

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

PacifiCorp

Project Nos. 2082-039 and
2082-040

ORDER DENYING PETITION FOR DECLARATORY ORDER
AND ISSUING NOTICE OF PROPOSED READJUSTMENT OF ANNUAL
CHARGES FOR THE USE OF A GOVERNMENT DAM

(Issued January 20, 2006)

1. The U.S. Department of the Interior (Interior) requests a declaratory ruling that a contract between Interior and PacifiCorp pertaining to the use of Upper Klamath Lake and the Klamath River for power and irrigation is included in the license for the Klamath Hydroelectric Project No. 2082, which is licensed to PacifiCorp, and that the contract will continue in effect during the term of any annual license that may be issued for the project. Under the contract, PacifiCorp operates a dam owned by Interior's Bureau of Reclamation (Reclamation) and provides power at fixed rates to Reclamation, the U.S. Fish and Wildlife Service (FWS), and private irrigators of farmland within Reclamation's Klamath River irrigation project.
2. As discussed below, we are denying Interior's petition. We are also proposing to modify the annual charges PacifiCorp pays for use of the Government dam in question.

Background

3. Reclamation's Klamath irrigation project is located in Oregon and northern California. Its principal features, as relevant here, are Upper Klamath Lake and its outlet, Link River Dam. This dam provides storage for the irrigation project and, as described below, hydroelectric power. Part of Upper Klamath Lake is also included in the Upper Klamath National Wildlife Refuge.
4. PacifiCorp's Klamath Hydroelectric Project consists of seven hydroelectric developments and one non-generating development. The uppermost project features are two small power developments associated with the Link River Dam, East Side and West

Side. Downstream in Oregon are Keno Dam, which has no generating facilities, and the J. C. Boyle development. There are also three developments on the mainstem of the river in California and a tributary development in California.¹

5. The operation of Link River Dam affects generation at the mainstem hydroelectric developments. It was constructed in the early 20th century by PacifiCorp's predecessor-in-interest, California Oregon Power Company (Copco), pursuant to a contract with the United States (1917 Contract). Under that contract, Copco constructed the dam and conveyed it and the land on which it is situated to the United States for use in the irrigation project, but continued to operate the dam. Copco agreed to maintain Upper Klamath Lake at specified elevations for irrigation purposes, furnish water to the irrigators, and supply electricity to the United States and the irrigators for pumping of irrigation and drainage water for the 50-year life of the contract (*i.e.*, expiration in 1967).² Copco used surplus water released at Link River Dam after these purposes were fulfilled to generate electricity to serve its customers.

6. Some years later, the Federal Power Commission (FPC) investigated the jurisdictional status of Copco's Klamath River hydroelectric developments. As a result, it issued a license to Copco, with a term expiring on February 28, 2006 (1954 Order).³ That order included two provisions relevant to this proceeding. First, Copco was directed, "with and as part of the acceptance of this license,"⁴ to file the 1917 contract with the Commission, amended or renewed to cover a time period at least equivalent to the time period of the license, or to file a new agreement for the same period with substantially the same terms and conditions as the 1917 contract.⁵ Second, license

¹ The project facilities are more particularly described in PacifiCorp's application for a new license, filed February 25, 2004, Volume I at 1-1 to 1-8.

² See 13 FPC at 3.

³ *California Oregon Power Company*, 13 FPC 1. In later orders, Copco's other Klamath River developments were incorporated into the license. In 1961, Pacific Power and Light Company (PP&L) acquired Copco, and the license was transferred to PP&L. In 1989, PP&L merged with Utah Power and Light Company, and the merged entity was named PacifiCorp.

⁴ 1954 Order, Ordering Paragraph (A), 13 FPC at 9.

