

74 FERC ¶ 61,262

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

PacifiCorp Electric Operations) Project No. 2643-002

ORDER DENYING REHEARING, DENYING MOTION
FOR STAY PENDING AN ADMINISTRATIVE HEARING,
AND APPROVING WITHDRAWAL OF LICENSE APPLICATION

(Issued March 4, 1996)

In this order, we deny requests for rehearing of our order of December 22, 1995, 1/ in which we found that PacifiCorp Electric Operations (PacifiCorp) is not required to obtain a license to continue operating its Bend Hydroelectric Project No. 2643. 2/ We also deny a motion for a stay pending an administrative hearing, and approve PacifiCorp's withdrawal of its license application for the project.

BACKGROUND

A detailed procedural history of this proceeding appears in our December 22 order and will not be repeated here. In that order, we found that the Bend Project is not required to be licensed pursuant to Section 23(b)(1) of the Federal Power Act (FPA), because a substantial reach of the Deschutes River is not navigable in the vicinity of the project, and the project has not undergone construction or major modification after 1935. 3/ Because PacifiCorp had stated that it would not likely accept a

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- 1/ 73 FERC ¶ 61,365.
- 2/ The project is located on the Deschutes River in the City of Bend in Deschutes County, Oregon.
- 3/ As explained in our December 22 order, licensing is required under Section 23(b)(1) of the FPA if a project: (1) is located on a navigable river; (2) occupies U.S. lands or reservations; (3) uses surplus water or water power from a government dam; or (4) is located on a non-navigable Commerce Clause water, affects interstate or foreign commerce, and has undergone construction or major modification after 1935.

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subsequent license for the project, 4/ we directed the licensee to file either a notice of withdrawal of its application or a request that the Commission continue processing the application.

On January 16, 1996, PacifiCorp filed a notice of withdrawal of its application pursuant to 18 C.F.R. § 385.216. That same day, the U.S. Department of the Interior (Interior) filed a motion in opposition to the withdrawal. On January 22, 1996, the following parties filed timely requests for rehearing of the December 22 order: Interior; Trout Unlimited; and American Rivers, Pacific Rivers Council, and Oregon Trout (Conservation Parties). 5/ Trout Unlimited also filed, in the alternative, a motion for a stay pending an administrative hearing on the jurisdictional issues raised. 6/

On rehearing, the parties once again take issue with two main aspects of our decision: navigability of the Deschutes River in the vicinity of the Bend Project, and construction or major modification of the project after 1935. They also raise several related jurisdictional and procedural issues. We examine their arguments below.

DISCUSSION

A. Navigability of the Deschutes River

Conservation Parties argue that the information provided to the Commission in comments on the staff's navigability report is sufficient to establish that the Deschutes River is used or susceptible to use as a navigable waterway in interstate commerce. They cite the declarations of Morgan Smith, Bruce Mason, Loren Hall, and Bob Woodward, which they assert "describe

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- 4/ As explained in our December 22 order, a subsequent license is a particular type of new license (or relicense). See 73 FERC at n. 1.
- 5/ In its request for rehearing, Trout Unlimited adopts the positions advanced in Conservation Parties' rehearing request regarding jurisdiction, navigability, and post-1935 construction. Interior incorporates by reference its arguments and comments on the staff's navigability report.
- 6/ On February 1, 1996, the Oregon Department of Fish and Wildlife filed an untimely request for rehearing in which it incorporated by reference the grounds asserted in Interior's rehearing request. On February 15, 1996, the Commission Secretary issued an order granting rehearing for further consideration of the timely rehearing requests and rejecting the Oregon Department's untimely rehearing request.

extensive boating by kayakers and canoeists in the reach between Bend and Oden Falls, and between Lake Billy Chinook to the lower dam of the Pelton-Round Butte Hydroelectric Complex." 7/ They maintain that independent confirmation of this is demonstrated by Soggy Sneakers, A Guide to Oregon Rivers, published by The Mountaineers. 8/ They take issue with our characterization of the degree of difficulty of the river reaches in question, and assert that we improperly considered low flows caused by dams and irrigation withdrawals. They also argue that the approximately 20-mile segment of falls and rapids between the City of Bend and Oden Falls is a "mere interruption" and meets the definition of navigable waters in Section 3(8) of the FPA.

