149 FERC ¶ 61,038

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

PacifiCorp Project No. 2082-061

ORDER DENYING REHEARING

(Issued October 16, 2014)

1. The Hoopa Valley Tribe (Tribe) has requested rehearing of the Commission's June 19, 2014, order[1] denying the Tribe's petition for a declaratory order either (1) finding that PacifiCorp, the licensee for the Klamath Hydroelectric Project No. 2082, has failed to diligently pursue relicensing of the project, dismissing PacifiCorp's relicense application, and directing PacifiCorp to file a plan for decommissioning the project, or (2) in the alternative, declaring that the State of California Water Resources Control Board (California Water Board) and the Oregon Department of Environmental Quality (Oregon DEQ) have waived their authority to issue water quality certification for the project pursuant to the Clean Water Act. As discussed below, we deny rehearing.

Background

2. The 169-megawatt Klamath Project is located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California.[2] The project includes seven hydroelectric developments and one non-generating dam.[3] The Commission's predecessor, the Federal Power Commission, issued a 50-year original license for the

[1] *PacifiCorp*, 147 FERC ¶ 61,216 (2014) (June 19 Order).

[2] One development is located on Fall Creek, a tributary to the Klamath.

[3] *See Final Environmental Impact Statement for Hydropower License, Klamath Hydroelectric Project*, Federal Energy Regulatory Commission, Office of Energy Projects (November 2007) at xxxiii.

project in 1954. The license expired in 2006 and the project has been operated under annual license since that time.[4]

3. On February 25, 2004, PacifiCorp filed with the Commission an application for a new license for the Klamath Project. The company proposed to relicense five of the project's generating developments and to decommission the other three developments, including the non-generating development. In November 2007, Commission staff issued a Final Environmental Impact Statement (EIS) in the relicensing proceeding.[5] Staff recommended adopting PacifiCorp's proposal, with the addition of a number of environmental measures.

4. On March 5, 2010, PacifiCorp filed with the Commission the Klamath Hydroelectric Settlement Agreement (Settlement Agreement). The Settlement Agreement, which was signed by the Governors of the States of California and Oregon, PacifiCorp, the U.S. Department of the Interior, the Department of Commerce's National Marine Fisheries Service, several Indian tribes (not including the Hoopa Tribe), and a number of local counties, irrigators, and conservation and fishing groups, provided for the future removal of PacifiCorp's licensed Klamath River dams, with a target date of 2020. The parties did not ask the Commission to act on the agreement, the completion of which is contingent on the passage of federal legislation and action by the Secretary of the Interior.

5. To date, no federal legislation regarding the Settlement Agreement has been enacted,[6] and the parties have not requested Commission action.

6. Under section 401(a)(1) of the Clean Water Act,[7] the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued a Water Quality Certification for the project or has waived certification by failing to act on a request for certification within a

[4] *See* 16 U.S.C. § 808(a)(1) (2012).

[5] *See* n.2, *infra*.

[6] On May 21, 2014, Senator Wyden introduced S. 2379, entitled, "A bill to approve and implement the Klamath Basin agreements, to improve natural resource management, support economic development, and sustain agricultural production in the Klamath River Basin in the public interest and the interest of the United States, and for other purposes."

[7] 33 U.S.C. § 1341(a)(1) (2012).

reasonable period of time, not to exceed one year.

7. PacifiCorp filed a request for water quality certification with the California Water Board on March 29, 2006. Since then, the company has withdrawn and refiled its application eight times. Similarly, PacifiCorp filed a request for certification with Oregon DEQ on March 29, 2006, and has withdrawn and refiled its application eight times.

8. On May 25, 2012, the Tribe filed a petition for a declaratory order, asking the Commission to find that PacifiCorp has failed to diligently pursue relicensing of the project and accordingly require the company to file a plan for decommissioning the project, or, in the alternative, find that California and Oregon have waived water quality certification and issue a new license for the project.

9. In the June 19 order, the Commission denied the Tribe's petition. We explained that, while the circumstances of the Klamath project relicensing are far from ideal, the Commission is barred by the Clean Water Act from issuing a new license in the absence of water quality certification from Oregon and California. We further concluded that ordering PacifiCorp to file a decommissioning plan would be unlikely to resolve the current impasse, given that the great majority of parties to the relicensing are pursuing implementation of the settlement, and that decommissioning would probably require water quality certification, which the states, as supporters of the settlement process, would not likely issue.[8] With respect to the Tribe's assertion that we should find that California and Oregon have waived water quality certification, we found that there was little point in pursuing a course that would almost certainly lead to protracted litigation and would be unlikely to resolve the issues in this proceeding.[9]

10. On July 18, 2014, the Tribe filed a timely request for rehearing.

Discussion

A. Dismissal of the Relicensing Application

11. The Tribe reiterates its assertions that PacifiCorp is diligently pursuing neither the issuance of a new license nor water quality certification, and that delay in relicensing is not in the public interest.[10] It asserts that our conclusion that a decommissioning plan

[8] June 19 Order, 147 FERC ¶ 61,216 at P 11.

[9] *Id*. P 17.

[10] Request for rehearing at 12-14. The Tribe notes that the Commission has the authority to deny a new license to an applicant seeking relicensing. *Id*. at 14. While this *(continued ...)*

would require water quality certification that the states would be unlikely to issue is unsupported by the record and an insufficient basis for denying its petition.[11] The Tribe further argues that, if the Commission were to grant the Tribe's petition, decommissioning would be the only appropriate course of action. It contends that the Commission must not let the settlement process play out, but should either dismiss PacifiCorp's application for lack of prosecution or find that the states have waived water quality certification.[12]

12. Given that neither the Federal Power Act nor our regulations impose any requirements with respect to situations such as that presented here, we have considerable discretion with respect to administering this proceeding. Indeed, "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments."[13] The Tribe points to nothing in law, regulation, or precedent that requires us to find that PacifiCorp's application should be dismissed.

13. As we explained in the June 19 order, lengthy delays in licensing proceedings are contrary to the public interest.[14] At the same time, we see little to be gained by taking steps that would likely result in further delay, litigation, and extensive expenditures of time and money by the parties and the Commission. While it is unfortunately the case that there are relicensing proceedings that have been pending for many years awaiting water quality certification,[15] there has been no such instance in which we have dismissed

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is true, it does not assist us in resolving this case. Denying a new license where no party, other than the Tribe, seeks such a result, and, indeed, where our staff in the Final EIS recommended issuing a new license, would be difficult to justify.

[11] *Id*. at 14-17.

[12] *Id*. at 17-20. The Tribe asserts that the fact that we have not taken action on the Settlement Agreement is contrary to our settlement policy. *Id*. at 5, n.8 (citing *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 (2006)). Nothing in our policy or practice requires us to act on settlements where, as here, the parties explicitly file an agreement for the Commission's information only, and not for Commission action.

[13] *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524-25 (1978).

[14] June 19 Order, 147 FERC ¶ 61,216 at P 12.

[15] For example, relicensing of the Hells Canyon Project No. 1971 and the Poe Project No. 2107 has been pending since 2003, while the Upper North Fork Feather River *(continued ...)*

a relicense application for the licensee's failure to diligently pursue the application, in large part because of the confusion such an action would cause and because we have not seen a clear path to resolving the issues in these cases.[16]

14. We disagree with the Tribe's assertion that we lacked a basis in the record for suggesting that California and Oregon would be no more likely to issue water quality certification for a project decommissioning proceeding than they have been during the relicensing proceeding.[17] In the June 19 Order, we explained that "[g]iven that we would be acting contrary to the process envisioned by all the parties to the settlement, including the two water quality certifying agencies, it appears unlikely that the agencies would issue certification for a decommissioning process that did not comport with the terms of the settlement to which they have agreed."[18] There is indeed no direct evidence in the record as to how the agencies would react were we to grant the Tribe's petition,[19] but our experience, both in this proceeding and generally, led us to conclude that California and Oregon could not be expected to act more promptly to authorize an outcome they do not support[20] than they have in the relicensing proceeding. We continue to find this conclusion reasonable.

15. The Tribe is also incorrect in asserting that requiring a decommissioning plan would be the only alternative in the case of a dismissed application. We could, for example, consider the project to be orphaned and seek other applications,[21] or we could issue PacifiCorp a non-power license for all or part of the project.[22]

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relicensing has been awaiting water quality certification since 2002, and the Waterbury Project No. 2090 has been pending since 1999. Of 43 pending license applications regarding which our staff has completed its environmental analysis, 29 (67 percent) are awaiting water quality certification.

[16] We continue to consider whether there are actions or incentives we can take that may be appropriate in individual proceedings to break these logjams.

[17] Request for Rehearing at 16.

[18] June 19 Order, 147 FERC ¶ 61,216 at P 13.

[19] It is difficult to envision what evidence there could be, absent a statement by the agencies as to what they would do in a hypothetical situation.

[20] As noted in the June 19 order, a number of parties, including PacifiCorp, Oregon DEQ, and the California Water Board, opposed the Tribe's petition.

[21] *See* 18 C.F.R. § 61.25 (2014). While this section explicitly deals with instances *(continued ...)*

16. In sum, the Tribe has shown no error in our decision to deny its request that we dismiss PacifiCorp's application and we deny rehearing on this matter.

B. Waiver of Water Quality Certification

17. The Tribe argues that we erred in not determining that California and Oregon have waived water quality certification. The Tribe notes that section 401(a)(1) of the Clean Water Act provides that if a state "fails or refuses to act on a request for certification, within a reasonable time (which shall not exceed one year) after receipt of such request, the certification . . . shall be waived . . . ,"[23] and states that the question whether waiver has occurred is a federal question to be decided by the Commission.[24] The Tribe cites a number of cases, as well as legislative history, for the proposition that Congress intended the one-year deadline to avoid undue state delay of the federal proceedings.[25]

18. We agree with the Tribe that continued delays in completing the water quality certification are inconsistent with Congress' intent. We further agree that, in licensing proceedings before it, the Commission has the obligation to determine whether a state has complied with the procedures required by the Clean Water Act, including whether a state has waived certification.[26]

19. We part company with the Tribe on whether certification has been waived in this case. The Tribe carefully hedges its argument, maintaining that it "does not ask the Commission to declare that the practice of 'withdrawal and resubmission' is unlawful in

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in which a license fails to file a timely, complete application, we believe that it would be applicable in the case of an application that we elected to dismiss later in a proceeding.

[22] *See* 16 U.S.C. § 808(f) (2012).

[23] *See* 33 U.S.C. § 1341(a)(1) (2012).

[24] Request for Rehearing at 20-21.

[25] *Id*. at 22-23.

[26] *See, e.g., Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011) (affirming, as a federal question, the Commission's determination that a state had not waived certification); *City of Tacoma v.* FERC, 460 F.3d 53 (D.C. Cir. 2006) (stating that the Commission was obligated to inquire as to whether a state satisfied the Clean Water Act's notice requirements); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) (holding that the Commission was obligated to determine the effectiveness of a state's purported revocation of certification).

every instance,"[27] but is so only under the facts of this case, including the states' not acting within one year of the initial certification requests, the passage of time since the original requests, the delay in the relicensing proceeding, the states' agreement with the licensee not to move forward on certification, and the fact the licensee continues to operate its project under the terms of its existing license.[28]

