189 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Chairman;
Mark C. Christie, David Rosner,
Lindsay S. See and Judy W. Chang

Pacific Gas and Electric Co. Project No. 77-321

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued November 21, 2024)

1. On June 27, 2024, the Commission issued an order[1] granting a request by Pacific Gas and Electric Company (PG&E), licensee for Potter Valley Hydroelectric Project No. 77, for a temporary variance of the minimum flow and irrigation release requirements set forth in license Article 52.[2] On July 29, 2024, the City of Ukiah, California ("the City") filed a timely request for rehearing.[3]

2. Pursuant to *Allegheny Defense Project v. FERC*,[4] the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),[5] we are modifying the discussion in the

[1] *Pac. Gas & Elec. Co.*, 187 FERC ¶ 61,192 (2024) (Variance Order).

[2] PG&E's February 22, 2024 Variance Request (2024 Variance Request).

[3] On August 15, 2024, the County of Mendocino, California filed a letter in support of the City's rehearing request and included similar letters from the Mendocino County Board of Supervisors, the Mendocino County Farm Bureau, the Millview County Water District, the Redwood Valley County Water District, and the Willow County Water District. These letters were received after the deadline for filing a rehearing request.

[4] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[5] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

Variance Order and continue to reach the same result in this proceeding, as discussed below.[6]

## I. Background

3. On October 4, 1983, the Commission issued a new license for the continued operation and maintenance of the 9.4-megawatt project located on the East Branch Russian River and Eel River in Lake and Mendocino Counties, California.[7] The project consists of several project works. As relevant to the instant matter, Scott Dam is the uppermost project work, which impounds Lake Pillsbury on the Eel River and has no fish passage. Below Scott Dam, the Eel River flows into the Van Arsdale Reservoir, impounded by project work Cape Horn Dam, which includes upstream and downstream fish passage facilities for threatened salmonid species found in the Eel River.

4. At the Van Arsdale Reservoir, water is either released from or spilled over Cape Horn Dam, from which it then flows northwest in the Eel River or is conveyed south by tunnel and penstock to the Potter Valley Powerhouse. Water discharged from the powerhouse is released into the East Branch Russian River, which flows into the mainstem Russian River. Both the Eel River and Russian River flow to the Pacific Ocean. The project's watershed is the source of most of the water in the East Branch Russian River. The U.S. Army Corps of Engineers' (Corps) Coyote Dam and its impoundment, Lake Mendocino, which provides water for municipal, irrigation, and recreational uses, are approximately 15 miles downstream of the Potter Valley Powerhouse on the Russian River.

5. Irrigated agriculture, including orchard crops and vineyards, has been an important component of the East Branch Russian River's upper basin economy since water diversions began in 1912. Surface and subsurface water sources are used extensively for irrigation, and some of the water discharged from the Potter Valley Powerhouse into the

[6] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Variance Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

[7] *Pac. Gas & Elec. Co.*, 25 FERC ¶ 61,010 (1983). The license expired on April 14, 2022, and PG&E continues to operate the project under an annual license. Notice of April 21, 2022 Authorization for Continued Project Operation. PG&E filed a plan and schedule for filing an application to surrender the project on July 8, 2022, and revised the schedule on June 6, 2024. PG&E July 8, 2022 and June 6, 2024 Filings.

East Branch Russian River satisfies a non-license contract between PG&E and the Potter Valley Irrigation District (Irrigation District).

### A. Threatened Species Protection and License Article 52

6. The California coastal distinct population segment Chinook salmon (*Oncorhynchus tshawytscha*) and northern California distinct population segment steelhead trout (*O. mykiss*) migrate the length of the Eel River and spawn in the mainstem and tributaries up to the reach between the Cape Horn and Scott Dams. Both species are federally listed as threatened[8] under the Endangered Species Act (ESA).[9]

