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## United States Department of the Interior



### FISH AND WILDLIFE SERVICE

Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846

In reply refer to:

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE  
Washington, DC 20426

MAY 17 2007  
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OFFICE OF THE  
SECRETARY

**Subject:** U.S. Fish and Wildlife Service Comments on the Motion to Intervene Out of Time and the Notification of Intent to Seek a New License filed by Davis Hydro, LLC, and the Proposed License Surrender Application Schedule filed by Pacific Gas and Electric Company, Inc., for the Kilarc-Cow Creek Hydroelectric Project, Federal Energy Regulatory Commission Project No. 606, on Old and South Cow Creeks, Shasta County, California

Dear Ms. Bose:

The U.S. Fish and Wildlife Service (Service) has reviewed the April 27, 2007, Motion to Intervene Out of Time (MIOT) and the Notification of Intent to Seek a New License (NOI) filed by Davis Hydro, LLC (Applicant), as well as the Proposed License Surrender Application Schedule filed by Pacific Gas and Electric Company, Inc. (Licensee), for the Kilarc-Cow Creek Hydroelectric Project, Federal Energy Regulatory Commission (Commission or FERC) Project No. 606 (Project). The Service submits the following comments on the MIOT/NOI filed by the Applicant as well as comments of support for the current Proposed License Surrender Application process being conducted by the Licensee in accordance with the Commission's processes.

#### **The Project's Relevant Chronology through the Commission's Licensing Processes**

- The Service is a signatory to the March 31, 2005, Kilarc-Cow Creek Project Agreement (Kilarc Agreement) in which the Licensee agreed not to seek a new license for the Project, but to continue operating the Project until it is acquired by another license applicant or decommissioned by the Commission.
- In accordance with the Kilarc Agreement, the Licensee did not file an application for new license by the deadline of March 27, 2007 (when the current license expired), but instead filed a copy of the Kilarc Agreement with the Commission.

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- Subsequently, the Commission issued a Notice Soliciting Applications for the Project on April 7, 2005.
- Synergics Energy Services, LLC, (SES) filed a NOI to file an application for new license for the Project on June 7, 2005.
- No other party filed a NOI for the Project in response to the Commission's above Notice.
- The deadline for SES to file its application with the Commission was December 27, 2006 (18 months after its NOI).
- On July 14, 2005, the Commission Noticed SES's NOI.
- On December 18, 2006, SES filed a Motion with the Commission seeking an extension of time in which to file its application.
- The Commission denied SES's motion on January 8, 2007, as SES did not file an application by December 27, 2006.
- In accordance with the Kilarc Agreement and the Commission's guidance, the Licensee filed a Proposed License Surrender Application and Decommissioning Schedule for the Project with the Commission on March 23, 2007.
- The original license for the Project expired on March 27, 2007.
- On April 10, 2007, the Commission acknowledged the Licensee's filing of the Proposed License Surrender Application Schedule in issuing a Notice of Authorization for Continued Project Operation, and an Annual License for the Project to the Licensee, effective from April 2, 2007, to March 31, 2008, or until issuance of a new license or other disposition of the Project, whichever comes first.
- On April 27, 2007, Davis Hydro, LLC, filed its MIOT/NOI for the Project with the Commission.

### **Comments on the MIOT/NOI**

The MIOT/NOI by Davis Hydro, LLC, is inappropriate at this late stage and should be denied by the Commission for the following reasons:

- (1) The Commission's regulations provide that when a Licensee had filed a NOI to file a new application, but failed to file an application, the Commission must publish a Notice Soliciting Applications that solicits applications from potential applicants other than the existing Licensee. 18 C.F.R. 16.25(a). The Commission did this on April 7, 2005.

(2) A potential applicant must file a NOI within 90 days of the Commission's soliciting notice, and then must file an application for a new license within 18 months of the date it filed its NOI. 18 C.F.R. 16.25(b). Accordingly, the appropriate time for any party to file a NOI was during the 90-day period between April and July of 2005. SES was the only party to do so. Davis Hydro's application is untimely and should not be considered. Because SES also failed to file a license application by the Commission's 18-month deadline, the only party with a valid application now pending before the Commission is the current Licensee.

