**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 06-1212**

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**KLAMATH WATER USERS ASSOCIATION,**
**PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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# BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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**WASHINGTON, DC 20426**

**FINAL BRIEF: July 12, 2007**

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# CIRCUIT RULE 28(a)(1) CERTIFICATE

## A. Parties:

To counsel's knowledge, all parties and intervenors appearing below are listed in Petitioner's brief. Intervenors before this Court are PacifiCorp, Hoopa Valley Tribe, Pacific Coast Federation of Fishermen's Associations, Inc., and Institute for Fisheries Resources. There are no amici.

## B. Rulings Under Review:

1. *PacifiCorp*, 114 FERC ¶ 61,051 (2006), R.23, JA 22 ("Initial Order")

2. *PacifiCorp*, 115 FERC ¶ 61,075 (2006), R.32, JA 38 "Rehearing Order")

## C. Related Cases:

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this Court or any other court.

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Jeffery S. Dennis
Attorney

July 12, 2007

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## GLOSSARY

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|---|---|
| 1917 Contract | Original Contract between Copco and the United States concerning construction and operation of Link River Dam, maintenance of water levels in Upper Klamath Lake, and furnishing of water and electricity to the United States and irrigators |
| 1956 Contract | Revised and extended version of the 1917 Contract, entered into for a term of 50 years |
| Commission or FERC | Federal Energy Regulatory Commission |
| Copco | California Oregon Power Company, predecessor to PacifiCorp |
| FPA | Federal Power Act |
| Initial Order | *PacifiCorp*, 114 FERC ¶ 61,051 (2006), R.23, JA 22 |
| Interior | United States Department of Interior |
| PacifiCorp | Licensee for the Klamath Hydroelectric Project |
| Reclamation | United States Bureau of Reclamation |
| Rehearing Order | *PacifiCorp*, 115 FERC ¶ 61,075 (2006), R.32, JA 38 |
| Water Users | Petitioner Klamath Water Users Association |

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# BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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## STATEMENT OF THE ISSUE

Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably concluded that an annual license issued to PacifiCorp for the continued operation of the Klamath Hydroelectric Project, pursuant to Section 15(a)(1) of the Federal Power Act ("FPA"), 16 U.S.C. § 808(a)(1), would not include the terms of a contract executed in connection with the original licensing of the project after the contract had expired by its own terms.

## COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to review the FERC orders being challenged here. In addition to satisfying the requirements of FPA § 313(b), 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Petitioner Klamath Water Users Association ("Water Users") must satisfy the requirements of Article III of the United States Constitution. As discussed more fully in Part I of the Argument section of this brief, *infra*, Waters Users fail to establish standing in their opening brief, and do not and cannot allege any concrete and particularized injury that is traceable to the orders under review. Moreover, any injury Water Users might claim cannot be redressed by a favorable decision of this Court.

## STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

## STATEMENT OF THE CASE

PacifiCorp operates the Klamath Hydroelectric Project, located on the Klamath River in southern Oregon and northern California, in close proximity to the United States Bureau of Reclamation's ("Reclamation") Klamath Irrigation Project. When the Federal Power Commission (the predecessor to FERC) licensed the hydroelectric project, it required PacifiCorp's predecessor to extend a 1917 contract with the United States that addressed, *inter alia*, the operation of the Link

River Dam and water levels in Upper Klamath Lake, and also set forth rates for electric power used for irrigation activities by the United States and users of the irrigation project. In 1956, PacifiCorp's predecessor revised and extended that contract for a 50-year term, roughly corresponding to the 50-year term of its license for the hydroelectric project. Both the original license and the contract expired in 2006.

The instant case concerns the Commission's response to a request for a declaratory order filed by the United States Department of Interior ("Interior") regarding the continuation of the terms of that contract while relicensing proceedings for the Klamath Hydroelectric Project were ongoing. Specifically, Interior asked the Commission to rule that any annual license issued to PacifiCorp under FPA § 15(a)(1), 16 U.S.C. 808(a)(1), for the continued operation of the project during the pending relicensing proceedings, would also require that the terms of the 1956 contract between the United States and PacifiCorp continue in effect. In particular, Interior asked the Commission to act, through any annual license it issues, to maintain the rates specified in that agreement for electric power service used by the United States and certain irrigation customers for water pumping activities.