7. Following a 10-year study of flow-release effects on the salmonid fishery in the Eel River and East Branch Russian River and the monitoring of water temperature downstream of Scott Dam, PG&E sought and, on January 28, 2004, the Commission approved, a license amendment adding Article 52 to the license.[10] It requires PG&E to comply with the reasonable and prudent alternative (RPA)[11] provided in the U.S. Department of Commerce's National Marine Fisheries Service's (NMFS) 2002 Biological Opinion[12] to prevent jeopardy to the threatened salmonids in the Eel River Basin.[13] The RPA establishes a complex regime of minimum flows into the Eel River and East Branch Russian River, as well as caps on supplementary releases to the Irrigation District, based on a variety of factors which include cumulative inflow to Lake Pillsbury and the water-year classification (normal, dry, or critical).[14]

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[8] 65 Fed. Reg. 36074 (June 7, 2000), listing the California distinct population segment steelhead trout as a threatened species; 64 Fed. Reg. 50394 (Sept. 16, 1999), listing the California distinct population segment Chinook salmon as a threatened species.

[9] 16 U.S.C. §§ 1531 *et seq*.

[10] *Pac. Gas & Elec. Co.*, 106 FERC ¶ 61,065 (2004 License Amendment), *reh'g denied*, 107 FERC ¶ 61,232 (2004).

[11] *See* 2004 License Amendment, 106 FERC ¶ 61,065 at PP 102-103 & ordering para. (E). *See id.* at app. A (attaching the RPA).

[12] *See* NMFS, Nov. 26, 2002 Final Biological Opinion, Docket No. P-77-110 (filed Nov. 29, 2002).

[13] 2004 License Amendment, 106 FERC ¶ 61,065 at P 1.

[14] A water-year begins on October 1 and ends on September 30 the following year. To determine the water-year classification for a given river basin, the estimated total unimpaired runoff for the water-year is compared to historical data and then classified as

8. PG&E is required to release minimum flows into the Eel River from Scott Dam, based on the water-year classification.[15] PG&E is also required to release minimum flows from Cape Horn Diversion Dam into the Eel River, in amounts which are determined using a combination of factors including water-year type, season, date, cumulative inflow into Lake Pillsbury, and a calculated set of upper and lower flow limits. Additionally, the RPA requires PG&E to release minimum flows into the East Branch Russian River, based on normal, dry, and critical water-year classifications, for the protection of aquatic resources.[16] Finally, the RPA provides limits on PG&E's ability to release supplementary flows to the Irrigation District through the Potter Valley Powerhouse between April 15 and October 15[17] and requires PG&E to reserve 2,500 acre-feet of water (block water) for release to the Eel River for fishery resources at the discretion of resource agencies, including NMFS, California Department of Fish and Wildlife (California DFW), Round Valley Indian Tribes, and the U.S. Fish and Wildlife Service (FWS), each water year.[18]

9. At the time of the Variance Order, the 2024 water-year was on track for a normal water-year classification for the Eel River below Scott Dam and the East Branch Russian River compliance locations, and a wet water-year in the Eel River at the Cape Horn Dam compliance location.[19]

### B. Dam Safety

10. Preliminary results of a multi-year engineering reevaluation of Scott Dam assessing its expected performance under seismic and flood loading suggested that the dam may become structurally unstable when subjected to updated seismic loading conditions and that the potential for seismic instability is lower when the water level in

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the corresponding water year type. The total estimated unimpaired runoff includes the prior year's water-year index, current runoff, and forecasted runoff in the watershed. Water-year classifications in California are based on data prepared by the California Department of Water Resources. *See California Data Exchange Center – River Forecasts*, California Department of Water Resources, https://cdec.water.ca.gov/rivforecasts.html (last accessed Apr. 11, 2024).

[15] Variance Order, 187 FERC ¶ 61,192 at P 6.

[16] *Id.* P 8.

[17] *Id.* P 9.

[18] RPA Condition D.1; *Pac. Gas & Elec. Co.*, 116 FERC ¶ 62,158 (2006).

[19] Variance Order, 187 FERC ¶ 61,192 at P 15.

