UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

PacifiCorp Project No. 2082-041

ORDER DENYING REHEARING

(Issued April 20, 2006)

1. This order denies requests for rehearing of our January 20, 2006 Order denying a petition by the U.S. Department of the Interior (Interior) for a declaratory ruling that a contract between Interior and PacifiCorp pertaining to the use of Upper Klamath Lake and the Klamath River for power and irrigation is a condition of the license for the Klamath Hydroelectric Project No. 2082, which is licensed to PacifiCorp, and that the contract will continue in effect during the term of any annual license that may be issued for the project.[1]

Background

2. The factual background for this order is set forth in detail in the January 20 Order and will not be repeated here. In brief, the Upper Klamath River Basin is the site of extensive agricultural irrigation systems maintained by the U.S. Department of the Interior and private agricultural interests, and of two national wildlife refuges.

3. An integral feature of the federal irrigation system and wildlife refuges is the Link River Dam. The dam was constructed and conveyed to the United States by PacifiCorp's predecessor in interest (Copco) pursuant to a contract between Copco and the United States (1917 Contract). Under that contract Copco maintained specified water levels at the dam for irrigation, furnished water to the United States and private irrigators, and supplied electricity to the United States and private irrigators at fixed rates. Surplus

[1] *PacifiCorp*, 114 FERC ¶ 61,051 (*January 20 Order*).

water released at Link River Dam was used by Copco to generate electricity. The 1917 Contract was to run for a 50-year term ending in 1967.

4. In 1954, the Federal Power Commission (FPC) issued a license to Copco for its Klamath River Basin hydroelectric developments, including two small developments at Link River Dam.[2] Copco was required, "with and as part of the acceptance of this license,"[3] to file the 1917 Contract, amended or renewed, or a new contract with substantially the same terms and conditions, "to cover a time period at least equivalent to the time period of this license."[4] The FPC found, pursuant to section 10(e) of the Federal Power Act (FPA),[5] that the consideration and benefits set forth in the 1917 Contract were reasonable and adequate to compensate the United States for Copco's use of Link River Dam.[6]

5. In 1956, Copco filed a new contract (1956 Contract). Like the 1917 Contract, it is for a term of "50 years," effective from the date of its approval by the Public Utility Commissions of Oregon and California, which have jurisdiction over the licensee's retail electric rates. The Commission then amended the effective date of the license so that its expiration date (February 28, 2006) would coincide generally with the expiration date of the 1956 Contract (April 16, 2006).[7]

6. Through a series of mergers, the license was transferred to PacifiCorp. In February 2004, PacifiCorp applied for a new license. PacifiCorp has also applied to the

---

[2] *Copco*, 13 FPC 1 (*1954 Order*).

[3] *1954 Order*, 13 FPC at 9.

[4] *Id*. at 9-10.

[5] 16 U.S.C. § 803(e) (2000).

[6] *1954 Order*, Article 35(d), 13 FPC at 11. This holding was affirmed in later orders. *See Copco*, 15 FPC 14, 21 (1956) (*1956 Order*) and 18 FPC 364, 368 (1957).

[7] *1956 Order*, 15 FPC 15, 21 (1956). This order also amended the license to reflect an agreement pertaining to water rights and affirmed the FPC's findings regarding compensation for the use of a government dam.

Oregon and California Public Utility Commissions to charge the irrigators' standard irrigation tariff rates following expiration of the 1956 Contract in April 2006.[8]

7. On January 20, 2006, we denied Interior's request for an order finding that the 1956 Contract is a condition of the license, and therefore must, pursuant to FPA section 15(a)(1),[9] remain in effect during the term of any annual license that may be issued for the project pending disposition of the new license application. Interior and the Klamath Basin Water Users Protective Association (KWUA) filed requests for rehearing.

8. PacifiCorp filed a motion for leave to answer and answer to Interior's and KWUA's rehearing requests. Our Rules of Practice and Procedure prohibit an answer to a request for rehearing, unless otherwise ordered by the decisional authority.[10] PacifiCorp's answer does not increase our understanding of the issues, and will therefore be rejected.

Discussion

9. FPA section 15(a)(1) provides that, if the United States does not, at the expiration of an existing license, take over the project or issue a new license to the existing licensee, "then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued . . ."

10. In the underlying proceeding, Interior and KWUA argued that the 1956 Contract is a condition of the license because the FPC dictated its essential terms (*i.e.*, terms for the storage and release of water and provision of electricity for irrigation and the wildlife refuges) and directed the licensee to file the contract with the Commission. PacifiCorp responded that the FPC merely accepted the contract as a means of setting the licensee's annual charges for the use of the Link River Dam during the license term, and cited other instances where the Commission has held that contracts associated with license requirements are not license conditions. We held that even if the 1956 Contract is a license condition, it expires by its terms on April 16, 2006.[11]

---

[8] It appears that Oregon and California will condition any such rate increases with transition provisions. *See* www.pacificpower.net/Article/Article49750.html.

[9] 16 U.S.C. § 808(a)(1) (2000).

[10] 18 C.F.R. § 385.213(a)(2) (2005).