⁵ 1954 Order, Ordering Paragraph (A), 13 FPC at 9-10.

article 35(d) stated, pursuant to the provisions of Federal Power Act (FPA) section 10(e)⁶ pertaining to payment of annual charges for the use of Government dams and facilities,⁷ that the consideration and benefits set forth in the 1917 agreement were reasonable and adequate during the term of that contract to compensate the United States for Copco's use of Link River Dam.⁸

7. Copco did not immediately accept the license, but sought judicial review. It also continued negotiations with interested parties concerning water rights and other matters. During these negotiations, Copco agreed to provide electricity at fixed rates for pumping of irrigation and return water to all of its customers located in the Klamath River Basin, including those located outside the boundaries of Reclamation's irrigation project. This led to separate contracts for "On-Project customers" (*i.e.*, irrigators located within the boundaries of Reclamation's project) and "Off-Project customers," (those located outside the boundaries of Reclamation's project).⁹

8. Copco ultimately filed the contract required by the 1954 Order relating to the On-Project customers (1956 Contract).¹⁰ The 1956 Contract extends and revises the 1917 Contract. Under the 1956 Contract, PacifiCorp provides power at fixed rates to Reclamation for use primarily to drain lands it manages within the irrigation project, to FWS to pump water into and drain water from Klamath River Basin National Wildlife

⁶ 16 U.S.C. § 803(e) (1994).

⁷ A "Government dam" is defined in FPA section 3(10), 16 U.S.C. § 796(10) as a dam "constructed or owned by the United States for Government purposes with or without contribution from others."

⁸ 1954 Order, Article 35, paragraph (d), 13 FERC at 11.

⁹ The Off-Project Contract is between Copco and the Klamath Basin Water Users Protective Association. Under this agreement, Copco agrees to provide service to all Off-Project irrigators at a specified contract rate. That agreement contains no express termination date.

¹⁰ Petition, Exhibit 1.

Refuges, and to the private On-Project customers.¹¹ The 1956 contract states that it is for a term of “50 years,” effective from the date of its approval by the Public Utility Commissions of Oregon and California, whichever is later.¹²

9. To implement the 1956 Contract, and pursuant to Ordering Paragraph (A) of the 1954 Order, Copco filed an application to amend the 1954 Order to add a new license article reflecting the parties’ agreements regarding water rights and the above-mentioned service arrangements. The Commission’s order granting the application (1956 Order) found that the United States is adequately compensated by the 1956 Contract for the licensee’s use of Link River Dam, and changed the effective date of the license to make the license term consistent with the term of the 1956 Contract.¹³

10. Copco still did not accept the license or commence construction. In 1957, the 1954 Order was further amended upon Copco’s application to incorporate into the hydroelectric project another proposed development (1957 Order).¹⁴ The 1957 Order affirmed that the provisions of the 1956 Contract adequately compensate the United States for the use of surplus water from Link River Dam.¹⁵ Ultimately, Copco accepted the license and the facilities were constructed.

11. On February 25, 2004, PacifiCorp filed an application for a new license for the Klamath Hydroelectric Project.

12. In November 2004 PacifiCorp filed a general retail rate increase application before the Oregon Public Utility Commission (Oregon PUC).¹⁶ In that proceeding, PacifiCorp proposes to move both the On-Project and Off-Project Irrigators to standard irrigation tariff rates when the 1956 Contract expires. Oregon PUC denied PacifiCorp’s motion to

¹¹ Petition at 7.

¹² 1956 contract, Articles 11 and 17. Approval was received first from Oregon and then, on April 16, 1956, from California, resulting in an expiration date of April 16, 2006.

¹³ *California Oregon Power Company*, 15 FPC 14.

¹⁴ *California Oregon Power Company*, 18 FPC 364.

¹⁵ *1957 Order*, 18 FPC at 368.

¹⁶ *Pacific Power & Light Company dba PacifiCorp*, Docket UE 170.

delay action pending this Commission's examination of the matter in the relicensing proceeding, holding that it has exclusive authority to determine retail rates for Klamath River Basin irrigators.¹⁷

13. On October 3, 2005, Interior filed its petition for declaratory order. Timely responses to the petition supporting Interior were filed by the Klamath Basin Water Users Protective Association (KWUA), Karuk Tribe (Karuk), Yurok Indian Tribe (Yurok), and Oregon State Senator Doug Whitsett. Timely responses opposing Interior's petition were filed by PacifiCorp, Hoopa Valley Tribe (Hoopa), Trout Unlimited and American Rivers (TU), Resighini Rancheria (Resighini) and, collectively, WaterWatch of Oregon, Oregon Natural Resources Council (ONRC), the Pacific Coast Federation of Fishermen's Associations (WaterWatch). PacifiCorp and KWUA filed answers to one another's responses.

