

73 FERC ¶ 61,365

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;  
Vicky A. Bailey, James J. Hoecker,  
William L. Massey, and Donald F. Santa, Jr.

PacifiCorp Electric Operations ) Project No. 2643-001

ORDER FINDING LICENSING NOT REQUIRED

(Issued December 22, 1995)

Pending before the Commission is an application filed by PacifiCorp Electric Operations (PacifiCorp) for a subsequent license to continue operating its Bend Hydroelectric Project No. 2643. The project is located on the Deschutes River in the City of Bend in Deschutes County, Oregon. As part of its review of PacifiCorp's application, the Commission staff prepared and issued for public comment a navigability report, which concludes that the Deschutes River is not navigable in the vicinity of the Bend Project. As explained below, we accept the staff's conclusions and find that the Bend Project is not required to be licensed pursuant to Section 23(b)(1) of the Federal Power Act (FPA).

Background

PacifiCorp filed its application for a subsequent license for the 1.1 megawatt Bend Project on December 24, 1991. 1/ The staff issued public notice of the application on May 6, 1992, and several parties intervened in response to the notice. 2/ On

1/ A "subsequent license" is "a license for a water power project issued under Part I of the Federal Power Act after a minor or minor part license that is not subject to sections 14 and 15 of the Federal Power Act expires." 18 C.F.R. § 16.2(d). A "minor water power project" is one that has a total installed generating capacity of 1.5 MW or less. Id. at § 4.30(17). The subsequent licensing of an project with an expired minor license is a relicensing proceeding. See Oconto Falls, WI v. FERC, 41 F.3d 671, 672 (D.C. Cir. 1994). For convenience, we use the terms "subsequent licensing" and "relicensing" interchangeably in this order.

2/ The following agencies and organizations became parties to the proceeding by filing timely motions to intervene that were not opposed: Coalition for the Deschutes; Oregon Department of Fish and Wildlife; American Rivers, Pacific  
(continued...)

9512280052

FERC - DOCKETED  
DEC 22 1995

Project No. 2643-001

-2-

December 7, 1992, the staff issued notice that the application was ready for environmental analysis, and set a deadline of February 5, 1993, for filing recommendations, terms and conditions, and prescriptions. Among other things, the Department of the Interior (Interior) prescribed upstream and downstream fish passage facilities for the project under Section 18 of the FPA.

The staff issued a draft Environmental Assessment (EA) on August 31, 1993. In the draft EA, the staff examined PacifiCorp's relicensing proposal, PacifiCorp's proposal with agency- and staff-recommended environmental measures, continued operation under the terms and conditions of the existing license, and project retirement. Among other things, the staff found that installing a downstream fish passage facility that would direct trout past the dam would be so costly that it would cost less to retire the project. In the draft EA, the staff recommended continued project operation without downstream fish passage and deferral of upstream fish passage to provide an appropriate balance between environmental and developmental resources. 2/

The staff received extensive comments from resource agencies, parties, and members of the public. Many commenters suggested that the staff had underestimated the project's impact on trout, undervalued the trout resource and the project's power benefits, and overstated the costs of the project. Interior reaffirmed its prescription of upstream and downstream fishways. In a letter dated March 24, 1994, PacifiCorp informed the Commission that if Interior did not withdraw its fishway prescription, PacifiCorp might decide to retire the project. PacifiCorp also requested that decommissioning issues be considered in a separate proceeding. The staff responded on May 9, 1994, that a separate proceeding would not be necessary, but that the parties should continue to explore these issues in their ongoing settlement negotiations.

---

2/ (...continued)

Rivers Council, and Oregon Trout; Bend Metro Park and Recreation District; City of Bend; and Deschutes County. By notices issued on July 20, 1993, the Commission granted late motions to intervene filed by the Deschutes River Chapter of Trout Unlimited on July 10, 1992, and the Department of the Interior on December 23, 1992, respectively. See 18 C.F.R. § 385.214(c) (1995).

