

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

Docket No. UM 1209

In the Matter of)	
)	
MIDAMERICAN ENERGY HOLDINGS CO.)	HOOPA VALLEY TRIBE'S REPLY TO
)	MEHC'S AND PACIFICORP'S OBJECTIONS
Application for Authorization to Acquire Pacific)	TO THE TRIBE'S APPLICATION FOR
Power & Light, dba PacifiCorp)	INTERVENTION
)	

The applicants' objections to the Hoopa Valley Tribe's (the "Tribe") application for intervention are unfounded and misrepresent the issues that the Tribe intends to raise in this proceeding. The purpose of this proceeding is to evaluate whether the transfer of ownership and control of PacifiCorp to MidAmerican Energy Holdings Company ("MEHC") benefits or harms the public interest. ORS § 757.511. It is well within the scope of the Commission's public interest review to consider whether PacifiCorp's new owner, MEHC, is committed to spending the millions (potentially hundreds of millions) of dollars that will be necessary to comply with the FERC licenses for the Klamath Hydroelectric Project.

The public interest review under ORS § 757.511 demands that the Commission determine whether MEHC is fully informed of the extent of funds that will be necessary to comply with the new FERC licenses, whether MEHC has adequately budgeted funds for compliance with the licenses, and how MEHC intends to finance the obligations related to FERC license compliance. In general, the Commission, in order to comply with its duties under ORS § 757.511 must assure itself that MEHC is fully prepared to shoulder the significant liabilities and obligations associated with the new FERC licenses. This transaction will harm Oregon's citizens and Oregon's environment if MEHC is not fully committed to spending the substantial amount of money necessary to comply with the FERC licenses.

A. The Issues Raised By The Tribe Are Within The Proper Scope of This Proceeding.

The applicants incorrectly state that the Tribe is "trying to pursue conditions unrelated to the alleged harms posed by the transaction." The Tribe is not asking the Commission to evaluate technical issues related to dam operations or to evaluate and impose environmental related conditions. The Tribe is asking the Commission to ensure that MEHC is fully aware of and committed to implementing and funding the conditions that will be required in the new FERC licenses.

FERC is currently evaluating conditions to impose in the new licenses for the Klamath Hydroelectric Project, and the Tribe does not seek to duplicate that process here. In stark contrast to the legal requirements applicable when the Klamath Project was built (in 1917) and licensed (in 1956), federal law now mandates that equal consideration be given to power and environmental interests when a FERC license is issued. *See* Electric Consumers Power Act, Pub. L. No. 99-495 (1986) (amending § 4(e) of Federal Power Act to provide for "equal consideration" of energy and environmental concerns, including fish, wildlife, and recreation in licensing decisions). In the FERC proceeding, the Tribes, the States of Oregon and California, the U.S. Department of the Interior, NOAA Fisheries, and FERC are going to follow the mandate of federal law and require conditions to protect and restore the imperiled Klamath fishery. Those license conditions are likely to include things such as removal or laddering of dams which were built without any fish passage and improvement of existing defective fish ladders at upstream dams. *American Rivers, Inc. v. FERC*, 170 F.3d 896 (9th Cir. 1999) (§ 18 of the Federal Power Act requires FERC to impose any fish passage prescriptions recommended by the Secretaries of Commerce and the Interior in a new license).

The costs associated with implementing the conditions imposed to protect fish, wildlife, and water quality will be substantial. The Tribe does not seek a repetition of the FERC process in this proceeding. The Tribe simply wants the Commission to ensure that the new owner, MEHC, is fully informed of, and committed to, the significant obligations to all citizens that it will be assuming when it acquires PacifiCorp and control over the Klamath Hydroelectric Project.