In the orders on review, the Commission denied Interior's request, finding that the 1956 contract, assuming that it was a license condition in and of itself,

expired by its own express terms on April 16, 2006. As a result, the Commission held that the terms of that contract would not be included in any annual license issued to PacifiCorp under FPA § 15(a)(1), and PacifiCorp would no longer have any ongoing responsibilities under that contract. *PacifiCorp*, 114 FERC ¶ 61,051 (2006), R.23, JA 22 ("Initial Order"), *order on reh'g*, 115 FERC ¶ 61,075 (2006), R.32, JA 38 ("Rehearing Order").

## STATEMENT OF FACTS

### I. Statutory and Regulatory Background

Under Part I of the FPA, § 4 *et seq*., 16 U.S.C. § 797 *et seq*., the Commission is authorized to issue licenses for the construction, operation and maintenance of hydroelectric projects on jurisdictional waters, and to oversee those licenses.

Two provisions of Part I are relevant to this appeal. First, upon the expiration of an existing license, FPA § 15(a)(1), 16 U.S.C. § 808(a)(1), provides that if the United States does not exercise its right (as provided in FPA § 14, 16 U.S.C. § 807) to "take over, maintain, and operate any project or projects of the licensee," the Commission may issue a new license to the licensee upon such terms and conditions as may be authorized or required under law. Additionally, if the United States does not exercise its right to take over a project upon the expiration of the license, and the Commission does not immediately issue a new license (to

either a new licensee or the existing licensee), FPA § 15(a)(1) provides that 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 such time as the United States takes over the project or a new license is issued. *Id.*

Second, FPA § 10(e), 16 U.S.C. § 803(e), requires that license holders pay reasonable annual charges. When the license involves the use of a Government dam, as in the instant case, the Commission must fix a reasonable annual charge payable by the licensee to compensate the United States for the use of the dam. *Id.*

## II. History of the Klamath Hydroelectric Project (P-2082)

### A. Description of the Project

Reclamation's Klamath Irrigation Project is located on the Klamath River in southern Oregon and northern California. The project includes the Link River Dam and Upper Klamath Lake, which provides storage for the irrigation project as well as hydroelectric power. Initial Order at P 3, JA 22.[1]

PacifiCorp's Klamath Hydroelectric Project includes seven hydroelectric developments and one non-generating development. The Link River Dam and its two small power developments represent the northernmost project features, and the

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

operation of that dam impacts generation at the other hydroelectric developments. *Id*. at PP 4-5, JA 22-23.

The Link River Dam was constructed by PacifiCorp's predecessor, California Oregon Power Company ("Copco"), pursuant to a 1917 contract with the United States ("1917 Contract"). Under that contract (which had a 50-year term), Copco constructed the dam and conveyed it to the United States for use in the Klamath Irrigation Project. Copco continued to operate the dam under the contract, maintaining Upper Klamath Lake at specified levels, and furnishing water for irrigation and electricity to the United States and the irrigators to power water pumping activities. Copco also used surplus water releases to generate electricity for its customers. *Id.* at P 5, JA 23.

**B. Original License Proceedings**

In the early 1950s, the Commission determined that the Klamath Hydroelectric Project was subject to its licensing authority under Part I of the FPA. *In Re California Oregon Power Co.*, 13 FPC 1, 3 (1954), JA 84, 85. In its first order issuing Copco a license for the Klamath Hydroelectric Project, the Commission directed Copco to file the 1917 Contract with amendments, or a new contract with substantially the same terms, to cover a term at least the same as the 50-year time period of the license. Initial Order at P 6, JA 23-24; *In Re California Oregon Power Co.*, 13 FPC at 9-10, JA 89.

Additionally, the Commission included Article 35(d) in Copco's license. That provision stated that the consideration and benefits set forth in the 1917 Contract were reasonable and adequate during the term of that agreement to provide compensation to the United States for Copco's use of the Link River Dam, satisfying the obligation under FPA § 10(e) to establish reasonable annual charges for the use of a Government dam. Initial Order at P 6, JA 23-24; *In Re California Oregon Power Co.*, 13 FPC at 11, JA 90.

After seeking judicial review and negotiating with interested parties, in 1956, Copco filed a revised and extended version of the 1917 Contract, as required by the Commission's 1954 order. Pursuant to this contract (the "1956 Contract"), PacifiCorp (like Copco before it) provided electric power at fixed rates to Reclamation and irrigation customers of the Klamath Irrigation Project, for use in pumping irrigation water. *See* Petition for Declaratory Order, R.1, Exhibit 1, 1956 Contract, JA 48. The 1956 Contract stated that it was for a term of 50 years, effective beginning on the date it was approved by the Oregon and California Public Utility Commissions (the state agencies with authority over retail electric rates), whichever was later. 1956 Contract, Articles 10 & 11, JA 52-53.

