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July 20, 2001

VIA INTERNET E-FILING

David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, D.C. 20426

Re: Project No. 2342-012 - PacifiCorp (Condit Hydroelectric Project)

Our File No. 106658-119099

Dear Mr. Boergers:

Enclosed for filing in the above referenced proceeding are the original and 8 copies of the MOTION TO INTERVENE AND PROTEST BY WHITE SALMON CONSERVATION LEAGUE, WHITE SALMON RIVER STEELHEADERS, AND FOREST J. HOFER. Copies of this document have been served on all parties listed on the attached service list.

Thank you for your assistance in this matter.

Sincerely,

Raymond S. Kindley

RSK:kbe

Enclosure

cc: Official Service List

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PacifiCorp

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Project No. 2342-012

**MOTION TO INTERVENE AND PROTEST
BY WHITE SALMON CONSERVATION LEAGUE,
WHITE SALMON RIVER STEELHEADERS, AND
FOREST J. HOFER**

White Salmon Conservation League, White Salmon River Steelheaders, and Forest J. Hofer (hereinafter “WSCL et al.”) move to intervene and protest PacifiCorp’s petition for a declaratory ruling that the Federal Energy Regulatory Commission (“Commission”) has jurisdiction to grant PacifiCorp’s pending Application for Amendment of License and Approval of Offer of Settlement which PacifiCorp filed with the Commission on October 21, 1999 (“Application”). WSCL et al. files this Motion to Intervene and Protest pursuant to the Commission’s Notice of Petition for Declaratory Order, dated June 14, 2001, and Rules 211 and 214 of the Commission’s Rules of Practice and Procedure.¹

The exact name and address of the White Salmon Conservation League are:

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41 Private Lake Rd.
White Salmon, WA 98672

The exact name and address of the White Salmon River Steelheaders are:

White Salmon River Steelheaders
PO Box 1362
White Salmon, WA 98672

The exact name and address of Forest J. Hofer are:

¹ 18 C.F.R. §§ 385.211 and 385.214 (2000).

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I. COMMUNICATIONS

The following persons should be included on the official service list in this proceeding and all correspondence, communications, and pleadings should be served upon:

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II. INTERVENORS

The White Salmon Conservation League is a nonprofit corporation organized under the laws of the state of Washington. Its mission is to protect and promote the interests of its members and supporters. The White Salmon Conservation League is created by, and primarily composed of, residents who own homes and live on the shores of Northwestern Lake.

The White Salmon River Steelheaders is a nonprofit corporation organized under the laws of the state of Washington. Its members include lifelong anglers of steelhead, trout, and

other resident fish in the White Salmon River and Northwestern Lake. They are dedicated to the protection of fish habitat and fishery resources in the White Salmon River Valley and Northwestern Lake. Many of the members have directly participated in the preservation and enhancement of fish habitat and fishery resources in the lower White Salmon River.

Forest J. Hofer is a resident of the White Salmon River Valley and owns property that will be directly affected by the actions proposed under PacifiCorp's Application and the Commission's decision in this proceeding.

The White Salmon Conservation League, White Salmon River Steelheaders, and Forest J. Hofer are all parties to the Commission's proceedings concerning PacifiCorp's Application, FERC Project No. 2342-011.

III. INTERVENTION

The members of WSCL et al. have immediate and significant interests that will be directly affected by the Commission's decision on the proposed Declaratory Order concerning PacifiCorp's Application. The Commission's determination regarding the Declaratory Order, PacifiCorp's Application and the Condit Hydroelectric Project Settlement Agreement ("Settlement") could lead to the removal of Condit Dam. The Commission's decision will, in essence, decide the fate of several WSCL et al. members' homes and property. It will significantly impact all of the WSCL et al. members' interests. Absent this process for intervention and comment, their concerns, which best reflect the local population's interests, will not be presented to the Commission. Their interests are unique and not represented by any other party to this proceeding. The participation of WSCL et al. in this proceeding is in the public interest pursuant to 18 C.F.R. § 385.214(b)(2)(iii) (2000).

