BEFORE THE UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In re Klamath Hydroelectric Project	)	
	)	FERC Project No. P-2082
License Applicant: PacifiCorp	)	
_____	)	

PETITION OF HOOPA VALLEY TRIBE FOR DECLARATORY ORDER

I. INTRODUCTION

Pursuant to 18 C.F.R. § 385.207(a)(2), the Hoopa Valley Tribe, party-intervenor in this proceeding regarding re-licensing of the Klamath Hydroelectric Project (P-2082) hereby petitions the Commission for a declaratory order: (a) finding that the license applicant, PacifiCorp, has failed to diligently pursue re-licensing of the Klamath Project; (b) ordering PacifiCorp's re-license application dismissed; and (c) directing PacifiCorp to file a plan for decommissioning of Project facilities.

Alternatively, the Tribe petitions the Commission for a declaratory order finding that the State of California Water Resources Control Board (SWRCB) and the Oregon Department of Environmental Quality (ODEQ) (collectively, the "States") have failed to act on PacifiCorp's applications for water quality certification, first filed in 2006, within the one-year time limit required under Section 401 of the Clean Water Act[1] and have waived their certification authority. If the Commission determines that the States have waived their authority, it should proceed to issue a new license to PacifiCorp, including the mandatory Section 4(e) and Section 18 conditions prescribed by the Departments of Interior and Commerce in 2007. The time has come for the Commission to re-assert its jurisdiction over the Project and require PacifiCorp to either comply with current applicable law in a new license, or alternatively decommission the Project.

[1] 33 U.S.C. § 1341(a)(1).

PacifiCorp's failure to diligently pursue re-licensing and the States' agreement with PacifiCorp to hold their Section 401 proceedings in perpetual abeyance have effectively divested the Commission of its licensing authority in this proceeding. To date, this arrangement has allowed PacifiCorp six additional years of post-license power generation under the terms of its 1950's era-license – with many more years of anticipated unregulated operation to come. PacifiCorp's fifty-year license to operate the Klamath Hydroelectric Project expired on March 1, 2006. Since that date, PacifiCorp has continued to operate the Project under annual licenses that incorporate terms and conditions originally issued in 1954. The annual licenses lack conditions that would be required under current law and that are necessary to mitigate for the Project's significant impacts to water quality, fish, and other aquatic organisms in the Klamath River.

Although FERC long ago completed all the steps necessary to re-license the Klamath Project with terms, conditions, and mitigation measures required by current law, PacifiCorp has permanently stalled the re-licensing through a contract known as the Klamath Hydroelectric Settlement Agreement (KHSA).[2] Consistent with the KHSA, the States have committed to not act on PacifiCorp's applications for certification under Section 401 of the Clean Water Act (the last necessary step to complete re-licensing), holding the re-licensing in a state of abeyance without FERC consent. In a purely technical charade designed to circumvent FERC authority, PacifiCorp withdraws and re-submits its applications for certification each year although it is clear that neither PacifiCorp nor the States intend for any action to be taken on the applications.

The Tribe requests that FERC either dismiss the re-license application for lack of diligent prosecution or find that the States, as a matter of federal law, have waived their authority under

[2] PacifiCorp filed the Klamath Hydroelectric Settlement Agreement (KHSA) with the Commission on March 5, 2010. *FERC Elibrary Accession No. 20100305-5023*. PacifiCorp did not request the Commission to take any action with regards to the "settlement" nor has the Commission taken any such action on the KHSA since that date.

Section 401 of the Clean Water Act. Once FERC deems the Section 401 certifications waived, it should proceed to issue a new license to PacifiCorp that includes the mandatory prescriptions filed by Interior and Commerce pursuant to Section 4(e) and 18 of the Federal Power Act, in addition to other necessary conditions. The public interest requires that FERC end the delay, re-assert control, and move this proceeding toward either re-licensing or decommissioning.

II. STATEMENT OF FACTS

A. BACKGROUND OF THE KLAMATH HYDROELECTRIC PROJECT

In 1954, the Federal Power Commission issued a fifty year license for operation of the Klamath Hydroelectric Project on the Klamath River in southern Oregon and northern California. The Commission subsequently changed the effective date of the license to March 1, 1956. That license, currently held by PacifiCorp, expired on March 1, 2006. Since license expiration, PacifiCorp has continued to operate the Project on the same terms of the 1954 license under the authority of annual licenses issued by FERC. PacifiCorp's application to re-license the Project (filed in 2004) remains pending in a state of perpetual delay before FERC.

In 2006, the Departments of Interior and Commerce filed conditions and prescriptions for inclusion in the Klamath Project license under the authority of Section 4(e) and 18 of the Federal Power Act. These conditions include provisions for minimum flow and fish passage, among others, that would provide substantial mitigation to the imperiled water and fish resources of the Klamath River. PacifiCorp unsuccessfully challenged these terms and conditions in a trial-type evidentiary hearing pursuant to the Energy Policy Act of 2005, Public Law 109-58, § 241.