3/ The staff originally requested comments on the draft EA by October 15, 1993. However, in response to requests from several parties, the staff extended the comment period to January 15, 1994.

Project No. 2643-001

- 3 -

On December 14, 1994, while the staff was analyzing comments on the draft EA for the project, the Commission issued its Policy Statement on Project Decommissioning at Relicensing. <sup>4/</sup> Among other things, the Policy Statement made clear that the Commission would not necessarily deny a new or subsequent license on the grounds that additional costs imposed at relicensing would render a project uneconomic. Rather, if a license could be fashioned to meet the requirements of the FPA, the Commission would issue the license and allow the licensee to determine whether to accept it and continue operating, or to decommission the project. <sup>5/</sup> The Policy Statement also made clear that, if a project is to be decommissioned, it would not be appropriate to require the licensee to install new facilities, such as fish ladders.

On February 8, 1995, the staff held meetings with representatives of Interior and the Oregon Department of Fish and Wildlife to attempt to resolve the staff's preliminary determination that some of these agencies' fish and wildlife recommendations under Section 10(j) of the FPA might be inconsistent with the comprehensive development standard of Section 10(a)(1) of that act. At those meetings and during a subsequent public discussion period, many people raised issues concerning project retirement and the Commission's decommissioning policy statement. At one point, counsel for PacifiCorp questioned the Commission's authority to require a surrender application to oversee the process of project retirement.

In anticipation of an order that would address both licensing and project retirement issues, the staff investigated the jurisdictional status of the project and prepared a navigability report for the Deschutes River. <sup>6/</sup> The staff also prepared a draft memorandum of agreement (MOA) on historic preservation issues to address the Commission's responsibilities under Section 106 of the National Historic Preservation Act. On April 18, 1995, PacifiCorp declined to sign the proposed MOA, explaining that, if the Commission issued a subsequent license with mandatory fishways and other agency recommendations for fish and wildlife, the project would be uneconomic to operate. The

---

<sup>4/</sup> 69 FERC ¶ 61,336.

<sup>5/</sup> On July 13, 1995, the Commission provided further guidance on project economics and hydroelectric licensing in Mead Corporation, 72 FERC ¶ 61,027 at pp. 61,068-70.

<sup>6/</sup> As explained in more detail below, the navigability of the Deschutes River in the vicinity of the project is critical to a determination of whether licensing is required under Section 23(b)(1) of the FPA.

Project No. 2643-001

-4-

licensee added: "PacifiCorp is not likely to accept a new license proffered by the Commission for the Bend Project if such conditions are included." 7/

Because the jurisdictional status of the project could affect whether the project would have to be decommissioned if the licensee did not accept a new license, the staff decided to address jurisdiction before preparing a licensing order. 8/ Accordingly, on July 24, 1995, the staff published a notice of availability of its navigability report for the Deschutes River and requested that comments be filed no later than September 29, 1995. At around the same time, on July 17, 1995, the staff issued its final EA for the project.

---

7/ Letter from S. A. DeSousa, PacifiCorp, to John H. Clements, FERC (April 18, 1995).

8/ Conservation Parties take issue with the timing of the staff's navigability report, arguing that the Commission should determine the nature of its jurisdiction at the outset of a proceeding. The Commission ordinarily addresses jurisdiction in its licensing orders. However, the Bend Project is one of 35 "Taum Sauk" projects (see n. 15, *infra*) licensed between 1965 and 1971 based on their location on a Commerce Clause water and generation of electricity entering the interstate transmission grid, and on the subsequently overruled finding that such projects were required to be licensed, whether or not they had undergone any project construction after 1935. See Central Vermont Public Service Corp., 70 FERC ¶ 61,150 at pp. 61,446-47 (1995). A 1972 court decision ruled that this class of projects was only required to be licensed if there was post-1935 construction. *Id.* However, as is described in the Discussion, *infra*, because these projects are on Commerce Clause waters, the Commission is authorized to issue them licenses, which, if accepted, are as valid and enforceable as a required license. Because the economic benefits provided by existing hydropower projects are under pressure from electric industry restructuring and the often costly new environmental mitigation measures required at project relicensing, it has recently become important to establish whether a project is required to be relicensed in order to continue operating. The answer to this question also controls whether, if the licensee wishes to decommission the project, the Commission has authority to oversee that process. The staff is consequently in the process of examining the jurisdictional status of all Taum Sauk projects as the expiration of their license approaches.

