ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 09-1134

HOOPA VALLEY TRIBE,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 16, 2010

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

All parties appearing before the Court are indicated in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. "Order Denying Motion For Interim License Conditions," *PacifiCorp*, 125 FERC ¶ 61,196 (November 20, 2008) (JA 521); and
2. "Order Denying Rehearing," *PacifiCorp*, 126 FERC ¶ 61,236 (March 19, 2009) (JA 608).

C. Related Cases:

Counsel for Respondent is not aware of any related cases pending before this Court or any other.

/s/ *Samuel Soopper*
Samuel Soopper
Attorney

March 16, 2010

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REGULATIONS:

GLOSSARY

FPA	Federal Power Act
Interior	United States Department of Interior
Order	"Order Denying Motion For Interim License Conditions," *PacifiCorp*, 125 FERC ¶ 61,196 (November 20, 2008)
Rehearing Order	"Order Denying Rehearing," *PacifiCorp*, 126 FERC ¶ 61,236 (March 19, 2009)
The Tribe	Petitioner Hoopa Valley Tribe

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (Commission or FERC) reasonably exercised its discretion in denying the request of petitioner Hoopa Valley Tribe (the Tribe) to have certain interim environmental conditions imposed in annual hydroelectric licenses issued for the operation of the Klamath Hydroelectric Project pursuant to section 15 of the Federal Power Act (FPA), 16 U.S.C. § 808(a).

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE FACTS

I. Statutory And Regulatory Background

Under the Federal Power Act, the Commission is authorized to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. FPA § 4(e), 16 U.S.C. § 797(e). In deciding whether to issue an original license, or grant a new license in a relicensing proceeding, the Commission is required, "in addition to the power and development purposes for which licenses are issued," to "give equal consideration to" the purposes of energy conservation, fish and wildlife protection, recreational opportunities, and other aspects of environmental quality. *Id.* Furthermore, the statute mandates that each new license contain "conditions for . . . protection, mitigation, and enhancement" of fish and wildlife, based on recommendations by relevant state and federal wildlife agencies. FPA § 10(j), 16 U.S.C. § 803(j).

The statute gives the Commission authority to reject such recommended conditions for a new license under certain circumstances. *Id.* However, for a license involving a project on a federal reservation, the Commission must include "such conditions as the Secretary of the department under whose supervision such

reservation falls shall deem necessary." FPA § 4(e), 16 U.S.C. § 797(e). Under a 2005 amendment to section 4(e), the license applicant or other party to a license application is entitled to a trial-type hearing before the relevant federal agency on any disputed fact concerning the section 4(e) conditions the agency submits to the Commission. *Id.*

A license issued by the Commission for a hydroelectric project "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe"; it "may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter and may be altered or surrendered only upon mutual agreement between the licensee and the Commission . . . ." FPA § 6, 16 U.S.C. § 799. However, a license can be modified during the duration of its term if it contains a "reopener clause." Such reservations of authority are a recognized means of obtaining the licensee's consent to any future modifications to project facilities or operations that the Commission may require in the public interest. *See, e.g., United States Dep't of Interior v. FERC,* 952 F.2d 538, 547 (D.C. Cir. 1992).

The Commission typically issues hydroelectric licenses for 30 to 50 year terms. Pursuant to section 15 of the FPA, in the event that a new license is not in place prior to the expiration of the existing license, FERC issues to the licensee an annual license to operate the project from year to year, "under the terms and

conditions of the existing license until . . . a new license is issued." 16 U.S.C. § 808(a).

This Court addressed the Commission's responsibility with respect to the imposition of interim environmental protection conditions in annual licenses in *Platte River Whooping Crane v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (*Platte I*), and *Platte River Whooping Crane v. FERC*, 962 F.2d 27 (D.C. Cir. 1992) (*Platte II*). In *Platte I*, the Court rejected the Commission's then-position that it had no authority to impose new conditions in an annual license that included a reopener provision, even to prevent ongoing irreversible environmental damage caused by the project. The Court held that the agency had acted arbitrarily to "refuse even to conduct a preliminary investigation into this threat and the availability of interim measures to combat it." 876 F.2d at 117.