The Tribe has cause for concern that the Klamath Hydroelectric Project is not a top priority for MEHC. In its joint application, MEHC says that the primary public benefit of its ownership of PacifiCorp is its willingness to invest in infrastructure and project improvements. MEHC goes on to list numerous projects where it intends to invest hundreds of millions of dollars into PacifiCorp operations - many of which have no relation to Oregon. Significantly, no mention is made of the Klamath Hydroelectric Project even though that project will require millions of dollars in infrastructure upgrades and even though it has a great effect on Oregon's citizens and environment. There is no indication in the joint application that MEHC even knows that the Klamath Hydroelectric Project exists. This Commission, on behalf of Oregon's citizens, must assure itself that MEHC is prepared to undertake the obligations associated with the Klamath Project. If MEHC is not so prepared, the public interest, at least for citizens of southern Oregon, is not furthered by this transaction.

B. The Tribe's Intervention Will Not Unreasonably Broaden The Issues, Burden The Record, Or Unreasonably Delay The Proceeding.

The intervention of the Hoopa Valley Tribe will not unreasonably broaden the issues. The issues to be raised by the Tribe are no broader than those listed in ORS § 757.511, which outlines the information that an applicant must provide under that section. Under ORS § 757.511, the applicant must provide information on "(a) financial ability; . . . (c) the source and amounts of funds or other consideration to be used in the acquisition; . . . (g) the applicant's expertise in operating public utilities; (h) the applicant's plan for operating the public utility; and (i) how the acquisition will serve the public utility's customers in the public interest." The Tribe's issues are consistent with those listed in § 757.511. The Tribe wants assurance that MEHC is aware of the extent of its obligations related to the Klamath Project and is committed to funding those obligations in full. Those issues are directly related to the purpose of this proceeding.

MEHC and PacifiCorp argue that this Commission should not be concerned with their application because it simply is an application to "replace MEHC for ScottishPower as the owner of PacifiCorp." However, under Oregon law, this "replacement" of ScottishPower with MEHC

is the event that triggers the public interest review. Oregon law recognizes that a transfer of ownership is not as benign as MEHC and PacifiCorp make it out to be, and thus requires the Commission to carefully evaluate the benefits and harms associated with such a change in ownership. Whether the new owner of a company (in this case, MEHC) is committed to making necessary infrastructure investments in a project that has devastated a portion of Oregon's environment is within the scope of the Commission's public interest review.

Intervention of the Tribe will not burden the record. On the contrary, the Tribe does not anticipate the need to submit a substantial amount of information into the record. If MEHC and PacifiCorp provide realistic estimates to the Commission of the anticipated cost of compliance with the new FERC license and MEHC provides sufficient assurance that it is prepared to undertake those obligations in full, the Tribe may have little evidence to add to the record. If the Tribe believes that MEHC's and PacifiCorp's estimates are unrealistic and do not convey the proper scope of the necessary investment, the Tribe would like to present additional evidence to inform the Commission of the conditions that are likely to be imposed by federal law in the new licenses. The Tribe has no desire to create needless work for itself, MEHC, PacifiCorp, or the Commission. The Tribe has legitimate concerns it wants addressed, and seeks its legal right to join this proceeding and raise those concerns.

There is no reason why the Tribe's intervention will delay this proceeding. MEHC and PacifiCorp argue that the Tribe wants this proceeding to turn into a second FERC proceeding; to re-argue all the things that are already being addressed in the FERC proceeding. Nothing is further from the truth. The FERC forum is adequate to address the specific environmental conditions that PacifiCorp and MEHC must comply with in the new FERC licenses. This forum is necessary to ensure that MEHC is prepared, financially and operationally, to fulfill those conditions.