The following agencies and organizations, some of which are parties to the Bend relicensing proceeding, filed comments on the navigability report: Interior; City of Bend, Oregon; Deschutes County Board of Commissioners; Oregon Division of State Lands; PacifiCorp; National Wildlife Federation; and American Rivers, Pacific Rivers Council and Oregon Trout (Conservation Parties). PacifiCorp agrees with the staff's conclusions regarding navigability and jurisdiction. <sup>9/</sup> The City of Bend and the Oregon Division of Lands express no opinion on the navigability report, but the City urges the Commission to resolve the matter expeditiously by upholding the staff's determinations and allowing future management of the Bend Project to be governed by state and local law. <sup>10/</sup> The remaining commenters take issue with two aspects of the staff's conclusions: navigability of the Deschutes River in the vicinity of the Bend Project, and construction or major modification of the project after 1935. We examine these issues in detail below.

---

<sup>9/</sup> PacifiCorp also points out that it reached the same determination in 1967 when it filed its original license application.

<sup>10/</sup> The City of Bend states that its primary interest is in ensuring that Mirror Pond, the Bend Project reservoir, is maintained. The City, the Oregon Division of State Lands, and the Deschutes County Board of Commissioners all point out that determining navigability for purposes of jurisdiction under the FPA is different from determining navigability for purposes of establishing title to the bed and banks of a river, and they urge the Commission to acknowledge this. We recognize that there are differences in the two standards. See *State of Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 794 n. 1 (1982). We note, however, that in a 1983 report, the Oregon Division of State Lands reached conclusions consistent with our own regarding the non-navigability of the Deschutes River in the vicinity of the Bend Project. See Report and Recommendation on the Navigable Waters of Oregon at 54 (January 1983) (recommending that the Deschutes River be declared navigable only in its meandered reaches between its mouth and river mile 12 and between river miles 54 and 102). (The Bend Project is located at river mile 160.)

Discussion

The Commission recently explained its licensing jurisdiction as follows: 11/

Under the FPA, the Commission has two types of licensing jurisdiction: permissive and mandatory. Permissive licensing is authorized rather than required, and is governed by Section 4(e) of the FPA. Mandatory licensing is governed by Section 23(b)(1) of the FPA, which prohibits the unlicensed construction and operation of certain hydroelectric projects. Thus, it is possible for a voluntary applicant to obtain a license under Section 4(e) of the FPA for a project that would not require a license under Section 23(b)(1).

Under Section 23(b)(1) of the FPA, a license is required for a hydroelectric project if it: (1) is located on "navigable waters of the United States"; (2) occupies lands or reservations of the United States; (3) uses the surplus water or water power from a government dam; or (4) is located on a non-navigable Commerce Clause stream, affects the interests of interstate or foreign commerce, and has undergone construction or major modification after August 26, 1935. 12/ If those conditions are not met,

---

11/ Swanton Village, Vermont, 70 FERC ¶ 61,325 at pp. 61,992-93 (1995) (citations omitted). See *Cooley v. FERC*, 843 F.2d 1464, 1471 (D.C. Cir. 1988), cert. denied, 109 S.Ct. 327 (1988).

12/ See *Farmington River Power Co. v. Federal Power Commission*, 455 F.2d 86 (2d Cir. 1972). Section 23(b)(1) provides, in pertinent part:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States . . . , or utilize the surplus water or water power from any Government dam, except under and in accordance with . . . a license granted

(continued...)