In *Platte II*, the Court affirmed FERC's determination that review of environmental conditions in annual licenses is not governed by the formal environmental requirements for a new full-term (30-50 year) license under FPA sections 4(e) and 10(a)(1). 962 F.2d at 32-33. Rather, the Court agreed with the Commission that in reviewing environmental issues in the context of issuing annual licenses, the agency can impose such interim conditions, if any, it deems reasonable that are supported by the record (assuming the license contains a reopener provision allowing this action by the agency). *See also* 18 C.F.R. §

16.18(d) ("In issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.").

II. The Proceedings Before The Commission

A. The Klamath Project

This case involves the Klamath Hydroelectric Project, located primarily on the Klamath River in Klamath County, Oregon, and Siskiyou County, California. The project consists of eight developments, one of which, the J.C. Boyle development, is located partly on lands of the United States Department of the Interior's (Interior) Bureau of Land Management.

The original 50-year license for the Klamath project issued by the Federal Power Commission (FERC's predecessor) expired on March 1, 2006. Since that time, PacifiCorp, the licensee of the project (and intervenor in support of the Commission on appeal), has been operating the project under annual licenses. *See Klamath Water Users Ass'n v. FERC*, 534 F.3d 735 (D.C. Cir. 2008) (dismissing, for lack of standing, appeal of other FERC orders denying inclusion of terms of preexisting contract in annual license for another of the Klamath developments).

On February 25, 2004, PacifiCorp filed an application with the Commission for a new license for the project. In the relicensing proceeding, which is not yet completed and not on appeal here, Interior filed conditions under section 4(e) that

must be imposed in any new license for the Klamath project, including specific ramping rate (*i.e.*, rate of flow release) and minimum flow conditions for the J.C. Boyle development intended to prevent damage to the local trout fishery. PacifiCorp requested a trial-type hearing concerning these conditions, which was held before an Interior administrative law judge. On September 27, 2006, the judge issued a decision holding, *inter alia*, that Interior's ramping rate and minimum flow conditions would mitigate harm to the trout fishery caused by the project. Portions of this decision, which was filed in the agency's record of the relicensing proceeding, can be found at JA 330.

In the relicensing proceeding, the Commission has been awaiting state action on the necessary water quality certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341, in the absence of which the Commission cannot issue a license. However, on February 18, 2010, Interior, the States of California and Oregon, PacifiCorp and numerous other parties, including three affected Indian tribes (but not petitioner), reached two settlements concerning the Klamath project.[1] Essentially, these agreements provide a framework for studying whether four project dams, including the J.C. Boyle facility, should be decommissioned and removed, and a process for accomplishing this. The parties have not yet asked the

[1] *See* http://www.doi.gov/news/pressreleases/2010_02_18, which contains links to the text of both the Klamath Basin Restoration Agreement and the Klamath Hydroelectric Settlement Agreement. *See also* Rehearing Order PP 24-26, JA 616-617 (discussing the Agreement in Principle leading to the Klamath settlements).

Commission to act on the settlement, and it is unclear at this time when the Commission will be able to act on PacifiCorp's relicensing application.

B. The Tribe's Motion To Impose Conditions

On February 23, 2007, the Tribe filed with the Commission a motion asking that interim environmental conditions be imposed in PacifiCorp's annual licenses. JA 420. Specifically, the Tribe requested that the Commission immediately impose the conditions with respect to ramping rates and minimum flows that Interior had required in the relicensing proceeding. *Id.* (Interior did not join the Tribe's request.)

In the first order on review, "Order Denying Motion for Interim License Conditions," *PacifiCorp*, 125 FERC ¶ 61,196 (Nov. 20, 2008) (Order), JA 521, the Commission concluded that the record did not demonstrate the need for imposing the requested conditions in PacifiCorp's annual licenses.

On December 19, 2008, the Tribe filed a request for rehearing of the Commission's Order, arguing that the agency had erroneously rejected the proposed conditions on the ground that they were not necessary to prevent irreversible environmental damage to the trout fishery. JA 532.

In the second order on review here, "Order Denying Rehearing," *PacifiCorp*, 126 FERC ¶ 61,236 (March 19, 2009) (Rehearing Order), JA 608, the Commission agreed with the Tribe that a showing of irreversible environmental impact was not

necessary for the imposition of interim environmental conditions in an annual license. Rehearing Order P 9, JA 610. Rather, the Commission determined that, absent the prospect of irreversible impacts, "we examine a request to impose interim conditions under the terms of the license essentially in the same manner as if we were being asked to reopen the license." *Id.* P 12, JA 612. Applying this standard, and exercising the discretion afforded the agency under its regulations, the Klamath project license and this Court's *Platte* decisions, the Commission concluded that the Tribe had not demonstrated that its proposed conditions were appropriate in PacifiCorp's annual license, even if required in the event the project is relicensed.

