People don't typically talk about a sale starting the weekend before Memorial Day, or their plans for the weekend before Memorial Day — unless what they really mean is that those events are occurring the weekend before Memorial Day weekend. The phrase "Memorial Day weekend" is the common, unambiguous usage that (for 2012) denotes the weekend starting May 26. The phrase "Weekend before Memorial Day" is ambiguous in that regard, and, in 2012, could refer to either the weekend starting May 19 or the weekend starting May 26. The ambiguity demands clarification.

Return to the hypothetical family member's question using the USFS Chart formulation, "Are you free the weekend before Memorial Day?" Complainant believes a Commissioner receiving a question in this form would best be served by asking the loved one for clarification, lest he or she make a plane reservation for the wrong weekend. The loved one may have meant May 26, but may just as well have meant May 19. Many people would hear, "Are you free the weekend before Memorial Day?" and think to themselves, "Am I free the weekend before Memorial Day weekend?" or, "Memorial Day

is the last weekend in May; am I free the weekend before that?,” or “She didn’t say ‘Memorial Day weekend’; she must mean the weekend before.” Complainant invites the Commission to perform a Google search of “weekend before Memorial Day” and “Victoria Day weekend.” (Use the quotes.) Victoria Day weekend, a Canadian holiday, falls on the weekend before Memorial Day weekend, and in 2012 commenced on May 19. The internet is littered with references *equating* the USFS Chart’s formulation of “weekend before Memorial Day” and “Victoria Day weekend.” People thus routinely use the USFS Chart formulation to denote the weekend before Memorial Day weekend, which is when the parties to the 2002 Settlement Agreement intended the Daily phase of the whitewater flow regime to kick in all along. Indeed, the Commission is in possession of a document from the Department of the Interior where that Department uses the phrase “weekend before Memorial Day” to denote the weekend before Memorial Day weekend. (FERC SUBMISSION 20040506-0026 at p. 25; Appendix at p. 65 [Interior statement: “Hozomeen is open to the public from the weekend before Memorial Day (Canada’s Queen Victoria day) through October”].) These uses demonstrate that if anyone had wanted to denote the weekend commencing May 26, 2012 in clear language, they would have used the unambiguous phrase, “Memorial Day weekend.” The phrase “weekend prior to Memorial Day,” by contrast, is ambiguous.<sup>3</sup>

It is unfortunate that USFS used this ambiguous phrase in the Chart. But ambiguities should not be interpreted in ways that lead to absurd results, such as the Friday before Memorial Day problem noted above. (See *Clinton v. City of New York* (1998) 524 U.S. 417, 429 [court should construe ambiguities in manner that avoids absurd results].) Nor should ambiguities be used to thwart the intentions of the relevant

---

<sup>3</sup> In fact, without ever having seen the 2002 Settlement Agreement — that is, by only looking at the USFS Chart — complainant as a newcomer to this issue initially came to both conclusions over a few hours, *i.e.*, that the phrase could mean May 19 or May 26. The ambiguity must be interpreted as the former in the context of this license, however, for the reasons developed herein.

parties. (See *Kemmis v. McGoldrick* (9th Cir.1985) 767 F.2d 594, 597 [“If a provision is ambiguous . . . its interpretation depends on the parties' intent at the time of execution”].) There is no question that the parties to the 2002 Settlement Agreement, including SCE, intended that the whitewater recreational flow regime apply to the entire week before Memorial Day weekend, including May 21, 22 & 23 of 2012. SCE requested that USFS implement the Daily phase of the flow regime on “the Weekend before Memorial Day Weekend.” (FERC SUBMITTAL 2003-0106-0377, Whitewater Recreational Flow Schedule, at p. 2; Appendix at p. 26.) SCE provided a thoughtful rationale behind that specific request. (FERC SUBMITTAL 2003-0106-0377, Rationale, at pp. 4, 6; Appendix at pp. 30, 32.) In its cover letter to USFS, SCE urged that it “adopt as a 4(e) Condition for submittal to FERC the whitewater recreational flow schedule” it had agreed to. (FERC SUBMITTAL 2003-0106-0377, Cover Letter, at p. 2; Appendix at p. 13.) American Whitewater sent a letter to USFS a few weeks after USFS filed the 2003 USFS 4(e) Conditions with this Commission, and stated how it “appreciate[d] the fact that your staff honored the language contained in the Settlement Agreement in your 4(e) conditions.” (Appendix at p. 36.) The parties to the 2002 Settlement Agreement plainly intended that the whitewater recreational flow regime apply on the weekdays before Memorial Day weekend.