IV. PROTEST

WSCL et al. opposes the declaratory ruling requested by PacifiCorp. PacifiCorp requests a ruling that the Commission has authority to extend the term of PacifiCorp's license for Condit Dam through 2006 and to incorporate the terms of the Settlement into the amended license. Commission approval of the Settlement would, in essence, provide Commission approval of the proposed removal of Condit Dam. For the reasons stated below the Commission does not have authority to extend PacifiCorp's license where PacifiCorp does not propose to substantially improve or redevelop of the project. Also, the Commission does not have authority to approve the Settlement when it calls for dam removal. For these reasons, the Commission lacks the authority to grant PacifiCorp's requests in its Petition.

A. Background

In December 1991, PacifiCorp filed a timely application for a new license for Condit Dam. The expiration date for the original license was December 1993. Since 1993, PacifiCorp has operated the project pursuant to annual licenses, pending disposition of PacifiCorp's application for new license.

In October 1996, Commission staff issued the Final Environmental Impact Statement addressing PacifiCorp's relicensing proposal.² In January 1997, PacifiCorp informed the Commission that it was negotiating a settlement with interested parties that would entail dam removal. PacifiCorp selected this course because it decided the preferred alternative in the

² Federal Energy Regulatory Commission Office of Hydropower Relicensing, Final Environmental Impact Statement, Condit Hydroelectric Project, Skamania and Klickitat Counties, Washington, FERC No. 2342-005 (Oct. 1995).

FEIS, which called for the installation of upstream and downstream fish bypass facilities and other mitigation measures, was too expensive.³

PacifiCorp filed its Application with the Commission on October 21, 1999. In the Application, PacifiCorp requested the Commission to amend the project license for Condit Dam by extending the license term to October 1, 2006, and to approve the Settlement. The Settlement requires the removal of Condit Dam if certain events occur subsequent to the Commission's approval of the Settlement.

On May 17, 2001, the Commission's staff conducted a technical conference to discuss PacifiCorp's Application. The purpose of the meeting was to discuss legal issues raised by the procedural posture of the Application and for the Commission's staff to learn more about PacifiCorp's proposal.

On or about June 1, 2001, PacifiCorp filed with the Commission the Petition for Declaratory Ruling ("Petition"). The Petition requests that the Commission issue a declaratory ruling finding that it has jurisdiction to grant the relief requested in PacifiCorp's pending Application. The Petition also requests the Commission to find that it has the authority to extend the term of the Condit Dam license through 2006 and to incorporate into the license the terms and conditions of the Settlement relating to decommissioning and removal of Condit Dam upon expiration of the extended license.

B. The Commission Lacks Authority to Extend the Current License Term Under the Terms of the Proposed Settlement Agreement.

³ See Settlement, Recital G.

PacifiCorp requests the Commission to extend the term of PacifiCorp's current license for Condit Dam to 2006. The Commission lacks authority, however, to extend the current license term unless the licensee has proposed a substantial improvement to or a significant redevelopment of the project, such as an increase in project generating capacity and physical improvements to enhance the environment. Montana Power Company, 47 FERC P61,277 (1989).

In Montana Power Company, Montana Power requested an extension to its license for the Milltown Dam. The Commission noted that Montana Power did not propose any substantial improvements or a significant redevelopment of the project to justify the license extension. Montana Power did install facilities to improve the safety of the project, but the Commission found that the original license required those improvements and, therefore, did not justify a license extension. Based on the lack of any substantial improvement or redevelopment of the project, the Commission denied Montana Power's request for a license extension.

Here, PacifiCorp's Settlement requires the termination of generation prior to October 1, 2006, and commencement of project removal during October 2006.⁴ It does not require, however, any improvement in generation capacity or implementation of substantial environmental protection, enhancement, or mitigation measures in the interim prior to the retirement and removal. Consequently, the Settlement Agreement fails to provide the justification for extension of the license term that is necessary for the Commission to grant PacifiCorp's request for Declaratory Order.