We found in our December 22 order that the 20-mile reach of the Deschutes River from the City of Bend to Oden Falls consists primarily of class 4 or greater rapids. 9/ This class of

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- 7/ Request for rehearing at 1. The declarations of Morgan Smith, Bruce Mason, and Loren Hall are appended to the National Wildlife Federation's comments on the staff's navigability report (filed September 29, 1995). The declaration of Bob Woodward and a second declaration of Morgan Smith are appended to American Rivers' additional evidence of navigability (filed November 27, 1995).
- 8/ Relevant portions of this publication (particularly pp. 236-238) are appended to Conservation Parties' comments on the navigability report (filed September 29, 1995).
- 9/ Upon closer examination of the evidence presented, we find that the segment of interrupting rapids and falls is actually about 46 miles long. In our December 22 order, we incorrectly identified the Bend project as being located at river mile 160; in fact, the Bend Project dam is located at river mile 166, and the Bend urban growth boundary is at river mile 160. See Environmental Assessment at 16, Figure 4, and National Wildlife Federation comments at 3-4. Therefore, the segment of the Deschutes River from below the Bend Project dam to Oden Falls is about 26 miles long instead of 20 miles as stated in our order. Soggy Sneakers rates both the 5-mile stretch from below the Bend Project to Tumalo State Park (about river miles 165 to 160) and the 15-mile stretch from Lower Bridge to Lake Billy Chinook (river miles 135 to 120) as Class 4 or greater, with some Class 3 drops and one 2-mile stretch of class 1-2 rapids. Morgan Smith states that the segment downriver from Tumalo State Park to Lower Bridge, which includes Cline Falls (river mile 145), is Class 2 if the two waterfalls are portaged, and Class 4-5 if the falls are run. Declaration of Morgan
(continued...)

whitewater is dangerous and difficult, and requires an advanced level of skill. 10/ We recognize that recreational boating may provide evidence of a river's suitability for "the simpler types of commercial navigation." 11/ However, we do not believe that recreational use by skilled kayakers demonstrates such suitability. In Pennsylvania Electric, when presented with similar facts regarding recreational whitewater use by kayakers, we found the river in question nonnavigable. 12/ We find no basis for departing from that precedent here.

Nor may we properly regard a 20-mile reach of rapids and falls as an "interruption" that should be automatically included as navigable waters under Section 3(8) of the FPA. That section

9/(...continued)

Smith, par. 4 (November 27, 1995).

In our December 22 order, we were primarily concerned with the segment from below the Bend Project dam (river mile 166) to Oden Falls (river mile 140). Although we noted that the staff's navigability report recognized the segment from Oden Falls to Lake Billy Chinook (river miles 140 to 120) as "suitable for boating," the report did not differentiate types of boating or levels of difficulty for this segment. Based on the ratings from Soggy Sneakers identified above, most of this reach (river miles 135 to 120) is also Class 4 or greater. Thus, under the standard articulated in our December 22 order, we would regard the entire 46-mile segment as nonnavigable under the FPA. However, because we find that even a 20-mile segment of interrupting rapids and falls is sufficiently long to support a finding of non-navigability under the FPA, we need not separately address the additional 26 river miles.

10/ See American Red Cross, Canoeing and Kayaking at Figure 5-11, pp. 5.14 to 5.15 (1981), quoting the Safety Code of the American Whitewater Affiliation as follows: "Class IV. Long, difficult rapids with constricted passages that often require precise maneuvering in very turbulent waters. Scouting from shore is often necessary, and conditions make rescue difficult. Generally not possible for open canoes. Boaters in covered canoes and kayaks should be able to Eskimo roll." See also 73 FERC at n. 24.

11/ United States v. Appalachian Electric Power Co., 311 U.S. 377, 416 (1940).

12/ Pennsylvania Electric Co., 56 FERC ¶ 61,435 at pp. 62,549-50 (1991).

defines navigable waters to include interrupting "falls, shallows, or rapids compelling land carriage." ^{13/} The purpose of this broad definition was to ensure comprehensive control over the Nation's waters, and to prevent the steep gradients, falls, shallows and rapids that frequently occur at hydroelectric generation sites from themselves becoming a bar to the Commission's jurisdiction if the stream is otherwise navigable. ^{14/} We find nothing to suggest that it was intended to define as navigable substantial river segments not otherwise suitable for commercial navigation. ^{15/} We therefore reject Conservation Parties' argument that the approximately 20-mile segment in question is an "interruption . . . compelling land carriage" within the meaning of Section 3(8) of the FPA.

Conservation Parties also argue that the reach occupied by the Pelton-Round Butte complex is also a "mere interruption" in navigability. ^{16/} They maintain that we improperly considered dams and irrigation diversions in this segment of the river as impediments to navigability. They correctly point out that navigable waters include streams which were navigable in their natural state although they may not now meet that standard.

^{13/} 73 FERC at n. 17.

^{14/} See Federal Power Commission v. Union Electric Co., 381 U.S. 90, 101 (1965); Sierra Pacific Power Co. v. FERC, 681 F.2d 1134, 1139 (9th Cir. 1982).