Section 4(e) of the FPA would permit licensing of a hydroelectric project in response to a voluntary application if the project is located on a Commerce Clause water. [13/]

12/ (...continued)

pursuant to this Act. Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such construction such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

16 U.S.C. § 817(b).

13/ Section 4(e) provides, in pertinent part:

The Commission is hereby authorized and empowered-- . . . (e) To issue licenses . . . for the purpose to constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient 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

(continued...)

Project No. 2643-001

-8-

The Bend Hydroelectric Project is not located on federal lands and does not make use of a government dam. Therefore, whether licensing is required depends on whether conditions (1) or (4) above are met.

For the reasons discussed below, we find that, although portions of the Deschutes River are navigable both above and below the project site, the river is not navigable in the vicinity of the project, and there is no evidence that it was ever used or suitable for use for the transportation of persons or property in interstate or foreign commerce. Therefore, licensing is not required based on navigability.

Regarding the second possible basis for mandatory licensing, we find that the Bend Hydroelectric Project is located on a non-navigable Commerce Clause stream within the meaning of Section 23(b)(1) of the FPA. <sup>14/</sup> Because the Bend Project generates power for the interstate electric grid, the project affects the interests of interstate commerce within the meaning of Section 23(b)(1). <sup>15/</sup> However, as discussed below, the project was constructed in 1913, and the licensee has neither undertaken nor proposed any significant construction or major

---

<sup>13/</sup>(...continued)

the public lands and reservations of the United States . . . , or for the purpose of utilizing the surplus water or water power from any Government dam . . . .

16 U.S.C. § 797(e).

<sup>14/</sup> The Deschutes River flows into the navigable Columbia River. It is well-settled that Commerce Clause streams include the headwaters and tributaries of navigable rivers. See Swanton Village (supra n. 11), 70 FERC at p. 61,994.

<sup>15/</sup> See Federal Power Commission v. Union Electric Co. ("Taum Sauk"), 381 U.S. 90, 97 (1965). The Bend Project is also a member of the class of small hydroelectric projects that, because of their interconnection with the interstate electrical grid, collectively have a real and substantial effect on interstate commerce. See Clifton Power Company, 39 FERC ¶ 61,117 at pp. 61,452-55 (1987), aff'd on other grounds sub nom. Cooley v. FERC, 843 F.2d 1464 (D.C. Cir. 1988); Aquenergy Systems Inc., 39 FERC ¶ 61,178 at pp. 61,178-79 (1987), aff'd, Aquenergy Systems v. FERC, 857 F.2d 227 (4th Cir. 1989); Fairfax County Water Authority, 43 FERC ¶ 61,062 (1988); Habersham Mills, 57 FERC ¶ 61,351 (1991), aff'd, Habersham Mills v. FERC, 975 F.2d 1381 (11th Cir. 1992).

modification of the facility. Therefore, licensing is not required because the requirement of "post-1935 construction" is not met.

#### A. Navigability of the Deschutes River

Interior, Conservation Parties, National Wildlife Federation, and the Deschutes County Board of Commissioners all take issue with the staff's conclusion on navigability. They maintain that the navigability report fails to consider relevant information and inadequately analyzes factors supporting a finding of navigability. They question the staff's consideration of irrigation withdrawals in judging the suitability of certain river segments for navigation. They also argue that extensive use of the Deschutes River by commercial and private recreational boaters demonstrates the navigability of the river segment downstream of the Bend Project. National Wildlife Federation provides declarations of three individuals who use that portion of the river for recreational and commercial boating, and argues that this use is sufficient to demonstrate that the river is navigable. 16/

---

16/ The Oregon Division of State Lands makes no substantive comments on the navigability report, but provides a bibliography of additional sources of information for the Commission's consideration. The bibliography provides no additional information regarding the content or possible relevance of the listed references, and includes some sources upon which we may not properly rely, such as draft environmental impact statements or drafts of agency reports. Other sources do not appear likely to yield relevant information (for example, captions to photographs in the Deschutes County Museum and Deschutes County mechanics liens). The staff consulted many of the remaining sources in preparing its navigability report, but did not cite them, because they duplicated other sources or pertained to recreational boating of the type not recognized by the Commission as providing sufficient basis for a determination of navigability.