14. On November 9, 2005, the Commission issued public notice of the petition.¹⁸ Timely motions to intervene or notices of intervention were filed by KWUA, Klamath Tribes, Karuk, Hoopa, OPUC, TU, Waterwatch, ONRC, and Yurok.¹⁹

Discussion

A. Government Dam Use Charges

15. FPA section 10(e) provides that when the Commission licenses a project that will use a Government dam or other structure, it is to set "reasonable" annual charges to recompense the Government for the use of its property. In doing so, the Commission "shall seek to avoid increasing the price to the consumer of power by such charges. . ." Charges for the use of dams in Reclamation projects are "subject to the approval of the

¹⁷ Oregon PUC Order No. 05-726 at 3-4 (June 6, 2005), Exh. 3 to Interior's petition.

¹⁸ 70 F.R. 69751 (Nov. 17, 2005).

¹⁹ Resighini mistakenly believes that it is not required to intervene in this proceeding on the basis that it is consolidated with the relicense proceeding in subdocket P-2082-027, in which it has intervened. In fact, this is a separate proceeding, and intervention in the relicense proceeding does not carry over to this proceeding.

Secretary of the Interior.” Government dam use charges may be readjusted at the end of twenty years following commencement of operation and at periods not less than ten years thereafter upon notice and opportunity for a hearing.²⁰

16. In 1984, the Commission amended the regulations governing annual charges for projects that use Government dams to provide for graduated flat rates based on the amount of energy produced.²¹ The flat rates apply when the annual dam use charges are “not already specified in final form in the license.”²² As discussed above, the federal dam use charges for the Klamath Project were already specified in final form when the current flat rate charges were established.

B. Interior’s and the Respondents’ Arguments

17. Interior contends that the Commission made the terms of the 1956 Contract “an integral part of the license”²³ and a condition thereof by dictating its essential terms and

²⁰ Section 10(e) provides, as pertinent to this proceeding:

. . . the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for . . . recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property; . . . Provided, That when licenses are issued involving the use of Government dams . . . the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams . . . in reclamation projects . . . fix a reasonable annual charge for the use thereof, and such charges may with like approval be adjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing. . .

²¹ Annual Charges for Use of Government Dams and Other Structures Under Part I of the Federal Power Act, Order No. 379, 49 Fed. Reg. 22770 (June 1, 1984), FERC Stats. & Regs., Reg. Preambles 1982-1985 ¶ 30,570 at 30,946 (May 24, 1984). The applicable regulations are at 18 C.F.R. § 11.3 (2005).

²² 18 C.F.R. § 11.3(a) (2005). The exception to the general rule for projects with established charges was made in recognition of the fact that when Order No. 379 was promulgated, there were numerous projects at federal dams for which such charges had already been established.

²³ Petition at 8.

ordering it to be filed with the Commission. The terms to which it refers are those pertaining to the storage and release of water for the generation of electricity and for supplying low cost electricity for pumping irrigation and drainage water.²⁴ To support its assertion regarding the importance of the contract to project operations, Interior cites the FPC's assessment at the time of licensing that the project would not be economically feasible without the use of the Link River Dam for storage.²⁵ It states that the connection between the contract retail power rates and the licensee's federal dam use charges is further evidence that the contract is a license condition.²⁶

18. Based on its conclusion that the 1956 Contract is a condition of the license, Interior states that it must be continued during the term of any annual license by operation of FPA section 15(a)(1).²⁷ This section provides that, if the United States does not, at the expiration of the existing license, take over the project or issue a new license to the existing licensee, "then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued . . ."