The Commission issued an order in 1956 amending the license issued to Copco to reflect the filing of the 1956 Contract, and to change the effective date of the license to make its term consistent with the term of the 1956 Contract. *In Re*

*California Oregon Power Co.*, 15 FPC 14 (1956), JA 92. In that order, the FPC concluded that the 1956 Contract provided adequate compensation to the United States for Copco's use of the Link River Dam (as required by FPA § 10(e)). *Id.* at 21, JA 94-95. The Commission affirmed in a 1957 order that the 1956 Contract adequately compensates the United States for use of surplus water from the Link River Dam. *In Re California Oregon Power Co.*, 18 FPC 364, 368 (1957), JA 96.

The end result of these proceedings was that a final license was issued to Copco for a 50-year term, expiring March 1, 2006. *See In Re California Oregon Power Co.*, 15 FPC at 21, JA 94. The 1956 Contract expired under its own terms on April 16, 2006.[2]

### C. Recent Activity

In February 2004, PacifiCorp submitted an application for a new license to continue operating the Klamath Hydroelectric Project. An annual license was issued to PacifiCorp on March 9, 2006 for the continued operation of the Klamath Hydroelectric Project while relicensing proceedings are ongoing. *See* "Notice of

[2] This date is 50 years from the date of the contract's approval by the California Public Utilities Commission, which occurred after approval by the Oregon Public Utility Commission.

Authorization for Continued Project Operation," Docket No. P-2082 (issued March 9, 2006), JA 99.[3]

Additionally, the Oregon and California Public Utilities Commissions have each concluded proceedings to establish new retail electric service rates for the irrigation customers whose rates were set forth in the now expired 1956 Contract. *See In Re Pacific Power & Light (dba PacifiCorp)*, Oregon Public Utility Commission Docket No. UE-170, Order No. 06-172 (entered April 12, 2006) and *In Re Application of PacifiCorp*, California Public Utilities Commission Docket No. U 901-E, Decision No. 06-04-034 (entered April 13, 2006) (included in the Addendum to this brief). In both states, the irrigation customers will be transitioned from the rates in the 1956 Contract to full general irrigation tariff rates over a multi-year period. *Id.*

## III. Interior's Petition for Declaratory Order

On September 30, 2005, Interior[4] filed with the Commission a Petition for Declaratory Order, seeking a declaratory ruling that any annual license issued to PacifiCorp under FPA § 15(a)(1) would require the 1956 Contract, including the rates for electric power specified in that contract, to continue in effect. *See* Petition

[3] That notice provides that if a new license or other disposition is not issued by March 1, 2007, annual licenses will be automatically issued until further order of the Commission. *Id.*

[4] Reclamation, one of the two federal agencies taking electric power at the rates specified in the 1956 Contract, is within Interior.

for Declaratory Order, R.1, JA 1. Interior argued that the Commission, when it held that the 1956 Contract provided adequate compensation to the United States for the use of Link River Dam, and when it included this finding in license Article 35, made that contract an "integral" part of the license. *Id.* at 11-14, JA 3-6. Accordingly, Interior asserted that the terms of the 1956 Contract (including the power rates specified in that agreement) were part of the existing terms and conditions of PacifiCorp's license and, pursuant to FPA § 15(a)(1), should continue to be part of any annual license issued to PacifiCorp while the relicensing proceedings continued. *Id.*

Several parties filed comments on Interior's petition, including Water Users, which supported Interior's request. *See* R.16 & R.38, JA 7.

## IV. Commission Response

In the challenged orders, the Commission denied Interior's request for a declaratory order. In the Initial Order, the Commission concluded that, even if the 1956 Contract were a term of PacifiCorp's license (a fact that it assumed without deciding), the contract expired by its own terms on April 16, 2006. Initial Order at P 27, JA 31-32. Accordingly, the Commission held that any annual license issued to PacifiCorp after the expiration of its original license would not include the terms of the 1956 Contract. *Id.* Also, the Commission issued notice of its intent to set

new government dam use charges at the graduated flat rates in its regulations, effective upon the expiration of the 1956 Contract. *Id.* at PP 29-30, JA 32-33.