^{15/} The reported cases support this view. In *New York v. FERC*, the court found the Salmon River navigable despite the interruption of a single 110-foot waterfall, because the river had historically been used both above and below the falls for transportation and for floating logs downstream. 954 F.2d 56, 60-61 (2d Cir. 1992). In *Sierra Pacific v. FERC*, a 14-mile stretch of river that was neither used nor suitable for navigation was sufficient to render the Truckee River nonnavigable, because it lacked a navigable interstate linkage by water. 681 F.2d 1134, 1138 (9th Cir. 1982). In *Muckleshoot Indian Tribe v. FERC*, the court found that a 21-mile "difficult stretch of river" could not be considered a "mere interruption." 993 F.2d 1428, 1433 (9th Cir. 1993).

^{16/} In our December 22 order, we identified the river reach from below Lake Billy Chinook to the lower dam of the Pelton-Round Butte complex as river miles 120 to 100, as indicated on the map included in the staff's navigability report. In fact, it appears that Lake Billy Chinook occupies river miles 120 to 110. See Final EA at 16 and National Wildlife Federation comments at 4.

As we pointed out in our December 22 order, the staff mentioned dams and irrigation diversions in its navigability report because they affect current use of the river; it did not and could not rely on these features as a basis for finding the river stretches nonnavigable. We reiterate that the staff found these stretches not suitable for commercial navigation because they are characterized by a series of dangerous, high falls and rapids. Conservation Parties have not presented evidence to contradict this conclusion.

B. Construction or Major Modification After 1935

Conservation Intervenors argue that PacifiCorp has proposed modifications to the Bend Project that would allow the project to operate differently from its pre-1935 design and that, therefore, these modifications constitute "construction" or "significant modifications" within the meaning of Section 23(b)(1) and (2) of the FPA. They maintain that adding remote and automatic headwater level controls and reducing seepage would necessarily seem to increase head and generating capacity, as would modifying the powerhouse to improve operating reliability.

We examined these proposed modifications in our December 22 order and found that they would not increase either head or generating capacity. PacifiCorp has proposed to remove the flashboards from the top of the dam and replace them with an inflatable crest-control structure. As shown on the drawings filed with the license application, neither the height of the dam nor the reservoir elevation will increase. ^{17/} Although headwater levels will be controlled automatically rather than manually, the available head for hydroelectric generation will not increase. Nor will reducing seepage or using the crest-control structure to allow ice passage affect hydroelectric generating capacity.

Conservation Intervenors appear to be arguing that if repairs allow a project to operate "any differently from its pre-1935 design," regardless of the significance of the change, the repairs must constitute post-1935 construction within the meaning of Section 23(b)(1). ^{18/} This distorts and misapplies the statutory standard. Repairs often extend the useful life of a facility and allow it to operate more reliably. They also can involve minor changes in the way a facility is operated. But, as we explained in our December 22 order, if repairs or improvements

^{17/} See Application for License, Exhibit F, Sheet F-2 (filed December 24, 1991).

^{18/} Puget Sound Power and Light v. FERC, 557 F.2d 1311, 1316 (9th Cir. 1977).

do not increase the project's head, generating capacity, or water storage capacity, or otherwise significantly modify the project's pre-1935 operation, they do not constitute post-1935 construction.

C. The Commission's Relicensing Jurisdiction

Interior argues that our determination that we do not have jurisdiction to require relicensing of the Bend Project is contrary to the intent of the FPA. Interior asserts that neither Section 4(e) nor Section 23(b)(1) addresses the Commission's jurisdiction to relicense a project over which it has already asserted jurisdiction. Once the Commission has determined that the project affects the interests of interstate commerce and has issued it an original license, Interior argues, there is no jurisdictional impediment to relicensing the project under Section 15 of the FPA. Interior maintains that allowing projects to "opt out" of our jurisdiction on relicensing is inconsistent with the primary purpose of the FPA: to provide comprehensive control over the uses of the Nation's water resources.

Interior also argues that Farmington is inapplicable to this case, because it involved the Commission's authority to issue an original license for a project that had never before been licensed. Interior argues that, in that case, the court simply held that the 1935 amendment to Section 23 could not be applied retroactively to require an owner of an existing project on a nonnavigable stream to seek an original license; it did not address the relicensing of an already-licensed project. In essence, Interior asserts that the post-1935 construction requirement applies only to a declaration of intention that may precede original licensing, and that there is no such requirement when a project with a voluntary license under Section 4(e) seeks relicensing.