In September 2006, after reviewing extensive testimony from federal, tribal, state, and non-governmental entities, Administrative Law Judge Parlen McKenna dismissed PacifiCorp's challenges, finding that the Section 4(e) and Section 18 conditions were supported by the

evidence in the record and necessary for the protection of affected fish and water resources of the Klamath River.[3] In early 2007, the Departments of Interior and Commerce filed their final mandatory Section 4(e) and Section 18 prescriptions.[4] Yet, five years later, PacifiCorp continues to operate without these conditions and prescriptions in effect. FERC must include these mandatory measures in any new license issued for the Klamath Project.[5]

FERC published its Final Environmental Impact Statement and completed its environmental analysis of the Klamath re-licensing well over four years ago, on November 16, 2007. The FEIS confirms that the Project results in significant, presently un-mitigated, impacts on the Klamath River environment. No regulatory agency disputes the significant impacts caused by the Project. FERC and the respective federal agencies have completed all steps necessary to re-license the Klamath Project with the mandatory protective terms and conditions. The only missing requirement is issuance or waiver of Section 401 water quality certification.[6]

B. BACKGROUND RELATING TO THE KLAMATH HYDROELECTRIC SETTLEMENT AGREEMENT AND ITS EFFECT ON RE-LICENSING.

In 2008, PacifiCorp, the States of California and Oregon, and the United States signed an Agreement in Principle ("AIP") providing that Oregon and California resource agencies would

[3] Judge McKenna's September 27, 2006 Decision and Findings of Fact are available in the FERC Record at *FERC Elibrary Accession No. 20061002-5081*.

[4] *See* DOI Modified 4(e) Conditions, January 22, 2007 (*FERC Elibrary Accession No. 20070130-5034*); NMFS Modified Fishway Prescriptions (*FERC Elibrary Accession No. 20070129-5059)*.

[5] *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding FERC has no discretion to reject 4(e) conditions imposed by Interior); *City of Tacoma v. FERC,* 460 F.3d 53, 66-67 (D.C. Cir. 2006) (same).

[6] *See* November 18, 2011 correspondence from Jeff C. Wright, Director, Office of Energy Projects to Elizabeth Vasquez, *FERC Elibrary Accession No. 20111118-3013*; February 13, 2009 correspondence from J. Mark Robinson, Director, Office of Energy Projects to Dorothy Rice, *FERC Elibrary Accession No. 20090213-3027* (identifying certification as last necessary step and stating "bringing this relicensing proceeding to its conclusion is appropriate and may provide various measures to improve fisheries, water quality and other project-affected resources").

not impose "significant costs" on PacifiCorp (absent PacifiCorp's consent) relating to water quality certification studies during negotiation of the KHSA.[7] The intent and effect of this provision was to de-rail Section 401 certification studies and proceedings pending in the States.

In February 2010, PacifiCorp completed negotiations and executed the KHSA, in which the States agree to put the Section 401 certification process in abeyance.[8] PacifiCorp, through the KHSA, has effectively suspended the FERC re-licensing process until at least 2020 (the year in which the KHSA, Section 7.3, provides that decommissioning might commence), allowing itself at least fourteen additional years of unmitigated power generation beyond the date of its license expiration. Significantly, if the KHSA fails or terminates (which is likely), the process will simply return to FERC for additional (but significantly delayed) re-licensing proceedings.

FERC has not approved the KHSA. Given PacifiCorp's express request that FERC take no action on the KHSA, and the lack of any proceedings initiated by FERC regarding the KHSA, it is not clear whether FERC has even reviewed the KHSA or understands its effect.[9] Contrary to the claims of PacifiCorp and its supporters, the KHSA is not an agreement to decommission or remove the dams of the Klamath Project. The KHSA does not require the removal of any dams of the Klamath Hydroelectric Project, but instead establishes a planning process that could potentially lead to the commencement of project decommissioning in 2020. Such commencement of decommissioning in 2020 is highly speculative and doubtful, because such potential decommissioning is expressly subject to the achievement of contingent events that include, but are not limited to: (a) enactment of comprehensive federal legislation; (b) California

[7] PacifiCorp filed the AIP with FERC on Nov. 24, 2008. *FERC Elibrary Accession No. 20081124-5160*.

[8] KHSA, Section 6.5 (entitled "Abeyance of Relicensing Proceeding").

