**UNITED STATES OF AMERICA**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| In re Klamath Hydroelectric Project | ) | |
| | ) | **FERC Project No. P-2082-058** |
| License Applicant: PacifiCorp | ) | |
| _____ | ) | |

**ANSWER TO**
**PETITION OF HOOPA VALLEY TRIBE FOR DECLARATORY ORDER**

**BY**

**COUNTY OF SISKIYOU AND SISKIYOU COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT**

## I. INTRODUCTION

Pursuant to Rule 213(a)(3)[1] of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, the County of Siskiyou and the Siskiyou County Flood Control and Water Conservation District (collectively referred to hereinafter as "Siskiyou County") respectfully submit this Answer to the Petition of Hoopa Valley Tribe for Declaratory Order ("Hoopa Petition") related to the relicensing of PacifiCorp's Klamath Hydroelectric Project ("Project").

The Hoopa Petition requests two alternative forms of relief from the Commission: (1) a declaration that PacifiCorp has not diligently pursued its application for a new license and an order to initiate decommissioning of Project facilities or (2) a determination that the States of California and Oregon have waived their water quality certification authority and the Commission's issuance of a new license with the terms and conditions that were completed in 2007 through the proper relicensing process.[2] Issuance of the new license with the 2007 terms and conditions has been held in suspended

[1] 18 C.F.R. §385.213(a)(3) (2011).

[2] Hoopa Petition, p. 1.

animation for the past five years as the licensee and certain third parties have attempted to negotiate and implement a settlement agreement in a realm beyond the Commission's authority. The position of Siskiyou County is that the latter Hoopa alternative – issuance of a new license – is the only course of action that is consistent with Section 15 of the Federal Power Act (16 U.S.C. § 808) and other applicable authorities cited herein. Issuance of a new license will also bring to an end the ongoing charade of the "Klamath Hydroelectric Settlement Agreement" and the perpetual deferral of adequate protection, mitigation, and enhancement measures to address Project impacts. Finally, the new license will restore a measure of equity by preventing PacifiCorp from continuing to shift disproportionate burdens for water quality improvement and endangered species recovery to other water users.

## II. STATEMENT OF FACTS

Siskiyou County concurs with the Statement of Facts presented in the Hoopa Petition.

The only addition Siskiyou County would like to submit is to call to the Commission's attention the shifting and inconsistent positions of Commission staff with respect to the States' processing of water quality certifications pursuant to section 401 of the Clean Water Act (33 U.S.C. § 1341).

In a February 13, 2009, letter from Mark Robinson, Director of the Office of Energy Projects, to Dorothy Rice, Executive Director of the California State Water Resources Control Board, Mr. Robinson noted the "uncertain" prospects for legislation required to implement a Klamath settlement agreement. (FERC Accession No. 20090213-3027.) Mr. Robinson went on to describe the Commission's duties as follows:

> [T]he Federal Power Act, which governs the authorization of non-federal hydropower projects, calls for this Commission to move forward in the review of all projects, including the Klamath Project. […] [W]e encourage the Water Board to act as soon as possible on PacifiCorp's application for water quality certification.

However, by November of 2011, Commission staff appears to have shifted to a completely deferential posture toward continued inaction by the States. Responding to an inquiry from the Resighini Rancheria, Ann Miles, Director of the Division of Hydropower Licensing, stated:

> [T]he Commission has been unable to issue a licensing decision in this proceeding because neither Oregon nor California has issued water quality certification under section 401 of the Clean Water Act (CWA), or waived their authority to do so. The CWA precludes the Commission from issuing a license without such certification or waiver thereof. Under the Federal Power Act, in these circumstances, we are required to issue annual licenses.
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> FERC Accession No. 20110815-3011; emphasis added.

As of June 2012, the Commission has taken no further action and demonstrated no intention of either compelling the States to fulfill their legal obligations under the Clean Water Act or proceeding by other means to fulfill the Commission's own obligations under the Federal Power Act.

## III. ARGUMENT AND AUTHORITIES

### A. THERE IS NO APPROPRIATE APPLICATION OR LEGAL BASIS FOR DECOMMISSIONING

The first remedy requested by the Hoopa Petition is for a declaration that PacifiCorp has not pursued its license application with diligence and an order to file a plan for decommissioning.[3] However, PacifiCorp has certainly demonstrated earnest diligence in filing and advancing its application for a new license to the point of near

[3] Hoopa Petition, pp. 12-14.

completion. The license application has only been suspended because of the activities surrounding the Klamath Hydroelectric Settlement Agreement. The final step for the new license is the water quality certification from California and Oregon. While PacifiCorp and the States have suspended work on the certification, the suspension in no way relates to a lack of diligence. The suspension even appears to have the tacit approval of the Commission, as reflected by the November 2011 staff comments quoted above. The Commission is in no position to find a lack of diligence unless and until it clearly directs PacifiCorp to resume work on water quality certification.