19. Interior is supported by KWUA, Karuk, and Yurok. KWUA essentially echoes Interior's arguments,²⁸ and contends that continuation of the 1956 Contract would not create a conflict with Oregon or California because both jurisdictions will permit PacifiCorp to continue charging the 1956 Contract rates during the term of any annual license.²⁹ PacifiCorp disputes this contention.³⁰ Karuk and Yurok state without elaboration that they support extension of the 1956 Contract.

²⁴ *Id.* at 11-14.

²⁵ *Id.* at 13.

²⁶ *Id.* at 2-5, 8

²⁷ 16 U.S.C. § 808(a)(1).

²⁸ KWUA at 3-6.

²⁹ *Id.* at 7-8.

³⁰ PacifiCorp response to KWUA's comments, filed November 28, 2005 at 5-7.

20. PacifiCorp responds that the 1956 Contract is not a license condition, but was merely accepted (as opposed to approved) by the Commission as a means of setting the licensee's Government dam use charges for the license term.³¹ PacifiCorp also likens this case to *P.U.D. No. 1 of Chelan County, WA*,³² where the FPC determined that although a license referenced, and required the licensee to abide by, a contract providing for compensation to an upstream licensee for lost generation due to encroachment by the downstream project's reservoir, the contract was not part of the downstream project's license.

21. PacifiCorp contends that the 1956 Contract violates FPA section 10(e) because: (1) section 10(e) requires compensation to the United States to be proportional to the benefit conferred on the licensee,³³ but PacifiCorp no longer receives a benefit because operating restrictions required by Interior to comply with the Endangered Species Act³⁴ and its Tribal trust obligations³⁵ give it little or no flexibility to shape flows for power generation; (2) the cost differential between the contract rates and PacifiCorp's tariff rates for other irrigators forces the latter to subsidize the On-Project irrigators, thereby "increasing the price to consumers of power"; (3) tying federal dam use charges to private contract power rates illegally delegates the Commission's exclusive authority under section 10(e) to assess annual charges; and (4) the contract compensates the On-Project irrigators instead of the United States.³⁶

³¹ PacifiCorp response to Interior's petition (hereafter PacifiCorp) at 4.

³² 51 FPC 1141 (1974).

³³ PacifiCorp at 15-16, citing *City of Vanceburg, Ky. v. FERC*, 571 F.2nd 630, 643 (D.C. Cir. 1977).

³⁴ 16 U.S.C. § 1531-43 (1996). PacifiCorp references Interior's obligations to protect the federally endangered Lost River sucker and shortnose sucker, and treaty rights of the Klamath and Yurok tribes. PacifiCorp at 14, n. 52.

³⁵ PacifiCorp does not quantify the alleged reduction in the value of project power resulting from diminished operating flexibility. Instead, it asserts that the charges paid by Interior and private entities under the 1956 Contract are \$7.2 million less than those entities would be charged under PacifiCorp's irrigation tariffs filed with the state commissions. PacifiCorp at 15 and Exh. B.

³⁶ PacifiCorp at 13-14. PacifiCorp characterizes the below tariff contract rates these customers pay as a payment to them.

22. PacifiCorp additionally argues that: (1) it is unreasonable for an annual charge scheme to provide discount rates to a subset of PacifiCorp's retail customers; (2) the Commission has no authority over PacifiCorp's retail rates,³⁷ (3) the Commission cannot compel Interior, a non-licensee, to enter into a contract extension;³⁸ and (4) using the 1956 Contract to assess annual charges violates FPA section 17,³⁹ which contemplates that federal dam use charges will be collected from licensees and remitted to the United States according to a formula set forth in that section, rather than paid to private parties.⁴⁰

23. Finally, PacifiCorp asserts that section 10(e) establishes a retained authority in the Commission, which cannot be waived, to adjust federal dam use charges from time to time,⁴¹ and even if the 1956 Contract is a license condition, it expires by its own terms after 50 years.⁴² PacifiCorp states that we should set the annual charges for the use of Link River Dam during the term of any annual licenses at the graduated fixed rates established in our rules for non-grandfathered projects.