[9] FERC's failure to take any action on the KHSA appears directly inconsistent with FERC's Policy Statement on Hydropower Licensing Settlements (PL06-5-00, September 21, 2006).

voter approval of a $250 million bond package; (c) an affirmative determination by the Secretary of the Interior that dam removal is in the public interest; and (d) separate concurrences by the states of Oregon and California that dam removal is in the public interest.[10] If any of these events fail to occur, decommissioning and facilities removal will not occur.[11]

There is no evidence that even one of the required contingencies will occur. Now, two years after execution of the KHSA, no federal legislation supporting the KHSA has been passed.[12] Similarly, action on the required California bond package has been deferred until November 2012 at the earliest. The Secretarial Determination has not been issued, despite the agreed-upon target of March 31, 2012 in Section 3.3.4 of the KHSA. Finally, the concurrence of the Governors of the States of Oregon and California (which is a purely discretionary political decision) is far from guaranteed as both of the respective Governors that signed the KHSA are no longer in office. In sum, the established deadlines for action in the KHSA have passed with not one contingency satisfied and the KHSA is now expressly terminable (although no party has invoked termination).[13] It is extremely unlikely that all the KHSA's necessary contingencies for dam removal will occur, if any. Absent immediate FERC intervention, the only certainty is

[10] KHSA, Sections 3.3.1; 3.3.4; 3.3.5; 4.1.2.

[11] KHSA, Section 7.2.1 (Definite Plan for Facilities Removal shall be developed upon an Affirmative Determination (which is contingent on passage of federal legislation and required state and federal funding authorizations) and States' Concurrences).

[12] The KHSA set a goal for introduction of federal legislation by no later than May 2010. Section 2.1.1.A. The Klamath Basin Economic Restoration Act of 2011, which would provide the Congressional ratification required by the terms of the KHSA, was not introduced until November 10, 2011 (S. 1851/H.R. 3398). Since its introduction seven months ago, no action has occurred and no committee hearings have been scheduled for either bill, suggesting little interest in such legislative action. This lack of interest is likely tied to the connected agreement, the Klamath Basin Restoration Agreement, which would require appropriation of approximately $1 billion in federal subsidies.

[13] KHSA, Section 8.11.

continued delay and continued operation of the Klamath Project by PacifiCorp on the terms of a long-expired license. The current status quo is not in the public interest.

C. BACKGROUND RELATING TO WATER QUALITY CERTIFICATION.

PacifiCorp applied for water quality certification from the California SWRCB on March 29, 2006.[14] PacifiCorp withdrew and re-submitted its application on February 28, 2007[15] and again on February 22, 2008, and again in 2009, 2010, and 2011.[16] PacifiCorp engaged in the same practice of submitting, withdrawing, and re-submitting its applications with the Oregon DEQ during this same time-period, most recently withdrawing its application in January 2012.[17]

Significantly, PacifiCorp does not actually desire the States to process its applications, nor do the States intend to. The withdrawals and re-submissions are merely a contractually-mandated charade designed as an attempt to continually re-start the one year maximum timeframe provided in Section 401 of the Clean Water Act and delay license issuance.[18] By continuing to withdraw and re-submit the applications, PacifiCorp purposefully acts to

[14] Correspondence from SWRCB to PacifiCorp (April 27, 2006) (confirming receipt of PacifiCorp application), *FERC Elibrary Accession No. 20060509-0091*.

[15] Correspondence from SWRCB to PacifiCorp (March 30, 2007) (confirming receipt of PacifiCorp withdrawal and resubmittal), *FERC Elibrary Accession No. 20070419-0089*.

[16] Correspondence from SWRCB to PacifiCorp (Aug. 17, 2011) (confirming receipt of PacifiCorp withdrawal and resubmittal), *FERC Elibrary Accession No. 20110823-0006*; Correspondence from PacifiCorp to FERC (September 24, 2010) (transmitting copies of PacifiCorp withdrawal and resubmittal), *FERC Elibrary Accession No. 20100924-5064*; Correspondence from PacifiCorp to FERC (September 17, 2009) (same), *FERC Elibrary Accession No. 20090917-5046*.

[17] Correspondence from PacifiCorp to FERC (January 5, 2012) (transmitting correspondence to ODEQ withdrawing and re-submitting certification application), *FERC Elibrary Accession No. 20120105-5101;* see also correspondence from PacifiCorp to FERC (February 11, 2010) (same), *FERC Elibrary Accession No. 20100212-5150*.

[18] *See* KHSA, Section 6.5 (providing that PacifiCorp agrees to "withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA").

circumvent FERC jurisdiction and prevent FERC from acting on its application and issuing a license with mandatory terms and conditions necessary to protect the Klamath River.