[11] *January 20 Order*, 114 FERC ¶ 61,051 at P 27.

11. Interior and KWUA continue to argue that the express language of the 1956 Contract is irrelevant because the purpose of section 15(a)(1) is to maintain the status quo at the expiration of a license, in order to protect the interests of the United States and other entities with an interest in continuation of the license pending a decision on federal takeover of the project or, as here, action on an application for a new license.[12]

12. Section 15(a)(1) is indeed intended to protect the expectations of entities with an interest in a licensed project, but it does so by ensuring that the license continues in effect *according to its terms*. For example, instream flow conditions intended to benefit fish and wildlife resources continue in effect during annual licenses because they have no expiration date. Here, in contrast, the 1956 Contract (assuming, arguendo, it is a license condition) specifies the date on which it expires. No party to or beneficiary of that contract has a reasonable expectation that it will continue notwithstanding its express terms.[13]

13. KWUA's next argument is that we have focused on the wrong license condition. According to KWUA, the applicable license condition is not the 1956 Contract itself but the direction in the license order for the licensee to file a contract that covers "a time period at least equivalent to the time period of this license."[14] KWUA asserts that this

---

[12] KWUA rehearing request at 8-10; Interior rehearing request at 3-7. Interior also argues that PacifiCorp's assertion that its benefits under the 1956 Contract have diminished have not been substantiated and, in any event, is irrelevant to whether section 15(a)(1) requires the contract to remain in effect during annual licenses. Rehearing request at 7-9. We agree, but did not rely on that assertion in the January 20 Order and do not see what bearing it has on the rehearing request.

[13] Although we have not amended the license, we note for the record that KWUA's suggestion that section 15(a)(1) is an absolute bar to license amendments during the term of an annual license (rehearing request at 8-9) is in error. An annual license may be amended if the underlying license reserves Commission authority to amend it in the manner contemplated by the proposed amendment or if the licensee agrees to the amendment. *See, e.g., Central Nebraska Public Power & Irrigation District*, 39 FERC ¶ 61,378 (1987), *reh. denied*, 43 FERC ¶ 61,225 (1988), *remanded on other grounds, Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989); *Swinomish Tribal Community v. FERC*, 627 F.2d 499, 505-06 (D.C. Cir. 1980) (approving protested increase in dam height); *PacifiCorp*, 97 FERC ¶ 61,348 (2001) (extension of license term and incorporation of settlement provisions).

[14] *1954 Order*, 13 FPC at 9.

language necessarily requires the contract term to be interpreted to include the terms of any annual licenses.[15]

14. What evidence there is in the record appears to be to the contrary. The FPC directed Copco to file a contract "under terms and conditions substantially similar to those terms and conditions contained in the existing [1917 Contract]."[16] That contract, which was executed before the FPA and section 15(a)(1) were enacted, provided for a 50-year term, and specifically stated that after that time Copco would have no rights to use the Link River Dam in the absence of a new agreement.[17] The 1956 Contract simply replicates that provision.[18] We also note that the 1956 Contract became effective, not upon any approval by this Commission, but upon approval by California and Oregon. The only reasonable inference of this provision is that the Commission did not intend to interfere with the authority of the states to modify the licensee's retail electric rates, an authority Oregon and Oregon have elected to exercise based on an April 16, 2006 expiration date for the 1956 Contract.

15. KWUA next argues that the true purpose of the 1956 Contract was to ensure that Link River Dam would be operated consistent with Interior's needs and for the benefit of the irrigators, with compensation to the government pursuant to section 10(e) being a mere incidental benefit, and that the Commission failed to reserve authority to modify the contract. The exercise of our general reserved authority in section 10(e) to adjust the annual charges,[19] it asserts, would therefore impermissibly interfere with the true purpose of the 1956 Contract.[20]

16. Again we disagree. First, there is no dispute that the 1956 Contract was intended to benefit Interior and the irrigators, as well as to compensate the government for the use of the dam. As discussed above, however: (1) we are not amending the 1956 Contract, but ensuring that its express terms are carried out; and (2) we may not prevent the states from exercising their retail ratemaking authority. Accordingly, this Commission has

---

[15] KWUA rehearing request at 10-11.

[16] *1954 Order*, 13 FPC at 9-10.

[17] *Id.*, 13 FPC at 3.

[18] *See* 1956 Contract, Clause 10.

[19] *See January 20 Order*, 114 FERC ¶ 61,051 at P29.

