



Decision

Matter of: Federal Energy Regulatory Commission—Applicability of the Congressional Review Act to an Order Modifying and Approving Surrender of the Lower Klamath Project License

File: B-335030

Date: May 8, 2024

DIGEST

The Federal Energy Regulatory Commission (FERC) issued an order titled, *Order Modifying and Approving Surrender of License and Removal of Project Facilities* (Order). 181 FERC ¶ 61,122 (2022). The Order approved the surrender of the Lower Klamath Project license, conditioned on the licensees performing additional activities under the license, including the requirement to decommission four hydroelectric dams.

The Congressional Review Act (CRA) requires agencies to submit rules to Congress for review before they may take effect. CRA incorporates the Administrative Procedure Act's definition of a rule, which does not include agency orders, such as licensing. We conclude that FERC's Order is a licensing action and therefore not a rule subject to CRA's requirements.

DECISION

On November 17, 2022, the Federal Energy Regulatory Commission (FERC) issued, an order titled, *Order Modifying and Approving Surrender of License and Removal of Project Facilities* (Order). 181 FERC ¶ 61,122 (2022). We received a request for a decision regarding whether the Order falls within the definition of a rule under the Congressional Review Act (CRA). Letter from Representative Doug LaMalfa and Representative Cliff Bentz to Comptroller General, GAO (Feb. 6, 2023) (Request Letter). Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>. Accordingly, we reached out to FERC to obtain their legal views. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, FERC (Feb. 28, 2023). We received

FERC's response on March 22, 2023. Letter from General Counsel, FERC, to Assistant General Counsel for Appropriations Law, GAO, (FERC Response).

BACKGROUND

FERC Order

FERC issues licenses for the construction, operation, and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other project works. 16 U.S.C. § 797(e). FERC may also revoke, alter, and allow for the surrender of a license subject to mutual agreement with the licensee. *Id.* § 799. When a licensee voluntarily surrenders its license, FERC's regulations require the licensee to file a surrender application, which must include a decommissioning plan. Order at 1–2 n. 2 (*citing* 18 C.F.R. § 6.1 (2021)). Forms of decommissioning range from shutting down power operations to restoring the site to its pre-project condition. Order at 2 n. 2. FERC will only approve a license surrender if the licensee has fulfilled its obligations under the license or as otherwise established by FERC. *Id.* (citations omitted).

PacifiCorp held a license to operate and maintain the Klamath Project.¹ Order, at 2. In 2004, PacifiCorp applied to renew its license, but later decided to pursue alternatives to relicensing. *Id.*, at 3. In April 2016, PacifiCorp, the states of California and Oregon, and other interested parties executed a settlement agreement through which PacifiCorp would request FERC's approval to transfer four hydroelectric dams under the Klamath Project license to the Renewal Corporation,² which would, in turn, seek FERC's approval through its licensing surrender procedures to decommission the dams. *Id.*, at 3.

In 2016, PacifiCorp and the Renewal Corporation filed a joint application with FERC to amend the Klamath Project license to place the four hydroelectric dams into a new license (the Lower Klamath Project license), and to transfer this new license from PacifiCorp to the Renewal Corporation. *Id.*, at 4. In 2018, FERC approved the creation of the Lower Klamath Project license and in 2021 it approved the transfer of the Lower Klamath Project license to the Renewal Corporation. *Id.*, at 6. Finally, in 2022, FERC issued the Order approving the surrender of the Lower Klamath Project license conditioned on the licensees completing new activities under the license, including the decommissioning and removal of the four hydroelectric dams under the license. *See Id.*, at 1, 54–56. This is the Order at question in this decision.

¹ The Klamath Project is a hydroelectric project on the Klamath River in Klamath County, Oregon, and Siskiyou County, California. Order, at 2.

² The Renewal Corporation was created to facilitate implementation of the settlement agreement. Order, at 3 n. 9. It is a non-profit public benefit corporation whose primary purpose is to surrender and remove the Lower Klamath Project. *Id.*

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. *See id.* § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id.* §§ 801(b)(1); 802.

