

127 FERC ¶ 61,255  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Portland General Electric Company and the  
Confederated Tribes of the Warm Springs  
Reservation of Oregon

Project No. 2030-186

ORDER DISMISSING PETITION FOR DECLARATORY ORDER

(Issued June 18, 2009)

1. Anita Jackson, Charles Jackson, Deborah Jackson, and Mark Jackson (Jackson family or petitioners) have asked the Commission to issue a declaratory order finding that Portland General Electric Company (PGE) and the Confederated Tribes of the Warm Springs Reservation of Oregon (Tribes), co-licensees for the Pelton Round Butte Project No. 2030, are required to pay reasonable annual charges pursuant to section 10(e) of the Federal Power Act (FPA)<sup>1</sup> to the Jackson family for use of their land in the operation of the Pelton Round Butte Project. For the reasons discussed below, we dismiss the petition without prejudice.

**Background**

2. The Pelton Round Butte Project is located on the Deschutes River in Jefferson County, Oregon and consists of three developments having a combined installed capacity of 366.82 megawatts. The project occupies 2,161.9 acres of land within the Warm Springs Indian Reservation that are held in trust by the United States for the benefit of the Tribes or individual allottees. These acres include three allotments (Allotments 527, 528, and 532)<sup>2</sup> in which the Jackson family holds an undivided one-third interest.<sup>3</sup> The

---

<sup>1</sup> 16 U.S.C. § 803(i) (2006).

<sup>2</sup> Approximately 69.3 acres of Allotment 528 are within the project boundary and 17.3 acres of Allotment 532 are within the project boundary. Allotment 527 is entirely outside the project boundary.

<sup>3</sup> The petitioners are also members of the Tribes but individually hold beneficial interests in these allotments.

United States Department of the Interior's (Interior) Bureau of Indian Affairs is the trustee for the allotments.

3. The Commission issued PGE an original license for the project in 1951.<sup>4</sup> At that time, tribal members Charles and Georgiana Jackson, the petitioners' grandparents, held a full ownership interest in the allotments. In 1956, before commencing project construction, PGE entered into an agreement with Charles Jackson, pursuant to which PGE obtained a 50-year easement on the allotments, in exchange for a lump sum payment of \$2,500 and \$500 monthly payments. As required by law, the agreement became effective upon its approval by the Bureau of Indian Affairs. The lease gave PGE a right to renew it upon its expiration, at a monthly rental to be then agreed upon.

4. In 1980, the Commission amended the project license, making the Tribes a co-licensee and authorizing construction of a new powerhouse.<sup>5</sup> In connection with the amendment, the co-licensees entered into a second agreement with Charles Jackson, and also approved by the Bureau of Indian Affairs, with respect to portions of the allotments to be used for new construction. The 1980 agreement, which was perpetual, called for an initial payment of \$100,000, and monthly payments of \$3,000.

5. The Tribe subsequently purchased a two-thirds interest in the allotments – one-third each from two of petitioners' uncles -- so that the complainants hold a one-third interest in the lands.

6. Prior to the expiration of the original license in 2001, the co-licensees sent a letter to the Jacksons stating their intent to renew the 1956 easement agreement, and noting the obligation under both agreements to renegotiate payment terms. The co-licensees and the petitioners have not been able to agree upon new payment terms.

7. The Commission issued a new 50-year license for the project to PGE and the Tribes on June 21, 2005.<sup>6</sup>

8. On February 11, 2009, the Tribes began proceedings before the Bureau of Indian Affairs to acquire the complainants' one-third interest in the allotments. Under

---

<sup>4</sup> *Portland General Electric Company*, 10 FPC 445.

<sup>5</sup> *Portland General Electric Company*, 10 FERC ¶ 62,142.

<sup>6</sup> 111 FERC ¶ 61,450 (2005). The original license for the project was issued to PGE on December 21, 1951, for a term of 50 years effective January 1, 1952. On December 16 and 17, 1999, PGE and the Tribes, respectively, filed competing applications to continue operation and maintenance of the project, and on June 29, 2001, they jointly filed an amendment to become co-applicants for a new license.

section 2204 of the Indian Land Consolidation Act (ILCA),<sup>7</sup> a tribe may purchase, at no less than fair market value, any land within its jurisdiction, with the consent of the owners of over 50 percent of the interests in the land. As noted, the tribe currently owns a two-thirds interest in the allotments.

