

170 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

PacifiCorp

Project No. 2337-079

ORDER ON REHEARING

(Issued January 23, 2020)

1. On September 27, 2019, Commission staff issued a new license to PacifiCorp to continue to operate and maintain the Prospect No. 3 Hydroelectric Project No. 2337 (Prospect No. 3 Project).¹ On October 25, 2019, PacifiCorp filed a timely request for rehearing of the License Order. For the reasons discussed below, we grant in part and deny in part PacifiCorp's request for rehearing.

I. Background

2. The Prospect No. 3 Project is located on the South Fork Rogue River in Jackson County, Oregon, near the town of Prospect,² and occupies 52.5 acres of federal land within the Rogue River-Siskiyou National Forest.³ The 7.2-megawatt project consists of a dam, which creates a one-acre impoundment, a water conveyance system, penstock, powerhouse, and transmission line.⁴ The License Order incorporates conditions specified by the Oregon Department of Environmental Quality (Oregon DEQ) in its water quality certification,⁵ issued pursuant to section 401 of the Clean Water Act.⁶ The License Order

¹ *PacifiCorp*, 168 FERC ¶ 62,175 (2019) (License Order).

² *Id.* P 1.

³ *Id.* P 35.

⁴ *Id.* P 11.

⁵ *Id.* at Appendix A.

⁶ 33 U.S.C. § 1341(a)(1) (2018).

noted that PacifiCorp contested certain conditions in the certification and appealed the water quality certification.⁷

3. On October 25, 2019, PacifiCorp filed a request for rehearing of the License Order requesting that Ordering Paragraph (D) be revised to expressly reserve the Commission's authority to: (1) modify the license to reflect changes in the water quality certification conditions that may result from the state administrative or judicial review process; (2) modify the license as necessary to achieve consistency with the final water quality certification; and (3) express the Commission's views on the validity of the conditions in the final water quality certification.⁸

II. Procedural Matters

4. On November 15, 2019, Oregon DEQ filed an answer to PacifiCorp's request for rehearing. Rule 713(d)(1) of our regulations prohibits answers to requests for rehearing.⁹ Accordingly, we reject Oregon DEQ's answer.

III. Discussion

5. PacifiCorp requests that the Commission expressly reserve authority to modify the license, as needed, to reflect any changes in the water quality certification that could occur as a result of its appeal of the water quality certification.¹⁰ PacifiCorp states that it has initiated a state administrative review process before the Oregon DEQ and that it will also have the right to seek judicial review of the Oregon DEQ decision.¹¹ As a result, PacifiCorp notes that it could be several years before the final resolution of the water quality certification.¹²

6. Although PacifiCorp could request to amend the license based on the outcome of the administrative and judicial reviews of the water quality certification, consistent with

⁷ License Order, 168 FERC ¶ 62,175 at P 47.

⁸ PacifiCorp Request for Rehearing at 2.

⁹ 18 C.F.R. § 385.713(d)(1) (2019).

¹⁰ PacifiCorp Request for Rehearing at 2.

¹¹ *Id.* at 7. On January 10, 2020, PacifiCorp filed comments stating that it has reached a settlement agreement with Oregon DEQ whereby Oregon DEQ will issue a revised water quality certification for the project by February 7, 2020. PacifiCorp January 10, 2020 Comments at 1.

¹² PacifiCorp Request for Rehearing at 7.

our past practice, we will grant rehearing and reserve our authority to amend the license.¹³ However, it is not necessary that the license include language reserving the Commission's authority to express its agreement or disagreement with the validity of specific conditions. The Commission is free to do so in any order that it may issue.

The Commission orders:

(A) PacifiCorp's October 25, 2019 request for rehearing is granted in part and denied in part.

(B) Ordering paragraph (D) of the License Order is revised to read as follows:

The license is subject to the conditions submitted by the Oregon Department of Environmental Quality under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (2018), as those conditions are set forth in Appendix A to this order, although condition V.i is not enforceable. Authority is reserved to the Commission to amend the license to include such water quality certification conditions as may be required by the Oregon Department of Environmental Quality pursuant to state law procedures for administrative and judicial review of its certification, and to modify the existing conditions of this license as necessary to achieve consistency with any such certification conditions.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹³ See, e.g., *Pacific Gas and Electric Co.*, 129 FERC ¶ 61,026, at ordering para. (B)(3) (2009) (reserving the Commission's authority to modify the license consistent with the outcome of pending litigation); *Public Utility District No. 1 of Pend Oreille County, Wash.*, 117 FERC ¶ 61,205, at ordering para. (B) (2006) (same); *Flambeau Hydro LLC*, 113 FERC ¶ 61,291, at ordering para. (C) (2005) (same).