CRA adopts the definition of “rule” under the Administrative Procedure Act (APA), section 551(4) of title 5, which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). CRA excludes three categories of rules from coverage: (1) rules of particular applicability, including a rule that approves or prescribes for the future rates or wages; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

FERC did not submit a CRA report on the Order to Congress or the Comptroller General. In its response to us, FERC stated the Order meets the definition of an order under APA and is not subject to CRA. FERC Response, at 2. For the reasons discussed below, we conclude that the Order is not a rule under CRA.

DISCUSSION

At issue here is whether the Order meets CRA’s definition of a rule, which adopts APA’s definition of a rule, with three exceptions. We conclude the Order is not a rule, as defined by APA, because it is a licensing action and thus not subject to CRA.

APA provides for two mutually exclusive ways to implement agency actions, either rules or orders. 5 U.S.C. § 551(5)–(6); *See* B-334995, July 6, 2023. Any agency action meeting the definition of an order cannot be a rule under APA, and thus cannot be a rule for purposes of CRA. *See id.* APA specifically includes licensing in the definition of an order. *See* 5 U.S.C. § 551(6). APA defines licensing to include an agency process respecting, in relevant part, the “revocation, suspension, annulment, withdrawal, limitation, modification, or conditioning of a license.” *Id.* § 551(9). APA defines a license as “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission[.]” *Id.* § 551(8).

Applying these definitions, our case law has found licensing actions to be outside the purview of CRA. For example, in B-332233, Aug 13, 2020, we concluded that FCC engaged in licensing when it issued an order modifying the terms of a license to permit the licensee to conduct a new activity under the license while also placing certain conditions on that activity. *Cf.* B-334995, July 6, 2023 (finding modifications to a Risk Evaluation and Mitigation Strategy issued by the Food and Drug Administration was an order and not a rule under APA). We also noted that the D.C. Circuit stated that a modification of individual licenses should be done through orders by way of adjudication, as opposed to a rulemaking, to protect the rights of individual stakeholders. See B-332233 (*citing Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1318–1319 (D.C. Cir. 1995)).

The Federal Power Act authorizes FERC to issue licenses for the construction, operation, and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other project works. 16 U.S.C. § 797(e). FERC licensing authority also includes the power to revoke, alter, or allow for the surrender of such licenses subject to mutual agreement with the licensee. *Id.* at § 799.

Here, the licensees sought to surrender the Klamath Project license. CRA does not define the term “withdrawal” under the definition of licensing. Where, as here, the language of the statute is unambiguous, the ordinary meaning of the words in the statute controls. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); B-329603, Apr. 16, 2018. And, when a term is not defined in the legislation itself, we may turn to the dictionary definition for its common meaning. *Id.* The ordinary meaning of the term *withdrawal* is the act of taking back or away something that has been granted or possessed. *Withdrawal*, Merriam-Webster’s Unabridged Dictionary, <https://unabridged.merriam-webster.com/unabridged/withdrawal> (last visited Apr. 30, 2024). Therefore, taking back a prior approval or permission constitutes a withdrawal for purposes of APA’s definition of licensing. Through the Order at issue here, FERC, in part, took back permissions granted under the Lower Klamath Project license, and therefore the Order is a licensing action.

Additionally, through this Order, FERC placed several conditions on the surrender of the Lower Klamath Project license, such as winding down the generation of hydroelectric power and decommissioning of the project. Order at 53–124. By granting new permissions to the license holder, FERC also modified the Lower Klamath Project license. Consistent with our case law finding that modifications to existing licenses are licensing actions, FERC’s modifications to the Lower Klamath Project license are licensing actions.

Because the Order modified and withdrew a license, we conclude it is a licensing action. Thus, the Order constitutes an order under APA, and therefore, it is not a rule for purposes of CRA and not subject to its requirements.

CONCLUSION

FERC's Order approving the surrender of the Lower Klamath Project license both modified and withdrew an existing license, and therefore meets APA's definition of licensing. Because APA specifically defines licensing as an order, which is mutually exclusive from a rule, it does not meet CRA's definition of rule and is not subject to CRA.

A handwritten signature in cursive script that reads "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel