

147 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

PacifiCorp

Project No. 2082-058

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued June 19, 2014)

1. The Hoopa Valley Tribe (Tribe) has filed a petition for a declaratory order asking the Commission to find that PacifiCorp, the licensee for the Klamath Hydroelectric Project No. 2082, has failed to diligently pursue relicensing of the project, dismiss PacifiCorp's relicense application, and direct PacifiCorp to file a plan for decommissioning the project. In the alternative, the Tribe asks the Commission to declare that the State of California Water Resources Control Board (California Water Board) and the Oregon Department of Environmental Quality (Oregon DEQ) have waived their authority to issue water quality certification for the project pursuant to the Clean Water Act. This order denies the petition.

Background

2. The 169-megawatt Klamath Project is located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California.¹ The project includes seven hydroelectric developments and one non-generating dam.² The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the project in 1954. The license expired in 2006 and the project has been operated under annual license since that time.³

3. On February 25, 2004, PacifiCorp filed with the Commission an application for a new license for the Klamath Project. The company proposed to relicense five of the

¹ One development is located on Fall Creek, a tributary to the Klamath.

² See *Final Environmental Impact Statement for Hydropower License, Klamath Hydroelectric Project*, Federal Energy Regulatory Commission, Office of Energy Projects (November 2007) at xxxiii.

³ See 16 U.S.C. § 808(a)(1) (2012).

project's generating developments and to decommission the other three developments, including the non-generating development. In November 2007, Commission staff issued a Final Environmental Impact Statement (EIS) in the relicensing proceeding.⁴ Staff recommended adopting PacifiCorp's proposal, with the addition of a number of environmental measures.

4. On March 5, 2010, PacifiCorp filed with the Commission the Klamath Hydroelectric Settlement Agreement (Settlement Agreement). The Settlement Agreement, which was signed by the Governors of the States of California and Oregon, PacifiCorp, the U.S. Department of the Interior, the Department of Commerce's National Marine Fisheries Service, several Indian tribes (not including the Hoopa Tribe), and a number of local counties, irrigators, and conservation and fishing groups, provided for the future removal of PacifiCorp's licensed Klamath River dams, with a target date of 2020. The parties did not ask the Commission to act on the agreement, the completion of which was contingent on the passage of federal legislation and action by the Secretary of the Interior.

5. To date, no federal legislation regarding the Settlement Agreement has been enacted,⁵ and the parties have not requested Commission action.

6. Under section 401(a)(1) of the Clean Water Act,⁶ the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued a Water Quality Certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year.

7. PacifiCorp filed a request for water quality certification with the California Water Board on March 29, 2006. Since then, the company has withdrawn and refiled its application eight times. Similarly, PacifiCorp filed a request for certification with Oregon DEQ on March 29, 2006, and has withdrawn and refiled its application eight

⁴ See n.2, *infra*.

⁵ On May 21, 2014, Senator Wyden introduced S. 2379, entitled, "A bill to approve and implement the Klamath Basin agreements, to improve natural resource management, support economic development, and sustain agricultural production in the Klamath River Basin in the public interest and the interest of the United States, and for other purposes."

⁶ 33 U.S.C. § 1341(a)(1) (2012).

times. In refiling its applications, PacifiCorp has noted that the Settlement Agreement requires it to do so in order to avoid waiver by the water quality certifying agencies.⁷

8. On May 25, 2012, the Tribe filed a petition for a declaratory order, asking the Commission to find that PacifiCorp has failed to diligently pursue relicensing of the project and accordingly require the company to file a plan for decommissioning the project, or, in the alternative, find that California and Oregon have waived water quality certification and issue a new license for the project.

9. On June 25, 2012, PacifiCorp, on behalf of itself and 16 other parties, filed an answer opposing the petition. Also on June 25, 2012, the County of Siskiyou and Siskiyou County Flood Control and Water Conservation District filed an answer opposing project decommissioning but urging issuance of a license.

Discussion

10. The Tribe argues that PacifiCorp is not taking action to obtain water quality certification and thus is not diligently pursuing its license application.⁸ The Tribe therefore asks the Commission to dismiss the relicense application and require the company to file a plan to decommission the project.⁹

11. We agree with the Tribe that the circumstances of this case are far from ideal. As noted above, Commission staff issued the EIS in November 2007. The Commission could act on PacifiCorp's application but for the absence of water quality certification.¹⁰ The Klamath Project is operating under the terms of the 1954 license, and, as a result, the many environmental benefits that could accrue under the new license have not occurred.¹¹ Under the express terms of the Clean Water Act, however, the Commission

⁷ See, e.g., letter from Mark A. Sturtevant (PacifiCorp) to Kimberly D. Bose (Commission Secretary), enclosing December 2, 2013 letter from PacifiCorp to Oregon Department of Water Quality (filed December 16, 2013).

⁸ Petition at 1-12.