More important, though, is the fact that the relevant parties in this matter — this Commission and USFS as author of the 4(e) — stated that the 2004 License Amendment and the 2003 USFS 4(e), respectively, were intended to incorporate and institutionalize the terms of the 2002 Settlement Agreement.

When USFS filed the 2003 USFS 4(e) Conditions with the Commission, it announced that the 2003 “4(e) conditions have been revised from those [1996 USFS 4(e) Conditions] *to reflect the changes requested in the Settlement Agreement* and to reflect current Forest Service policy and standards.” (FERC SUBMITTAL 20031223-5088, Cover Letter, at p. 1; Appendix at p. 33 (italics added).) SCE might hope to find support

for its position that USFS unilaterally altered the 2002 Settlement Agreement in the latter portion of that statement (“and to reflect current Forest Service policy and standards”), but it would be mistaken. A quick glance at the USFS “crosswalk” shows at least seven instances in the “Remarks” where USFS patently states it made changes between the 1996 USFS 4(e) Conditions and the 2003 USFS 4(e) Conditions to reflect its policies and standards. (FERC ISSUANCE 20040512-3014, USFS Crosswalk, at pp. 4-5; Appendix at pp. 40-41.) *Not a single one of those remarks are directed at the whitewater recreation flow regime*, which is contained in a subsection of Condition 6. (FERC ISSUANCE 20040512-3014 at p. 10-11; Appendix at pp. 46-47.) The remarks for Condition 6 indicate in part that “Minor rewording and editing throughout to reflect actual recreation management agreements reached between [SCE] and Forest Service since 1996.” (FERC ISSUANCE 20040512-3014, USFS Crosswalk, at p. 4; Appendix at pp. 40.) But the “minor rewording and editing” doesn’t go to the whitewater recreational flow regime, either. Condition 6 contains seven subsections, the majority of which involve USFS campground lands. (FERC ISSUANCE 20040512-3014 at pp. 9-11; Appendix at pp. 45-47.) USFS specifically states the minor rewording and editing stem from its own relationship with SCE — “licensee and Forest Service” — and thus would not have arisen from involvement with the whitewater interests. (FERC ISSUANCE 20040512-3014, USFS Crosswalk, at p. 4; Appendix at pp. 40.) Moreover, the change between 1996 and 2003 to the whitewater recreational flow regime did not involve “minor rewording and editing.” According to USFS, that regime was “modified” (FERC ISSUANCE 20040512-3014, USFS Crosswalk, at p. 4; Appendix at pp. 40) and “revised” (FERC SUBMITTAL 20031223-5088, Cover Letter, at p. 1; Appendix at p. 33) in service of the 2002 Settlement Agreement. The 2003 USFS 4(e) substantially modified the whitewater recreational flow regime because of that settlement; there is nothing “minor” about that. Finally, at no point in the 2003 USFS 4(e) cover letter or crosswalk does USFS even hint that it intended to unilaterally change the terms of the 2002

Settlement Agreement. To the contrary, USFS underlines in the crosswalk remark concerning the whitewater flow regime that it “Modified language of Whitewater Recreation section *to reflect* Settlement Agreement language.” (FERC ISSUANCE 20040512-3014, USFS Crosswalk, at p. 4; Appendix at pp. 40 (italics added).) Again, the whitewater flow regime is in section (f) of Condition 6. Here we have USFS directly stating that with respect to the “Whitewater Recreation section” — section (f) — it “modified language” in order “to reflect [the 2002] Settlement Agreement.” USFS intended to incorporate and institutionalize the terms of the 2002 Settlement Agreement in the 2003 USFS 4(e) Conditions.