Lake Pillsbury is at or below the spillway crest elevation.[20] Based on these findings, PG&E identified two interim risk-reduction measures to implement until more detailed studies are complete: (1) establish a ten-foot restriction on the maximum reservoir operating level; and (2) leave Scott Dam's spillway gates open year-round to maintain the water level in Lake Pillsbury at or below spillway crest elevation. According to PG&E, by reducing the maximum available storage in the reservoir by approximately 20,000 acre-feet, these measures would reduce the storage pressure behind the dam and, thus, reduce potential seismic risk.[21]

11. In an April 28, 2023 letter, the Commission's Division of Dam Safety and Inspections concurred with PG&E that the seismic instability of Scott Dam may be greater than previously understood.

### C. Coldwater Pool

12. As the upper water layer of the Lake Pillsbury reservoir warms, a thermal gradient is created and a coldwater pool forms at the lake bottom. PG&E states that its operational experience demonstrates that drawing cooler water from the deeper coldwater pool and releasing it into the Eel River downstream of Scott Dam improves the aquatic habitat for listed salmonids.[22] As the cooler water is removed and the storage level decreases, the upper, warmer water increasingly mixes with the cooler deeper water, further diminishing the coldwater pool.[23] If the coldwater pool is depleted, it cannot be restored until the following winter or spring.

13. Based on water temperature analysis, PG&E determined that there are limited options for mitigating high water temperatures, and that an effective strategy to maintain Lake Pillsbury's cold-water pool and ensure cooler flow releases from Scott Dam into the Eel River is to reduce the minimum flows and releases to the Irrigation District.[24]

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[20] *Id.* P 10.

[21] *Id.* P 11.

[22] PG&E draws water from the coldwater pool via a lower-level outlet below full pool.

[23] 2024 Variance Request at 3.

[24] *See* Variance Order, 187 FERC ¶ 61,192 at P 14.

### D. PG&E Request

14. To address the dam safety and water temperature issues, PG&E requested a temporary variance to reduce certain releases for a normal-water year under Article 52 of its license.[25] Specifically, the requested temporary variance would reduce minimum flow releases to the Eel River below Scott Dam from the normal water-year requirement of 60 cfs from June 1 through November 30 and 100 cfs from December 1 through May 31 to the critical water-year requirement of 20 cfs.[26]

15. In addition, PG&E proposed to initially reduce minimum flow releases to the East Branch Russian River to the dry water-year requirement of 25 cfs, with the ability to further decrease these flows to as low as 5 cfs if daily average Lake Pillsbury release water temperatures exceeded 15° C or as needed based on PG&E and resource agency determinations. After September 30, minimum flows in the East Branch Russian River would remain at 25 cfs for the remainder of the temporary variance, but further reductions could occur if monitoring indicated that Lake Pillsbury storage is approaching the critical 12,000 acre-feet storage level.

16. PG&E proposed that the variance would end when Lake Pillsbury storage exceeds 36,000 acre-feet following October 1, 2024, or when the variance is superseded by another variance. In the meantime, PG&E would provide monthly storage reports to the Commission and adopt a flexible monitoring approach to manage releases in consultation with NMFS, California DFW, Round Valley Indian Tribes, and FWS (collectively, the agencies) as well as continued engagement with the Drought Working Group.[27] Prior to filing the request, PG&E had consulted with the agencies, which all supported the proposed variance.[28] Following public notice of PG&E's request, a number of parties intervened, including the City, which opposed the request.

### E. Variance Order

17. In the Variance Order, the Commission granted PG&E's requested temporary variance to permit it to manage the remaining water in Lake Pillsbury more effectively. The Commission noted that its dam safety staff had confirmed the dam safety issues may be greater than previously understood and concluded that the variance does not represent a departure from the parameters and analysis of NMFS's RPA or license Article 52 but

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[25] *See id.* P 16.

[26] 2024 Variance Request at 9.

[27] Variance Order, 187 FERC ¶ 61,192 at PP 18-22.