This appeal followed.

SUMMARY OF ARGUMENT

The Commission applied an appropriate legal standard in deciding whether the Tribe's proposed interim conditions should be included in the Klamath project's annual license. Specifically, the agency applied the same standard as used to invoke its discretion to reopen a hydroelectric license, under which it will deem new mitigation measures to be required only if necessary, *i.e.*, solely to prevent a project's serious, unanticipated impacts on environmental resources.

This standard is fully consistent with this Court's decisions in *Platte I* and *Platte II*, and should be upheld on this basis. In those cases, the Court held that the Federal Power Act requires the Commission, in the context of issuing annual licenses, to review relevant environmental conditions and to take such ameliorative steps as it deems necessary, but does not require the agency to impose the environmental conditions that may be statutorily mandated for a new, long-term license.

Contrary to the Tribe's argument, the Commission did not require that irreversible environmental impact be demonstrated before interim conditions could be imposed. Additionally, the legal standard applied by the Commission is consistent with the terms of its own regulations and the Klamath license, which afford the agency considerable discretion on this issue based upon the particular circumstances presented.

The Commission's decision not to impose the interim conditions was fully supported by substantial evidence. Record evidence indicated that the Klamath trout fishery was healthy, despite some adverse impacts caused by the project which could require ameliorative measures upon relicensing of the project.

ARGUMENT

THE COMMISSION REASONABLY EXERCISED ITS DISCRETION UNDER THE FPA IN DECLINING TO IMPOSE THE TRIBE'S PROPOSED CONDITIONS ON THE PROJECT'S ANNUAL LICENSE.

A. Standard of Review

The Court reviews hydroelectric licensing decisions to determine whether they are "arbitrary and capricious" and whether the underlying factual findings are supported by substantial evidence. *Rhinelander Paper Co. v. FERC*, 405 F.3d 1, 4 (D.C. Cir. 2005); *N. Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997). "In both cases, the review is quite deferential." *N. Carolina*, 112 F.3d at 1189; *Brady v. FERC*, 416 F.3d 1, 5 (D.C. Cir. 2005). Additionally, where the Commission is exercising its statutory authority on a matter to which Congress has not spoken directly, the Court should defer to the Commission's reasonable interpretation. *Rhinelander Paper Co.*, 405 F.3d at 6 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)). Thus, when reviewing a Commission decision whether or not to impose conditions in an annual license, the standard of review for the Court is limited to determining whether the

Commission abused its discretion on the facts presented. *Platte I*, 876 F.2d at 111, 117, 119. *See also California Trout v. FERC*, 313 F.3d 1131, 1136 (9th Cir. 2002) (the Commission's interpretation of its annual licensing responsibilities under FPA § 15 "is entitled to *Chevron* deference").

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

B. The Commission Applied An Appropriate Legal Standard.

In the Rehearing Order in particular, the Commission extensively addressed the question of the appropriate legal standard to apply to the Tribe's request for the imposition of interim conditions in the Klamath project's annual licenses. As indicated above, the Commission views such a request, if not based on the type of irreversible environmental impacts presented in *Platte I*, "essentially in the same manner as if we were being asked to reopen the license." Rehearing Order P 12, JA 612. In this context, the agency "explained that '[i]f, with the passage of time, a project is found to have unanticipated, serious impacts on . . . fishery resources, the Commission can reopen the license to determine what, if any, additional mitigation measures are required by the public interest, after notice and

opportunity for hearing.'" *Id.* P 14 & n.10, JA 613 (quoting *Ohio Power Co.*, 71 FERC ¶ 61,092 at 61,314 n.43 (1995)). Applying this standard here, the Commission concluded that "[b]ecause the project is not having an unanticipated, serious impact on the trout fishery, it was an appropriate exercise of our discretion to deny the Tribe's request to reopen the license to impose interim conditions." *Id.* P 14, JA 613. *See also id.* P 28, JA 617 (the interim conditions requested by the Tribe are, under the circumstances, "not needed," nor would they be "as simple" to add to the license as the Tribe suggests).