On rehearing, the Commission affirmed its determination that the 1956 Contract would not be included in the terms of any annual license issued to PacifiCorp. In doing so, the Commission rejected arguments advanced by Interior and Water Users regarding the consistency of its conclusions with the purpose of FPA § 15(a)(1) and the evidence in the record regarding the nature, purpose and intent of the 1956 Contract (as well as the intent of the parties to that agreement). Rehearing Order at PP 11-17, JA 41-43. The Commission also rejected rehearing arguments advanced by Water Users concerning the Commission's compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4231 *et seq.*, and the consistency of the Commission's conclusion with the Klamath River Basin Compact. Rehearing Order at PP 18-22, JA 43-45.

## SUMMARY OF ARGUMENT

Water Users lack standing to obtain judicial review of the challenged orders. Water Users do not and cannot allege any concrete and particularized injury that is traceable to the orders under review, which did nothing more than apply the plain language of PacifiCorp's hydroelectric license and the 1956 Contract, and did not alter any of the pre-existing rights or obligations of the parties to those documents. Any injury Water Users may claim to have suffered is attributable to the expiration of the 1956 Contract by its own terms, and to state retail ratemaking orders, not to the Commission's orders. Moreover, to the extent Water Users claim injury from the loss of the favorable rates for retail electric power contained in the 1956 Contract, that injury cannot be redressed by a favorable decision of this Court. Those rates are exclusively regulated by the states, not FERC, and both Oregon and California have already exercised their independent authority to set new retail irrigation service rates for PacifiCorp.

Assuming standing, the Court should defer to the Commission's reasonable interpretation in the challenged orders of PacifiCorp's hydroelectric license and the terms of the 1956 Contract. Based on the actual language of those documents, the Commission found that the 1956 Contract has expired and, accordingly, that the parties to that contract have no ongoing responsibilities. As a result, the Commission reasonably held, consistent with FPA § 15(a)(1), that an annual

license issued to PacifiCorp for the continued operation of the Klamath Hydroelectric Project would not include the terms of that expired contract.

## ARGUMENT

### I. Water Users Lack Standing to Obtain Judicial Review of the Challenged Orders

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2002) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" for standing requires the petitioner to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Water Users fail to establish Article III standing in their opening brief. In support of their standing, Water Users simply recount that the Commission granted their motion to intervene in the underlying proceedings and denied their request for rehearing of the Initial Order. *See* Water Users Br. at 6. "Petitioners do not have

the right to seek court review of administrative proceedings merely because they participated in them" and, as noted above, must meet the constitutional requirements for standing. *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 856 F.2d 1563, 1565 (D.C. Cir. 1988); *see also Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) ("A party seeking review of a final Commission order must demonstrate that it has been 'aggrieved' by the order").

Further, given that Water Users did not file the petition that prompted the challenged orders, are not parties to the 1956 Contract, and are not the target of any of the determinations in that order, they bear a higher burden to establish standing, which they fail to meet here. *See Lujan*, 504 U.S. at 562 (where party is not "the object of the government action or inaction . . . challenge[d], standing is not precluded, but it is ordinarily substantially more difficult to establish") (citations and internal quotation marks omitted); *Sierra Club and Envtl. Tech. Council v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (petitioner whose standing is not self-evident must establish standing at first appropriate point; "an argument first made in the reply comes too late").

As discussed below, Water Users' appeal fails to satisfy the constitutional requirements for standing, and should be dismissed.

### A. Water Users Do Not Demonstrate Any Concrete and Particularized Injury That is Traceable to the Challenged Orders

Water Users fail to demonstrate that they have suffered any "injury in fact;" they offer no demonstration that the challenged orders invade "a legally protected interest which is . . . concrete and particularized." *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted).

The instant orders did not amend PacifiCorp's license or the 1956 Contract, and did nothing more than apply the express terms of the 1956 Contract in response to Interior's request for declaratory order. *See* Rehearing Order at P 16, JA 42-43. The explicit terms of that agreement specified that it would be in effect for 50 years, and that upon its expiration, PacifiCorp (as successor to Copco) would have no further rights with regard to the Link River Dam. *Id.* at P 14, JA 42; 1956 Contract at Article 10, JA 52-53.

