

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PacifiCorp

Project No. 2082-040

ORDER ESTABLISHING ANNUAL CHARGES,
AMENDING LICENSE, AND GIVING NOTICE OF
HEADWATER BENEFITS INVESTIGATION

(Issued April 25, 2006)

1. In an order issued January 20, 2006,¹ we determined that a contract between PacifiCorp, licensee for the Klamath River Hydroelectric Project No. 2082, and the U.S. Department of the Interior (Interior), pursuant to which annual charges for the use of a government dam were established for Project No. 2082 during the term of the contract, will expire on April 16, 2006. We further determined that it is no longer appropriate to link annual charges for the use of a government dam at this project to retail electric rates charged by PacifiCorp under the expiring contract. We therefore issued notice of our intent to set the annual Government dam use charges for Project No. 2082 at the graduated fixed rates set forth in our regulations,² effective upon expiration of the aforementioned contract, and afforded interested entities and opportunity to file comments. Upon consideration of the comments, we are setting the government dam use charges at the rates established in our regulations. We also notify the parties that the Commission will initiate a headwater benefits investigation for the Klamath River Basin.

¹ *PacifiCorp*, 114 FERC ¶ 61,051 (January 20 Order), *reh'g denied*, 115 FERC ¶ 61,075 (2006).

² 18 C.F.R. § 11.3(b) (2005). These are the maximum rates the Commission is permitted to charge by FPA section 10(e)(2).

Background

2. The factual background for this order is set forth in detail in the January 20 Order and will not be repeated here. In brief, the Upper Klamath River Basin is the site of agricultural irrigation systems maintained by Interior and private agricultural interests, and two national wildlife refuges. The Link River Dam, which is owned by the United States and operated by PacifiCorp, as discussed below, is an integral part of the federal irrigation system.

3. In 1956, PacifiCorp's predecessor licensee filed, at the direction of the Commission, a 50-year contract (1956 Contract) providing for the licensee to maintain specified water levels at the Link River Dam for irrigation, to furnish water to the United States and private irrigators, and to supply electricity to the United States and private irrigators at rates fixed for the contract term. The 1956 Contract also permitted the licensee to use surplus water after other contract requirements were met to generate electricity. The Commission found, pursuant to Federal Power Act section 10(e),³ that the consideration and benefits set forth in the 1956 Contract were reasonable and adequate to compensate the United States for the licensee's use of Link River Dam.⁴

4. In the January 20 Order, we determined that the 1956 Contract, which expires April 16, 2006, is not required to remain in effect during the term of any annual license that may be issued for the project pending disposition of PacifiCorp's pending application for a new license.⁵ We also found that it is no longer appropriate to link the government dam use charges under section 10(e) to PacifiCorp's rates for retail electric service to Interior or its irrigation customers at the federal irrigation project. We therefore issued notice of our intent to assess charges for the use by Project No. 2082 of Link River Dam at the graduated fixed rates set forth in our regulations,⁶ effective on April 17. We

³ 16 U.S.C. § 803(e) (2000).

⁴ *California Oregon Power Company*, 15 FPC 14, 21 (1956) and 18 FPC 364, 368 (1957).

⁵ 114 FERC at P 29-30.

⁶ 18 C.F.R. § 11.3(b) (2005). The graduated flat rate charges were established in 1984, subject to a grandfather provision for charges already specified in final form in a license. The charges for Project No. 2082 were subject to the grandfather provision. In the January 20 Order we exercised our reserved authority in FPA section 10(e) to periodically adjust government dam use charges by proposing to convert the charges for Project No. 2082 to the graduated flat rate charges upon expiration of the 1956 contract.

afforded interested entities an opportunity to file comments. Comments were filed by the Klamath Basin Water Users Protective Association (KWUA), PacifiCorp, and Interior. PacifiCorp timely filed an answer to the comments of KWUA and Interior.

Discussion

5. FPA section 10(e)(1) provides that when the Commission licenses a project that will use a Government dam or other structure, it is to set “reasonable” annual charges to recompense the Government for the use of its property. In doing so, the Commission “shall seek to avoid increasing the price to the consumer of power by such charges. . .” Government dam use charges may be readjusted at the end of twenty years following commencement of operation and at periods not less than ten years thereafter upon notice and opportunity for a hearing.⁷ This license, like every other license, is issued subject to the terms and conditions of the FPA, and the rules and regulations issued thereunder.⁸

6. Interior and KWUA contend that the graduated flat rates would not fully compensate the United States “or the Klamath Project water users”⁹ for the use of Link River Dam or surplus water used to generate power. They explain that the irrigation project increases the amount of water available to Project No. 2082 annually by introducing water from the Lost River Basin into the Klamath River Basin, and by returning excess irrigation water to the Klamath River. They add that storage associated with Link River Dam (among others) increases flows for generation during late summer

⁷ Section 10(e) provides, as pertinent to this proceeding:

. . . the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for . . . recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property; . . . Provided, That when licenses are issued involving the use of Government dams . . . the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams . . . in reclamation projects . . . fix a reasonable annual charge for the use thereof, and such charges may with like approval be adjusted 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. . .

