

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

PacifiCorp, American Fork Hydroelectric Project

)
) No. 696-012
)

**AMERICAN WHITEWATER AFFILIATION’S MOTION TO INTERVENE AND
OPPOSITION TO PACIFICORP’S PETITION FOR DECLARATORY ORDER THAT
PROJECT IS SUBJECT TO PERPETUAL LICENSE**

Pursuant to the Notice of Petition for Declaratory Order (June 14, 2001) and 18 C.F.R. §§ 385.210, 385.211, and 385.214, American Whitewater Affiliation moves to intervene in this proceeding and responds in opposition to PacifiCorp’s Petition for Declaratory Order and Motion to Abey Relicensing Proceedings (March 14, 2001).

BASIS FOR INTERVENTION

American Whitewater has interests which may be directly affected by the Commission’s action on PacifiCorp’s petition for declaratory order that the American Fork Project is subject to a perpetual license. As an intervener in the underlying relicensing proceeding, American Whitewater seeks new license articles to mitigate the project’s adverse impacts on navigation, recreation, and environmental quality of the American Fork. If this petition were granted, the Commission would lose its authority to require such articles in any license held by PacifiCorp for this project.

American Whitewater is a non-profit organization with more than 8,000 members and 180 local canoe club affiliates, representing approximately 80,000 whitewater paddlers

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nationwide. We are dedicated to conserving and restoring America's whitewater resources and enhancing opportunities to enjoy them safely. Many of our members live in the region of Salt Lake City. These members use and enjoy adjacent federal lands, including the 28.8 acres of such lands within the Uinta National Forest and the Timpanogos Cave National Monument that the American Fork Project affects. The American Fork, upstream and downstream of the project dam, provides rare opportunities for recreation critical to our members in this arid region.

Finally, this petition, if granted, would authorize PacifiCorp to operate the American Fork Project in perpetuity on conditions established 26 years ago. Such a perpetual license would be unprecedented in the history of the Federal Power Act. As a founding member of the Hydropower Reform Coalition, American Whitewater views such a result as contrary to the express requirements and fundamental purpose of that statute: namely, to assure that this project, like any other, is and remains best adapted to a comprehensive plan of development of the affected waters. We have a substantial interest in the precedent that the Commission will establish in this proceeding.

ARGUMENT IN OPPOSITION TO PETITION FOR DECLARATORY ORDER

PacifiCorp petitions for a declaratory order that the American Fork Project is subject to a perpetual license. The authority for this petition is *inference* from one sentence in the original license waiving Federal Power Act (FPA) section 14 and the part of Section 15 that concern federal take-over of the project on expiration of that license. The Commission should deny this petition with prejudice. PacifiCorp misreads the original license, which on its face creates a 25-

year term subject to relicensing. It seeks a remedy expressly prohibited by Section 6, 16 USC § 799, which requires that any license have a term not to exceed 50 years. The purpose and sole effect of the petition is to delay compliance with Additional Information Requests (AIRs) issued by the Commission as necessary for the relicensing proceeding.

I. THE ORIGINAL LICENSE ON ITS FACE ESTABLISHES A 25-YEAR TERM.

PacifiCorp relies on the waiver in finding 9 in the Order Issuing License (Minor), 54 FPC 2433, 1975 FPC LEXIS 167, *11: “It will be in the public interest to waive, pursuant to section 10(i) of the Act, the terms and conditions contained in the following Sections of Part I of the Act: ... 14, except insofar as the power of condemnation is reserved; 15, insofar as it relates to Federal take over.” The petition infers from this sentence that the Commission must issue an annual license to PacifiCorp in perpetuity, subject to termination only if the Commission issues a new license to another party or the U.S. condemns the project in a judicial proceeding. This inference is the only basis for a result that has otherwise never occurred in the 66-year history of the Federal Power Act. PacifiCorp misreads the waiver and other articles of the original license.

The original license waived the right of the U.S. to take over the project pursuant to Section 14 by administrative proceeding before the Commission, while it reserved the other federal right to condemn the project in a judicial proceeding. In turn, the partial waiver of Section 15(a) – “...insofar as it relates to federal take over...” -- confirms that the U.S. may not assert that right in a relicensing proceeding before the Commission. Section 15(a), as partly waived, thus reads:

~~“If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the license, as provided in section 807 of~~

~~this title~~, the Commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee... *Provided*, That in the event the United States ~~does not exercise the right to take over or~~ does not issue a new license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.”

