

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 171**

In the Matter of the Request of	)	RESPONSE BY THE BUREAU OF
	)	RECLAMATION AND U.S. FISH AND
PACIFIC POWER & LIGHT	)	WILDLIFE SERVICE TO PACIFICORP'S
(d/b/a PacifiCorp)	)	MOTION FOR SUMMARY DISPOSITION
	)	
Klamath Basin Irrigation Rates	)	
_____	)	

The United States Bureau of Reclamation (Reclamation) and Fish and Wildlife Service (Service) requested to intervene in Docket UE-171 because Reclamation is a party to the underlying "On-Project" contract with PacifiCorp and because of the impacts to Reclamation and the Service from the significant increase in power rates proposed by PacifiCorp. It is the position of Reclamation and the Service that the Oregon Public Utilities Commission (OPUC) should hold in abeyance and refrain from deciding the issue before it in this docket until such time as the issue has been addressed by the Federal Energy Regulatory Commission (FERC) in issuing an annual license to PacifiCorp for Project No. 2082.

Reclamation and the Service understand that the OPUC has established Docket No. UE-171 to address the issue as to "whether irrigators [in the Klamath Basin] should continue to be served under these historic contracts, or whether they should be treated like other irrigation customers and served under standard irrigation tariffs." OPUC Order No. 05-134, p. 5, March 17, 2005.<sup>1</sup> Reclamation and the Service are not taking any position at this time as to whether, over the long term, any provision of power to the Klamath Basin irrigators should be at or less than the standard tariff rates. They are asking the OPUC to refrain from deciding this issue until FERC has addressed this issue in the context of issuing an annual license that is expected to be issued to PacifiCorp for Project No. 2082 prior to the termination of the current license in early 2006.

The basis for this request to refrain from ruling at this time on PacifiCorp's motion is the ongoing licensing process for PacifiCorp's Project No. 2082. FERC is currently considering PacifiCorp's proposed new license, or relicensing, of Project No. 2082 on the Klamath River in California and Oregon. As part of that process, FERC is preparing an Environmental Impact Statement (EIS). The final EIS is not anticipated to be available until October 2006, well after the expiration date of the current FERC license for Project No. 2082. Letter to PacifiCorp from FERC, February 17,

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<sup>1</sup>As noted in the Petition to Intervene filed by Reclamation and the Service, both of these agencies also are served power under the "historic contracts" and thus, benefit from the current rates and will be affected by the proposed significant rate increase. Petition to Intervene by United States Bureau of Reclamation and US Fish and Wildlife Service, April 22, 2005. Reclamation's power cost is for providing Project Flood control and the Service's power cost is for pumping water for use on the Lower Klamath National Wildlife Refuge.

2005. Thus, pursuant to section 15(a)(1) of the Federal Power Act, FERC must issue an annual license to the existing licensee under the current terms and conditions of the license. 16 USC section 808(a)(1); See Southern California Edison, 106 FERC P61,212 at 61,712-714 (2004) (and cases cited therein).<sup>2</sup> Issuance of annual licenses is a ministerial and non-discretionary act that the Commission must perform. Id. at 61,714. The annual license is a statutory mechanism designed to ensure that the terms and conditions of the existing license will remain in effect until a decision can be made about what will be done with the project. Id. Further, the annual license is a means of preserving the “option of making a careful, deliberate judgment concerning disposition of a project at the end of the initial license term.” Id. (citing Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission, 510 F.2d 198, 206 (D.C. Cir. 1975)).<sup>3</sup>

The current terms and conditions of PacifiCorp’s FERC license for Project No. 2082, include the following provision.

Article 35. The Licensee shall pay to the United States the following annual charges:

...

(d) The annual benefits to the United States under the Link Dam Agreement [sic] dated January 31, 1956, are reasonable and adequate for the purpose of recompensing the United States for the use of surplus water from Link Dam.

The California Oregon Power Company, Project No. 2082, 18 F.P.C. 364, p. 11-12 (1957). FPC described that agreement as providing for the storage in and release of water from Upper Klamath Lake in Oregon, and the use thereof by the licensee for the generation of electric energy under the terms and conditions substantially similar to those terms and conditions contained in the existing February 24, 1917, agreement, as amended. The California Oregon Power Company, Project No. 2082, 15 F.P.C. 14,15 (1956). The “Link Dam Agreement” is the January 31, 1956, contract (1956 contract) between the California Oregon Power Company (Copco), now PacifiCorp, and the United States, acting through the Bureau of Reclamation. See Exhibit 1 attached to the Affidavit of Laura Beane, filed with PacifiCorp’s Motion for Summary Disposition. The 1956 contract (or “On-Project” contract) provides as part of the “annual benefits to the United States” the current power rate of .6 cents per KWh. 1956 contract, Article 5.

Therefore, the 1956 contract, including the current power rate of .6 cents per KWh are part of the existing terms and conditions of the current FERC license for PacifiCorp’ Project No. 2082 and as such will continue to be part of the annual license to be issued by FERC at the expiration of the

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<sup>2</sup>Section 15(a)(1) contains certain exceptions to this mandatory issuance of an annual license, however, none of these exceptions are relevant here.

<sup>3</sup>FERC’s regulations reflect this view of the annual license. “The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license ...” 18 CFR section 16.18 (b). “In issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.” 18 CFR section 16.18 (d).

existing license. The issue of the historic power rates is now before FERC by virtue of the need to issue an annual license to PacifiCorp to allow completion of the relicensing process.<sup>4</sup> In order to avoid confusion and conflict with FERC, the OPUC should hold in abeyance and refrain from deciding this issue until it is properly addressed by FERC.<sup>5</sup>

As an additional basis for OPUC to refrain from deciding this issue now, is that the parties to the ongoing FERC process for PacifiCorp's Project No. 2082 are in negotiations over the terms of any future license. The power rate issue is part of these negotiations and any decision by the OPUC may unduly prejudice these negotiations that are intended to address the many issues that have arisen with regard to the relicensing.

Thus, OPUC should hold in abeyance and refrain from deciding the issue regarding the "historic contracts" until this issue is properly addressed by FERC. We anticipate presenting this issue to FERC in the near future and hope to obtain an early decision because of the potential economic impact to the basin irrigators, Reclamation and the Service. Thus, we anticipate a decision on this issue prior to the issuance of an annual license which is expected no later than March 2006.

Respectfully submitted,

Daniel G. Shillito  
Regional Solicitor

/s/

Dated: \_\_\_\_\_

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<sup>4</sup>PacifiCorp argues in its motion that FERC cannot preempt the commission and set the retail rates for PacifiCorp's electric service to customers in Oregon. PacifiCorp's Motion for Summary Disposition at 14. PacifiCorp supports its argument by citing to the Federal Power Act, 16 USC section 824(b), that recognizes state jurisdiction over the sale of electric energy. Reclamation and the Service are not suggesting that FERC has jurisdiction over such sale of electric energy, rather, that the continuation of the current power rates in the 1956 contract are mandated when FERC issues an annual license to PacifiCorp.

<sup>5</sup>The OPUC has previously held proceedings in abeyance when appropriate to obtain information or a decision from another source, including FERC. See Wah Chang v. PacifiCorp, Order No. 04-305, UM1002, OPUC (May 27, 2004)(Commission held proceeding in abeyance until the conclusion of the FERC investigation); In the Matter of the Revised Tariff Schedules in Oregon Filed by PacifiCorp, Order No. 98-191, UE94, OPUC (May 5, 1998) (Commission held case in abeyance until after 1997 Oregon Legislative Assembly adjourned).