20. We continue to be concerned that states and licensees that engage in repeated withdrawal and refiling of applications for water quality certification are acting, in many cases, contrary to the public interest by delaying the issuance of new licenses that better meet current-day conditions than those issued many decades ago, and that these entities are clearly violating the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions; however, notwithstanding that concern, we do not conclude that they have violated the letter of that statute. Section 401(a)(1) provides that a state waives certification when it does not act on an application within one year. The Act therefore speaks solely to *state action or inaction*, rather than the repeated withdrawal and refiling of applications. By withdrawing its applications before a year has passed, and presenting the states with new applications, PacifiCorp has, albeit repeatedly, given the states new deadlines. The record does not reveal that either state has in any instance failed to act on an application that has been before it for more than one year. Again, while the Commission continues to be concerned that these entities are violating the spirit of the Clean Water Act, the particular circumstances here, including the length of the delay, do not demand a different result because the Act speaks directly only to state action within one year of a certification request. Accordingly, we find that California and Oregon have not waived water quality certification in this case.

21. The Tribe's reliance on *Central Vermont Public Service Corporation*[29] is unavailing. In that case, although the state and the licensee had agreed that the licensee would withdraw and refile its water quality certification application on an annual basis, the licensee ultimately failed to do so and the state did not act on the then-pending application before the one-year deadline. We held that the passage of the deadline resulted in waiver, regardless of the fact that the two parties had intended to continue the withdrawal and refiling process: the governing fact was the expiration of the one-year period.[30] Here, whether for good or ill, PacifiCorp has withdrawn and refiled its

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[27] Request for Rehearing at 25.

[28] *Id.* at 25-26.

[29] 113 FERC ¶ 61,167 (2005) (*Central Vermont*). *See* Request for Rehearing at 23-24.

[30] *See Central Vermont* 113 FERC ¶ 61,167 at PP 15-16.

certification applications numerous times. The Tribe does not assert that the states missed the one-year deadline with respect to any single one of the company's applications. In essence, PacifiCorp and the states have avoided the error that Vermont and the licensee in that proceeding made. Accordingly, *Central Vermont* is inapposite here.

22. The Tribe goes on to argue that our decision not to declare that California and Oregon have waived water quality certification is arbitrary, capricious, and an abuse of discretion. The Tribe again asserts that our conclusions that the parties to the settlement are committed to it is unsupported by the record and that the public interest requires us to issue a new license or a decommissioning order.[31]

23. As we have explained, it is the Clean Water Act that prescribes when a state agency has waived certification; it is not an exercise of discretion vested in the Commission. If our interpretation of the statute is incorrect, that would be for the courts to determine.[32] As to the adherence of the settling parties to their agreement, we have no way of knowing how firm their commitment is, but we think it a reasonable assumption that entities will support an agreement which they have voluntarily negotiated and signed.

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[31] Request for Rehearing at 26-30. The Tribe also objects to what it asserts is the Commission's "failure to reinitiate the licensing process [because] it cannot require a licensee to accept a license." *Id*. at 29. In the June 19 Order, 147 FERC ¶ 61,216 at P 17, we simply intended to indicate that the likely negative reaction to our issuing a license that ignored the wishes of the settling parties gave us little incentive to pursue untested legal theories. We nonetheless fully agree with the Tribe that we must issue licenses that satisfy the public interest standards established by the Federal Power Act, and we do not base licensing decisions on whether the applicant (or any other entity) will be pleased by our actions. We further agree, as noted above, that a new license would bring the project in line with current environmental standards. Were we to determine that water quality certification has been waived here, we would then issue a license that we concluded met the public interest, as we have done in other cases involving waiver. *See, e.g.*, *Central Vermont, supra*; *FPL Energy Maine Hydro LLC*, 139 FERC ¶ 61,215 (2012); *Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power*, 110 FERC ¶ 61,241 (2005); *Gustavus Electric Company*, 109 FERC ¶ 61,105, *reh'g denied*, 110 FERC ¶ 61,334 (2004).

[32] *See Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C.Cir.2003) (noting that the Commission's interpretation of Section 401 of the Clean Water Act is entitled to no deference by the court because the Environmental Protection Agency, and not the Commission, is charged with administering the Clean Water Act, and that judicial review of the Commission's interpretation of Section 401 is de novo).

The Commission orders:

The request for rehearing filed by the Hoopa Valley Tribe on July 18, 2014, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.