24. KWUA disputes PacifiCorp's assertion that the 1956 Contract can be terminated or amended during the period of any annual licenses on the basis that the purpose of annual licenses is to preserve the status quo during the pendency of any relicense or

³⁷ *Id.* at 17-20. The same argument is advanced by Hoopa (at 2-5), TU (at 2-5), and WaterWatch (at 3-4).

³⁸ PacifiCorp at 21-22.

³⁹ 16 U.S.C. § 810 (2005).

⁴⁰ PacifiCorp at 22-23.

⁴¹ *Id.* at 6-7. *See also* Hoopa at 8-10.

⁴² PacifiCorp at 10-13. PacifiCorp acknowledges that if the Commission accepts its argument, its right to operate the Link River Dam will expire, with the 1956 Contract, on April 16, 2006.

federal takeover proceedings.⁴³ It also charges that although the project has essentially been converted from peaking to baseload operation by Interior's flow restrictions, PacifiCorp receives various other financial benefits from the 1956 Contract.⁴⁴

25. Hoopa⁴⁵ asserts that it has a "federally protected interest in the waters of the Klamath River and its fishery resource"⁴⁶ and that extending the 1956 Contract would violate the Commission's trust responsibility to the tribe by encouraging continued over-appropriation of irrigation water by private parties to whom the Commission has no fiduciary responsibility.⁴⁷ WaterWatch similarly urges us to modify the federal dam use charges on the basis that higher electric rates will protect the environment by discouraging overappropriation of irrigation water.⁴⁸

C. Status of the 1956 Contract

26. Although the participants' arguments are complex, the essence of this dispute can be stated in simple terms. Interior seeks to protect itself and the On-Project customers from increases in retail electric rates that are likely to result from Oregon PUC's proceeding. PacifiCorp seeks to free itself from a contract that binds it to charge low rates and no longer provides much countervailing benefit in terms of being able to control the use of surplus water from Upper Klamath Lake for power generation.

27. This dispute is also easily resolved. Even if the 1956 Contract is a license term, it expires by its terms on April 16, 2006. Thus, any annual license for the project following the license expiration date of February 28, 2006, will not include the terms of the 1956

⁴³ KWUA motion to intervene at 9, citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC*, 510 F.2d. 198, 205-206 (D.C. Cir. 1975).

⁴⁴ *Id.* at 12-13. The purported benefits include resolution of Interior's initial opposition to the original license application; low cost hydropower for PacifiCorp's system, at a location that enables sales into the California market; and the ability to use project power to firm non-firm power resources for resale at higher prices.

⁴⁵ Hoopa at 4-8.

⁴⁶ *Id.* at 11.

⁴⁷ *Id.* at 10-12, citing *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990).

⁴⁸ WaterWatch at 6-8.

Contract beyond April 16, 2006, and PacifiCorp will no longer have any rights or obligations under that contract. This is not inconsistent with the obligation of a licensee to have all the rights necessary to operate its project because the 1956 Contract authorizes, but does obligate, PacifiCorp to shape flows for the purpose of enhancing electric generation. PacifiCorp may choose to forego this right by letting the contract expire, and its new license application indicates that it intends to do so.⁴⁹

28. It is also not necessary, as explained in the following section, for the 1956 Contract to continue in effect for annual charges purposes.

D. Readjustment of Government Dam Use Charges

29. We conclude that the most prudent and practical course at this time is to exercise our reserved authority⁵⁰ to readjust PacifiCorp's charges for the use of surplus water from Link River Dam. Specifically, we proposed to decouple these charges from PacifiCorp's retail rates. We do so for several reasons. First, this Commission clearly has no jurisdiction over PacifiCorp's retail rates.⁵¹ Second, continuing to tie Government dam

⁴⁹See License Application sections B3.0, B6.2, and B6.4. We note, however, that as long as PacifiCorp's East Side and West Side developments, which are directly connected to the Link River Dam, continue to receive water released from the dam by Interior, PacifiCorp will need to have an operating agreement with Interior for that purpose.