This Commission intended the same thing in its 2004 License Amendment Order. When the Commission incorporated the 2003 USFS 4(e) Conditions into the KR3 license, it announced that “The Section 4(e) conditions have been revised from those in the 1996 filing *to reflect the requested changes* in the Settlement Agreement” (and other changes according to USFS policy and standards that did not impact the whitewater flow regime, as complainant has discussed above). (FERC ISSUANCE 20040512-3014 at p. 1.; Appendix at p. 37 (italics added).) The Commission noted: “The Regional Forester has incorporated changes in the Section 4(e) conditions *pursuant to those points agreed upon by the licensee [SCE] and Whitewater Interests.*” (FERC ISSUANCE 20040512-3014 at p. 2.; Appendix at p. 38 (italics added).) And: “The Regional Forester has made revisions *concurrent with those requested by the licensee [SCE] and various stakeholders* in the [2002] Settlement Agreement.” (*Ibid* (italics added).) The Commission intended to incorporate the 2002 Settlement Agreement into SCE’s KR3 license.

On February 28, 2005, about a year after the Commission amended the KR3 license, it issued an Environmental Inspection Report in which it stated that SCE was complying with the following condition: “Supplemental whitewater flow releases . . . , releases to occur on Friday and weekends from 4-1 to **weekend before Memorial Day weekend**; daily from **weekend prior to Memorial Day weekend** to July 4 . . . .” (FERC

ISSUANCE 20050228-0207 at p. 5; Appendix at p. 59 (bold and italics added.) That language specifies in unambiguous terms it was the Commission's understanding that SCE was subject to the terms of the 2002 Settlement Agreement.

To summarize, in order for this Commission to align itself with SCE's interpretation of the whitewater recreational flow regime in its license to operate KR3, it would have to adopt the following conclusions as its own:

- (1) the Commission's 2005 Environmental Inspection Report erroneously recited the terms of SCE's license to operate KR3.
- (2) the Commission was mistaken in its statements that SCE's license were "pursuant to," were "concurrent with," and "reflected," the terms of the 2002 Settlement Agreement between SCE and the whitewater stakeholders.
- (3) USFS unilaterally altered the terms of the 2002 Settlement Agreement in its 2003 USFS 4(e) Conditions without providing any rationale to do so.
- (4) USFS was mistaken when it said the 2003 USFS 4(e) Conditions "reflect" the terms of the 2002 Settlement.
- (5) It was reasonable for USFS to remove the Friday before Memorial Day weekend from the whitewater flow regime but not the half-dozen Fridays before or after that weekend.
- (6) "Weekend prior to Memorial Day" carried the unambiguous meaning of May 26 & 27 in 2012 notwithstanding common usage of the phrase to denote May 19 & 20 in that year.

On the other hand, all this Honorable Commission must conclude to affirm complaint's position is this: USFS intended to implement the 2002 Settlement Agreement that SCE freely entered into, but, in an act akin to clerical error, employed one ambiguity in so doing. Draw that one conclusion, and everything else — the intentions of all the parties and all their writings from 1996 to 2005 — falls right into place and makes perfect sense.

Rather than seeing the ambiguity in the USFS Chart for what it is and abiding by the terms it freely agreed to in the 2002 Settlement Agreement, SCE has construed the ambiguity to the company's financial advantage, and now seeks to cement its construction. SCE became aware of the controversy developing about its interpretation of the USFS Chart in the Spring of 2012, and, during a Environmental Inspection in September 2012, procured a statement that it was in compliance with the whitewater recreational flow regime at all times during in 2012. (FERC ISSUANCE 20121016-0001 at p. 3; Appendix at p. 62.) However, as complainant has shown, the only way SCE was in compliance on May 21, 22 & 23 in 2012 is if the Commission has changed its position since 2005 and adopted SCE's interpretation of the ambiguity in the USFS Chart. For the reasons developed in this complaint, the Commission should reject the product of SCE's one-sided discussion with the Commission's representative. It should instead hold SCE in violation of its license on May 21, 22 & 23 in 2012. This action would make whole the stated intentions of the parties to the 2002 Settlement Agreement, the stated intention of USFS in filing its 2003 USFS 4(e) Conditions, and the stated understanding of the Commission in ordering those conditions into the KR3 license.