PacifiCorp does not even attempt to interpret the actual language of Section 15(a) (as incorporated by the original license) to support its claim of entitlement to perpetual renewal of the annual license after expiration of the original license. Instead, its claim is inference based entirely on *dicta* in several unrelated cases where the Commission speculated whether a partial waiver of Section 15(a) might create a perpetual license. However, the Commission did not hold in those cases, and it has never held elsewhere (including any rule or policy), that a perpetual license is lawful. The Commission has never issued a license that, on its face, is perpetual.

We turn to the plain meaning of the partial waiver in the Order Issuing License for this project. As incorporated by the original license (in the redacted form shown above), Section 15(a) authorizes the Commission to issue a new license either to PacifiCorp or a new licensee on expiration of the original license. The final proviso requires the Commission to issue an annual license to PacifiCorp only until that relicensing decision occurs. As such, Section 15(a) does not entitle PacifiCorp to perpetual renewal of the annual license. Finding 9 simply means that, except for the waiver of the federal right to take over the project by administrative proceeding, PacifiCorp is in the same position as any other original licensee on expiration of the original license: it will continue to operate the project under annual license only until the Commission issues or denies a new license.

PacifiCorp does not cite any statement in the Order Issuing License (other than finding 9), or any actual article, that confirms that the Commission issued a perpetual license. It ignores the Commission's requirement in other articles that the project is subject to relicensing. First, Ordering Paragraph (A) issues a license for a term of 25 years, until October 31, 2000. 1975 FPC LEXIS 167, *11. It does not require or authorize an annual license in perpetuity thereafter. Second, Article 25 provides that the licensee's right to occupy federal lands "...absolutely ceases..." on expiration of the original license, unless the licensee has obtained a new license or annual license. *Id.*, *36. This means that the right to use and occupy federal lands is not perpetual but instead requires the Commission's affirmative action on expiration of the original license. Third, Article 26 reserves all other provisions of the Federal Power Act except as expressly set forth in the license. One such provision is Section 6, which (as discussed in Section II below) requires that a license have a term of not more than 50 years. Section 10(a) is also reserved. Under that statute, the Commission must determine whether a new license is best adapted to a comprehensive plan of development of the American Fork – and if not, deny the license. See Udall v. Federal Power Commission, 387 U.S. 428 (1967). Taken together, these articles confirm that the project is subject to relicensing, and that the annual license now in effect will expire when the Commission makes its relicensing decision.

As required by the Section 15(b), PacifiCorp applied for a new license two years before expiration of the original license. During the term of the original license and also the relicensing proceeding – indeed, until it received unwelcome AIRs -- it never interpreted the original license as perpetual. In the absence of any article stating that intent, and in the face of several that expressly establish contrary requirements, this petition effectively alleges that the Commission made and is now

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bound by a mistake in the 1975 Order Issuing License: it accidentally waived its duty to make a decision on a new license application by PacifiCorp when it used non-customary language to effect the limited waiver of the federal right of take-over. This extraordinary claim violates a fundamental principle of administrative law that agency action will be interpreted on the basis of its plain meaning and record. The license articles discussed above require that, following expiration of the original license, any annual license will terminate when the Commission takes final action on a new license application, and PacifiCorp will pursue a new license application until such final action or surrender the project.

II. THE PETITION SEEKS RELIEF PROHIBITED BY FPA SECTION 6.

This petition relies on inference to claim a perpetual license. The fatal flaw of that inference is that it requires the Commission, in acting on this petition, to violate Section 6. That statute requires that “[l]icenses under this subchapter shall be issued for a period not exceeding fifty years.” No license – whether original, new, or annual -- may exceed that period. Section 10(i) prohibits any waiver of Section 6. Even if PacifiCorp prevailed on its extraordinary claim that the Order Issuing License accidentally created a perpetual license, statutory law prohibits that mistake. PacifiCorp is required to pursue its new license application or surrender the project, and the Commission is required to act on the new license application.

SERVICE

Petitioners request that any further communication in this proceeding be served on the following representatives:

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CONCLUSION

For all of the foregoing reasons, American Whitewater respectfully requests that the Commission grant our motion to intervene and deny with prejudice PacifiCorp's Petition for a Declaratory Order and Motion to Abey Relicensing Proceedings.

Dated: July 16, 2001

Respectfully submitted,

John Gangemi
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AMERICAN WHITEWATER AFFILIATION

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DECLARATION OF SERVICE

I, Amy Roon, declare that I today served, “AMERICAN WHITEWATER AFFILIATION’S MOTION TO INTERVENE AND OPPOSITION TO PACIFICORP’S PETITION FOR DECLARATORY ORDER THAT PROJECT IS SUBJECT TO PERPETUAL LICENSE,” by first-class mail to each person on the official service list maintained by the Commission in this proceeding.

Dated: July 16, 2001

By: _____
Amy Roon
NATURAL HERITAGE INSTITUTE