Project No. 2643-001

-10-

Section 3(8) of the FPA defines "navigable waters." 17/ In essence, navigable waters are those that are used or suitable for use for the transportation of persons or property in interstate or foreign commerce.

It is apparently undisputed that portions of the Deschutes River, both above and below the Bend Project, are navigable. 18/ However, in order to find the Deschutes River navigable at the project, there must be substantial evidence that

---

17/ Section 3(8) of the FPA provides:

"[N]avigable waters" means those parts of 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, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

18/ As described in the navigability report, the staff found no evidence of historic use of the Deschutes River at and below the Bend Project site to transport persons or property in interstate or foreign commerce. Rather, trails beside the river, including part of the Oregon Trail, were used. See Report at 2-4. The staff therefore investigated the river's suitability for boating to assist it in determining navigability. As depicted in the staff's report, portions of the river are used or suitable for use for recreational boating, which may be relevant to a determination of navigability under the FPA: from Wickiup Dam to an area north of the Bend Project (river miles 226.8 to 172); from Oden Falls to Lake Billy Chinook (river miles 140 to 120); and from below Pelton Dam to the Columbia River (river miles 100 and below). The Bend Project is located at river mile 160. Thus, there are 52 river miles, comprising a 32-mile segment that includes the Bend Project and a 20-mile segment further downstream, that the staff identified as unsuitable for transportation of persons or property in interstate commerce. See Report at 5 and accompanying map.

the river is at that point a part of an aqueous highway that was or is used or suitable for use to transport persons or property between states or to a port of access to international waters. 19/ The Deschutes River empties into the Columbia River at a point where the Columbia is a boundary river between states and from which it is moreover navigable to its mouth at the sea. 20/ Therefore, in order to demonstrate that the Deschutes River at the project site is a navigable water, we need only find that it was or is used or suitable for use to transport persons or property between the project site and the Columbia River. 21/

The Bend Project is located on the Deschutes at river mile 160. 22/ The controversy concerns the 20-mile segment from Bend to Oden Falls (river miles 160 to 140) and the 20-mile segment from Lake Billy Chinook to the lower dam of the Pelton-Round Butte Complex (river miles 120 to 100).

Conservation Parties and National Wildlife Federation have provided evidence that both these segments of the river are used or suitable for use by recreational boaters. 23/ However, all of the evidence of use or suitability for use for recreation

---

19/ See, e.g., *Sierra Pacific Power Co. v. FERC*, 681 F.2d 1134 (9th Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

20/ See, e.g., *Public Utility District No. 2 of Grant County, Washington*, 14 FPC 1067 (1955).

21/ See, e.g., *Central Vermont* (supra n. 8), 70 FERC at p. 61,447.

22/ River miles are counted from the mouth of a river to its source; i.e., the mouth is at river mile zero and the miles increase with distance upstream.

23/ On November 27, 1995, Conservation Parties filed additional evidence to aid the Commission in its navigability determination. This consists of the declarations of two individuals concerning the segment of the Deschutes River from the Bend Project to Cline Falls (river mile 145), and a 1986 river study by Deschutes County and the City of Bend. While this evidence supplements what Conservation Parties and National Wildlife Federation have already filed with the Commission, it does not change our conclusions regarding navigability of the river segments in question.

concerns use by skilled kayakers or whitewater rafters. 24/ This is not the sort of recreational boating that the Commission has recognized as demonstrating the suitability of a river for "the simpler types of commercial navigation." 25/ Rather, the

---

24/ American Rivers appends excerpts from Soggy Sneakers, A Guide to Oregon Rivers, published by The Mountaineers. These excerpts reveal that, from below the Bend Project to Lake Billy Chinook, the Deschutes River consists primarily of Class 4 or greater rapids. Id. at 236-38. According to the International Scale of Difficulty, which defines six classes of whitewater, Class 4 or advanced whitewater is characterized as follows:

Intense, powerful but predictable rapids requiring precise boat handling in turbulent water. Depending on the character of the river, it may feature large, unavoidable waves and holes or constricted passages demanding fast maneuvers under pressure. A fast, reliable eddy turn may be needed to initiate maneuvers, scout rapids, or rest. Rapids may require "must" moves above dangerous hazards. Scouting is necessary the first time down. Risk of injury to swimmers is moderate to high, and water conditions may make self-rescue difficult. Group assistance for rescue is often essential but requires practiced skills. A strong eskimo roll is highly recommended.

See Final EIS, Ayers Island Hydroelectric Project No. 2456, at pp. A-2 to A-3 (October 1995); Northwest Power Co., 59 FERC ¶ 61,132 at p. 61,495 n. 27 (1992). Contrary to National Wildlife Federation's suggestion, our determination of navigability in Iliamna did not involve the use of kayaks, but rather "16- to 20-foot wooden or aluminum boats with 25- to 50-horsepower outboard motors." Iliamna-Newhalen-Nondalton Electric Cooperative, Inc., 58 FERC ¶ 61,065 at p. 61,151 (1992).

25/ United States v. Appalachian Electric Power Co., 311 U.S. 377, 416 (1940); see Pennsylvania Electric Co., 56 FERC ¶ 61,435 at pp. 62,549-50 (1991) (non-navigable; substantial reach of river could not be safely navigated by an average recreational canoeist at any time of year, but could only be navigated by a kayak or comparably specialized sporting craft designed for river running, maneuvered by an expert paddler), reh'g denied on other grounds, 57 FERC ¶ 61,211 (1991); David Zinkie, 53 FERC ¶ 61,029 (1990) (navigable; documented historical account of canoe voyage); Swans Falls Corp., 53 FERC ¶ 61,309 (1990) (navigable; use by rental

(continued...)

Commission has expressly declined to base a finding of navigability under the FPA on recreational boating where a substantial reach of the river "can only be navigated by a kayak (or comparably specialized sporting craft designed for river running) maneuvered by an expert paddler." 26/ Where historical evidence of use of these reaches is lacking, and the only evidence of suitability for commercial navigation consists of this specialized type of recreational boating, we do not regard this showing as sufficient to support a determination of navigability under Section 3(8) of the FPA. 27/

#### B. Construction or Major Modification After 1935

Conservation Parties argue that the navigability report did not adequately review construction or major modification after 1935 as a possible basis for mandatory jurisdiction under Section 23(b)(1). They maintain that the staff should have

---

25/ (...continued)

canoes as well as for logging). See also New York v. FERC, 954 F.2d 56 (2d Cir. 1992) (navigable; historic use for boat traffic and floating logs, also use by recreational canoes and drift boats); Consolidated Hydro, Inc., 53 FERC ¶ 61,256 at p. 62,035 (1990) (navigable; includes use by recreational canoes on flat and tidal water), reh'g denied, 54 FERC ¶ 61,067 (1991), aff'd, Consolidated Hydro Inc. v. FERC, 968 F.2d 1258 (D.C. Cir. 1992); Muckleshoot Indian Tribe v. FERC, 993 F.2d 1428, 1433 (9th Cir. 1993) (non-navigable; 21-mile segment unsuitable for navigation, other segments used by canoeists or for logging).

26/ Pennsylvania Electric Co., n. 25 supra, at p. 62,549. In that regard, we would distinguish this highly specialized recreational use of a river, which requires a great deal of skill, from simpler forms of commercial navigation, which have as their purpose the transportation of persons or property in interstate commerce.

27/ Nor do we regard the staff's discussion of dams and irrigation diversions in its navigability report as significant. The staff mentioned these features because they affect current use of the river. However, the staff did not and could not rely on these features as a basis for finding the river stretches nonnavigable. Rather, it is because these stretches are characterized by a series of dangerous, high falls and rapids that they are not suitable for commercial navigation. See Navigability Report at 5. We agree that existing dams and irrigation diversions could not be used as a basis for finding an otherwise navigable river non-navigable.