[28] *Id.* P 23.

instead represents an operational shift from the water release requirements of a normal water-year to those of a dry water-year or a critical water-year.[29]

18. With respect to water resources, the Commission found that the temporary variance would reduce the likelihood of harm to ESA-listed salmonids and their critical habitat in the Eel River by maintaining a coldwater pool and sufficient storage levels in Lake Pillsbury. While implementation of the variance would result in temporary, adverse effects to aquatic resources in the Russian River immediately below the project, these impacts would be minimized by incrementally reducing flows only as needed to preserve water for releases later in the season. The Commission explained that the proposed variance mirrored the minimum flow requirements for a dry water-year as outlined in Article 52 of the License and the RPA in NMFS's 2002 Biological Opinion, the impacts of which had been analyzed in the 2000 Environmental Impact Statement (Final EIS) prepared for the 2004 license amendment adopting Article 52, and updated the Final EIS' analysis to address effects to the human environment specific to the proposed temporary variance.[30] The Commission found that the temporary variance would appropriately balance the protection of federally listed species in the Eel River and the interests of water users in the Russian River watershed.[31]

19. Based on these conclusions, the Commission granted the temporary variance, subject to ongoing monitoring and reporting requirements.[32]

20. On October 9, 2024, PG&E filed a report that indicated that the variance ended as of October 1, 2024.[33]

## II. Discussion

21. In its request for rehearing of the Variance Order, the City argues that the Commission should not have granted the temporary variance because: (1) the Commission failed to take the required hard look at the potential impacts of the proposed variance and instead relied on the Final EIS and additional information provided in the

[29] *Id.* P 28.

[30] *Id.* P 46.

[31] *Id.* P 29.

[32] *Id.* PP 62-63, ordering paras (A)-(D).

[33] Potter Valley Hydroelectric Project, FERC No. 77-CA 2024 Temporary Minimum Instream Flow Variance September Storage and Temperature Report, Cover Letter and Enclosure 1 at 4.

Order; and (2) statements made by the Sonoma County Water Agency (Sonoma Water) after the Order call into question the Commission's reliance on earlier statements by Sonoma Water.[34]

22. As discussed further below, the Commission continues to find that the temporary variance helped ensure adequate water storage capacity to provide flows and temperature necessary for the protection of threatened species while conserving limited water resources and minimizing the risk of operational and dam safety effects at Lake Pillsbury within the bounds of Article 52 of the license.[35]

### A. Hard Look at Potential Impacts

23. Here, the Commission did not complete an Environmental Assessment (EA) or EIS analyzing the licensee's request because the proposed variance mirrors the minimum flow requirements for a dry water-year as previously analyzed in the Final EIS.[36] The City argues that the analysis in the Final EIS is outdated and does not fully account for all impacts of the variance.[37]

24. According to the City, the fact that the Final EIS dates from 2000 means that it must be updated to support the current variance request. While, as noted by the City, the Council on Environmental Quality (CEQ) offers guidance that as "as a rule of thumb . . . EISs that are more than 5 years old should be carefully reexamined,"[38] the Final EIS was, in fact, examined by the Commission, which determined that the proposed variance mirrored the minimum flow requirements for a dry water-year as previously analyzed.[39]

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[34] Rehearing Request at 3.

[35] Variance Order, 187 FERC ¶ 61,192 at P 62.

[36] *Id.* P 46.

[37] Rehearing Request at 11-13.

[38] *Id.* at 12 (citing 40 Most Asked Questions Concerning the CEQ's National Environmental Policy Act Regulation, Question 32 (March 23, 1981)). We note that the CEQ statements in this regard are not requirements under NEPA, the CEQ's implementing regulations, or the Commission's regulations implementing NEPA, but rather represent guidance on best practices.

[39] Variance Order, 187 FERC ¶ 61,192 at P 46.

25. The City argues that 2024 is, in fact, a normal or wet water-year and not a dry or critical water-year, and, therefore, using the prior analysis of dry and critical water-year impacts is factually incorrect.[40] We find that the City's characterization of normal or wet-water years discounts other current water situations at the dams. We recognize that, based only on precipitation, the area is in a normal to wet water-year; however, storage capacity in Lake Pillsbury has been reduced as a result of the seismic-risk-related restrictions, described above.[41] PG&E's variance preserves the coldwater pool to ensure cooler water release temperatures for the protection of threatened salmonids in the Eel River, decreases the likelihood of significant depletion of the storage reservoir, and decreases the chance of a loss of reservoir operations resulting from low water levels triggering bank sloughing and impairing the operation of the outlet works.[42] We continue to find that the comparison of the operations under the variance and those of a dry or critical water-year are appropriate.