This "unanticipated, serious impact" standard is a reasonable application of the agency's authority under FPA section 15. As the Court recognized in *Platte I*, with respect to annual licenses, the Commission is expected "to exercise whatever authority it might have to introduce into existing licenses environmental protective conditions that in its judgment appear necessary." 876 F.2d at 118. In *Platte II*, the Court agreed with the agency's statutory interpretation that it is not bound to apply relicensing standards to annual licenses. 962 F.2d at 33. Thus, the standard the Commission applied here is well within the scope of agency authority and discretion set out in *Platte I* and *Platte II*.

The Tribe contends that the Commission erred by requiring a showing of "irreversible environmental damage to the fishery pending relicensing" in order to require the proposed conditions. Pet. Br. 20 (quoting Order P 18, JA 527). The

Tribe's notion that the Commission applied this standard, however, is flatly refuted by the Commission's Rehearing Order (which the Tribe does not reference at all in its primary discussion of the issue, Pet. Br. 21-27).

In the Rehearing Order, the Commission explained that it had "discussed the role of irreversible environmental damage" in *Platte I* and *Platte II* in the first Order "only to explain why the evidence relating to impacts on resident trout in this proceeding did not rise to the level of adverse effects on resources that supported the adoption of interim protective conditions" in those cases. Rehearing Order P 10, JA 611.

The Commission attempted to dispel any confusion caused by its earlier analysis by emphasizing that it "did not view the *Platte* holdings as constraining us from imposing interim conditions absent a showing of irreversible environmental damage." *Id.* P 9, JA 610. Rather, the agency interpreted the Court's *Platte* opinions to mean that

> as long as we undertake an inquiry regarding the need for interim protective conditions, the [C]ourt's finding that Congress expected the Commission to exercise its authority to impose conditions "that in its judgment appear necessary" affords us considerable discretion as to their adoption.

Id. P 11, JA 611 (quoting *Platte River I*, 876 F.2d at 118).

Eventually the Tribe does concede that the Commission did not actually apply an "irreversible environmental damage" standard here. Pet. Br. 34. It then

goes on to argue that the proper standard should be derived from the language of the Klamath license and the agency's regulations.

As to the former, the Tribe argues that Article 58 of the Klamath license, its reopener provision, "authorizes FERC to impose interim modifications that are . . . necessary and desirable" for the conservation and development of fish and wildlife resources, and are consistent with both the primary purpose of the project and the FPA. Pet. Br. 28.[2]

As the Commission explained, however, "[t]he purpose of a reopener article such as Article 58 is to reserve Commission authority to direct modifications to project operations" for fish and wildlife conservation, "not to establish a legal standard that, if met, must result in the adoption of such modifications." Rehearing Order P 13, JA 612. In other words, "this language" was "[c]rafted by the Commission to preserve its discretion to modify project operations after a license is issued," not to obligate the Commission to act in a particular manner in a

[2] Article 58 of the license states, in pertinent part, that the licensee shall

> for the conservation and development of fish and wildlife resources . . . comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission . . . after notice and opportunity for hearing and upon findings based on substantial evidence that such . . . modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the [FPA].

Rehearing Order P 12, JA 612 (quoting Article 58).

particular set of circumstances. *Id.* Thus, contrary to the Tribe's view, "Article 58 is not equivalent to a statutory or regulatory requirement for the imposition of operational modifications." *Id.*, JA 612-613.

The Commission's interpretation of Article 58 as preserving agency discretion is reasonable. Indeed, as the agency observed, at least one court has already stated, albeit in a different context, "that reopener provisions 'do no more than give the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing.'" Rehearing Order P 13 n.9, JA 613 (quoting *California Sportfishing v. FERC*, 472 F.3d 593, 599 (9th Cir. 2006)).