Project No. 2643-001

-14-

reviewed the information provided in PacifiCorp's relicense application concerning proposed modifications to the project. They assert that, because these proposed modifications would allow the project to operate differently from its pre-1935 design, they are therefore sufficient to constitute construction for purposes of mandatory licensing jurisdiction.

The staff's report was directed to only one possible basis of mandatory jurisdiction: navigability. The notice of its availability addressed other possible jurisdictional bases to put the navigability report in context and to give notice to all parties and interested persons of the pending jurisdictional inquiry. Because the staff did not issue an order finding licensing not required, but simply requested comments on the navigability report and related issues, the staff was not required to address all possible jurisdictional bases in detail.

The notice stated that the staff had found no evidence of any significant construction or major modification of the project after 1935. Thus, the notice reflected the staff's review of information in the Commission's possession, including the modifications proposed in PacifiCorp's relicense application.

PacifiCorp has proposed to rehabilitate the existing project by: (1) adding an 18-inch-thick concrete cut-off wall on the upstream face of the timber crib spillway; (2) replacing the spillway and stoplog dam crest with an inflatable rubber crest control structure; (3) repairing portions of the concrete structures, including the wing wall, turbine bays, and powerhouse; (4) rehabilitating the turbine units and the generators; and (5) upgrading associated plant equipment to new plant standards. These measures would improve PacifiCorp's ability to maintain constant pool elevations and would allow more automatic control of headwater level. The inflated crest control structure would allow ice passage and reduce maintenance costs. 28/

Contrary to Conservation Parties' assertion, these proposed changes are not sufficient to constitute construction or major modification of the project within the meaning of Section 23(b)(1) of the FPA. Ordinary maintenance, repair, and reconstruction activity do not bring a project within the

---

28/ See Final Safety and Design Assessment, Bend Hydroelectric Project No. 2643, Oregon, at pp. 1-2 (Oct. 30, 1995). Contrary to Conservation Parties' suggestion, the project is safe and requires only normal maintenance and repair for continued operation. Id. at pp. 2, 10-11.

Commission's mandatory licensing jurisdiction. <sup>29/</sup> In general, to qualify as "post-1935 construction," the construction must increase the project's head, generating capacity, or water storage capacity, or otherwise significantly modify the project's pre-1935 design or operation. <sup>30/</sup> No such increase or significant change is proposed in this case. We therefore find no grounds for mandatory licensing based on construction or significant modification of the Bend Project after 1935.

### C. Voluntary Licensing Under Section 4(e)

Interior and Conservation Parties argue that, by accepting an original license and applying for a subsequent license under the FPA, PacifiCorp has, in effect, waived its right to operate its project without a license under the FPA. They seem to be arguing that, because the Commission is authorized to issue a license to a voluntary applicant under Section 4(e) and PacifiCorp filed its application voluntarily, PacifiCorp may not now avoid the Commission's licensing jurisdiction.

Interior and Conservation Parties misunderstand the nature of voluntary licensing under Section 4(e) of the FPA. Once an applicant accepts a voluntary license under that section, the license is fully valid and enforceable. Substantively, a license issued under Section 4(e) contains the same types of terms and conditions as a license issued under Section 23(b)(1). If the holder of a voluntary license under Section 4(e) wishes to be relieved of its obligations thereunder during the license term, the licensee must file an application to surrender the license.

In this case, however, PacifiCorp's original license has expired, and PacifiCorp has not yet accepted a subsequent license. In these circumstances, a voluntary applicant may choose either not to seek a new license (including withdrawing a pending license application) or to reject the Commission's offer of a new license and continue to operate the project without a license under the FPA, subject only to whatever other federal,

---

<sup>29/</sup> See *Puget Sound Power & Light Co. v. Federal Power Commission*, 557 F.2d 1311 (9th Cir. 1977).