26. Further, we disagree that a supplemental EIS is required in this instance. The decision whether to complete a supplemental EIS is left to agency discretion under a "rule of reason" standard and as set forth in CEQ regulations.[43] A supplemental EIS is required if: (1) the "agency makes substantial changes in the proposed action that are relevant to environmental concerns;" or (2) there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[44] New information must be sufficient to show that the remaining federal action will affect the environment in a significant manner or to a significant extent not already considered.[45] In other words, "the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains a 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be

[40] Rehearing Request at 14.

[41] Variance Order, 187 FERC ¶ 61,192 at P 16.

[42] *Id.* PP 16, 53; *supra* PP 10-12.

[43] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989) (*Marsh*); *Friends of the River v. FERC*, 720 F.2d 93, 109-10 (D.C. Cir. 1983) (citing 40 C.F.R. § 1502.9 (2023)).

[44] 40 C.F.R. § 1502.9(c) (2023).

[45] *Marsh*, 490 U.S. at 374.

prepared."[46] In *Marsh v. Oregon Natural Resources Council*, the U.S. Supreme Court explained that an agency's decision to prepare a supplemental EIS is governed by a "rule of reason" and that an agency need not supplement an EIS every time new information comes to light after an EIS is finalized, for to do so "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."[47] The U.S. Court of Appeals for the District of Columbia Circuit has similarly made clear that a supplemental EIS "must only be prepared where new information provides a *seriously* different picture of the environmental landscape."[48] An agency's determination of whether a supplemental EIS is needed "implicates substantial agency expertise" and is thus governed by the arbitrary and capricious standard and is entitled to deference.[49]

27. While the City claims that the prior analysis from the Final EIS is inadequate, it offers no evidence other than a bare assertion that the EIS is "clearly outdated."[50] While the Commission has recognized that environmental impacts are subject to change and cannot be sustained indefinitely, a new environmental analysis is not triggered simply by the passage of time, but rather where new information provides a seriously different environmental landscape.[51] Here, the environmental impacts of the conditions of the proposed variance have already been considered[52], and there is no significant new

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[46] *Id.*

[47] 490 U.S.at 373-74; *see also Mayo v. Reynolds*, 875 F.3d 11, 16 (D.C. Cir. 2017).

[48] *Stand Up for Cal. v. Dep't of the Interior*, 994 F.3d 616, 629 (D.C. Cir. 2021) (emphasis in original) (quoting *Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (*Friends of Capital Crescent Trail*) (internal quotation marks omitted)).

[49] *Marsh*, 490 U.S. at 375-76; *see also Friends of Capital Crescent Trail*, 877 F.3d at 1059 ("If an agency's decision not to prepare a [supplemental EIS] turns on a factual dispute the resolution of which implicated substantial agency expertise, the court defers to the agency's judgment.") (quoting *Marsh*, 490 U.S. at 376).

[50] Rehearing Request at 12.

[51] *Driftwood LNG LLC*, 186 FERC ¶ 61,112, at P 16, *order on reh'g*, 188 FERC ¶ 61,017, at P 30 (2024).

[52] Variance Order, 187 FERC ¶ 61,192 at P 46. As noted in the Variance Order, in "the 2004 License Amendment, the Commission highlighted that NMFS's November 29, 2002 Biological Opinion is based upon Interior and NMFS alternative analyzed in the Final EIS." *See also* 2004 License Amendment, 106 FERC ¶ 61,065 at P 52; Final EIS

information regarding the environmental impacts. Importantly, the City has not provided any new information. Further, in the Variance Order the Commission analyzed the environmental impacts of the variance, including examining an alternative flow regime proposed by some commenters.[53] Therefore, we continue to find that the prior reliance on the Final EIS, and additional analysis in the Variance Order, was appropriate.

