

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 14-1271

HOOPA VALLEY TRIBE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**SUPPLEMENTAL BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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GLOSSARY

Amended Settlement Agreement	Amended Klamath Hydroelectric Settlement Agreement
Commission or FERC	Federal Energy Regulatory Commission
Initial Order	<i>PacifiCorp</i> , 147 FERC ¶ 61,216 (2014), JA 798
JA	Joint Appendix
Klamath Project or Project	Klamath Hydroelectric Project No. 2082
Rehearing Order	<i>PacifiCorp</i> , 149 FERC ¶ 61,038 (2014), JA 850
Renewal Corporation	Klamath River Renewal Corporation
Respondent's Br.	Opening brief of Respondent Federal Energy Regulatory Commission
Settlement Agreement	Klamath Hydroelectric Settlement Agreement
Tribe	Hoopa Valley Tribe

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STATEMENT OF THE ISSUES

This appeal concerns the Hoopa Valley Tribe's challenge to orders issued by the Federal Energy Regulatory Commission. In these orders, the Commission denied the Tribe's request that the Commission find that the States of Oregon and California had waived their water quality certification authority for the relicensing of the Klamath Hydroelectric Project No. 2082 (Klamath Project). The Commission also denied the Tribe's alternative request for a finding that PacifiCorp had not diligently pursued its relicensing application and to direct

PacifiCorp to decommission the Klamath Project. *See* Respondent’s Br. at 10-15 (describing orders under review).

The case has been in abeyance since September 2016 in light of proceedings before the Commission regarding a proposal, developed through a 2016 settlement among various interested parties, to remove four dams associated with the Klamath Project. In a May 9, 2018 order, following pleadings from the parties, the Court removed the case from abeyance and offered the opportunity for supplemental briefing to address the 2016 settlement and any other recent, relevant developments.

STATEMENT OF THE FACTS

A. The Klamath Hydroelectric Project

The Klamath Project is located primarily on the Klamath River in Klamath County, Oregon and Siskiyou County, California. The Project includes seven hydroelectric developments (*i.e.*, dams, reservoirs, and generating units) – East Side, West Side, JC Boyle, Copco No. 1, Copco No. 2, Fall Creek, and Iron Gate – and one non-generating development – Keno. *See PacifiCorp*, 147 FERC ¶ 61,216, at P 3 (2014) (Initial Order), JA 799. The developments are located on the Klamath River, with the exception of the Fall River development, which is located on Fall Creek, a tributary to the Klamath River.

The original license for the Klamath Project expired in 2006. Since that time, PacifiCorp has been operating the Project under an annual license. In February 2004, PacifiCorp filed an application with the Commission for a new license for the Klamath Project. In 2007, the Commission issued a final environmental impact statement in the relicensing proceeding. In that document, Commission staff recommended adopting PacifiCorp's proposal, with additional environmental measures. Respondent's Br. at 7-8. Thereafter, PacifiCorp entered into negotiations with federal and state resource agencies, tribes, local governments, non-governmental organizations, and irrigation districts in order to evaluate alternatives to relicensing.

Those negotiations culminated in 2010 with the execution of the Klamath Hydroelectric Settlement Agreement (Settlement Agreement). The Settlement Agreement provided for the removal of the J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments on the lower portion of the Klamath River after passage of federal legislation and approval by the Secretary of the Interior. In that Agreement, PacifiCorp pledged to annually withdraw and re-file its water quality certification applications to avoid waiver by California and Oregon. Respondent's Br. at 8-10.

B. The Orders Under Review

In May 2012, the Tribe filed a petition for a declaratory order, asking the Commission to find that PacifiCorp was not taking action to obtain water quality certifications and thus had not diligently pursued relicensing of the Project. The Tribe asked the Commission to require PacifiCorp to file a plan for decommissioning the Project. In the alternative, the Tribe asked the Commission to find that California and Oregon have waived water quality certification by failing to act by the deadline established by the Clean Water Act and to issue a new license for the Project.

