

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**Docket No. UM - 1209**

In the matter of	)	
	)	OPENING COMMENTS OF
MIDAMERICAN ENERGY HOLDINGS CO.	)	HOOPA VALLEY TRIBE
	)	
Application for Authorization to Acquire	)	
Pacific Power & Light, dba PacifiCorp	)	
_____	)	

**OPENING COMMENTS OF HOOPA VALLEY TRIBE**

The Oregon Public Utility Commission ("Commission") is vested with the responsibility to ensure that proposed utility acquisitions provide a net public benefit to Oregon's citizens. ORS § 757.511; *In re Merger Standards Investigation*, Order No. 01-778, at p.11. The applicant, Mid-American Energy Holdings Company ("MEHC"), argues that its proposed acquisition of PacifiCorp is in the public interest due primarily to MEHC's ability and asserted willingness to invest hundreds of millions of dollars in upgrades to PacifiCorp's infrastructure. MEHC Application, p. 16, 19. In its application, MEHC cites numerous infrastructure improvements that it plans to undertake, but conspicuously omits one PacifiCorp activity, the Klamath Hydroelectric Project, which has caused substantial harm to Oregon's natural resources, and to Oregon as a whole. MEHC's omission of any commitment to invest in the Klamath Hydroelectric Project is significant, considering that PacifiCorp, the utility being acquired by MEHC, will soon be legally obligated to invest hundreds of millions of dollars in Klamath Project upgrades as a result of a new Federal Energy Regulatory Commission (FERC) license.

The Hoopa Valley Tribe ("Tribe") has intervened in this proceeding to inform the Commission of the financial impact of the harm that PacifiCorp's Klamath Project has caused to

historic Oregon fish runs and habitat, and to explain the legal and factual basis for the millions of dollars of capital investment that PacifiCorp must make upon issuance of the new FERC license. Based on that information, the Tribe requests that the Commission not approve MEHC's acquisition without, at minimum, an express condition requiring MEHC to acknowledge its awareness of and to guarantee, or act as a financial surety for, PacifiCorp's legal and financial obligations that arise from the new FERC license. If MEHC is not willing to guarantee fulfillment of PacifiCorp's existing and continuing legal obligations, this Commission should have significant cause for concern about whether MEHC's acquisition of PacifiCorp is in the best interest of Oregon's citizens.

The Tribe emphasizes that it does not seek duplication or re-litigation of issues that are currently being addressed in the FERC re-licensing proceeding. FERC is the agency with authority to impose environmental conditions and fish passage prescriptions, and the Tribe does not seek such relief from this Commission. However, this Commission has the authority, and a duty, to condition acquisitions so that they are in the public interest. This Commission has authority to ensure public utilities have sufficient capital to meet their legal and financial obligations going forward. In this transaction, PacifiCorp is substituting one parent corporation for another. This Commission, in fulfillment of its duty to ensure that utility acquisitions are in the public interest, should require PacifiCorp's new parent corporation, MEHC, to establish its financial responsibility if PacifiCorp becomes unable or unwilling to meet its legal commitments under the FERC license.

A. The Klamath Hydroelectric Project Has Destroyed Oregon's Anadromous Fish Runs In The Upper Klamath Basin and Poses Significant Threats To Water Quality.

The Klamath Hydroelectric Project, operating as FERC Project No. P-2082, consists of six (6) dams and associated powerhouse facilities located on the Klamath River in southern

Oregon and northern California. Although the Klamath Project consists of multiple dams and powerhouse facilities, and is located within two state jurisdictions, it is licensed by FERC as one cohesive project.

The Klamath Hydroelectric Project has destroyed anadromous fish runs in Oregon's Upper Klamath Basin. The three dams furthest downstream, Iron Gate, Copco 1, and Copco 2, were built without fish passage of any kind. The J.C. Boyle dam, located in Oregon, has a fish ladder, but its existing fish passage facilities do not comply with current guidelines promulgated by the state and federal fish and wildlife agencies. As a result of the defective, and/or non-existent fish passage facilities, the Klamath Hydroelectric Project blocks salmon and steelhead from reaching more than 350 miles of their historic habitat, almost all of which is located in Oregon.