Shortly after the KHSA became effective, the Oregon DEQ agreed to PacifiCorp's request of holding the Section 401 certification proceeding in "abeyance." In a March 29, 2010 letter to PacifiCorp's legal counsel, ODEQ confirmed that it would accept PacifiCorp's request to not process its future applications for certification:

> On March 22, 2010, the [ODEQ] received a request from [PacifiCorp] to hold in abeyance further review of the application for water quality certification under Section 401 of the Clean Water Act (CWA) for PacifiCorp Energy's (PacifiCorp) Klamath Hydroelectric Project (FERC No. 2082). . . . *In accordance with Section 6.5 of the KHSA, ODEQ will hold in abeyance further processing of Klamath Hydroelectric Project Section 401 applications submitted prior to a Secretarial Determination*. . . . During the period prior to a Secretarial Determination, PacifiCorp will withdraw and resubmit its application to ODEQ for water quality certification, as necessary to avoid waiver under the Clean Water Act.[19]

Similarly, on May 18, 2010, the California SWRCB passed Resolution No. 2010-0024,[20] entitled "Request for Abeyance in Processing the Water Quality Certification Application of the Klamath Hydroelectric Project." The SWRCB resolved to: "hold in abeyance PacifiCorp's application for water quality certification for the Klamath Hydroelectric Project until removal of the California mainstem facilities of the Project, except as provided in Paragraphs 2 and 3." In Paragraph 3, the SWRCB stated it would resume "processing" the certification application if federal legislation implementing the KHSA is not introduced by June 18, 2010 or if the Secretarial Determination does not occur by April 30, 2012. Neither of these conditions (federal legislation or the Secretarial Determination) have yet occurred.

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[19] *FERC Elibrary Accession No. 20100330-5024* (emphasis added).

[20] The three SWRCB resolutions are available at: *FERC Elibrary Accession No. 20120104-5084*.

As the deadlines passed, instead of processing the certification application, SWRCB simply changed the target dates and continued to abstain from its certification duties. On October 5, 2010, the SWRCB passed Resolution No. 2010-0049, entitled "Regarding Further Abeyance in Processing the Section 401 Water Quality Certification of the Klamath Hydroelectric Project."[21] Here, the SWRCB declared that: "PacifiCorp and [the Klamath Water Users Association] request that the federal legislation requirement in Resolution 2010-0024 be struck." The SWRCB acceded to PacifiCorp's request, resolving that: "The State Water Board will change Resolution 2010-0024, paragraph 3, first bullet, to a deadline for enactment of legislation, rather than introduction of legislation, and change the date from June 18, 2010 to May 17, 2011 (one year after the timeline anticipated in the KHSA). No legislation was either passed or introduced by May 17, 2011. Yet, this did not change the SWRCB's course of action.

On June 21, 2011, PacifiCorp requested the SWRCB "to remove the requirement [in Resolution 2010-0049] that federal legislation be enacted by a date certain since federal legislation is not likely to be enacted before August 15, 2011 (90 days after May 17, 2011)." On August 16, 2011, in Resolution 2011-0038,[22] the SWRCB again agreed to PacifiCorp's request, deleting the requirement for enactment of legislation as a prerequisite for maintaining the abeyance. However, enactment of legislation remains a prerequisite in the KHSA for project decommissioning. The SWRCB resolution did retain the requirement for completion of the Secretarial Determination by April 30, 2012. That deadline has now passed as well.

In summary, although PacifiCorp continues to submit, withdraw, and re-submit applications for certification, it is clear that these submissions are not a good-faith or diligent

[21] *FERC Elibrary Accession No. 20120104-5084*.

[22] *FERC Elibrary Accession No. 20120104-5084*.

request for certification. To the contrary, PacifiCorp does not want the States to process its applications and has affirmatively requested the States not to. The States have also agreed to accept PacifiCorp's applications, but not process them. As a result, PacifiCorp continues to operate its Project on a license issued in 1954, the resources continue to suffer, and this re-licensing moves no closer to closure.

This is not the first time that the Tribe has brought its concerns to FERC's attention. In February 2007, following Interior's release of its final Section 4(e) prescriptions, the Tribe moved FERC to impose some of those mandatory conditions as interim protective measures due to the delay in re-licensing.[23] In its Order Denying Rehearing, FERC addressed the Tribe's argument that the re-licensing was in a contractually-mandated state of delay due to the recent signing of the AIP finding that "while this proposal contemplates further delay in issuing a new license, we cannot be certain that delay is inevitable."[24] Since the Order on Rehearing, three more years have passed with no action on the license to the detriment of the resources. FERC must step in and reassert control over this proceeding, in accordance with its statutory duty.

III. ARGUMENT AND AUTHORITY

A. PACIFICORP HAS FAILED TO DILIGENTLY PURSUE WATER QUALITY CERTIFICATION AND COMPLETION OF RE-LICENSING.

Under well-established FERC policy, "indefinite delays in processing applications are not in the public interest."[25] Failure to diligently prosecute a license application is adequate grounds

[23] Order Denying Motion for Interim License Conditions, 125 FERC ¶ 61,196 (Nov. 20, 2008).

[24] Order Denying Rehearing, 126 FERC ¶ 61,236 (March 19, 2009).