⁵⁰ Our authority to periodically readjust charges for the use of Government dams was affirmed in *Montana Power Co. v. FPC*, 459 F.2d 863 (D.C. Cir. 1972), *cert. denied*, 408 U.S. 930 (1972). The FPC affirmed the reservation of authority in the 1956 Order. See 15 FPC at 17-18, 20. Nor is there any question that the Commission can amend a license during the terms of an annual license if it has reserved authority to do so with respect to the matter in question. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989).

⁵¹ Our ratemaking jurisdiction under FPA Part II, 16 U.S.C. §§ 824, *et seq.* (1994), extends only to wholesale sales of electricity. See 16 U.S.C. § 824(f); *FPC v. Conway Corp.*, 426 U.S. 271, 276 (1976). Under FPA section 19, 16 U.S.C. § 812, the Commission may regulate the rates and services of a non-municipal licensee only if its rates and services are not regulated by the state. Under FPA section 20, 16 U.S.C. § 813, we have jurisdiction over a licensee's rates and services only if they are not regulated by the state, or in the limited circumstance of a disagreement over rates between directly concerned states. None of these circumstances apply here.

use charges to PacifiCorp's retail rates creates the potential for conflict between the annual charges we set and those retail rates. Third, there is an established alternative means of setting annual charges in our regulations.⁵² Fourth, nothing in the 1954, 1956, or 1957 Orders indicates that the FPC intended to tie the Government dam use charges to the licensee's retail rates beyond the expiration date of the original license. Finally, this issue is readily severable from the relicense proceeding, which will not be resolved for at least another year.⁵³

30. To this end, we are issuing notice of our intent to set the annual Government dam use charges for Klamath Project No. 2082 at the graduated fixed rates set forth at 18 C.F.R. § 11.3(b), effective upon expiration of the 1956 Contract (*i.e.*, April 17, 2006). Interested persons will be afforded 30 days from the issuance date of this order to file comments.⁵⁴

E. Keno Dam Contract

31. Finally, we turn to the Keno Dam contract. Keno Dam was added to the license in 1965.⁵⁵ The license amendment authorized new generating facilities, but they were never built. The dam has always been operated under a contract between the licensee and the United States for the benefit of irrigators. The Keno Dam contract has no expiration date.⁵⁶ Interior states that although the operation of Keno Dam "is not included directly in this request for Declaratory Order," and the Keno Dam Contract is in effect as long as the project exists, the Commission should nonetheless require continuation of its terms and conditions in any declaratory order issued in this proceeding.⁵⁷

⁵² See Order No. 379 at 30,954.

⁵³ Issuance of a final environmental impact statement on the license application is currently scheduled for January 2007.

⁵⁴ We are establishing a separate proceeding for this purpose in subdocket Project No. 2082-040.

⁵⁵ *Pacific Power and Light Co.*, 34 FPC 1387.

⁵⁶ The Keno Dam contract is Exhibit 5 to the Petition.

⁵⁷ Petition at 10 and n.8.

32. We see no reason to address this request because there appears to be no dispute. PacifiCorp contests none of Interior's factual assertions with regard to that contract, and has not indicated any intention to modify or terminate it. Rather, PacifiCorp proposes to remove Keno Dam from the project in the relicense proceeding. That is the appropriate forum to consider matters relating to Keno Dam.

The Commission orders:

(A) The U.S. Department of the Interior's petition for an exemption from the filing fee for petitions for declaratory order pursuant to 18 C.F.R. § 381.302 (2005) is granted.

(B) The petition for declaratory order filed by the U.S. Department of the Interior on October 3, 2005, in this proceeding (P-2082-039) is denied, as discussed in the body of this order.

(C) Notice is hereby given of the Commission's intent to set the annual Government dam use charges for Klamath Project No. 2082 at the graduated fixed rates set forth at 18 C.F.R. § 11.3(b) (2005), effective April 17, 2006. Interested persons may file comments in P-2082-040 within 30 days from the issuance date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.