In addition, the Commission is aware that the only publicly available information on the flows above and below Fairview Dam is a "flow phone," meaning compliance information is only available in realtime and only available to persons who have the time and ability to call the phone every day that the whitewater recreational flow regime is in play. (FERC ISSUANCE 20040512-3014, Condition 6(g), at p. 11; Appendix at p. 47; see also FERC SUBMITTAL 20000710-0361 at pp. 1-2.) This limits the public's ability to monitor whether SCE is in compliance with the terms of its license, and denies the public any ability to monitor compliance after the fact. Once the moment is gone, the data for that moment disappears forever from public view. But SCE retains this data. (FERC ISSUANCE 20121016-0001 at p. 3; Appendix at p. 62.) Should the Commission find SCE in violation of its license on this ground, complainant asks that the Commission

direct SCE to release its flow data above and below Fairview Dam for the period in question (the days between the weekend before Memorial Day weekend and Memorial Day weekend in the years from 2004 through 2012) for public inspection.

### 3. VIOLATION FOUR: THE PREVIOUS DAY'S AVERAGE "CONDITION"

At 12:02 p.m. on Friday, April 20, 2012, according to the SCE flow phone, the inflow at Fairview Dam was 1,105 cfs, whereas the flow in the river below the dam was 522 cfs. (Declaration of Complainant, Appendix at p. 66.) Given the fact that this was a Friday in April and between 10:00 a.m. and 5:00 p.m., SCE was obligated according to the USFS Chart to release a minimum of 700 cfs. It didn't.

SCE maintains that its obligation to release whitewater recreational flows is not based on an application of the USFS Chart to the realtime inflow at Fairview Dam, but is instead based on the previous day's average inflow there. (Declaration of Complainant, Appendix at p. 66.)

SCE's position used to be correct. In the 1996 USFS 4(e) Conditions, which were incorporated by the Commission into the 1996 License, USFS provided that "all flow between 700 cfs and 1,100 cfs shall remain in the river channel" for recreation, and that the determination would be "based on the previous days [*sic*] average flow." (See FERC ISSUANCE 19961227-3115 at pp. 50-51 & 61; Appendix at pp. 2-3 & 7.)

However, there is no "previous day's average" provision in the 2002 Settlement Agreement entered into by SCE. Nor did USFS submit such a provision in the 2003 USFS 4(e) Conditions. Nor did the Commission include such a provision in its 2004 License Amendment Order.

Before examining the state of the license, complainant notes that a "previous day's average" condition in the whitewater flow regime substantially mitigates the financial impact on SCE of its obligation to provide recreational flows. If such a condition exists, it

means that SCE only loses water for power generation if the flow at Fairview Dam “threads the needle” of either the 1,000-1,300 cfs range or the 1,700-2,000 cfs range for two consecutive days. For instance, flows at Fairview were below 1,000 cfs on Thursday, April 19, 2012, above 1,000 cfs on Friday, April 20, and above 1,300 cfs on Saturday, April 21. At that time of year, the “Fridays-through-Sundays” phase of the regime applies. Under a “previous day’s average” condition, SCE would not have had to decrease the amount of water it diverted from the river on any of the two days covered by the regime: April 20 did not meet the previous day’s average condition (flows were below 1,000 cfs on the day before, April 19), and April 21 did not require any reduction in SCE’s diversion to meet the 700 cfs baseline. Then on Sunday, April 22, 2012, flows at Fairview were above 1,700 cfs for at least a part of the day<sup>4</sup>, but SCE did not have to decrease its diversion under its interpretation of the license because the previous day’s average was not above 1,700 cfs. SCE’s “previous day’s average” condition means that SCE gets a full diversion unless incoming flows at Fairview thread the needle between either 1,000-1,300 cfs or 1,700-2,000 cfs for *two* days in a row.