Alternatively, the Tribe contends that "FERC's regulations expressly authorize [it] to impose interim conditions in annual licenses 'if necessary and practical to limit adverse impacts on the environment.'" Pet. Br. 30 (quoting 18 C.F.R. § 16.18(d)). But as the Commission observed, this argument once again "conflates Commission discretion with Commission obligation," as the cited regulatory language "provides that the Commission 'may incorporate additional or revised interim conditions,' not that it must." Rehearing Order P 17, JA 614 (quoting 18 C.F.R. § 16.18(d)). Rather, the agency concluded, "a determination of what conditions are 'necessary' is a matter for the Commission's judgment in each particular situation." *Id.*

This Court has stated that it "owe[s] deference to the Commission's [reasonable] interpretation of the hydroelectric licenses it issues and oversees," *Platte I*, 962 F.2d at 33 (citing *City of Seattle v. FERC*, 883 F.2d 1084, 1087 (D.C. Cir. 1989)), and "substantial deference" to FERC's reasonable reading of its own regulations. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997). The Commission reasonably explained that the Klamath license and the relevant regulation, as well as this Court's *Platte* decisions, afford FERC considerable discretion to exercise as it deems appropriate. Here, because the agency's exercise of its discretion was based on substantial evidence (as explained in the next section of this brief), its decision should be sustained by the Court.

Finally, the Tribe argues that FERC "is not implementing the Federal Power Act as Congress intends" by issuing annual licenses indefinitely without incorporating the requested conditions that will be required upon relicensing. Pet. Br. 57. But this contention directly contradicts the Court's holding that section 4(e)'s provisions "*requiring* environmental factors to be given added weight" at relicensing "do not come into play until the ultimate relicensing proceeding." *Platte I*, 876 F.2d at 118 (emphasis the Court's); *see also Platte II*, 962 F.2d at 33 (upholding the Commission's interpretation that "the general terms of sections 4(e) and 10(a) apply to new licenses, not annual licenses," and "do not trump the

statute's specific requirements that annual licenses issue 'under existing terms and conditions of the existing license'" (quoting 16 U.S.C. §§ 799, 808(a)(1)). The Court further concluded that the Commission does not have the authority to impose protective conditions not authorized by the FPA. However, "Congress expected FERC to exercise whatever authority it might have to introduce into existing licenses environmental protective conditions that in its judgment appear necessary." *Platte I*, 876 F.2d at 118. Thus, the legal standard applied by the Commission here is fully consistent with both the terms and the intent of the FPA.

C. The Commission's Decision Not To Require The Tribe's Proposed Interim Conditions Is Supported By Substantial Evidence In The Record.

In the orders on review, the Commission found that the record evidence "presented a picture of a generally healthy trout fishery, despite the adverse affects caused by project operations." Rehearing Order P 21, JA 615; *see also* Order P 16, JA 526 ("While existing operations cause some adverse effects to the trout fishery, that fishery is nonetheless thriving."). The Commission based this finding on its "overall view of the evidence" in both the relicensing hearing and "the Commission staff's subsequently-issued final Environmental Impact Statement . . . for relicensing the Klamath project." Rehearing Order P 21, JA 615.

The Commission acknowledged the Interior judge's finding that the Klamath project has negative effects on the trout fishery. Nonetheless, FERC concluded,

"the record in that proceeding in fact presents a picture of a healthy trout fishery which nevertheless sustains certain adverse effects that are caused by project operations and that may be alleviated by adopting Interior's conditions." Order P 13, JA 525. Thus, taken as a whole, "the record does not suggest that the existing operations are causing the trout fishery to deteriorate to the extent that interim protective conditions are needed." Rehearing Order P 22, JA 615. "Rather," the Commission explained, "the record depicts conditions that have persisted during the license term but have not prevented the maintenance of a trout fishery." *Id.*

In this regard, the Commission relied on factual findings by agency staff in the Environmental Impact Statement "that the J.C. Boyle bypassed and peaking reaches[3] support high quality fisheries for rainbow trout, as reflected by angler catch rates reported by Oregon [Department of] Fish and Wildlife and PacifiCorp." Order P 14 & n.11, JA 526 (citing Environmental Impact Statement at 3-243, JA 486 and 3-257, JA 499). In particular, the Commission relied on the staff finding that the J.C. Boyle bypassed reach "is popular for trout fishing and that catch records indicate good angler success." Order P 14 & n.12, JA 526 (citing Environmental Impact Statement at 3-252, JA 494). Additionally, while the staff acknowledged the potential for flow downramping (*i.e.*, reduction) to strand fish,

[3] The J.C. Boyle "bypassed reach" is the 4.3 mile-long section of the river downstream of the dam. The "peaking reach" is the 17.3 mile-long section of the river between the J.C. Boyle powerhouse and the reservoir of the next dam. See Environmental Impact Statement at 2-6 to 2-8, JA 467-469.