PacifiCorp, the Commission, the trustee agencies, and the many interested parties have expended tremendous time, money, and effort to complete Project relicensing. PacifiCorp has not requested decommissioning, and the only circumstances under which PacifiCorp has considered facilities removal is through the Klamath settlement agreements. As speculated in the Klamath Basin Restoration Agreement, the only manner in which decommissioning is arguably feasible and possibly beneficial to some limited resource values is with massive, concurrent restoration efforts and substantial financial contributions from the States and ratepayers.[4] The scope of facilities removal and environmental restoration that could be accomplished through a PacifiCorp-only decommissioning is highly questionable under the Commission's asserted "policy statement" on decommissioning. As observed by the Ninth Circuit Court of Appeals in *City of Tacoma v. Federal Energy Regulatory Commission*, 460 F.3d 53 (2006), the

[4] There are substantial uncertainties surrounding implementation of the Klamath settlement. *See* Paragraph III.C., *infra*, regarding lack of various approvals for settlement agreement funding and authorizing legislation.

decommissioning policy has never been tested in the courts, and the Ninth Circuit specifically declined to take up "whether, and in what circumstances, FERC can impose decommissioning obligations or costs on a former licensee."

For these reasons, decommissioning is not an appropriate or feasible option for the Klamath Project, is not procedurally poised for consideration, and should be dismissed as a potential remedy for the Klamath situation.

### B. THE STATES' REFSUAL TO ACT EFFECTS A WAIVER OF CLEAN WATER ACT SECTION 401

Section 401 of the Clean Water Act expressly provides three options for action when a state is presented with a request for water quality certification:

1. The state may issue the certification.
2. The state may deny the certification.
3. The state may fail or refuse to act on the certification "within a reasonable period of time (which shall not exceed one year)."

In the case of the Klamath Hydroelectric Settlement Agreement, the states of California and Oregon have ignored their lawful options in processing the water quality certification for the Project and have instead entered into a contract – with the signatures of their respective governors – that provides for the 401 process to be held in abeyance until at least the year 2020. In doing so, the Klamath settlement agreement constitutes a *de facto* refusal to act on the part of the States, and not only for one year but <u>for an entire decade</u>.[5] The result of such a refusal to act under section 401 is clearly stated in the statute: water quality certification by the States "shall be waived."

[5] The withdrawal and resubmission of 401 applications has no bearing on the fact the States have entered into a 10-year agreement in which they expressly refuse to act on the 401 certification.

PacifiCorp and the other interested parties in the Klamath settlement must not be permitted to contract around federal law and circumvent the deliberately structured processes, requirements, and safeguards of the Federal Power Act and Clean Water Act. Allowing States and project licensees to enter into agreements to repeatedly submit and withdraw applications for water quality certification, as is occurring here,[6] would give States the ability to assert a controlling role in project licensing. As the Supreme Court warned in *First Iowa Hydro-electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 164 (1946), providing a State with veto power over a project "easily could destroy the effectiveness" of the Federal Power Act and "subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." For that very reason, the subsequent enactment of the Clean Water Act included the parameters stated in section 401 that prevent a State from abusing its authority and substituting its judgment on the overall merits of a project for that of the Commission.

The Commission should be highly cautious about the precedent of allowing States to abuse their 401 authority with the flagrance exhibited here by California and Oregon. In the era of *First Iowa*, the concern was that state law would be used to frustrate a project that was approved by the Federal Power Commission and determined to be in the national interest. Today, with the major projects and issues arising in the context of relicensing, the danger is that a licensee and a State will thwart the establishment of modern mitigation measures by indefinitely delaying a 401 certification and taking refuge

[6] Hoopa Petition, p. 7 (documenting the annual cycle of submission and withdrawal).

in the annual licenses that are automatically granted by section 15(a)(1) of the Federal Power Act (16 U.S.C. § 808(a)(1)). With the limited and specific options in section 401, the statute was purposely structured to prevent States from abusing their authority in order to either veto projects or to help a licensee escape the burdens and costs of new license conditions.