⁴ See Settlement, § 4.4.

C. Commission Regulations Do Not Allow for Conditional Applications As Proposed by the Settlement.

The Commission's rules and regulations provide that "any application, the effectiveness of which is conditional upon the future occurrence of any event or circumstance, will be rejected." 18 C.F.R. § 4.32(j).

Here, PacifiCorp's Application is conditioned upon future events. The Application requests the Commission to amend PacifiCorp's current license and to approve PacifiCorp's Settlement without condition or modification. The effect of the Commission's approval would be the incorporation of terms and conditions of the Settlement into the amended license.

Pursuant to Section 5.1 of the Settlement, PacifiCorp may withdraw from the Settlement if any of the listed events in that section occur. That list includes many subsequent events, such as failure to obtain permits, the Commission fails to issue a timely amended license, and the amended license is inconsistent with the Settlement. Also, Section 5.3 provides that if PacifiCorp withdraws from the Settlement, the agreement terminates. Section 5.4 states that upon termination, the parties to the Settlement anticipate PacifiCorp's original relicensing proceedings would resume. Therefore, the incorporation of the Settlement into the amended license makes the Application and, if the Commission approves the conditional Application, the amended license contingent upon subsequent events or circumstances. Pursuant to Commission regulations, 18 C.F.R. § 4.32(j), the Commission must deny PacifiCorp's request for Declaratory Order to reject PacifiCorp's conditional Application.

D. PacifiCorp's Application Is Actually an Application for Surrender With a Future Effectiveness Date.

The Commission has not permitted surrender of a project with the effectiveness date of surrender far in the future. County of Antrim, Michigan, 88 FERC P62,158 (1999) ("Antrim"). In Antrim, the County requested an extension to the license term of its Elk Rapids project for nearly 14 years. At the end of that term, the County proposed that the hydroelectric equipment would be decommissioned and the dam and related works would remain. The Commission granted the extension with additional environmental mitigation and enhancement measures. The Commission, however, did not approve the decommissioning of the hydroelectric facilities in future. The Commission noted that there was no evidence on the record to support that decision.

Here, PacifiCorp's Application requests the Commission to approve the removal of Condit Dam beginning in 2006, if certain events do not occur. While the Settlement Agreement parties claim that project removal will benefit some species of anadromous salmonids, the Application and proposed Settlement agreement do not provide substantial evidence to support a Commission decision, at this time, to approve the decommissioning of Condit Dam.

Here, the information in the FEIS, such as the economic analysis and environmental impacts, focuses on conditions when the FEIS was developed in 1996. PacifiCorp's Application offered limited, additional information on impacts from the release of sediments from the removal of Condit Dam.⁵ That information is very limited, however. That

⁵ See R.W. Beck, Condit Hydroelectric Project Removal – Summary Report, Engineering Considerations. (May 1998). This report provides additional analysis of sediment erosion. It does not provide, however, a complete

information and the other information on the record do not provide any analysis or impact assessment on project removal in 2006. Also, many events may occur prior to 2006, that will have a significant impact on the decision to decommission the dam, such as the need for the project's generation output, the price of power, and the condition of protected salmonid populations that inhabit the White Salmon River. Consequently, pursuant to the Commission's decision in Antrim, PacifiCorp's request for a declaratory decision approving dam removal in 2006 should be rejected due to an incomplete evidentiary record to support that decision.

E. The Commission Should Not Approve PacifiCorp's Application Based on the Terms and Conditions of the Settlement Agreement that Call for Dam Removal.