(3) In accordance with the Kilarc Agreement and with the Commission's guidance, the current Licensee did file a March 23, 2007, Proposed Surrender Application (which includes a Decommissioning Schedule) prior to the expiration of its license (March 27, 2007).

The Kilarc Agreement at paragraph F provides, in relevant part:

"If *no timely applications are received*, FERC will order the Company to prepare and file a license surrender application in compliance with FERC's rules that provides for the disposition of Project facilities." [*emphasis added*].

Although the Commission is not a party to the Kilarc Agreement, this provision of the Kilarc Agreement is consistent with the Commission's guidance. In the Commission's Hydroelectric Project Handbook for Filings other than Licenses and Exemptions, April 2001, the Commission provides, in relevant part:

"If an existing licensee elects not to file a relicense application (i.e., application for new license, nonpower license, subsequent license, or an exemption), and no other applicant files an application *in a timely fashion*, the existing licensee is responsible for:

- Filing a schedule for the submittal of a surrender application;
- Filing a surrender application according to the approved schedule; and
- Providing for disposition of all project facilities"

[*emphasis added*].

(4) The Commission and the Licensee have already initiated a new process as evident by the Licensee's filings and the Commission's acknowledgment of the Proposed License Surrender Application Schedule in the Commission's April 10, 2007, Notice. This is also consistent with the Kilarc Agreement (Section 1.3) and the Commission's guidance in that the Licensee will continue operating the Project on annual licenses after March 27, 2007, until the Commission determines the appropriate action.

**Comments on the Proposed License Surrender Application and its Schedule**

A major goal for the Service during the Project's relicensing processes has been the protection, mitigation, and enhancement of fish and wildlife resources affected by the Project, which includes the restoration of aquatic habitat for anadromous and resident fish, such as the fall-run and spring-run Chinook salmon, steelhead, and rainbow trout. The Service believes that the waterfalls within and downstream the Project area are not permanent barriers to fish passage and that all such falls are passable for anadromous fish during both normal and wet water year flow conditions. Thus, all relevant aquatic habitat currently affected by the Project could be restored, enhanced, or improved to benefit anadromous salmonids present within the South Cow Creek and Old Cow Creek watersheds. Such restoration efforts would likely protect and enhance other aquatic and terrestrial resources currently affected by the Project.

Therefore, the Service supports initiation of the Commission's license surrender application process for the Project and is satisfied with the Proposed License Surrender Application Schedule submitted to the Commission by the Licensee. While the Service would prefer that the schedule provide more details, we expect that such details will be further developed collaboratively among the Licensee and all interested parties as the surrender schedule is implemented. The Service looks forward to working collaboratively with all interested parties to develop a comprehensive surrender application and decommissioning schedule that will protect, mitigate, and enhance fish, wildlife, and other resources currently affected by the Project.

The Service appreciates the opportunity to comment during this stage of the Project. If you have any questions regarding this response, please contact Mr. William Foster of my staff at (916) 414-6600.

Sincerely,



Michael B. Hoover  
Acting Field Supervisor

cc:

Original and eight hardcopies filed FERC  
FERC #606 Service list, Kilarc-Cow Creek Project

## PROOF OF SERVICE

Federal Energy Regulatory Commission

Project No.: FERC #606. Kilarc-Cow Creek Hydroelectric Project

I hereby certify that I have this day served by regular mail, the foregoing letter, Subject: U.S. Fish and Wildlife Service Comments on the Motion to Intervene Out of Time and the Notification of Intent to Seek a New License filed by Davis Hydro, LLC, and the Proposed License Surrender Application Schedule filed by Pacific Gas and Electric Company, Inc., for the Kilarc-Cow Creek Hydroelectric Project, Federal Energy Regulatory Commission Project No. 606, on Old and South Cow Creeks, Shasta County, California to each person designated on the official FERC Service list.

Dated at Sacramento Fish and Wildlife Office, Sacramento, CA this 17<sup>th</sup> of May, 2007.



Heeja Seto  
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