Quoted above in the Statement of Facts is the 2011 comment from Commission staff that the Commission is "required to issue annual licenses" to PacifiCorp. That is an accurate, albeit incomplete, statement of law, and it implies that the Commission is powerless to take any other action. As set forth in 18 C.F.R. § 16.18, the purpose of annual licenses after expiration of a license term is to allow the licensee to operate the project "while the Commission reviews any applications for a new license" or other disposition of the project. Placing a license application in the bottom drawer and allowing annual licenses to renew year after year is not what the Federal Power Act intended nor what could legitimately be considered Commission "review" under the regulation. If PacifiCorp and properly placed co-conspirators can operate outside the Commission's authority and effectively extend a 50-year license into a 60-year license through abuse of the 401 process, one can only imagine the potential for future mischief by more nefarious minds. The structure, timelines, and sequences of the Federal Power Act and its implementing regulations show there was certainly no intention to facilitate or condone such abuse.[7]

[7] 18 C.F.R. § 5.23 requires that a license applicant file a copy of the request for water quality certification within 60 days following the date of issuance of the notice that the license application has been accepted by the Commission and is ready for environmental analysis. That 60-day period, plus the one-year deadline to complete the water quality certification, establishes a definite timeline for the relicensing process.

### C. THE LACK OF PROGRESS ON THE KLAMATH SETTLEMENT REINFORCES THE NEED FOR THE COMMISSION TO REASSERT ITS AUTHORITY

In considering the need to reengage the normal relicensing process, the Commission should note that nearly four years after the Klamath "Agreement in Principle" and two and a half years after execution of the formal settlement agreement, funding required to implement the settlement remains elusive and uncertain. The California funding was originally going to be considered by California voters in a 2010 bond measure, but the vote on the bond was postponed to November 2012 and may be postponed yet again.[8] This was just one of the reasons why the Secretary of the Interior was unable to make a determination on dam removal by the scheduled date of March 31, 2012, and why such a determination has now been deferred indefinitely.[9]

In addition to the lack of approval of California bond funding, recent PacifiCorp filings with the California Public Utilities Commission indicate that the licensee will not be able to meet the Klamath settlement agreement terms for the California ratepayers' contribution.[10] Even if PacifiCorp is granted its latest request to increase the Klamath surcharge, it will not be enough to collect the required funding by the deadline established in the settlement agreement. PacifiCorp is precluded from asking for any

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[8] *See* "Water Bond is Circling the Drain," George Skelton, Los Angeles Times, April 30, 2012.

[9] U.S. Department of the Interior Press Release, February 27, 2012, http://www.doi.gov/news/pressreleases/Salazar-Praises-Work-of-Klamath-Agreements-Parties.cfm.

[10] Petition of PacifiCorp for Modification of Decision 11-05-002 and Expedited Request for Consideration; California Public Utilities Commission; filed January 13, 2012.

additional increases in the surcharge, because doing so would further violate the settlement agreement by exceeding the surcharge cap.[11]

Implementation of the Klamath settlement also requires federal authorizing legislation.[12] However, the only action in the United States Congress related to Klamath restoration has been a vote in the House of Representatives to prohibit funding to proceed with dam removal.[13] Bills to authorize the Klamath settlement have been introduced (H.R. 3398; S. 1851), but no hearings or actions have occurred. In the House of Representatives, the bill has been referred to the Water and Power Subcommittee of the Committee on Natural Resources. The subcommittee chairman has scheduled no action on the bill and has been a vocal opponent of the Klamath settlement:

> In the Klamath, the federal government is seeking to destroy four perfectly good hydroelectric dams at the cost of more than a half billion dollars at a time when we can't guarantee enough electricity to keep refrigerators running this summer.
>
> Rep. Tom McClintock, Siskiyou Daily News, March 3, 2011.

All of these impediments and the continued unraveling of the Klamath settlement only reinforce the need for the Commission to reassert its proper role in relicensing.

## IV. CONCLUSION

The Commission has the ability to exercise its authority to remedy the abuses in the current license situation with PacifiCorp, as well as the duty to enforce and comply with the Federal Power Act. Commission staff was correct in 2009 in stating that the

[11] Klamath Hydroelectric Settlement Agreement, § 4.1.1.B. (providing that the California Klamath Surcharge shall at no time exceed two percent of the revenue requirements set for PacifiCorp by the California PUC as of January 1, 2010).

[12] Klamath Hydroelectric Settlement Agreement, § 3.3.4.A.

[13] House Amendment 121 to H.R. 1, the Full-Year Continuing Appropriations Act, 2011; Roll call vote No. 111; February 18, 2011.

Commission was required to "move forward in the review of all projects, including the Klamath Project."[14] The explicit agreement of the States of California and Oregon to delay the 401 certification until at least 2020 is a clear "refusal to act within one year" that triggers the waiver provision in section 401. And that clear agreement triggering the waiver is unrelated to and unaffected by any games that are being played with the annual withdrawal and resubmission of applications. The Commission should declare that there has been a waiver of water quality certification and proceed with issuance of a new license for the Klamath Hydroelectric Project.

Respectfully submitted this 25th day of June, 2012.

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[14] February 13, 2009, letter from Mark Robinson to Dorothy Rice (FERC Accession No. 20090213-3027.)

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Executed at Yreka, California, on this 25th day of June, 2012.

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