PacifiCorp requests the Commission to find that it has jurisdiction to authorize PacifiCorp to proceed with the removal of Condit Dam pursuant to the terms and conditions of the Settlement and without an application for surrender or requesting third parties to submit applications for new licenses.⁶ PacifiCorp claims that it does not need to file a surrender application, but the Commission may order the removal of Condit Dam based solely on its own determination that the removal of Condit Dam is in the public interests.⁷ PacifiCorp bases this claim on the Commission's decision in Edwards Manufacturing Company, Inc., City of Augusta, Maine, 81 FERC P61,255 (1997) ("Edwards"), and the Commission's Policy Statement on Decommissioning ("Decommissioning Policy").⁸

analysis of environmental, social and legal aspects of the project removal option. It also does not provide any information on conditions in 2006.

⁶ PacifiCorp's Memorandum in Support of Petition for Declaratory Order, dated May 31, 2001, pp. 12-13.

⁷ Id. at 12.

⁸ 18 C.F.R. § 2, 60 Fed. Reg. 339.

The Edwards decision and the Decommissioning Policy, however, provide that the Commission has authority to deny the relicensing of a project only when the Commission has no other way of meeting the comprehensive development standard of the Federal Power Act. In Edwards the Commission considered the findings of the final environmental impact statement for that relicensing process, which concluded that dam removal was the preferred alternative. The Commission found that no condition in the license could be fashioned with existing technology that would allow upstream passage for shortnose sturgeon, Atlantic sturgeon, striped bass, and rainbow smelt. Due to this inability to provide upstream passage for these species, the Commission determined it could not comply with its statutory obligations under section 10(a) of the Federal Power Act to balance power and nonpower values. Consequently, the Commission concluded that no license should be issued for the Edwards project.

The Decommissioning Policy sets forth the same requirements as discussed in Edwards. The Decommissioning Policy provides:

The Commission concludes that it has the legal authority to deny a new license at the time of relicensing if it determines that, even with ample use of its conditioning authority, no license can be fashioned that will comport with the statutory standard under section 10(a) of the Federal Power Act and other applicable law.⁹

The Commission's Decommissioning Policy and Edwards decision lead to the same conclusion: the Commission has authority to deny a new license at the time of relicensing only when there is no way of conditioning a new license to achieve the standards under section 10(a) of the Federal Power Act.

⁹ Decommissioning Policy, 60 Fed. Reg. 339 at 340.

In regard to Condit Dam, its FEIS has already identified ways to condition a new license to achieve the standards of section 10(a) of the Federal Power Act. The preferred alternative under the FEIS calls for the installation of fish ladders and downstream fish passage facilities, which would allow Condit Dam to continue to operate and still achieve the resource needs of the White Salmon River. The findings in the FEIS expressly rejected dam removal as a viable option because it provided no certainty in enhancing unique stocks and would result in huge expenditures and impacts with little environmental benefits.¹⁰ Unlike the situation in Edwards, where no existing technology was available for bypass of several fish species, the findings in the FEIS conclude that preferred alternative best balances the development and nondevelopment resources in the project area and best meets the Commission's obligations under section 10(a).¹¹

Given the findings set forth in the FEIS, the Commission does not have authority based on the Edwards decision and the Decommissioning Policy to order dam removal. The Commission can clearly condition a new license for the Condit project and meet the standards under section 10(a) of the Federal Power Act. Consequently, the Commission should not grant a declaratory decision that approves the Settlement, which proposes the removal of Condit Dam, because the findings of the FEIS do not support that decision.

F. The Proposed Settlement Agreement Requires Actions That Are Not Within the Scope of the Final Environmental Impact Statement.

¹⁰ FEIS at 5-25.

¹¹ FEIS at 5-24.

PacifiCorp's Petition for Declaratory Order requests the Commission determine, at this time, that it has the authority to incorporate the terms and conditions of the proposed Settlement Agreement in to an amended license. PacifiCorp's Memorandum in Support of its request for Declaratory Order, goes further and requests that "the Commission should approve the implementation of the Settlement Agreement."¹² WSCL et al. strongly objects to PacifiCorp's request for the Commission to approve the Settlement. The Settlement calls for the removal of Condit Dam without any treatment of sediment in the reservoir.¹³ PacifiCorp's request ignores the fact that the FEIS found that project removal without sediment treatment was not a viable option.