The “previous day’s average” condition works to SCE’s benefit when flows are decreasing as well. If on Day One flows at Fairview average 1,000 cfs but on Day Two flows decrease to the 800 cfs range, one might think that SCE would be obligated to release 700 cfs on Day Two under a “previous day’s average” condition. One would be mistaken. SCE is guaranteed a minimum of 300 cfs for power generation by both the

---

<sup>4</sup> Complainant is uncertain as to what the flows were above and below Fairview Dam on April 22, 2012 between 10:00 a.m. and 5:00 p.m. This underlines a problem with the flow phone as a public source for compliance information and SCE accountability. Complainant had no cellular service between those hours on that day and SCE only provides realtime flow information. However, complainant obtained results of (above/below Fairview) 1,736/1,154 cfs and 1,583/1,002 cfs at 9:40 a.m and 5:27 p.m., respectively, on April 22. Given ramping issues and a baseline diversion of around 580 cfs, all signs point to SCE not augmenting flows for whitewater recreation that day. Whether the flow at Fairview after 10:00 a.m. triggered an obligation to release augmented flows remains an uncertainty to the public.

2002 Settlement Agreement and 2003 USFS 4(e). (FERC ISSUANCE 20040512-3014 at pp. 11.; Appendix at pp. 25 & 47 [“The flow schedule is designed to allow the Licensee to continuously divert 300 cubic feet per second (cfs) into the Project powerhouse”].) Complainant does not challenge the 300 cfs guarantee, but notes its impact when coupled with SCE’s “previous day’s average” condition: The two cannot coexist; one has to give way to the other. In the Day One 1,000 cfs / Day Two 800 cfs example, a choice must be made on Day Two: either (a) provide 700 cfs based solely on the previous day’s average and thus only divert 100 cfs for power generation, well below the 300 cfs guarantee, or (b) use the 300 cfs guarantee for power and thus fail to provide the minimum recreational flow of 700 cfs. You cannot do both.<sup>5</sup> SCE’s “previous day’s average” condition is structurally incompatible with the 300 cfs guarantee. Yet the whitewater flow regime was “designed” to protect that guarantee. (FERC ISSUANCE 20040512-3014 at pp. 11.; Appendix at pp. 25 & 47.) It was also designed to provide recreational flows when inflows at Fairview Dam are within certain ranges.

The only way to do both is if the obligation to augment flows is triggered in realtime.

The conflict between the 300 cfs guarantee and SCE’s “previous day’s average” condition suggests that there is, in fact, no “previous day’s average” condition in the current whitewater recreational flow regime for KR3. The suggestion is correct. SCE was well aware of the “previous day’s average” condition in the 1996 USFS 4(e) Conditions. Yet SCE failed to negotiate a “previous day’s average” condition into the 2002 Settlement Agreement. Nor did USFS or the Commission include such a provision in the 2003 USFS 4(e) Conditions or the 2004 License Amendment Order, respectively. To the contrary, the 2004 License Amendment Order, reciting the 2003 USFS 4(e) Conditions, provides for whitewater recreational flows as follows: “Beginning no later than 10 a.m. and ending no

---

<sup>5</sup> Indeed, there was no 300 cfs guarantee in the 1996 USFS 4(e), and thus there was nothing for the “previous day’s average” condition in that 4(e) to conflict with. (See FERC ISSUANCE 19961227-3115 at pp. 50-51 & 61; Appendix at pp. 2-3.)

earlier than 5 p.m. of each day that whitewater flows are scheduled, the Licensee shall release the whitewater flows described [in the USFS Chart] into the [river].” (FERC ISSUANCE 20040512-3014 at p. 11; Appendix at p. 47.) Period. This language is all about the flow at Fairview Dam — incoming and outgoing — between 10 and 5 on a given day. There is nothing in this language that remotely suggests the previous day’s average flow is germane to SCE’s obligation to release whitewater.

Moving on to the the USFS Chart, when “River Flow at Fairview Dam” is between 1,000 cfs and 1,300 cfs or above 1,700 cfs, there shall be a “Whitewater Release.” (*Ibid.*) Nothing in the USFS Chart remotely suggests a condition based on the previous day’s average flow.