In addition to the blockage of Oregon's anadromous fish runs, Klamath Project operations under the existing license also harm fish that reside within the Klamath Project (i.e., upstream of the Copco dams), such as the ESA-listed Lost River Sucker and Short-nosed Sucker. Project operations result in low and variable flows that strand fish, increase water temperature, and reduce the availability of adequate habitat for resident fish species.

The dams also adversely affect water quality. On September 30, 2005, the State of California North Coast Regional Water Board issued an alert regarding high levels of the toxic algae *Microcystis aeruginosa* in the Klamath River, just south of the Oregon border, advising people to avoid all contact with the Klamath River while the bloom is occurring. According to the Regional Water Board's alert, levels of the toxic algae exceeded World Health Organization standard for recreational use by as much as 468 times. The levels were among the highest ever recorded in the United States. The California alert linked the cause of the toxic algae to the

Klamath Project, stating: "Warm and calm surface water created by Iron Gate and Copco Reservoirs provide an ideal environment for the growth of large algal blooms."

Poor water quality and higher water temperatures that result from the existence and operations of the Klamath Project contributed, in 2002, to one of the largest recorded fish kills in United States history, with over 68,000 fish found dead in the Klamath. The Klamath Project is an enormous liability to Oregon, its natural resources, and its citizens.

B. PacifiCorp Will Require Hundreds of Millions Of Dollars of Capital To Comply With The Environmental Conditions In the New FERC License for the Klamath Project.

The Klamath Project dams were built in an era without environmental regulations. PacifiCorp operates the Klamath Project under a 50-year license, issued in 1956, that shows little concern for the protection of fish, wildlife, and water quality. The existing PacifiCorp license will expire in 2006 and FERC is currently processing PacifiCorp's application for a new license to operate the Klamath Project. A great change in applicable law has occurred since 1956 and the new FERC license will look significantly different in terms of environmental protection.

In 1986, Congress passed the Electric Consumers Power Act, Pub. L. No. 99-495, which amended the Federal Power Act to provide for "equal consideration" to energy and environmental concerns, including fish, wildlife, and recreation, in licensing decisions. *See* 16 U.S.C. § 797(e). Under the Federal Power Act, state and federal resource agencies, and interested Indian tribes, may recommend, and in some cases require, conditions that will protect fish and wildlife adversely affected by hydroelectric operations. Section 18 of the Federal Power Act, 16 U.S.C. § 811, obligates FERC to *require* construction, maintenance, and operation of "fishways" that are prescribed by the Secretaries of Interior and Commerce. "Fishways" are "physical structures, facilities, or devices necessary to maintain all life stages of [affected fish], and project operations and measures related to such structures, facilities, or devices which are

necessary to ensure the effectiveness of such structures, facilities, or devices for such fish." Pub. L. No. 102-486 (1992). FERC has no power to reject the "fishway prescriptions" mandated by the Secretaries of Interior and Commerce. *American Rivers v. FERC*, 187 F.3d 1007 (9th Cir. 1999).

Under the current FERC re-licensing schedule, the Secretaries of Commerce and Interior will submit their fishway prescriptions to FERC by the end of 2005. Based on a review of published draft prescriptions, these agencies § 18 prescriptions are very likely to require volitional fish passage, in the form of laddering or dam removal, for the dams located in California, and will require significant upgrades to the laddering facilities at J.C. Boyle in Oregon. To be clear, FERC will have no authority to reject these conditions and prescriptions and they will become mandatory conditions of PacifiCorp's new license.