The Commission agreed that the “circumstances of this case are far from ideal.” Initial Order at P 11, JA 800. Nonetheless, the Commission found that, under the terms of the Clean Water Act, PacifiCorp’s withdrawals of its applications provided the states with new, one-year statutory deadlines. The Commission also declined to find that PacifiCorp had failed to diligently pursue relicensing. *See PacifiCorp*, 149 FERC ¶ 61,038, at P 12 (2014) (Rehearing Order) (“The Tribe points to nothing in law, regulation, or precedent that requires us to find that PacifiCorp’s application should be dismissed.”), JA 853. *See also* Respondent’s Br. at 11-15 (summarizing orders under review).

The Commission recently reaffirmed its analysis in the orders at issue in this appeal. In *Constitution Pipeline Co.*, 162 FERC ¶ 61,014 (2018), the Commission

again found that section 401 of the Clean Water Act “provides that a state waives certification when it does not act on an application within one year,” *id.* at P 23, but that “by withdrawing its applications before a year had passed, and by presenting New York [Department of Environmental Conservation] with new applications, Constitution gave New York [Department of Environmental Conservation] new deadlines.” *Id.*¹

In *New York State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), involving another pipeline proceeding, the Second Circuit agreed with the Commission’s finding that the one-year review period under the Clean Water Act commences when the state agency receives a request for water quality certification, not when the state agency deems such application to be complete. *Id.* at 455-56. In response to the contention that such a statutory construction could require premature decisions by state agencies, the Second Circuit explained that the state agency could “request that the applicant withdraw and resubmit the application.” *Id.* at 456.

¹ Constitution Pipeline Company’s request for rehearing of FERC’s non-waiver decision remains pending before the Commission.

ARGUMENT

I. The 2016 Amended Settlement Agreement Contemplates Removal Of Four Dams On The Klamath River.

The dam removal contemplated by the 2010 Settlement Agreement required federal legislation and approval by the Secretary of the Interior. Congress, however, did not enact the required legislation by January 2016, which triggered the Settlement Agreement's dispute resolution procedures. Ultimately, in April 2016, PacifiCorp, California, Oregon, Interior, National Marine Fisheries Service, the Yurok Tribe, and the Karuk Tribe executed the Amended Klamath Hydroelectric Settlement Agreement (Amended Settlement Agreement).² The Amended Settlement Agreement sets out a process by which PacifiCorp's four dams on the main stem of the Klamath River would be removed under FERC license transfer and surrender proceedings, rather than by federal legislation. *See PacifiCorp*, 162 FERC ¶ 61,236, at P 12 (2018).

The Amended Settlement Agreement requires PacifiCorp and the Klamath River Renewal Corporation (Renewal Corporation) – a private, independent non-profit organization formed by signatories of the Amended Settlement Agreement – to seek approval from the Commission to: (1) administratively remove the J.C.

² American Rivers, California Trout, Trout Unlimited, Sustainable Northwest, and others subsequently signed the Amended Settlement Agreement as well. The Hoopa Valley Tribe, however, did not.

Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments from PacifiCorp's existing license; (2) place those developments into a new license for the so-called Lower Klamath Project; and (3) transfer the Lower Klamath Project license to the Renewal Corporation. The Renewal Corporation would then seek to physically remove the developments under the Commission's license surrender procedures.

Id. at PP 1, 11.

Under the Amended Settlement Agreement, if the Commission were to approve the license transfer from PacifiCorp to the Renewal Corporation, the parties would enter into an agreement to provide for PacifiCorp's continued operation and maintenance of the dams until they are decommissioned. The Amended Settlement Agreement provides a January 1, 2020 target date to begin dam removal. The Renewal Corporation would be responsible for the removal of the four developments and subsequent environmental restoration activities. Funding of these activities would come from a state surcharge on PacifiCorp's customers in Oregon and California, as well as a California bond funding measure.

Id. at PP 15-17.

In May 2016, PacifiCorp asked the Commission to hold the relicensing proceeding in abeyance in anticipation of the applications to transfer and surrender the Klamath Project license called for by the Amended Settlement Agreement. The Commission granted the motion, finding that requiring the parties to proceed

simultaneously with “relicensing proceedings and a transfer and surrender proceeding would be burdensome and an inefficient use of resources.” *PacifiCorp*, 155 FERC ¶ 61,271, at P 13 (2016).