⁹ *Id.* at 12-13.

¹⁰ There is also a need to conclude consultation under the National Historic Preservation Act, but such matters, as a rule, do not delay license issuance.

¹¹ While we cannot and do not consider the license application now, we note, as a general matter, that all licenses we have issued in recent times contain substantially more environmental measures than those issued 50 years ago, before any of the current environmental statutes were enacted and before the Federal Power Act was amended to enhance consideration of environmental matters.

cannot issue and implement a new license until water quality certification has been issued.

12. We also agree with the Tribe that PacifiCorp has been complicit with the parties to the Settlement Agreement in agreeing to delay water quality certification, and that there is no apparent prospect of the federal legislation called for by the settlement being passed or of the necessary actions by the Secretary of the Interior taking place. Again, as the Tribe asserts, infinite delays in licensing proceedings are not in the public interest. Indeed, they are contrary to it.

13. Nonetheless, the remedy suggested by the Tribe – requiring PacifiCorp to file a decommissioning plan – would not resolve the impasse here. Any major decommissioning would likely result in some form of discharge into the navigable waters, meaning that the Commission could not implement decommissioning without a water quality certification.¹² Given that we would be acting contrary to the process envisioned by all the parties to the settlement, including the two water quality certifying agencies, it appears unlikely that the agencies would issue certification for a decommissioning process that did not comport with the terms of the settlement to which they have agreed.¹³ It seems more probable that they would either deny certification, thereby precluding decommissioning, or work with PacifiCorp and the other parties to repeatedly delay certification, as has already occurred in this case.

14. In addition, while we do have the authority to order a licensee to decommission a project,¹⁴ we have done so only once in the absence of the licensee's consent, upon a finding that the facts of the case required that outcome.¹⁵ Here, we have not concluded based on the record that decommissioning is required, and thus lack a basis for imposing

¹² See, e.g., *Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054 (2007) at PP 33-36 (stating that Commission could not accept license surrender, which included dam removal, without state water quality certification), *reh'g denied*, 123 FERC ¶ 61,069 at 17-21) (2008), *aff'd*, *Jackson County v. FERC*, 589 F.3d 1284 (D.C. Cir. 2009).

¹³ Another likely outcome might be for PacifiCorp to file the Settlement Agreement as its decommissioning plan, even though the plan could not be implemented absent Congressional and executive department action.

¹⁴ See *Edwards Manufacturing Company, Inc. and City of Augusta, Maine*, 81 FERC ¶ 61,255 at 62,207-09 (1997).

¹⁵ *Id.*

such a requirement.¹⁶ We are also unsure how demanding that PacifiCorp file a decommissioning plan when it had already taken substantial steps in that direction in concert with a large number of parties would yield a positive result. If we had a viable way to require the parties to move forward, we would certainly consider it. We do not see such an option before us.

15. The Tribe asks that, if we do not dismiss PacifiCorp's license application for lack of diligence and require a decommissioning plan, we issue a license, based on the conclusion that California and Oregon have waived water quality certification by failing to act by the deadline established by the Clean Water Act – a reasonable period of time, not to exceed one year from the filing of a request for certification.¹⁷ The Tribe contends that the states' failure to act within one year and their agreement with PacifiCorp not to do so amount to waiver.¹⁸

16. Again, we have some sympathy with the Tribe's argument. Indefinite delays in licensing proceedings do not comport with at least the spirit of the Clean Water Act and have the effect of preventing us from issuing new licenses that are best adapted to a current comprehensive plan for improving or developing a waterway in the public interest.¹⁹ We have previously stated that we “cannot endorse procedures that result in undue extensions of the licensing process. . . . [Such an] inordinate delay was hardly what Congress contemplated in crafting the one-year certification deadline.”²⁰

17. In this case, however, we see little to be gained from finding that the states have waived certification and then issuing a license. It is clear that PacifiCorp and the other settling parties are committed to the process envisioned in the Settlement Agreement. PacifiCorp states in its opposition to the petition that it is endeavoring to implement the terms of the Settlement Agreement, and will pursue relicensing if the agreement terminates. Given that we cannot require a licensee to accept a license, and that

¹⁶ Without in any way prejudging the merits of the relicensing proceeding, we note that the EIS prepared by our staff recommended decommissioning only some of the project dams, consist with PacifiCorp's licensing proposal. We would at a minimum seriously consider staff's recommendation in acting in this case.

¹⁷ See 33 U.S.C. § 1341(a) (2012).

¹⁸ Petition at 14-21.

¹⁹ See 16 U.S.C. § 808(a) (2012).

²⁰ *Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167, at P 16, n.14 (2005).

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PacifiCorp views itself as bound to follow the settlement, we see little point in pursuing a course that would almost certainly leads to protracted litigation and would be unlikely to resolve the issues in this proceeding.

The Commission orders:

The petition for declaratory order filed by the Hoopa Valley Tribe on May 25, 2012, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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