As noted in our December 22 order, we considered and rejected these arguments in Pennsylvania Electric. ^{19/} Interior's view would require us to determine that Sections 4(e) and 23(b)(1) are inapplicable at relicensing, and that the source of our relicensing jurisdiction stems exclusively from Sections 14 and 15 of the FPA. We have examined this issue in detail elsewhere, and reiterate our conclusion that Section 4(e) is applicable to relicensing as well as to original licensing

^{19/} 56 FERC ¶ 61,435 (1991) (hydroelectric licensee with a voluntary license under Section 4(e) of the FPA need not file a relicense application and may continue operating without a license following expiration of the original license).

proceedings. 20/ Moreover, we find nothing in the FPA to suggest that if an applicant accepts a voluntary license under Section 4(e), it is forever barred from operating without a license under the FPA once its original license expires. The essence of a voluntary license under Section 4(e) is that the applicant may choose whether or not it wishes to enjoy the benefits and assume the corresponding responsibilities that federal licensing entails.

We also reject Interior's argument that Farmington is inapplicable where relicensing is involved. In that case, the court construed the "intending to construct" provision of Section 23(b)(1) and concluded that this language applies to new projects rather than those already in existence. Existing projects are "grandfathered," and their owners need not file a declaration of intention unless they propose substantial new construction or major modification of their projects that can be considered "construction" within the meaning of that section. 21/ A project issued a voluntary license under Section 4(e) is by definition not subject to Section 23(b)(1), and the mere fact that it is the subject of a relicensing proceeding does not bring it under Section 23(b)(1). Rather, like the project at issue in Farmington, the Bend Project will come under the terms of that section only if it is to be the subject of substantial new construction or major modification.

D. Administrative Hearing and Stay Requests

Trout Unlimited argues that the record is not sufficient to support our decision and that we should stay any Commission action regarding the disposition of our jurisdiction, such as withdrawal of the license application, pending a hearing on jurisdictional issues before an administrative law judge. 22/ In support, Trout Unlimited maintains that no party will be harmed by maintaining the status quo, but the parties will have

20/ See City of Pasadena Water and Power Dept., 46 FERC ¶ 61,004 at pp. 61,011-12 (1989).

21/ See Puget Sound, note 18 supra, at 1315 ("the statute is to apply only to projects begun after the effective date in 1935").

22/ Although not requesting a stay, Interior also maintains that we should not approve withdrawal of Pacificorp's pending license application until the issue of our jurisdiction is finally resolved and we have either decommissioned the project or transferred it to another competent regulatory agency. Motion in Opposition to Notice of Withdrawal at 1 (filed Jan. 16, 1996).

to invest significant resources regarding transfer of jurisdiction to the State of Oregon, especially if the Commission later "revisits" its decision.

We find no basis in the record for setting these issues for an evidentiary hearing. There are no material facts in dispute. Nor are matters at issue that require the test of cross-examination for their satisfactory resolution. Rather, the controversy concerns the legal significance of facts already on the record as a result of notice-and-comment hearing procedures provided for in our hydroelectric licensing regulations. 23/ Thus, they are primarily legal issues or mixed issues of law and fact that need not be resolved by a trial-type hearing. 24/

In these circumstances, we find no basis for any further stay of effectiveness of our jurisdictional determination in this case. 25/ Since we have found that we have no jurisdiction to require PacifiCorp to obtain a subsequent license to continue operating the Bend Project, we similarly lack a legal basis for refusing to allow PacifiCorp to withdraw its license application. We therefore approve that withdrawal.

The Commission orders:

(A) The requests for rehearing of our order issued in this proceeding on December 22, 1995, filed by the U.S. Department of the Interior; Trout Unlimited; and American Rivers, Pacific Rivers Council, and Oregon Trout on January 22, 1996, are denied.

(B) The request for a stay pending an administrative hearing on jurisdictional issues, filed by Trout Unlimited on January 22, 1996, is denied.

23/ See 18 C.F.R. § 4.34(b).

24/ See *City of Seattle, Washington v. FERC*, 923 F.2d 713, 715-16 (9th Cir. 1991); *Sierra Association for Environment v. FERC*, 744 F.2d 661 (9th Cir. 1984).

25/ As explained in our December 22 order, Interior's motion in opposition to PacifiCorp's notice of withdrawal of its license application had the effect of staying the withdrawal pending our order accepting the withdrawal. See 73 FERC at n. 33; 18 C.F.R. § 385.216(b).

Project No. 2643-002

-10-

(C) The notice of withdrawal of license application for the Bend Hydroelectric Project No. 2643, filed by PacifiCorp Electric Operations on January 16, 1996, is approved.

By the Commission.

(S E A L)



Linwood A. Watson, Jr.,
Acting Secretary.