[25] *Georgia-Pacific Corporation*, 35 FERC ¶ 61,120, n. 8 (April 25, 1986); *Town of Summersville, W. Va. v. FERC*, 780 F.2d 1034, 1040 (D.C. Cir. 1986).

for dismissal.[26] FERC regulations require a licensee to diligently pursue water quality certification. For example, a licensee must file within 60 days from the date of issuance of the Ready for Environmental Analysis (REA) Notice: (a) a copy of the water quality certification; (b) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (c) evidence of waiver of water quality certification.[27] FERC expects certification to be obtained or applied for by the time the REA Notice is issued or shortly thereafter.[28] Once applied for, certification is to be obtained within one year.[29]

FERC issued its REA Notice for the Klamath Project re-licensing in December 2005, approximately 78 months ago. On February 14, 2006, PacifiCorp asked FERC for a mere 30-day extension of the deadline by which it was required to file its first application for certification.[30] FERC initially denied this request, citing its "commitment to processing license applications in a timely manner" and its determination in Order No. 2002 (July 23, 2003) that accepting a certification application more than 60-days following REA Notice would result in "unduly delaying the licensing process."[31] That 30-day extension request, resisted by FERC in 2006,

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[26] *In re Mountain Rhythm Resources*, 90 FERC ¶ 61,088 (Jan. 31, 2000) (dismissing license application for failure to show due diligence in prosecution of CZMA certification); *see also In re Swift River Company*, 41 FERC ¶ 61,146 (Nov. 6, 1987) (requiring applicant whose Section 401 certification was denied to exercise due diligence in pursuing any available appeal remedies).

[27] 18 C.F.R. § 4.34(b)(5)(i).

[28] *See* Order No. 2002, Hydroelectric Licensing Under the Federal Power Act, 104 FERC ¶ 61,109, P 264, 254-265 (July 23, 2003) (explaining why "the latest date we can accept for filing of the water quality certification application is 60 days following the REA notice for all processes").

[29] 33 U.S.C. § 1341(a)(1); 18 C.F.R. § 4.34(b)(5)(iii).

[30] Correspondence from J. Mark Robinson, Director, Office of Energy Projects to PacifiCorp (Feb. 15, 2006), *FERC Elibrary Accession No. 20060215-3009*.

[31] *Id.*

pales in comparison to the current 78-month delay that has resulted directly from PacifiCorp's failure to diligently prosecute its license application.

At this time, six and a half years after issuance of the REA Notice, PacifiCorp is taking no action (and has no intent to take any action) to obtain a Section 401 certification. In fact, PacifiCorp has secured written commitments from the States of Oregon and California to purposefully and intentionally hold FERC's re-licensing process in abeyance by means of not issuing or taking action on a Section 401 certification.[32] This arrangement effectively takes away FERC's licensing authority during the period of "abeyance" and also impairs the ability of intervenors such as the Hoopa Valley Tribe to participate in the process. As a sovereign Indian nation with a tribal water quality control plan approved by EPA under 33 U.S.C. § 1377(e), the failure to obtain certification also impairs the Tribe's rights to ensure Project-consistency with its own downstream water quality standards.[33]

In sum, PacifiCorp's scheme permits (without FERC consent or approval) PacifiCorp to continue operating its Project on the Klamath River (perhaps indefinitely) on the terms of its long-expired 1950's era license without required mitigation or compliance with current law. FERC should find and declare that PacifiCorp has failed and is failing to act with due diligence in pursuing its Section 401 certification and completion of this re-licensing.

B. DUE TO PACIFICORP'S FAILURE TO DILIGENTLY PURSUE SECTION 401 CERTIFICATION OR LICENSE ISSUANCE, FERC SHOULD DISMISS PACIFICORP'S APPLICATION AND COMMENCE A PROCEEDING TO DECOMMISSION THE KLAMATH PROJECT

[32] *FERC Elibrary Accession No. 20100330-5024*; *FERC Elibrary Accession No. 20120104-5084*.

[33] *Wisconsin v. EPA*, 266 F.3d 741, 748-749 (7th Cir. 2001); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996); 33 U.S.C. § 1341(a)(2); 33 U.S.C. § 1377(e); 40 C.F.R. §§ 121.11-121.16; 40 C.F.R. § 131.7.

As described above, PacifiCorp is not diligently pursuing Section 401 certification or the issuance of a new license in this proceeding. This is evidenced by the KHSA, PacifiCorp's written contract (entered into without FERC consent or approval and over the objection of intervenors) to hold re-licensing in abeyance. PacifiCorp can make no reasonable showing that it intends to obtain or pursue certification or a new license from the Commission.

The Commission has the statutory duty and obligation to regulate the use of public navigable waters for development of hydropower.[34] The Commission must make its licensing determinations consistent with the public interest and must give equal consideration to fish and wildlife resources.[35] Upon expiration of a license term, the Commission may issue a new license to the existing licensee upon such terms or conditions as are required under then existing laws and regulations, or it may deny a license if denial is in the public interest.[36] It is the Commission, and no other jurisdiction, that has the ultimate statutory duty to ensure that licensees are operating pursuant to valid licenses and in accordance with applicable law. Multi-year delays in re-licensing proceedings are not in the public interest because they allow the licensee to continue operating under the terms of annual licenses that do not conform with current law.[37]

[34] 16 U.S.C. § 797; 16 U.S.C. § 803.