II. The Commission Is Currently Considering The Parties’ Proposal To Transfer And Surrender The Lower Klamath Project License.

On September 23, 2016, PacifiCorp and the Renewal Corporation filed an application to remove the J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate developments from the current project license, create a new Lower Klamath Project No. 14803 license encompassing those developments, and transfer that new license to the Klamath River Renewal Corporation. On the same day, the Renewal Corporation filed an application to surrender the Lower Klamath Project license and physically remove the relevant developments. *PacifiCorp*, 162 FERC ¶ 61,236 at P 12. The Commission determined that it would address the transfer and surrender applications in separate proceedings. *See* Notice of Application for Amendment and Transfer of License and Soliciting Comments, Motions to Intervene, and Protests at 3-4 (Oct. 5, 2017)

In its comments on the applications, the Hoopa Valley Tribe noted that it had advocated for the “surrender, decommissioning, and removal of at least the J.C. Boyle, Copco 1, Copco 2, and Iron Gate Dams” to restore fish habitat and mitigate and restore water quality in the Klamath River. *See* Tribe’s Motion to Intervene and Comments, filed Oct. 17, 2017, at 2. The Tribe – while not a

signatory to the Amended Settlement Agreement – “supports Commission action that will promptly lead to the decommissioning and removal of Project dams and facilities.” *Id.* at 4.

A. The License Amendment Proposal Has Been Approved.

Following the submission of the applications, Commission staff issued a number of requests for information regarding the Renewal Corporation’s legal, technical, and financial capacity to fulfill its obligations under the Amended Settlement Agreement. In a March 15, 2018 order, the Commission approved the proposed amendment to the existing license to remove the four developments and place them in a new Lower Klamath Project license. *PacifiCorp*, 162 FERC ¶ 61,236 at P 71. The Commission found, however, that it lacked sufficient information to act on the proposed license transfer.

The Commission explained that “[t]ransferring a project to a newly formed entity for the sole purpose of decommissioning and dam removal raises unique public interest concerns,” and requires close consideration of the transferee’s legal, technical, and financial capacity to safely remove project facilities and restore project lands. *Id.* at P 51. Because the necessary detailed information regarding the Renewal Corporation’s risk management plans, funding mechanisms, and legal and technical capabilities had not yet been developed in the record, the Commission deferred action on the transfer proposal. *Id.* at P 72. As a result,

PacifiCorp remains the licensee for both the Klamath and Lower Klamath Project licenses. *Id.* at P 71.³

B. The Commission Has Not Yet Acted On The Transfer And Surrender Applications.

The Amended Settlement Agreement required the Klamath River Renewal Corporation to develop a “Definite Plan” for dam decommissioning and removal. The Definite Plan will include a complete discussion of the physical and technical aspects of facilities removal and remediation, as well as a detailed estimate of costs associated with those activities, and procedures for addressing potential cost overruns. *PacifiCorp*, 162 FERC ¶ 61,236 at P 53. It was anticipated that the Definite Plan would be filed by December 31, 2017. In December 2017, however, Commission staff granted the Renewal Corporation’s request for an extension until July 1, 2018 to submit the Definite Plan. *Id.* It is anticipated that the Definite Plan will provide information necessary for the Commission to analyze the transfer and surrender applications. *Id.* at P 72.

Due to the magnitude of the proposed dam removals, the actions that will be required, and the potential for safety issues, the Commission directed PacifiCorp

³ On April 16, 2018, PacifiCorp filed a motion to stay, or, in the alternative, a limited request for rehearing of the Commission’s March 15, 2018 order until the Commission acts on the requested license transfer. That filing is currently pending before the Commission.

and the Renewal Corporation to convene an Independent Board of Consultants to review and assess all aspects of the proposed dam removal process. In a May 22, 2018 letter order, Commission staff approved the proposed members of the Board of Consultants.

CONCLUSION

Nothing has occurred since initial briefing to alter the conclusion that the Tribe's petition for review should be denied.

Respectfully submitted,

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June 8, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation imposed by the Court's May 9, 2018 order because this supplemental brief contains 2,015 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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June 8, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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