28. The City further argues that the analysis of impacts on Russian River salmonid species and Russian River water users in the Final EIS is inadequate.[54] To advance this argument, the City argues that the Final EIS provides "one paragraph" of discussion related to both Russian River salmonid species and water uses as compared to a more fulsome analysis of the species in the Eel River.[55] The City, however, overlooks the main purpose of the Final EIS, namely, to consider the impacts of releases from the Scott Dam, and, further downstream, from the Cape Horn Dam and the Potter Valley Powerhouse, as well as the main purpose of analysis in the Variance Order.[56] While the variance releases from the Potter Valley Powerhouse flow into Lake Mendocino, the lake is located 15 miles downstream of the Potter Valley Powerhouse,[57] and, because Lake Mendocino operations are under the Corps' control, rather than the licensee's control, there is no assurance that additional flows from the project would in turn be released to the lower Russian River for environmental and consumptive use purposes, regardless of whether or not the variance is in place.

29. The City has not raised significant new information that calls into question the conclusions in the Final EIS regarding the impacts to the Russian River that would require supplementation under NEPA. We continue to find that the Final EIS, together

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at 4-30 to 4-36 (discussion of water resource impacts for the Interior and NMFS alternative) and 4-79 to 4-84 (discussion of fisheries impacts for the Interior and NMFS alternative).

[53] *Id*. at 38-42; 48-56.

[54] Rehearing Request at 12-13.

[55] *Id.*

[56] Variance Order, 187 FERC ¶ 61,192 at P 3. *See also* NMFS Nov. 26, 2002 Final Biological Opinion in Docket No. P-77-100 at 75 ("Effects of the proposed action to listed salmonids and critical habitat in the Russian River Basis are limited to the river reach below Coyote Dam" on Lake Mendocino).

[57] *See* Variance Order, 187 FERC ¶ 61,192 at P 40. As discussed in the Variance Order, winter storms have replenished the lake, buffering effects from the variance.

with the additional analysis in the Variance Order, adequately describe the potential environmental impacts of operation under the temporary variance.

30. The City further argues that the additional information on environmental impacts included in the Variance Order does not comply with the requirements for an adequate EA or supplemental EIS. According to the City, the inclusion of additional environmental information in the Variance Order indicates that the Final EIS was inadequate or out-of-date and required updating through a new or supplemental NEPA document.[58]

31. This argument misunderstands the purpose of the additional information included in the Variance Order. Here, the Commission reviewed the existing environmental analyses to confirm that the potential impacts from the variance were adequately analyzed in the Final EIS.[59] Additionally, the discussion of potential environmental impacts in the Variance Order provides responses to comments from the City and other parties.[60] Those comments and the Commission's responses did not amount to new information or changed circumstances that would trigger the need for a supplemental EIS.

### B. Reliance on Statements by Sonoma Water

32. The City argues that the Commission improperly relied on statements from Sonoma Water that are not in the record and do not support the Commission's findings in the Variance Order.[61] According to the City, Sonoma Water's letter from March 2024[62] does not support the Commission's findings with respect to the availability of water downstream on the Russian River under the temporary variance.[63] Moreover, the City

[58] Rehearing Request at 14.

[59] *See, e.g.*, *City of Spokane*, 187 FERC ¶ 62,153, at P 10 (2024); *Pac. Gas & Elec. Co.*, 185 FERC ¶ 62,019, at P 12 (2023); *S. Cal. Edison Co.*, 184 FERC ¶ 61,051, at P 13 (2022); *Nw. Corp.*, 179 FERC ¶ 61,131, at P 18 (2022).

[60] *See, e.g.*, Variance Order, 187 FERC ¶ 61,192 at PP 48-49.

[61] Rehearing Request at 16.

[62] March 1, 2024 Letter from Sonoma Water to Erik Ekdal, California SWRB.