<sup>30/</sup> See, e.g., *Western Massachusetts Electric Co.*, 7 FERC ¶ 61,126 at p. 61,192 (1979) (retiring water wheels and generators, rewinding generators, installing new coils, semi-automating developments, reinforcing dams, and replacing dikes and wave walls all found not to constitute "post-1935 construction").

state, or local laws may be applicable. <sup>31/</sup> In contrast, if a project is required to be licensed under Section 23(b)(1), an applicant must either accept the license that the Commission offers or cease operating without a license under the FPA. Therefore, we find no merit to the argument that, by accepting an original license and filing an application for a subsequent license, PacifiCorp has waived its right to operate its project without a license under the FPA.

### Implications for Relicensing

For all the foregoing reasons, we conclude that the Bend Hydroelectric Project is not required to be licensed under Section 23(b)(1) of the FPA. Moreover, we have good reason to believe that PacifiCorp would not accept a subsequent license issued under Section 4(e) of the FPA. As explained in the staff's final EA, the Bend Hydroelectric Project has negative economic benefits under any proposed operating scenario. Because of the high cost of prescribed fishway facilities, the costs of operating the project under a subsequent Commission license greatly exceed the costs of decommissioning the project. PacifiCorp has indicated that it is not likely to accept a subsequent license that includes mandatory fishways and certain other agency recommendations. For that reason, PacifiCorp has also declined to enter into an MOA on historic preservation, which often precedes issuance of a hydroelectric license.

If licensing is required under Section 23(b)(1) of the FPA, a hydroelectric licensee may not continue to operate its project without a license. <sup>32/</sup> If licensing is not required, however, a hydroelectric licensee may, following expiration of its original license, continue to operate the project without a license, subject only to whatever other federal, state, or local laws may be applicable.

In these circumstances, we question whether it makes sense for the Commission and the parties to continue to devote resources to considering PacifiCorp's relicensing application. Indeed, in light of our order finding licensing not required, as well as all of the particular facts and circumstances of this case, PacifiCorp may decide to withdraw its application and allow

---

<sup>31/</sup> See Pennsylvania Electric Co., 56 FERC ¶ 61,435 (1991) (hydroelectric licensee with a voluntary license under Section 4(e) of the FPA need not file a relicensing application and may continue operating without a license following expiration of the original license).

<sup>32/</sup> See 381 U.S. at 98 n. 10.

Project No. 2643-001

-17-

the future of the Bend Project to be determined outside of the Commission's licensing process.

Therefore, we hereby direct PacifiCorp to file with the Commission, within 30 days of issuance of this order, either: (1) a notice of withdrawal of its application, pursuant to 18 C.F.R. § 385.216; <sup>33/</sup> or (2) a request that the Commission continue processing its application. After reviewing PacifiCorp's filing and any other filings that may be received from other parties, the Commission will determine what further action may be appropriate.

The Commission orders:

(A) The Bend Hydroelectric Project No. 2643, located on the Deschutes River in the City of Bend, Deschutes County, Oregon, is not required to be licensed pursuant to Section 23(b)(1) of the Federal Power Act.

(B) Within 30 days of the date of issuance of this order, PacifiCorp must file with the Commission either: (1) a notice of withdrawal of its application for a subsequent license for the Bend Hydroelectric Project No. 2643, pursuant to 18 C.F.R. § 385.216 of the Commission's regulations; or (2) a request that the Commission continue processing its application for a subsequent license for the Bend Project.

By the Commission.

( S E A L )



Lois D. Cashell,  
Secretary.

---

<sup>33/</sup> Under that rule, any participant may seek to withdraw a pleading by filing a notice of withdrawal. If no participant files a timely motion in opposition to the notice, the withdrawal is effective 15 days after the notice is filed. Section 385.216(b). Otherwise, the withdrawal is not effective unless the decisional authority accepts the withdrawal. Section 385.216(c). License applications are a type of "pleading." See 18 C.F.R. § 385.202.