Under § 10(j) of the Federal Power Act, 16 U.S.C. § 803(j), state and federal agencies have authority to recommend conditions for the protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat). FERC must accept these conditions unless it makes formal findings that such conditions are inconsistent with the purposes of the Federal Power Act. *American Rivers v. FERC*, 187 F.3d 1007 (9th Cir. 1999). Indian tribes have authority to recommend fish and wildlife prescriptions under § 10(a) of the Federal Power Act, 16 U.S.C. § 803(a).

Finally, under § 401 of the Clean Water Act, Oregon, California, and Indian tribes with approved regulatory programs (such as the Hoopa Valley Tribe) have authority to require water quality conditions in the FERC license which FERC has no power to reject. The states and tribes essentially have "veto power" over the licensing of a FERC project. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S.Ct. 1900 (1994); *American Rivers v.*

*FERC*, 129 F.3d 99 (2nd Cir. 1997) (FERC has no authority to reject conditions imposed by state pursuant to its authority under § 401 of Clean Water Act).

The preceding discussion of relevant authorities is intended to illustrate that PacifiCorp is about to incur a significant legal and financial obligation when the new license is issued. It may cost PacifiCorp as much as \$300 million to comply with the environmental conditions prescribed in the FERC license. FERC is the jurisdiction that will impose the stringent environmental conditions, but this Commission, acting on behalf of Oregon's public, should ensure that MEHC is willing and able to shoulder the burden of these costs to the extent that its subsidiary PacifiCorp is not able to. The Commission should not approve this transaction without, at minimum, an express condition that MEHC will guarantee all funds and/or financing necessary to implement the conditions required in the FERC license.

C. The Commission Should Condition the MEHC Acquisition To Ensure That PacifiCorp Has All Necessary Funds To Comply With Its Legal Obligations Under The FERC License.

ORS § 757.511 requires the Commission to evaluate whether a proposed acquisition will result in a net public benefit. In addition to finding a net benefit to the utility's customers, the Commission must also find that the proposed transaction will not harm Oregon's citizens as a whole. *In re Merger Standards Investigation*, Order 01-778 at 11. The Commission has authority to impose conditions on a transaction, where such conditions are necessary to prevent harm to the public interest. ORS § 757.511(3) ("The Commission may condition an order authorizing the acquisition upon the applicant's satisfactory performance or adherence to specific requirements"). The applicant bears the burden of showing that granting the application is in the public interest. ORS § 757.511(3).

Before the Commission considers approving this acquisition, it must resolve questions that remain unanswered in the MEHC application, such as (1) how much has PacifiCorp disclosed to MEHC about the environmental liabilities associated with the FERC license; (2) how will this transaction affect PacifiCorp's ability to finance, implement, and comply with FERC license conditions; and (3) is MEHC willing and able to fund the costs associated with the FERC license compliance if PacifiCorp is not willing or able to do so. Given the significant harm that is caused to Oregon by PacifiCorp's Klamath Project, and the substantial financial liabilities that PacifiCorp will incur as a result of the new FERC license, the Commission should require a protective condition that ensures MEHC's capital resources will act as a financial surety for the environmental conditions imposed by the FERC license.<sup>1</sup>

Requiring MEHC to guarantee the availability of capital for FERC license compliance is especially appropriate in this case since MEHC has represented to this Commission that the "chief benefit" from the proposed transaction is "MEHC's willingness and ability to deploy capital to meet PacifiCorp's significant infrastructure needs." Application p. 19. MEHC continues by stating "MEHC is exceptionally well-matched to utilities, such as PacifiCorp, with a need for significant capital investment." Although MEHC outlines many specific commitments, both in infrastructure investment and otherwise, MEHC omits any commitment related to the Klamath Project. MEHC wants the Commission to focus on the general benefits offered by MEHC, and commitments made in other states, while ignoring the fact that MEHC has made no commitment to improve the Klamath Project - the project that is, or should be, of

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<sup>1</sup> As these are only preliminary comments by the Tribe, the Tribe reserves all rights to recommend additional protective conditions as this matter proceeds. The Tribe, merely points out in these preliminary comments, that a condition requiring MEHC to guarantee PacifiCorp has the necessary capital to comply with the FERC license conditions is the minimum protection necessary.

most concern to Oregon's citizens and the Project in the most dire need of significant infrastructure investment.