"under current conditions downramping occurs rarely." *Id.* & n.13 (citing Environmental Impact Statement at 3-256, JA 498 and 5-38, JA 511).

Similarly, as to the J.C. Boyle peaking reach, staff indicated that despite some fish mortality and stranding, the rainbow trout population is "highly productive." Order P 15, JA 526. In this regard, the agency emphasized, "trout population and catch rates" in the portion of the peaking reach in Oregon "are comparable to or exceed those reported for other high quality trout streams in Oregon." *Id.* & n.16 (citing Environmental Impact Statement at 3-257, JA 499, 3-264, JA 506 and 5-40, JA 512). Likewise, "the California Department of Fish and Game indicated that annual angler catch rates in the California section of the peaking reach are among the highest of the wild trout rivers managed by that agency." *Id.* & n. 17 (citing Environmental Impact Statement at 3-264, JA 506).

In the trial proceeding before the Interior judge, expert testimony consistent with these findings was presented by Mr. Olson, a fisheries biologist testifying for PacifiCorp. JA 171-189. Based on his analysis of the relevant data concerning the J.C. Boyle project in particular, Mr. Olson concluded that "[u]nder current operations there is an existing trout population that supports a recreational fishery" and which has been so designated by both the Oregon Department and California Department of Fish and Wildlife. JA 175. Mr. Olson further described the trout

fishery as one of "outstandingly remarkable values" which "offers high catch rates of wild trout." *Id.*

In sum, there was substantial record evidence present to support the Commission's finding that the Klamath project was not having such unanticipated, serious impacts on the trout fishery so as to require interim mitigation measures pending completion of the relicensing proceeding. Order P 13, JA 525; Rehearing Order P 22, JA 616.

The Tribe dismisses the evidence the Commission relies on, preferring to emphasize other expert testimony in the record of the trial-type proceeding it believes casts doubt on Mr. Olson's methods and conclusions. Pet. Br. 40-46. However, "[g]iven the presence of disputing expert witnesses," this Court "must defer to the informed discretion of the responsible administrative agenc[y]." *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (quoting *Marsh v. Oregon Natural Resources Council*, 410 U.S. 360, 376 (1989), and *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (internal quotation marks omitted)); *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (this Court "defers to the Commission's resolution of factual disputes between expert witnesses"). Here, such deference to the Commission's weighing of the evidence is appropriate, given the Commission's "overall" review of the factual record in the trial-type hearing before the Interior

judge as well as the subsequently-issued Environmental Impact Statement. *See* Rehearing Order P 21, JA 615.

The Tribe also places much reliance on the Interior judge's conclusion that "project operations adversely impact the fishery." Pet. Br. 47 (capitals and underlining omitted). But once again, the Tribe conflates the environmental standard for new licenses and annual licenses. As the Commission explained, the record before the judge

> was developed in response to PacifiCorp's challenge to the factual bases supporting Interior's section 4(e) conditions for the new license, and the [administrative law judge]'s determination addressed whether there is sufficient evidence to support including these conditions for the term of the new license, not whether there is a need for interim measures pending completion of the relicensing proceeding.

Rehearing Order P 20, JA 615. The Commission, therefore, drew the appropriate distinction (established in *Platte I*) from the facts presented, namely that "[t]he evidence depicts environmental conditions that are less than ideal for resident trout" – the basis for Interior's recommended section 4(e) conditions in the project relicensing – but "does not support a conclusion that the resource is declining or its habitat deteriorating" to such an extent that interim conditions must be imposed in PacifiCorp's annual licenses. *Id.* P 28, JA 617.

It is true that the Klamath annual licenses may remain in effect for a number of years while the relicensing proceeding continues (pending clean water certification by the states) and while the parties (but apparently not the Tribe) to

that proceeding negotiate a settlement (*see supra* p. 6). However, this possibility in no way undermines the Commission's decision here. As the Commission concluded, the responsibility of the agency, recognized by the Court in *Platte I* to review environmental conditions in the annual license context does not provide a "basis for inferring an intention to have us routinely amend licenses to incorporate, as interim measures, proposed mandatory conditions that have been submitted in ongoing relicensing proceedings." Rehearing Order P 16, JA 614.