In the FEIS, the Commission's staff determined that removal of Condit Dam absent sediment treatment was not an appropriate alternative due to impacts resulting from the release of accumulated sediments in Northwestern Lake and impacts to the in lieu tribal fishing site located in the lower White Salmon River.¹⁴ Due to these environmental impacts, the Commission's staff eliminated this alternative from consideration in the FEIS.¹⁵

In May 1998, R.W. Beck, PacifiCorp's consultant, submitted the draft report on dam removal ("Removal Report").¹⁶ The Removal Report stemmed from PacifiCorp's decision that it would be uneconomical to implement the preferred alternative adopted in the FEIS. The Removal Report looks at the least-cost method for removal of Condit Dam. It is not, however, a substitute for the Commission's environmental review of this alternative. The Removal Report provides:

¹² PacifiCorp's Memorandum in Support of Petition for Declaratory Order, dated May 31, 2001, p. 9.

¹³ See Settlement, Exhibit A: Removal Plan Summary.

¹⁴ FEIS at. B-6.

¹⁵ Id. at B-6.

¹⁶ R.W. Beck, Condit Hydroelectric Project Removal – Summary Report, Engineering Considerations. (May 1998).

This draft preliminary engineering report is not an agreement to remove the dam, nor does it mean that dam removal is imminent. It also does not examine legal, regulatory, or environmental issues associated with removal in any depth. It is not an environmental analysis document. Issues that must be addressed in greater detail are numerous and include impacts on: water quality and quantity, existing water supplies and pipelines, resident and anadromous fisheries, wetlands, birds and other wildlife, among others. Legal and regulatory issues include water quality permitting, requirements under the National Environmental Policy Review Act (NEPA), the State Environmental Policy Review Act (SEPA), the FERC licensing process, and how impacts to the tribal “in lieu” fishing site downstream of the dam will be addressed.¹⁷

Through its consultants, R.W. Beck, PacifiCorp acknowledges that the necessary environmental review of the proposed removal of Condit Dam is incomplete. The report also recognizes that the Commission’s staff specifically rejected the alternative of dam removal without sediment treatment.¹⁸ In PacifiCorp’s Settlement, PacifiCorp also states that the Commission should not take any action on its Application that the Commission should complete its environmental review and engage in Endangered Species Act consultations.¹⁹

Now, PacifiCorp requests the Commission to immediately approve the Settlement and to incorporate its terms and conditions into the amended license prior to the completion of the environmental review or consultations under Section 7 of the Endangered Species Act. Such approval fails to comply with the requirements of NEPA to evaluate alternatives and environmental impacts before final agency action.

WSCL et al. respectfully request that the Commission stay any action on the Settlement until the Commission has supplemented the Commission’s October 1996 FEIS. The

¹⁷ Removal Report at 1.

¹⁸ Removal Report at 2. (“The EIS Specifically rejected the river erosion option of sediment removal if the Project were removed because the anticipated environmental impacts from eroded sediment were thought to be unacceptable.”)

¹⁹ See Settlement, Exhibit A: Removal Plan Summary, p. 2. It provides: “The Settlement Agreement contemplates that before the Commission takes final action on PacifiCorp’s application for the Amended License that the Commission need to prepare a supplement to the October 1996 Final Environmental Impact Statement,

Commission must address information on the environmental impacts that will result from PacifiCorp's proposed method of dam removal, including impacts to listed species and critical habitat. It also should update the economic analysis associated with the various alternatives proposed in the FEIS, Settlement and the R.W. Beck report on dam removal. The economic analysis of the power benefits from future operation of the project needs to reflect the updated forecast power prices in the western United States. Those updated prices should entirely change the economic analysis of the feasibility of fish bypass systems.