[35] 16 U.S.C. § 797(e); 16 U.S.C. § 803(a); *In re Edwards Mfg. Co., Inc.*, 81 FERC ¶ 61255, 62210 (Nov. 25, 1997) (finding that "the public interest in this proceeding lies in our denying the license application and requiring the licensees to remove Edwards Dam").

[36] 16 U.S.C. § 808(a); FERC Policy Statement on Project Decommissioning at Relicensing, 60 Fed. Reg. 339 (January 4, 1995) (finding that the Commission has authority to deny a new license at the time of re-licensing and to require decommissioning).

[37] 16 U.S.C. § 808(a); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989).

Pursuant to its comprehensive authority under the Federal Power Act, FERC may decline to issue a new license to an applicant seeking re-licensing.[38] PacifiCorp, as evidenced by the KHSA, has confirmed that it has no intent to pursue or obtain a Section 401 certification or a new license for the Project. Yet, at the same time, PacifiCorp is currently under no contractual obligation to decommission or remove the facilities of the Klamath Hydroelectric Project – as none of the contingencies provided for in the KHSA have occurred. Nor is PacifiCorp being required to operate the Project in conformance with currently applicable law. The current status quo is not in the public interest. Upon finding that PacifiCorp is not diligently pursuing licensing, FERC should proceed to dismiss PacifiCorp's application and open a proceeding for the decommissioning of the Klamath Hydroelectric Project facilities.[39]

C. ALTERNATIVELY, THE COMMISSION SHOULD FIND THAT THE STATES HAVE WAIVED THEIR SECTION 401 CERTIFICATION RIGHTS AND PROCEED TO ISSUE A LICENSE THAT INCLUDES MANDATORY SECTION 4(e) AND 18 PRESCRIPTIONS

In the alternative, if the Commission declines to dismiss PacifiCorp's license application for lack of diligent prosecution, it should find that the States have waived certification and promptly proceed to issue a license to PacifiCorp for operation of the Klamath Hydroelectric Project in accordance with the Department of Interior and Commerce's mandatory Section 4(e) and 18 prescriptions, in addition to other mitigation measures deemed appropriate by FERC in accordance with its completed environmental analysis. Once FERC deems the certification

[38] *City of Tacoma v. FERC*, 460 F.3d 53, 71-74 (D.C. Cir. 2006) (discussing FERC authority to deny re-license applications); *In re Edwards Mfg. Co., Inc.*, 81 FERC ¶ 61255 (Nov. 25, 1997) (denying application for new license and directing applicant to file a plan to decommission and remove facilities); *see also* 18 C.F.R. § 4.32(g) (noting FERC authority to "dismiss the application, hold it in abeyance, or take other appropriate action" if an applicant fails to provide required information or documentation in the application process).

[39] *In re Edwards Mfg. Co., Inc.*, 81 FERC ¶ 61225 (Nov. 25, 1997); FERC Policy Statement on Project Decommissioning at Relicensing, 60 Fed. Reg. 339 (January 4, 1995).

waived, as a matter of federal law, it can and should issue a license authorizing continued operation in accordance with law and terminate this unduly protracted re-licensing proceeding.

Pursuant to Section 401(a)(1) of the Clean Water Act, hydroelectric license applicants must obtain either: (1) state certification that any discharge from the project would comply with applicable water quality standards; or (2) a waiver of certification by the appropriate state agency.[40] Under Section 401(a)(1), if the certifying agency "fails or refuses to act on a request for certification, within a reasonable period of time (*which shall not exceed one year*) after receipt of such request, the certification . . . shall be waived with respect to such Federal application."[41] The Commission's own regulations provide that a "certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification."[42] Likewise, an EPA regulation, 40 C.F.R. § 121.16, governing certification provides:

> The certification requirement with respect to an application for a license or permit shall be waived upon: (a) Written notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or (b) Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable time after receipt of such request, as determined by the licensing or permitting agency (*which period shall generally be considered to be 6 months, but in any event shall not exceed one year*).[43]

[40] 33 U.S.C. § 1341(a)(1).

[41] 33 U.S.C. § 1341(a)(1) (emphasis added).

[42] 18 C.F.R. § 4.34(b)(5)(iii).

[43] 40 C.F.R. § 121.16 (emphasis added).

The Commission has the authority to determine whether the States have waived their certification rights under Section 401 because this issue is purely a matter of federal law. Where a petition raises issues of federal law by challenging a state certifying agency's compliance with the terms of Section 401 itself, then the federal licensing agency (e.g., FERC) must address it.[44] The question of whether a state has waived certification under Section 401(a)(1), by failing to act within the time required by that federal statute and out of compliance with Congressional intent, is a question of federal law to be decided by FERC. Such a question involves no issues of state law, but only whether state action has complied with the requirements of the Clean Water Act.