Before the Court, the Tribe maintains that there is no practical reason why the Commission could not simply impose the interim conditions immediately. Pet. Br. 56-57. But as the Commission explained, "the imposition of Interior's conditions in a license amendment "would not be as simple as the Tribe had suggested," Rehearing Order P 28, JA 617, as it would require further notice and comment, as well as possible state action with respect to water quality certification. Order P 17, JA 527. "Since the completion of the relicensing proceeding is itself awaiting issuance of water quality certification," the Commission reasoned, "there would be no environmental advantage in instituting yet another proceeding that could not be completed" until such certification might issue. *Id.* Thus, the Commission not only concluded that the proposed conditions were unnecessary, but also that they were neither "practical" nor "desirable" (within the meaning of the agency's regulations and Article 58 of the license).

The Tribe likewise insists that, in view of the relicensing settlement process, lengthy delay is inevitable. Pet. Br. 56-57. However, as the Commission found, at the time of its decision here, it can only speculate, but "cannot be certain[,] that delay is inevitable." Rehearing Order at P 27, JA 617. In any event, subsequent events that may confirm or reject this possibility cannot serve to question, after the fact, the reasonableness of the Commission's decision on the record available now. *See, e.g., Brooklyn Union Gas Co. v. FERC,* 409 F.3d 404, 406 (D.C. Cir. 2005) (this Court will not reach out to consider decisions made after the decision actually under review).

In sum, as in *Platte II*, here the Commission evaluated the evidence and made a reasoned determination concerning the imposition of environmental conditions in annual licenses. The Court should likewise uphold FERC's analogous decision in this case.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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March 16, 2010

Hoopa Valley Tribe v. FERC **Docket No. P-2082**
D.C. Cir. No. 09-1134

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this briefs contains 4,940 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

/s/ *Samuel Soopper*
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March 16, 2010

ADDENDUM

STATUTES
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The Clean Water, 33 U.S.C. § 1341, provides as follows:

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311 (b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371 (c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, 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 requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The

Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in

(A) the construction or operation of the facility,

(B) the characteristics of the waters into which such discharge is made,

(C) the water quality criteria applicable to such waters or

(D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such

certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), provides as follows:

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: [1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United

States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Section 6 of the Federal Power Act, 16 U.S.C. § 799, provides as follows:

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

Section 10 of the Federal Power Act, 16 U.S.C. § 803, provides as follows:

(a)(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797 (e) of this title [1] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published

policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e)(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: Provided, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such

as determined by the Commission: Provided however, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and:

(i) the Quincy-Columbia Basin Irrigation District (Contract No. 14–06–100–6418);

(ii) the East Columbia Basin Irrigation District (Contract No. 14–06–100–6419); or,

(iii) the South Columbia Basin Irrigation District (Contract No. 14–06–100–6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the

Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 11/2 mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to—

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which—

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission. Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title. Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the

Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that:

(A) results in the contravention of the policies expressed in the antitrust laws; and

(B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1). Subsection (i) of this section shall not apply to the conditions required under this subsection.

Section 15(a) of the Federal Power Act, 16 U.S.C. § 808(a), provides as follows:

(a)(1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, 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 as aforesaid.
(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 803 of this title, consider (and explain such consideration in writing) each of the following:

(A) The plans and abilities of the applicant to comply with

(i) the articles, terms, and conditions of any license issued to it and

(ii) other applicable provisions of this subchapter.

(B) The plans of the applicant to manage, operate, and maintain the project safely.

(C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.

(D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 803 of this title, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

(B) The actions taken by the existing licensee related to the project which affect the public.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides as follows:

(a) Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for

failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

18 C.F.R. § 16.18(d) provides as follows:

Sec. 16.18 Annual licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) This section applies to projects with licenses subject to sections 14 and 15 of the Federal Power Act.

(b) The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license to allow:

(1) The licensee to continue to operate the project while the Commission reviews any applications for a new license, a nonpower license, an exemption, or a surrender;

(2) The orderly removal of a project, if the United States does not take over a project and no new power or nonpower license or exemption will be issued; or

(3) The orderly transfer of a project to:

(i) The United States, if takeover is elected; or

(ii) A new licensee, if a new power or nonpower license is issued to that licensee.

(c) An annual license issued under this section will be considered renewed automatically without further order of the Commission, unless the Commission orders otherwise.

(d) In issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.

Hoopa Valley Tribe v. FERC **Docket No. P-2082**
D.C. Cir. No. 09-1134

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 16th day of March 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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