G. The Proposed Settlement Agreement Will Harm Species Listed Under the Endangered Species Act.

The Commission must comply with the Endangered Species Act and assure that its decisions will not harm listed species or impact critical habitat prior to consultations with the appropriate agencies. After the Commission completed its FEIS for Condit Dam relicensing, the National Marine Fisheries Service ("NMFS") designated the Columbia River and its tributaries critical habitat for 19 Evolutionary Significant Units of chinook, chum, coho, and sockeye salmon and steelhead.²⁰ NMFS also designated the White Salmon River below Condit dam as critical habitat for chinook salmon and steelhead trout.²¹

After these listings, but before PacifiCorp submitted the Settlement Agreement to the Commission, the NMFS sent a letter to the Commission objecting to the construction activities

engage in consultations as appropriate under Section 7 of the Endangered Species Act, and that other actions as appropriate.

²⁰ See 50 C.F.R. § 223.102

²¹ See 50 C.F.R. §§ 226.212(b) and (s).

for fish bypass facilities that the Commission's staff proposed as the preferred alternative in the FEIS. The NMFS's letter signed by Michael Tehan, dated September 7, 1999, provides:

NMFS no longer believes that operation of the Project under the proposed new license terms and conditions would have not more than negligible or discountable effects on the listed Pacific salmonids and critical habitat of such species that occur near the Project; especially in light of these new listings that include species that spawn and rear in the lower White Salmon River. Therefore, we cannot concur that operation of the Project under the proposed new license would not likely adversely affect the subject listed Pacific salmonids.

The Settlement's proposal for dam removal without sediment treatment would impact the critical habitat and listed species identified by NMFS more than the expected impacts from bypass construction. In the FEIS, the Commission's staff recognized the greater impacts of dam removal without sediment treatment by selecting the construction of bypass as the preferred alternative. The NMFS letter provides official notice to the Commission that the current Administrative Record is incomplete and the Commission needs to assess the impacts from dam removal and sediment pollution on listed species.

The United States Fish and Wildlife Service ("FWS") also submitted a letter expressing concerns that listed bull trout would be impacted by construction activities at Condit Dam arising from the preferred alternative in the FEIS. The FWS letter is from Gerry A. Jackson, Manager of Western Washington Office, US Fish and Wildlife Service, FERC Docketed Date: Oct. 12, 1999. The FWS submitted this letter after the completion of the FEIS, but before PacifiCorp's submission of the Settlement. The letter provides that the FWS is concerned with the impacts to the listed bull trout resulting from (1) interruptions in instream flows and drawdown of Northwestern Lake; (2) construction impacts to quality or quantity of bull trout habitat in Northwestern Lake and in the White Salmon River below Condit Dam; (3) the need for mitigation measures if explosives are used; and (4) sedimentation and turbidity levels that

could result from construction of the fish ladders, screens, spillway improvements. The Administrative Record does not include a response to this letter or the NMFS letter.

Although the NMFS and the FWS are parties to the Settlement and apparently support the removal of Condit Dam, neither agency has retracted its letter or submitted additional information to the Commission to refute its earlier concerns with the potential impacts to listed species and critical habitat resulting from bypass construction activities. Those construction impacts should be far more benign than the expected impacts from dam removal without sediment treatment.

The Administrative Record does not support any action by the Commission to approve the Settlement and removal of Condit Dam prior to required consultations under Section 7 of the ESA. The Commission needs to conduct a comprehensive biological assessment of the impacts to listed species and critical habitat before the Commission acts on the dam removal proposal or incorporates the Settlement into an amended license.

VI. CONCLUSION

WHEREFORE, WSCL et al. respectfully request the Commission to grant this Motion to Intervene and to reject PacifiCorp's petition for Declaratory Order regarding its Application. We also request the Commission to not take any action that approves the Settlement or to incorporate its terms into any amended license until the Commission has completed its environmental review and fulfilled its consultation requirements under the Endangered Species Act.

DATED this 20th day of July 2001.

SCHWABE, WILLIAMSON & WYATT

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Portland, Oregon this 20th day of July 2001.

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