SCE’s position is that the “previous day’s average” condition from the 1996 USFS 4(e) Conditions somehow survived this Commission's implementation of the 2003 USFS 4(e) Conditions. It did not. The 2003 USFS 4(e) are “the Revised Final 4(e) Conditions.” (FERC ISSUANCE 20040512-3014 at p. 3; Appendix at p. 39.) USFS revised the 1996 “Final 4(e) Conditions” by reciting the conditions it wanted to keep and deleting the ones it didn’t in the 2003 USFS 4(e). One simply has to look at the structure of the 2003 USFS 4(e): It is a whole and complete recitation of all USFS conditions at issue for KR3. It is independent of the 1996 USFS 4(e). It takes the same format and structure of the 1996 USFS 4(e). It deals with the same subjects in the same condition numbers as the 1996 USFS 4(e). Where it wishes to alter the terms of the 1996 USFS 4(e), it does so. *And where it does not seek to alter the terms of the 1996 4(e), it restates those terms in whole.* (FERC ISSUANCE 20040512-3014 at pp. 4-22; Appendix at pp. 40-58.) The 2003 USFS 4(e) was not appended to the 1996 USFS 4(e); it replaced it. The 2003 USFS 4(e) is a complete and independent recitation of USFS 4(e) policy for KR3 to the exclusion of all other iterations of the 4(e). (See FERC ISSUANCE 20040512-3014 at p. 2; Appendix at p. 38 [ordering that that SCE be “subject to the [2003] conditions submitted by the USFS under Section 4(e)”].)

If USFS had intended the 1996 “previous day’s average” condition to survive the 2003 revision, USFS would have included it in the 2003 USFS 4(e) and restated it in whole — just like it did with every other 1996 4(e) condition it wanted to survive. But it didn’t. There is accordingly no authority for SCE’s position that a “previous day’s average” condition applies to the whitewater recreation flow regime in its license to operate KR3. Although that condition existed in the 1996 USFS 4(e), SCE failed to negotiate for it in the 2002 Settlement Agreement, USFS did not re-state it or otherwise include it in the 2003 USFS 4(e), and the Commission did not include it in the 2004 License Amendment Order. SCE has been asserting and financially benefitting from a nonexistent whitewater recreational flow condition for almost nine years. That squarely places SCE in violation of its license on April 20, 2012.

And perhaps on dozens or more other days between 2004 and 2012. Complainant asks that the Commission direct SCE to release its flow data above and below Fairview Dam for the applicable periods of time between April 01 and July 31 in the years 2004 through 2012 so the public can inspect it for compliance.

#### 4. RULE 206 STATEMENTS

1. Complainant has identified above which actions of SCE violated its license on four occasions in 2012.
2. Complainant has identified above how those actions violated its license on four occasions in 2012.
3. Those actions impacted whitewater recreation on the North Fork Kern River on those four days in 2012.
4. Complainant is a private boater and has suffered no financial impact from SCE’s actions.
5. Non-financial impacts include impeded recreational opportunities on the North Fork Kern River on at least four days in 2012 and potentially on many more days since the

2004 License Amendment Order. Non-financial impacts also include the potential for “safety problems” identified in the 2002 Settlement Agreement. (FERC SUBMITTAL 20030106-0377, Rationale, at p. 3; Appendix at p. 29 [“Flows less than the minimum acceptable flows may result in safety problems due to the shallowness of the river channel and numerous obstructions for safe passage.”].)

6. As for relief, complainant asks the Commission to hold SCE in violation of its license to operate KR3 on the four instances proven and direct SCE to release flow data above and below Fairview Dam for the public to examine for further instances of noncompliance.
7. Complainant has attached all portions of cited documents in a separately paginated Appendix to this complaint and has only excerpted documents available in the FERC Online eLibrary. [<http://elibrary.ferc.gov/idmws/search/fercgensearch.asp>]
8. Complainant has attached all relevant documents in the Appendix.
9. (i) Complainant has not used other methods of dispute resolution as this controversy involves competing interpretations of SCE’s license to operate KR3 that only this Commission can authoritatively resolve; (ii-iv) For that same reason, complainant does not believe other methods of dispute resolution would be fruitful.
10. Complainant has included a formal notice of complaint above.

DATED: December 14, 2012

Respectfully submitted,

// s // BHD

---

Brett Harding Duxbury  
PO Box 1938  
Kernville, California 93238-1938  
760.376.1905  
[kernville at mac dot com](mailto:kernville@mac.com)