Here, the failure of the States to act within the time required by federal law is directly precluding FERC's ability to exercise its own statutory licensing authority under the Federal Power Act. The facts presented in this case, where an applicant for re-licensing and a state certifying agency agree to a scheme of repeated withdrawal and re-submission of Section 401 applications despite the lack of intent to process such applications or obtain certification, could allow a licensee to continue operating *indefinitely* on an expired license. PacifiCorp essentially contends that it can continue operating on the terms of its 1950's era license as long as it can keep the States to refrain from issuing a certification. Under PacifiCorp's scheme, it is the States – not FERC – that hold sole control over when *and whether* a new license will be issued. So long as the States are willing participants, under PacifiCorp's theory, this could continue forever. This is not consistent with federal law and if FERC does not declare such practice unlawful, FERC risks losing its jurisdiction over the re-licensing process entirely.

Both Congress, in the express language of Section 401 of the Clean Water Act, as well as the EPA, in regulations implementing the Clean Water Act, have mandated that the certification

[44] *Alcoa Power Generating Facility, Inc., v. FERC*, 643 F.3d 963, 971-72 (D.C. Cir. 2011); *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006).

decision must happen within one year. The Commission's own regulations also require timely certification.[45] The D.C. Circuit Court of Appeals recently stated: "In imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request."[46] The Conference Report on Section 401 states that the one-year time limitation was meant to ensure that "sheer inactivity by the State . . . will not frustrate the Federal application."[47] "The purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."[48]

In *Central Vermont Public Service Corporation*, 113 FERC ¶ 61167 (Nov. 17, 2005), FERC found the state agency waived certification by not acting within the one-year time frame. The State argued that, "because it, [the license applicant], and other parties to the settlement agreement had agreed to a process in which [the state] would not issue water quality certification until after the Vermont Public Service Board approved certain aspects of the settlement, and because the Board had not yet acted, it could not properly be said that [the state] failed to act

[45] 18 C.F.R. § 4.34(b)(5).

[46] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). *See also Central Vermont Public Service Corporation*, 113 FERC ¶ 61167, 61653, P 18 (Nov. 17, 2005) ("Congress included a time limit in section 401 'to prevent a state from dragging its feet to stall a federal permit or license'").

[47] *Id*., citing H.R. Rep. 91-940, at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2741. *See also Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1215-1216 (W.D. Wash. 2003) ("Whether a state begins to act but does not complete the issuance of a certification or whether the state entirely fails to act at all, the legislative history of Section 401 makes clear that either of those two situations was unacceptable to Congress because both result in delays in issuing Federal permits."); *Central Vermont Public Service Corporation*, 113 FERC ¶ 61167, 61653 (Nov. 17, 2005) ("had Congress intended for states to have an indefinite period to act on certification applications, it would not have revised section 401 to include the one-year deadline"); 33 U.S.C. § 1251(f) (declaring the national policy of avoiding unnecessary delays at all levels of government in implementing the CWA).

[48] *Alcoa Power Generating Inc*., 643 F.3d at 972.

timely on the certification request."[49] The Commission rejected this argument, finding that "Section 401 contains no provision authorizing either the Commission or the parties to extend the statutory deadline."[50] The Commission added that "nothing in the Clean Water Act allows a state to use procedures agreed to in a settlement to indefinitely extend the statutory deadline, nor, as we have stated, do we endorse such delay."[51]

The State, in *Central Vermont*, argued that it should not be required to "engage in the overly formalistic and ministerial act of withdrawal and reapplication [of certification applications]."[52] The Commission was not asked to decide in *Central Vermont* whether the "formalistic" practice of withdrawal and reapplication was consistent with Section 401(a)(1) or sufficient to prevent a finding of waiver, but the Commission did note that this kind of "scheme" is not "approved of, by the Commission."[53]

Here, the Tribe requests that the Commission find that the States have affirmatively waived their certification authority in this re-licensing proceeding because they have failed to act on PacifiCorp's certification request within one year and because they have made written commitments to PacifiCorp agreeing that they will not take action on its certification requests. The license applicant and the certifying agencies are flouting the language and intent of the Clean Water Act and acting to "indefinitely extend the statutory deadline" for certification, delaying the federal licensing process. Again, as noted above, absent FERC intervention, this

[49] *Central Vermont Public Service Corporation*, 113 FERC ¶ 61167, 61653, P 15 (Nov. 17, 2005)

[50] *Id.*, at P 16.

[51] *Id.*, at P 19.

[52] *Id.*, at P 15.

[53] *Id.*, at P 16.

scheme could continue indefinitely, precluding FERC jurisdiction over the re-licensing as long as the States are willing to refrain from issuing certification.