This Commission should question why MEHC's application is silent about commitments to the Klamath Project. MEHC may represent to the Commission that it would, of course, step in and satisfy PacifiCorp's legal and financial obligations. However, in discovery in this proceeding, the Tribe learned that MEHC has made no commitment to PacifiCorp to fund or finance the costs of implementing the environmental conditions related to the FERC license.<sup>2</sup> This Commission should take the affirmative step of making such guarantee a legal condition of acquisition approval. The Commission should condition this acquisition so that MEHC has an obligation to provide any capital necessary to fully implement FERC license conditions, to the extent PacifiCorp is unable or unwilling to do so.

MEHC is asking this Commission for permission to "exercise substantial influence over the policies and actions" of PacifiCorp. A condition making MEHC secondarily responsible for funding FERC license obligations also reduces any incentive that MEHC may have to direct PacifiCorp capital to more profitable investments. If MEHC is also obligated, MEHC will have an incentive to ensure that PacifiCorp makes investment in the Klamath a priority.

The Tribe's recommended condition is by no means extraordinary. PacifiCorp, after all, will be legally obligated to comply with the FERC license and to implement the conditions in the FERC license. Likewise, PacifiCorp, as the license holder, will be the primary obligor on those conditions. The Tribe's recommended condition would merely require MEHC to establish that it

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<sup>2</sup> Hoopa Valley Data Request 18 stated: "Provide copies of all correspondence, including memorandums of conversations, in which MEHC commits to funding or financing the costs of implementing the environmental conditions, including fishway prescriptions, related to the FERC license." The response to Data Request 18 was: "There are no such documents."

will infuse sufficient capital to its new subsidiary, PacifiCorp, if such capital is necessary to meet PacifiCorp's legal and financial obligations under the FERC license.

D. Conclusion - The Commission Must Do Everything Within Its Authority To Ensure That This Acquisition Facilitates, and Does Not Impair, Fulfillment of PacifiCorp's Obligations.

The Tribe does not intend this Commission to conduct an extensive factual review of the detailed environmental issues surrounding re-licensing of the Klamath Hydroelectric Project; nor does it intend this Commission to impose fishway prescriptions or measures to mitigate the harm on spawning grounds or water quality. The Tribe does want this Commission to investigate and deliberate on how the transfer of PacifiCorp from Scottish Power to MEHC will affect compliance with, and implementation of the license conditions that FERC may impose.

If the FERC license conditions are not complied with in full, Oregon as a whole suffers harm. Oregon has lost historic anadromous fish runs while PacifiCorp benefited from operation of the Klamath Hydroelectric Project. Now, for the first time in fifty years, PacifiCorp is faced with an obligation to make improvements to the Klamath Project. This Commission must do everything in its power to ensure that a transfer of power at this crucial stage in the history of the Klamath Project will facilitate, and not impair, fulfillment of PacifiCorp's obligations. If MEHC is not willing to commit that it will guarantee PacifiCorp's legal and financial obligations under the FERC license, this Commission should have cause for concern as to whether this acquisition is in the public interest.

DATED this 14th day of October, 2005.

Respectfully submitted,

MORISSET, SCHLOSSER, JOZWIAK & MCGAW

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of October, 2005, in addition to electronic service, I mailed the original and one copy of Opening Comments of Hoopa Valley Tribe with the Public Utility Commission of Oregon, via *First-Class Mail* to:

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I further certify that the 14th day of October, 2005, I served a copy of Opening Comments of Hoopa Valley Tribe on counsel via *E-mail* to the following addresses:

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I declare the above to be true and correct under penalty of perjury. Executed this 14th day of October, 2005, at Seattle, Washington.

/s/ Nina Cordova  
Legal Assistant