⁸ See *Copco*, 18 FPC 364, 367 (1957).

⁹ Interior comments filed February 21, 2006, at 1.

low flow periods.¹⁰ KWUA states that these benefits accrue regardless of whether PacifiCorp has any control over the timing of releases.¹¹

7. Assuming all of Interior and KWUA's assertions regarding the benefits of the federal irrigation project to Project No. 2082 are correct, they have not provided a reason why we should impose annual charges other than the graduated flat rates. Under section 10(e), a project's use of water power or "surplus water" created by the government dam at which it is located is an element of the use covered by the government dam use charge. These terms do not apply to generation benefits to a project that result from operation of an upstream dam. The latter are headwater benefits, for which a licensee is liable pursuant to FPA section 10(f).¹²

8. Here, only two of Project No. 2082's eight developments, East Side and West Side, are located at the Link River Dam, and are therefore subject to government dam use charges. The remaining developments on the Klamath River mainstem, which are located from 21 to 64 miles downstream from Link River Dam, may be subject to headwater benefits assessments pursuant to section 10(f).¹³ Neither Interior nor KWUA

¹⁰ Declaration of Cecil H. Lesley, Chief, Water and Lands Division, U.S. Bureau of Reclamation Area Office, Klamath Falls, Oregon, attached to Interior's comments filed February 21, 2006, at 7; KWUA request for rehearing of the January 20 Order at 20-21, and Attachment C, Direct Testimony of Marc Van Camp on behalf of KWUA in Oregon Public Service Commission Docket No. UE 170 (January 17, 2006).

¹¹ Van Camp testimony at 16.

¹² *Wisconsin Electric Power Company*, 86 FERC ¶ 61,096 at 61,347-8 (1999) (*Wisconsin Electric*), *vacated sub nom.*, *City of Kaukauna v. FERC*, 214 F.3d 888 (7th Cir. 2000), *order on remand*, 92 FERC ¶ 61,136 (2000). Although this case concerns assessment of charges for headwater benefits, it makes clear that benefits to developments at the site of a government dam are subject to section 10(e) annual charges and benefits to downstream developments are subject to headwater benefits charges in the absence of reserved water rights.

¹³ Interior also contends that irrigation project storage reduces winter flood flows, which it suggests benefits PacifiCorp's revenues by reducing flood-related power outages. Lesley declaration at 3. Whatever the merits of these statements may be, they do not give rise to compensable benefit under either FPA section 10(e)(1) or 10(f).

make any effort to explain why these established compensation methods would not appropriately compensate the United States for any benefits conferred by its facilities or operations on Project No. 2082.

9. Finally, Interior cites no authority for its assertion that government dam use charges are assessed to compensate any entity other than the government, and nothing in section 10(e)(1) so indicates. Neither does Interior identify any loss from PacifiCorp's use of Link River Dam for which the irrigators who benefit from its operation should be compensated.

10. PacifiCorp requests that we amend the license for Project No. 2082 to reflect that government dam use charges apply only to the East Side and West Side developments. Consistent with the foregoing discussion, we will do so.

11. PacifiCorp also notes that our rules provide for the graduated flat rate charges to be assessed based on the number of kWh produced during the prior fiscal year.¹⁴ PacifiCorp states that it would be unfair to assess its charges based on the entire 2006 fiscal year when government dam use charges have already been assessed for part of the year (*i.e.*, October 1, 2005 through April 16, 2006) through the 1956 Contract. It therefore proposes that the Commission assess FY 2006 graduated fixed rate charges for East Side and West Side based on generation from April 17, 2006 through September 30, 2006. We agree.

12. Finally, the Commission conducted headwater benefits investigations for the Klamath River Basin in 1968 and 1998. In the 1968 investigation, it was determined that PacifiCorp's developments did not receive headwater benefits.¹⁵ In the 1998 investigation it was determined that any headwater benefits received are covered by the 1956 Contract. Because the 1956 Contract is expiring, it is appropriate to initiate a new investigation, and we hereby direct our staff to do so.

The Commission orders:

(A) Paragraph (d) of Article 35 of the license for the Klamath Hydroelectric Project No. 2082, set forth at 18 FPC 364, 368 (1957), is hereby amended by replacing the text of said paragraph with the following:

¹⁴ See 18 C.F.R. § 11.3(c)(1) (2005).

¹⁵ "Headwater Benefits Basin Screening Report – Klamath River Basin," Docket No. HB32-96-11 (August 1998) at 1.

(d) For the purpose of recompensing the United States for the East Side and West Side developments' use of surplus water or water power from Link River Dam, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

(B) For purposes of calculating its FY 2006 annual charges, PacifiCorp's sworn statement required by 18 C.F.R. § 11.3(c)(1) (2005) shall be based on generation at the East Side and West Side developments of Project No. 2082 for the period April 17, 2006 through September 30, 2006.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.