As a general matter, the Tribe disagrees that a State ever complies with Section 401(a)(1) when it allows a license applicant to withdraw and re-submit a certification application solely for the purpose of extending the one-year statutory deadline for action. Nothing in the Clean Water Act supports such a technical charade and every indication from the language of the Act, its implementing regulations, and legislative history is that actual action on the certification is required within one year.[54] However, the Tribe's current petition does not require the Commission to declare that the practice of "withdrawal and re-submission" is unlawful in every instance. Here, the Tribe more narrowly asks the Commission to find that the States, in this proceeding, have waived their certification authority where, under the facts presented here: (a) the States have not acted within one year from the initial certification requests filed in March 2006; (b) more than six years have passed since the initial certification requests; (c) the failure to obtain certification is resulting in delay in the licensing proceeding, which is in all other respects complete; (d) the States have made affirmative written commitments to the license applicant, by which the States have agreed to not process the certification requests and to effectively hold the federal licensing proceeding in abeyance without FERC consent; and (e) the public interest is being impaired by allowing the licensee to continue operation on the terms of an expired license from 1954 without compliance with currently applicable law or conditions.

In this proceeding, the States have taken affirmative and intentional action to not comply with their certification responsibilities solely for the purpose of delaying the federal licensing proceeding. Nothing could be more inconsistent with Congressional intent. The Commission

[54] *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 973-74 (D.C. Cir. 2011); *see also Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1215-1216 (W.D. Wash. 2003).

need not, and must not, allow this infringement of federal law and authority. The Clean Water Act, FERC regulation, and EPA regulation allow the Commission as a matter of federal law to declare the certification waived and to proceed ahead with licensing of the Klamath Project.

Action by the Commission is necessary to prevent PacifiCorp and the States from indefinitely blocking the issuance of a new license that will conform with current applicable law. It is the intent of Section 401(a)(1) and the Commission's own policy to minimize delay in relicensing proceedings and issue a new license in a timely manner once a licensing docket is ready for final decision.[55] A finding that the States have waived certification under Section 401(a)(1) would permit the Commission to conclude this proceeding via issuance of a new license to PacifiCorp. Such new license would have to incorporate the mandatory terms and conditions prescribed by the Departments of Interior and Commerce under their Section 4(e) and 18 authorities.[56] Conclusion of this proceeding and license issuance is necessary to bring the Project into compliance with current law and provide long overdue mitigation to the aquatic environment affected by the Klamath Project.[57]

The re-licensing process in this case has lasted eight years (since PacifiCorp's application for re-licensing in 2004). Since 2006, PacifiCorp has operated on annual licenses that fail to include critically necessary mitigation required under Section 4(e) and 18. The Klamath Project license is ready for issuance. The only obstacle is the lack of a Section 401 certification, or

[55] *See Flambeau Hydro, LLC*, 113 FERC ¶ 61,291, at P 9 (Dec. 20, 2005) (stating that "the public interest in the timely completion of relicensing proceedings requires us to act when our record is complete").

[56] *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (holding FERC has no discretion to reject 4(e) conditions imposed by Interior); *City of Tacoma v. FERC*, 460 F.3d 53, 66-67 (D.C. Cir. 2006) (same).

[57] A license issued following the Commission's determination of waiver would still include conditions for the protection of water quality. *Georgia-Pacific Corporation*, 35 FERC ¶ 61120, n. 8 (April 25, 1986) (stating, "the Commission has an independent responsibility under Section 10(a) of the Federal Power Act to insure that any license issued contains adequate provision for water quality").

formal waiver, from the States. It is clear that the States do not intend to issue a certification or formal waiver for years to come, if ever. In the meantime, the Project simply continues to operate without compliance with current law. The public interest mandates that the Commission re-assert its authority and render a final licensing decision.

IV. CONCLUSION.

The intervenor Hoopa Valley Tribe respectfully requests that the Commission expeditiously issue an order dismissing PacifiCorp's license application due to its failure to diligently pursue water quality certification and re-licensing; or alternatively issue an order finding that the States have waived their Section 401(a)(1) water quality certification with respect to the Commission's issuance of a new license for the Project.

Respectfully submitted this 25th day of May, 2012.

/s/ Thomas P. Schlosser
Thomas P. Schlosser
Thane D. Somerville
Morisset, Schlosser, Jozwiak & Somerville
801 Second Avenue, Suite 1115
Seattle, Washington 98104
Tel. 206-386-5200
Fax. 206-386-7322
t.schlosser@msaj.com
t.somerville@msaj.com
Attorneys for Hoopa Valley Tribe

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated this 25th day of May, 2012.

/s/ Thomas P. Schlosser

Thomas P. Schlosser
Morisset, Schlosser, Jozwiak & Somerville
801 Second Avenue, Suite 1115
Seattle, Washington 98104
Tel: 206-386-5200
Attorneys for Hoopa Valley Tribe

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