9. On March 6, 2009, the Jackson family filed a petition requesting that the Commission issue a declaratory order fixing and scheduling reasonable annual charges to be paid retroactively and prospectively to the Jackson family for the project's use of their land. The Jackson family also asks that the Commission suspend the licensees' operation of the project until the annual charges have been paid in full, in accordance with the schedule the Commission establishes. The Jackson family contends that the amount they have been paid since 1955 is a "modest" amount that does not constitute a reasonable annual charge for the project's use of their land, and that the Commission has never approved, fixed, or periodically adjusted the payments, as required by section 10(e).

10. The Commission issued notice of the petition on April 2, 2009. On April 29, 2009, Interior filed a motion to intervene to ensure that its interests and those of BIA are adequately represented in the proceeding. On May 4, 2009, PGE and the Tribes filed a response to the petition, arguing that the Commission should not act on the complaint until the conclusion of the ILCA proceeding.

11. On June 2, 2009, the petitioners filed a motion for partial summary judgment and for leave to respond to the co-licensee's answer.<sup>8</sup> Petitioners do not appear to disagree with the co-licensees as to any relevant facts, but assert that the Commission should order the co-licensees to pay them reasonable annual charges "from at least January 1, 2002 [after the original license expired] until such use ends."<sup>9</sup>

---

<sup>7</sup> 25 U.S.C. § 2201 *et seq.* (2006).

<sup>8</sup> While our regulations generally prohibit answers to answers, *see* 18 C.F.R. § 385.213(a)(2) (2009), and we do not favor filing a short initial pleading and then a lengthy response to an answer, as petitioners did in this case, we will accept the June 2 filing for completeness of the record.

<sup>9</sup> June 2 motion at 21.

## Discussion

### Annual Charges for Use of Tribal Lands

12. Section 10(e)(1) of the FPA,<sup>10</sup> provides in pertinent part:

when licenses are issued involving the use of ... tribal lands embraced within Indian reservations the Commission shall, subject to the approval of ... the Indian tribe having jurisdiction of such lands ..., fix a reasonable annual charge for the use thereof ....

The Commission's regulations provide that annual charges for the use of tribal lands within Indian reservations will be determined on a case-by-case basis.<sup>11</sup> The Commission's practice has been to allow the licensee and the tribe to negotiate the annual charges and submit them for Commission approval.<sup>12</sup> Because the project occupies tribal lands encompassed within the Warm Springs Indian Reservation, Article 25 of the original Pelton Round Butte license requires the payment of annual charges for the use of tribal lands, as specified by the Commission with the Tribes' approval. However, in light of the payments made under the 1956 and 1980 easements, and because the licensees concluded that annual charge payments do not apply to allotments, the lands within Allotments 528 and 532 were never treated by the licensees as the subject of annual charge payments.<sup>13</sup>

13. Given the procedural posture of this matter, and the fact that some or all of the issues at hand may be resolved by the pending ILCA proceeding, we conclude that the best course of action is to dismiss the complaint, without prejudice. Certainly, the question of who holds title to the allotment lands, which the ILCA proceeding will determine, is highly relevant. Should issues within our jurisdiction remain following conclusion of that proceeding, the complainants could refile their complaint and seek appropriate relief.

---

<sup>10</sup> 16 U.S.C. § 803(e) (2006).

<sup>11</sup> 18 C.F.R. § 11.4(a) (2009).

<sup>12</sup> See, e.g., *Public Utility District No. 1 of Pend Oreille County, Washington*, 77 FERC ¶ 61,146, at 61,553 (1996).

<sup>13</sup> See Protest and Response at 20 and 30. PGE and the Tribes contend that section 10(e) annual charges apply only to tribal lands, not allotted lands, the latter of which are held individually by tribal members. Protest and Response at 35, n.106. The complainants argue to the contrary. June 2 motion at 12-16, citing *Public Utility District No. 1 of Pend Oreille County, Washington*, 77 FERC ¶ 61,146, at 61,552 (1996).

The Commission orders:

The petition for declaratory order filed by Anita, Charles, Deborah, and Mark Jackson in this proceeding on March 6, 2009, is dismissed, without prejudice.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.