The challenged orders, then, did not alter the rights or obligations of either the United States or PacifiCorp (or any third parties like Water Users) as they existed under the terms of PacifiCorp's license and the 1956 Contract. Accordingly, Water Users can cite no definitive and concrete injury from the challenged orders. *See, e.g., Panhandle Eastern Pipeline Co. v. FERC*, 198 F.3d 266, 270 (D.C. Cir. 1999) (pipeline company could not demonstrate injury to support standing where challenged FERC orders had no impact on its rates).

For the same reasons, Water Users cannot demonstrate the necessary "causal connection" between the challenged orders and any injury it may have suffered. An injury, for purposes of Article III standing, must be "fairly . . . trace[able] to the challenged action . . . ." *Lujan*, 504 U.S. at 560 (alterations in original). The challenged orders did not change the pre-existing rights and obligations of the parties under PacifiCorp's license or the 1956 Contract, or otherwise alter the rates charged to Water Users and other parties. Accordingly, any injury Water Users might claim they have suffered is not traceable to those orders, but would instead be attributable to the specific terms of the 1956 Contract, the expiration of that contract by its terms, and retail ratemaking orders of state ratemaking agencies.

### B. Any Injury Suffered by Water Users Cannot Be Redressed by a Favorable Decision

Water Users also cannot demonstrate that it is "likely, as opposed to merely speculative," that any injury they have suffered "will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561; *see also, e.g., Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1195-96 (D.C. Cir. 2003); *Ranger Cellular and Miller Commc'ns v. FCC*, 348 F.3d 1044, 1050 (D.C. Cir. 2003).

As noted above, *supra* p. 7, the 1956 Contract obligated PacifiCorp to provide retail electric power service to Reclamation and irrigation customers of the Klamath Irrigation Project at fixed rates. The Commission concluded, pursuant to FPA § 10(e), that the 1956 Contract provided adequate compensation to the United

States for the use of the Link River Dam. *In Re California Oregon Power Co.*, 15 FPC at 21, JA 94-95.

While Water Users do not specify the injury they allege to have suffered from the challenged orders, it appears that the only harm they can arguably assert is the loss of the favorable retail electric rate provisions in the 1956 Contract. *See* Water Users Br. at 4-5 (noting that rate provisions are "particularly relevant to this case," and that the expiration of the 1956 Contract will subject them to "catastrophic" rate increases).

As the Commission noted in the challenged orders, however, FERC has no jurisdiction over PacifiCorp's retail rates, which are regulated by the states. Initial Order at P 29 & n.51, JA 32; Rehearing Order at P 16, JA 42-43; FPA § 201(b)(1), 16 U.S.C. § 824(b)(1) (Commission's jurisdiction extends only to wholesale sales of electricity); *see also New York v. FERC*, 535 U.S. 1 (2002) (discussing division between state and federal authority under the FPA). Accordingly, while the Commission found that the 1956 Contract provided adequate compensation for the use of the government-owned Link River Dam, it "never purported to approve or fix the licensee's retail irrigation rates." Rehearing Order at P 16, JA 42-43. In fact, the 1956 Contract did not even become effective until it was approved by state regulators. 1956 Contract at Article 11, JA 53.

Because the Commission lacks jurisdiction to approve or modify PacifiCorp's retail rates, Water Users cannot make the required showing that a decision from this Court directing the Commission to include the 1956 Contract in the annual license issued to PacifiCorp is "likely" to redress its purported injury. To do so, Water Users would have to demonstrate that state regulators in Oregon and California would, in the face of such a decision from this Court, likely refrain from exercising their undisputed independent authority to set PacifiCorp's retail rates. *See, e.g., US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000) (citing *Asarco Inc. v. Kadish*, 490 U.S. 605, 615 (1989)) (noting that courts are "loathe" to find standing where claims that a purported injury will be redressed by a favorable decision "depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict").

Water Users cannot make that showing because the California and Oregon Public Utility Commissions have already exercised their exclusive jurisdiction to set new retail electric rates for PacifiCorp's service to irrigation customers, including Water Users. *See In Re Pacific Power & Light (dba PacifiCorp)*, Oregon Public Utility Commission Docket No. UE-170, Order No. 06-172 (entered April 12, 2006) and *In Re Application of PacifiCorp*, California Public Utilities Commission Docket No. U 901-E, Decision No. 06-04-034 (entered April 13,

2006) (included in the Addendum to this brief).[5] Neither this Court nor the Commission can presume the authority to override these state actions and, as a result, Water Users cannot demonstrate the "redressibility" required to support standing. *See US Ecology, Inc.*, 231 F.3d at 24.