[63] Rehearing Request at 16-17.

argues that later correspondence from Sonoma Water in July 2024[64] shows that the temporary variance is having a negative effect on water availability within Sonoma Water's service area.[65]

33. The City overstates the Commission's reliance on Sonoma Water's correspondence. In the Variance Order, the Commission cited to a March 2024 letter from Sonoma Water, which stated that Sonoma Water can meet its water commitments during the current water season from Lake Mendocino.[66] Sonoma Water's letter was not submitted to the Commission by Sonoma Water but was added to the official record of the variance request proceeding by Commission staff.[67] Sonoma Water's letter confirmed other information received on the record from intervenors and commenters, which noted that, while downstream flows to users of the East Branch Russian River would likely be reduced,[68] water levels in Lake Mendocino at the time that the Commission was considering the request for a temporary variance had been replenished by winter storms.[69] Accordingly, the letter from Sonoma Water does not represent the entirety of the record considered by the Commission. The Commission also received correspondence from other entities, including PG&E and the Irrigation District, which indicated that the variance request would have an impact on available water and would require reductions in flow releases to downstream water users of the East Branch Russian River immediately below the Potter Valley Powerhouse.[70] The information available at the time the variance request was granted indicated that, as a result of the request, the conditions would mimic those of dry and critical water-years.

34. On rehearing, the City attempts to introduce new evidence, specifically a July 2024 letter from Sonoma Water. The Commission looks with disfavor on parties

[64] July 17, 2024 Letter from Sonoma Water to Erik Ekdal, California SWRB (provided by the City with the Rehearing Request).

[65] Rehearing Request at 17-18.

[66] Variance Order, 187 FERC ¶ 61,192 at P 40.

[67] *See Id.* n.72; *see also* June 11, 2024 Memorandum Forwarding March 1, 2024 Letter from Sonoma Water to the Public Record for Project No. 77, Potter Valley Project, California.

[68] *See* Variance Order, 187 FERC ¶ 61,192 at P 39.

[69] *Id.* P 40.

[70] *Id.* PP 39-40.

presenting new evidence on rehearing.[71] We reject this attempt to introduce new evidence on rehearing. Nevertheless, as discussed below, we find the substance of the July 2024 letter from Sonoma Water would not change the outcome of this proceeding.[72]

35. The subsequent July 2024 letter from Sonoma Water provided by the City describes water conditions following the grant and implementation of the temporary variance, and, therefore, the drop in water levels described in the letter is to be expected given the limits on releases under the temporary variance. Reductions in Lake Mendocino water levels are generally the result of many factors beyond the licensee's control, including actual inflow from non-project sources, discretionary water releases, consumptive water use patterns, actual evapotranspiration, and other water storage reductions.[73] Sonoma Water's observations in the July 2024 letter do not address or distinguish the impacts of these contributing factors to Lake Mendocino water levels. Accordingly, nothing in the July 2024 letter from Sonoma Water calls into question the Commission's prior conclusions that the temporary variance would result in releases that mimic a critical water-year as considered in the Final EIS and are, when balanced with the seismic risks to the Scott Dam, appropriate.

[71] *See Balt. Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) ("We look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.") (citations omitted); *see also Ala. Power Co.*, 179 FERC ¶ 61,128, at P 15 (2022); *KEI (Me.) Power Mgmt. (III) LLC*, 173 FERC ¶ 61,069, at P 38 n.77 (2020). Rule 713 of the Commission's Rules of Practice and Procedure permits raising new information on rehearing only if that information is "based on matters not available for consideration by the Commission at the time of the final decision or final order." 18 C.F.R. § 385.713(c)(3) (2024).

[72] *Nev. Power Co. v. Enron Power Mktg., Inc.*, 105 FERC ¶ 61,185, at P 74 (2003) (declining to reopen the record based on a lack of good cause where the information sought to be entered would not change the outcome of the proceeding).

[73] The July 2024 letter provides projections of water levels in Lake Mendocino, with and without the variance. Both projections show a decrease in water levels over time, although the projected decrease is larger with the variance. July 17, 2024 Letter from Sonoma Water to Erik Ekdal, California SWRB (Attachment). *See also* Variance Order, 187 FERC ¶ 61,192 at P 40.

The Commission orders:

In response to the request for rehearing filed by the City, the Variance Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

( S E A L )

Debbie-Anne A. Reese,
Secretary.