[20] KWUA rehearing request at 11-15.

never purported to approve or fix the licensee's retail irrigation rates, but only found that the 1956 Contract adequately compensates the United States for the use of its property.[21]

17. KWUA next advances various arguments that the January 20 Order is not based on substantial evidence. First, it contends that the order should have been preceded by an examination of project operations in the absence of the 1956 Contract because it is unclear who will operate the dam and under what conditions if the 1956 Contract expires. It asserts in this connection that "Interior has no intention" of operating its dam.[22] Interior's present-day intentions in this regard, whatever they may be, have no bearing on our interpretation of the 1956 Contract. We have anticipated expiration of the 1956 Contract in terms of operation of the licensed project in the only way we can, by making clear that as long as PacifiCorp operates the two project developments that are directly connected to the dam, it will need to have an operating agreement with Interior for that purpose, even if the 1956 Contract has expired.[23]

18. KWUA next states that the Commission has committed, pursuant to the National Environmental Policy Act of 1969,[24] to consider the economic effects of expiration of the 1956 Contract in the environmental impact statement being prepared in the pending relicense proceeding for Project No. 2082. It asserts that this analysis must be completed before the Commission issues a new license that does not include the 1956 Contract, and that the same analysis must precede any order issued in this proceeding.[25]

19. Issues regarding the Commission's compliance with NEPA in the relicensing context are premature until the Commission takes final action in that proceeding. NEPA does not apply to this proceeding. The January 20 Order takes two actions, neither of which will affect the environment. First, it denies Interior's request for a declaratory order. It does not, as KWUA and Interior suggest, terminate the 1956 Contract or amend

---

[21] KWUA's assertion that compensation for the use of the Link River dam was merely incidental is also belied by the fact that Copco vigorously opposed and sought rehearing of the FPC's finding that the project uses surplus water from a government dam. *See 1954 Order*, 13 FPC at 3-4; *Copco v. FPC*, 239 F.2d 426 (D.C. Cir. 1956).

[22] KWUA rehearing request at 15.

[23] *January 20 Order*, 114 FERC ¶ 61,051 at P 27, n.49.

[24] 42 U.S.C. § 4321 *et seq.* (2000).

[25] KWUA rehearing request at 16-18.

the license.[26] Second, we have proposed to adjust PacifiCorp's annual charges for the use of a Government dam when the 1956 contract expires. Our regulations implementing NEPA categorically exclude actions concerning annual charges.[27] If KWUA believes that the categorical exclusion should not apply to that action, such concerns should be raised in its pleadings filed in the subdocket we created for that purpose.[28]

20. Lastly, KWUA states that we have failed to explain how expiration of the 1956 Contract is consistent with the terms of the Klamath River Basin Compact (Compact). The Compact, which became effective with the consent of Congress in 1957,[29] created the Klamath River Compact Commission, as a cooperative relationship between Oregon, California, and Interior's Bureau of Reclamation. The purposes of the Compact Commission are to promote the orderly, integrated, and comprehensive development, use, conservation and control of water for irrigation, protection of fish and wildlife, domestic and industrial use, hydropower, navigation, and flood protection.[30]

21. The Compact is a federal law.[31] KWUA points to Article IV of the Compact, which provides that it shall be an objective of Oregon and California to "secure the most economic distribution of water and lowest power rates which may be reasonable for irrigation and drainage pumping. . ."[32] This language, KWUA claims, reflects

---

[26] KWUA asserts that expiration of the 1956 Contract will cause increased retail electric rates which will, in turn, cause economic harm to irrigators and environmental harm from changes in irrigation usage. Rehearing request at 16-18. Such impacts, if any, will result from the exercise by the Oregon or California authorities of their retail ratemaking authority, not from our denial of Interior's request for declaratory order.

[27] *See* 18 C.F.R. § 380.4(a)(11) (2005).

[28] Project No. 2082-040.

[29] Pub. L. No. 222, 85th Cong., 71 Stat. 497.

[30] *See* Compact Article I.

[31] *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003).

[32] Article IV reads, in its entirety:

> It shall be the objective of each state, in the formulation and the execution and the granting of authority for the formulation and execution of plans for the distribution of the use of the waters of the Klamath River Basin, to provide for the most efficient use of available power head and its

(continued)

Congressional affirmation of the federal license for Project No. 2082, including the 1956 Contract, and is therefore a legislative requirement for the continuation of the 1956 Contract as a condition of that license.[33]

22. KWUA's attempt to assign a very specific intent to the general language of Article IV fails. Article IV makes no mention of federal licensing or the 1956 Contract, but simply describes in general terms the objectives of the two concerned states with respect to hydroelectric power. This is consistent with the scheme of the FPA, which, as noted, leaves the matter of retail electric rates entirely in the hands of the states. KWUA's interpretation of the article rests on excerpts from a few sentences from the Senate committee report accompanying a bill to consent to the Compact.[34] These sentences make no mention of the license or the 1956 Contract. They simply indicate that Congress was aware that Copco was the owner and operator of all existing hydroelectric plants on the Klamath River, and that this Commission has jurisdiction with respect to federal licensing of such plants. The Commission's licensing authority, moreover, requires no federal affirmation in addition to the FPA.

23. In conclusion, none of the arguments advanced by KWUA or Interior cause us to conclude that the January 20 Order was in error.

---

integration with the distribution of water for other beneficial uses in order to secure the most economic distribution of water and lowest power rates which may be reasonable for irrigation and drainage pumping, including pumping from wells.

[33] KWUA rehearing request at 18-20.

[34] Senate Report No. 834, 85th Congress, 1st. Session (August 7, 1957).

The Commission orders:

The requests for rehearing filed in this proceeding on February 21, 2006, by the U.S. Department of the Interior and the Klamath Basin Water Users Protective Association are denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.