## II. The Commission Reasonably Interpreted the License for the Klamath Hydroelectric Project and the 1956 Contract

Assuming jurisdiction, this Court should deny the petition for review and uphold the Commission's reasonable exercise of its discretion to interpret the license for the Klamath Hydroelectric Project and the 1956 Contract.

### A. Standard of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[5] In both states, the irrigation customers who paid the rates in the 1956 Contract will be transitioned from those discounted rates to the full tariff rates paid by all irrigation customers over a multi-year period. *Id.*

Water Users erroneously suggest that this Court should review the challenged orders *de novo*, without deference to the Commission's reasonable interpretation of the language of PacifiCorp's license and the 1956 Contract. Water Users Br. at 5-6. Water Users base this assertion on their view that this case concerns an interpretation by FERC of FPA § 15(a)(1). *Id.* Quite to the contrary, this case involves only the Commission's interpretation of the terms and conditions of PacifiCorp's license, and in particular its conclusion that the 1956 Contract (assuming it is a license condition) expired by its own terms. As a result, the Court "owe[s] deference to the Commission's reasonable interpretation of the hydroelectric licenses it issues and oversees." *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 33 (D.C. Cir. 1992) (citing *City of Seattle v. FERC*, 883 F.2d 1084, 1087 (D.C. Cir. 1989)).

Even if this case were about the Commission's interpretation of FPA § 15(a)(1), Water Users would be incorrect that a *de novo* standard of review applies. FPA § 15(a)(1) does not address whether license conditions that have expired by their own terms must be included in an annual license, which is the specific factual issue presented here. In such circumstances, where the statute is "'silent or ambiguous with respect to the specific issue,'" the Court should defer to the Commission's reasonable interpretation. *Rhinelander Paper Co. v. FERC*, 405

F.3d 1, 6 (D.C. Cir. 2005) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

### B. The 1956 Contract Was Not An Ongoing License Condition, And Expired By Its Own Terms

As discussed above, *supra* p. 6, the original Commission order granting PacifiCorp a license for the Klamath Hydroelectric Project required PacifiCorp's predecessor, Copco, to:

> file conformed copies (in quadruplicate) of the existing agreement [the 1917 Contract] between the Licensee and the United States (by the Secretary of the Interior), . . . which has been further amended or renewed to cover a time period at least equivalent to the time period of this license, or a new agreement, covering a time period at least equivalent to the time period of this license between the Licensee and the United States, which provides for the storage in and release of water from Upper Klamath Lake in Oregon, and the use thereof by the Licensee for the generation of electric energy under terms and conditions substantially similar to those terms and conditions contained in the [1917 Contract].

*In Re California Oregon Power Co.*, 13 FPC at 9-10, JA 89. The Commission also, at that time, included an additional license article, pursuant to FPA § 10(e), stating that the "consideration and benefits" set forth in that contract were adequate to compensate the United States for Copco's use of the Link River Dam. *Id.* at 11, JA 90.

To satisfy the Commission's requirement in its original licensing order, Copco filed the 1956 Contract, which, as noted above, *supra* p. 7, revised the 1917 Contract and extended it for a 50-year term commencing from the date of approval

by the Public Utility Commissions of Oregon and California (whichever acted later). *See* 1956 Contract, Articles 2 & 11, JA 50, 53. The Commission found that the 1956 contract "satisfied the requirements" of its earlier order. *In Re California Oregon Power Co.*, 15 FPC at 15, JA 93.

Based on those earlier orders and the 1956 Contract itself, the Commission reasonably concluded in the challenged orders here that the 1956 Contract was not an ongoing license condition because, assuming the contract itself was a license condition, it expired according to its own express terms on April 16, 2006 (the date 50 years from its approval by the California Public Utilities Commission, following approval by the Oregon Public Utility Commission). Initial Order at P 27, JA 31-32; *see also* Rehearing Order at P 12, JA 41 (contrasting expired license condition with ongoing conditions, carried over in annual license, "intended to benefit fish and wildlife resources").

Water Users argue at length that the 1956 Contract *itself* "was an express condition of the original license" for the Klamath Hydroelectric Project. Water Users Br. at 9-13. Rather than decide this question, the Commission assumed in the challenged orders that the 1956 Contract was an express term or condition of PacifiCorp's license, and proceeded to analyze it as such. Initial Order at P 27, JA 31-32; Rehearing Order at P 12, JA 41.