C. Many of The Applicants' Objections Misunderstand or Misstate The Tribe's Position.

The applicants complain that the Tribe's Application for Intervention alleges detriment to the Tribe's environmental, economic, and cultural interests. The applicants confuse the Tribe's

interest in this proceeding (which is the harm caused by PacifiCorp's operation of the Klamath Hydroelectric Project) with the *issues* that the Tribe intends to raise. The Tribe was *required*, by OAR § 860-012-001, to explain to the Commission both its interest and the issues to be raised. While the Tribe's interest is clearly related to PacifiCorp's operations and the harm that they cause to the Klamath basin fishery, people, and economy, the issues to be raised in this proceeding relate to MEHC's ability and willingness to finance the infrastructure improvements and environmental conditions necessary to restore the fishery. As clearly stated in Section B of the Tribe's Application for Intervention:

The proposed purchase of PacifiCorp from Scottish Power is undoubtedly based upon assumptions concerning the costs of compliance with fisheries and water protection measures. It is critically important that the Commission assure itself that MidAmerican Energy Holdings Company is prepared to shoulder the liabilities and obligations to rectify operations that are lethal to salmonids.

The Tribe's underlying *interest* is protection and restoration of the Klamath fishery, but the *issues* to be raised by the Tribe focus specifically on the transfer of ownership to MEHC and the effect that such transfer will have on compliance with the new FERC licenses.

PacifiCorp also argues that "this case does not implicate any changes to PacifiCorp's responsibility for its hydro projects." Even if that is true, it is entirely beside the point. This proceeding was triggered because of the proposed change in control. The issue isn't whether PacifiCorp's responsibility for the Klamath Hydro Project is changing; the issue is whether the new owner of PacifiCorp, the entity responsible for decision-making, policy-making, and funding is prepared to carry out those responsibilities. It is clearly relevant in this proceeding to evaluate whether MEHC is committed to fulfilling PacifiCorp's obligations and responsibilities, or whether it considers infrastructure investment on the Klamath as a low priority.

The applicants' objections also make much of the fact that there is already an open FERC proceeding on the Klamath re-licensing. Again, that is entirely beside the point. The issues

raised by the Tribe in this proceeding in no way duplicate the work being conducted in the FERC proceeding. It is absurd to argue, as applicants do, that "deference to FERC authority" requires rejection of the Tribe's intervention. This proceeding in no way infringes on the FERC proceeding, nor does the FERC proceeding infringe upon this Commission. The FERC proceeding will determine what environmental conditions are required in the new FERC licenses; this Commission must ensure, for the benefit of Oregon's environment and public, that MEHC is fully aware of and prepared to fulfill those conditions when the FERC licenses are issued.

The applicants also argue that the Commission's obligation to "promptly" examine their application requires denial of the Tribe's petition. This is absurd. The applicants apparently are seeking a rubber-stamp approval, rather than the thorough public interest review required by Oregon law. Regardless, the Tribe is fully confident that their intervention will not delay the schedule adopted by the Commission in this proceeding. The Tribe, like the Commission, wants a prompt, but thorough, review of the proposed transfer of control.

D. Conclusion - The Tribe's Application for Intervention Should Be Granted.

The applicants' objections fail to show that the Tribe's intervention will unreasonably broaden the scope of these proceedings, burden the record, or unreasonably delay the proceeding. The applicants' objections misstate the Tribe's purpose in intervening in this proceeding. The Tribe does not seek to duplicate or re-litigate issues being raised in the FERC proceeding. The Tribe is entitled, in this forum, to express its concerns related to MEHC's willingness and commitment to implement and fund the conditions that will be required in the new FERC licenses for the Klamath Hydroelectric Project. The Tribe's application for intervention should be granted.

DATED this 15th day of August, 2005

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2005, in addition to electronic service, I mailed the original and five copies of the Hoopa Valley Tribe's Reply To MEHC's and PacifiCorp's Objections To the Tribe's Application For Intervention, via First-Class Mail to:

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Email: PUC.FilingCenter@state.or.us

I further certify that on the 15th day of August, 2005, I served a copy of Hoopa Valley Tribe's Reply To MEHC's and PacifiCorp's Objections To the Tribe's Application For Intervention on counsel via E-mail to the following addresses:

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I declare the above to be true and correct under penalty of perjury. Executed this 15th day of August, 2005, at Seattle, Washington.

/s/ Rob Roy Smith

Rob Roy Smith, OSB No. 00393