Water Users also argue that the "underlying license condition" requiring that PacifiCorp's predecessor execute the 1956 Contract did not expire, focusing on the Commission's direction that a new or renewed contract be filed to "'cover[] a time period at least equivalent to the time period of this license.'" Water Users Br. at 13 (citing *In Re California Oregon Power Co.*, 13 FPC at 9-10, JA 89).

The Commission reasonably rejected this argument on the basis of its review of its original licensing order and the terms of the 1956 Contract. Rehearing Order at PP 13-14, JA 41-42. The Commission's express direction to Copco in 1954 was to file a new contract with a term "at least equivalent" to the time period of its license, and with "'terms and conditions substantially similar to those" included in the existing 1917 Contract, which itself provided for a 50-year term, at the conclusion of which Copco would have no rights concerning use of the Link River Dam without a new agreement. *Id*. at P 3, 14, JA 38-39, 42 (citing *In Re California Oregon Power Co.*, 13 FPC at 3, 9-10, JA 85, 89). While the parties could have chosen a longer term to comply with this directive, "[t]he 1956 Contract simply replicates" the 50-year term of the 1917 Contract, as well as its express declaration that upon cancellation of the agreement or expiration of the 50-year term, Copco (now PacifiCorp) would have no further rights or obligations with regard to the Link River Dam. Rehearing Order at P 14, JA 42 (citing 1956 Contract, Article 10, JA 52-53).

Further supporting its conclusion that the 1956 Contract was intended to expire after its 50-year term, the Commission noted that the 1956 Contract did not become effective upon its approval by the Commission, but instead on the approval of the California and Oregon state commissions. *Id.*; *see* 1956 Contract at Article 11, JA 53. The Commission reasonably inferred from this provision that it did not intend, 50 years ago, to interfere with the authority of the states to set new retail electric rates for PacifiCorp's service to the irrigation customers after the 1956 Contract expired. Rehearing Order at P 14, JA 42.

Water Users make much of the fact that the Commission's requirement that Copco renew and file 1917 Contract with substantially similar terms (and benefits) represented an apparent compromise between the competing ambitions of Interior and Copco to develop hydroelectric facilities on the Klamath River. Water Users Br. at 9-11. The Commission responded to a similar argument from Water Users on rehearing here, agreeing with their basic premise that "the 1956 Contract was intended to benefit Interior and the irrigators, as well as compensate the government for the use of the dam," but ultimately finding that premise irrelevant to its decision. Rehearing Order at PP 15-16, JA 42-43. Noting that (1) it was not amending the 1956 Contract, but only carrying out its express terms, and (2) it had no authority over PacifiCorp's state-regulated retail rates, the Commission concluded that the benefits obtained by Interior and the irrigators under that

agreement did not bear on its decision, because it "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." *Id.* at P 16, JA 42-43.

Given the Commission's extensive review of the original FPC orders licensing the Klamath Hydroelectric Project and the express language of the 1956 Contract, its reasonable conclusion that the agreement was intended to be in effect for a 50-year term and was not an ongoing license condition is entitled to deference and should be upheld. *See Platte River*, 962 F.2d at 33 (citing *City of Seattle*, 883 F.2d at 1087).

### C. The Commission's Reasonable Interpretation is Not Barred by Section 15(a)(1) of the FPA

Given its finding that the 1956 Contract explicitly specified the date on which it would expire, the Commission explained that, assuming the agreement itself were a license term or condition, it would not be continued in any annual license issued to PacifiCorp pursuant to FPA § 15(a)(1). Initial Order at P 27, JA 31-32; Rehearing Order at P 12, JA 41.

The Commission held that this conclusion was consistent with FPA § 15(a)(1), which operates "to protect the expectations of entities with an interest in a licensed project . . . by ensuring that the license continues in effect *according to its terms*." Rehearing Order at P 12, JA 41 (emphasis in original). In contrast to other

kinds of hydroelectric license conditions that have no expiration date and continue in effect in an annual license, such as flow conditions intended to benefit fish and wildlife resources, "the 1956 Contract (assuming, arguendo, it is a license condition) specifies the date on which it expires." *Id.* Accordingly, "[n]o party or beneficiary of that contract has a reasonable expectation that it will continue notwithstanding its express terms." *Id.*

Contrary to Water Users' assertion that the Commission's holding here contradicts FPA § 15(a)(1) (which, in their view, "freezes all of the existing conditions in place at the expiration of the original license"), Water Users Br. at 7, the Commission's reasoning is completely consistent with the language of that statute. FPA § 15(a)(1) states that in the event a project license expires and the United States does not exercise its right to take over the project, or immediately issue a new license to a new or existing licensee, 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." 16 U.S.C. § 808(a)(1) (emphasis added). As noted above, the Commission concluded in the challenged orders that the terms of the 1956 Contract, assuming the contract was a term of PacifiCorp's license, provided that it would expire at the end of its 50-year term. Initial Order at P 27, JA 31-32; Rehearing Order at P 12, JA 41. Logically, then, any annual license issued according to "the terms and

conditions of the existing license," as required by FPA § 15(a)(1), would not include that contract, since its terms dictated that it would expire after 50 years. *Id.*

The Commission's conclusion here also comports with this Court's view that FPA § 15(a)(1) annual licenses "are designed simply 'to prevent a possible hiatus in the operation of a project.'" *Swinomish Tribal Cmty. v. FERC*, 627 F.2d 499, 506 (D.C. Cir. 1980) (citing *Lac Courte Oreille Band of Lake Superior Chippewa Indians v. FPC*, 510 F.2d 198, 206 & n.29 (D.C. Cir. 1975)). That provision was designed to "preserv[e] the status quo" by ensuring that hydroelectric projects will continue to operate while Congress and the Commission consider the possibility of a federal takeover or evaluate relicensing the project. *Lac Courte*, 510 F.2d at 205-06. The Commission's decision here fully preserved the status quo and ensured that project operations would continue, consistent with the express terms of PacifiCorp's license, until a decision is reached regarding a new license.

Additionally, as the Commission noted on rehearing, while PacifiCorp's license was not amended in the challenged orders, FPA § 15(a)(1) does not erect an absolute bar to changes in license terms and conditions during the term of an annual license. Rehearing Order at P 12 n.13, JA 41; *see also PacifiCorp*, 97 FERC ¶ 61,348 (2001). For example, annual licenses can be altered if the underlying license reserves the Commission's authority to require amendments, or

if the licensee agrees to the amendment. *Id.*; *see Swinomish*, 627 F.2d at 505-06; *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1136 (9th Cir. 2002); *see also Platte River*, 876 F.2d at 113-114. Just as new terms and conditions may be added to an annual license issued under FPA § 15(a)(1) where the existing license terms allow it, the Commission reasonably held here that the statute does not require an expired term or condition of PacifiCorp's existing license to be included in its annual license.

### D. The Commission Did Not Amend PacifiCorp's License in the Challenged Orders

Water Users assert that the Commission's amendment of PacifiCorp's license for the Klamath Hydroelectric Project in a separate order, *PacifiCorp*, 115 FERC ¶ 61,104 (2006), JA 101, "illustrates the error" of the orders challenged here. Water Users Br. at 13-14. As Water Users recognize, however, the Commission did not amend PacifiCorp's license in the challenged orders. In the order cited by Water Users, which was issued after the challenged orders here and for which they sought neither rehearing by the Commission nor judicial review, the Commission granted a request by PacifiCorp to amend its license to reflect the new government dam use charges established by the Commission pursuant to FPA § 10(e). *See PacifiCorp*, 115 FERC ¶ 61,104 at P 10 & Ordering P (A), JA 101-02. That order "comes too late" for Water Users to rely on here. *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (citing *MacLeod v. ICC*, 54 F.3d

888, 892 (D.C. Cir. 1995)) (declining to "'reach out to examine a decision made after the one actually under review'").

In any event, the Commission's order granting PacifiCorp's request to amend Article 35 regarding government dam use charges merely reflected the fact that after the 1956 Contract expired according to its own terms, government dam use charges would be established via the Commission's regulations. *PacifiCorp*, 115 FERC ¶ 61,104 at Ordering P (A), JA 101-02. That order did not "implement" the challenged orders, as Water Users suggest, Water Users Br. at 13-14, and says nothing regarding the Commission's reasonable determination in the challenged orders that the expired 1956 Contract would not be included in any annual license issued pursuant to FPA § 15(a)(1).

## CONCLUSION

For the reasons stated, the petition for review should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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July 12, 2007

***Klamath Water Users Association v. FERC*** **Docket No. P-2082**
**D.C. Cir. No. 06-1212**

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 6,659 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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July 12, 2007