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January 25, 2010

The Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 – 1st Street, NE, Mail Code PJ-12.3
Washington, DC 20426

filed electronically

Ref: Kilarc-Cow Creek Hydroelectric Project, FERC No. 606-027
Application for Surrender of License by Licensee Pacific Gas and Electric Company
Re: Request for Commission Determination of Voluntary Licensing of P-606
and Termination of License Surrender Proceedings

Dear Ms. Bose:

We regret any inconvenience or additional effort that may be caused to the Federal Energy Regulatory Commission (Commission) staff, however, new information has come to our attention in the last two weeks that we believe warrants due consideration before the Commission's opinion with regard to this proceeding is expressed in the release of its Environmental Assessment (EA) as scheduled for the end of this week.

We understand that the Commission might,

1. As in the recent Commission ruling on DI09-5 (Accession No. 20100113), determine that it is in the public interest to make a finding that the P-606 project is no longer under Commission jurisdiction, and/or
2. Determine that once the P-606 project license has been surrendered, that any party may continue hydropower generation utilizing the project facilities without a Commission license or exemption, and
3. Because all of the license surrender alternatives that have timely been presented for evaluation in the EA are considered by some stakeholders to have unmitigable, significant impacts, consider that before the EA is released, additional time for evaluation is warranted of hydropower generation without a

Commission license or exemption, including off-site fish habitat enhancement measures that resource agencies have supported in other licensing proceedings.

Just this past Thursday, at a meeting of the Yuba River Technical Working Group (supported by Pacific Gas and Electric Company [PG&E] as a condition of its P-1403 Narrows Project), there was a presentation regarding two different plans, only one of which could be funded under the Habitat Expansion Agreement, “Created to complement licensed operations of the Oroville, Poe, Upper North Fork Feather River, and Rock Creek-Cresta hydropower projects, all located on the Feather River, this program will provide greater gains for the target species beyond project boundaries through identification, evaluation, selection, and implementation of the most promising and cost-effective actions.” (<http://www.sac-basin-hea.com/default.aspx>)

The Cow Creek watershed lies within the boundaries of the Habitat Expansion Agreement and Battle Creek, proposed for enhancement measures under one of the alternatives, is much closer to the Cow Creek watershed than any of the projects for which the mitigation is proposed. We argue for a balanced evaluation *in the present P-606 EA*, of the benefits of spending on the order of \$10 million for the dismantling of the P-606 facilities, with significant unmitigated effects on stakeholders, versus utilizing these same funds to implement these well-studied projects for immediate and potentially substantially greater recovery of the identified Endangered Species Act populations, while studies in the Cow Creek watershed proceed with the additional funding from continuing the hydropower.

Background

The recent Commission ruling on DI09-5 found that the Commission did not have jurisdiction over the applicant’s project, citing the following:

“Pursuant to Section 23(b)(1) of the Federal Power Act (FPA), U.S.C. §817(1), a non-federal hydroelectric project must (unless it has a still-valid pre-1920 federal permit) be licensed if it:

- is located on a navigable water of the United States;
- occupies lands of the United States;
- utilizes surplus water or waterpower from a government dam; or

- is located on a stream over which Congress has Commerce Clause jurisdiction, is constructed or modified on or after August 26, 1935, and affects the interests of interstate or foreign commerce.” (Accession No. 20100113)

In a proceeding very similar to the P-606 license surrender, the Commission explained its licensing jurisdiction under the Federal Power Act (FPA)¹ as follows:

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)(i) 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)(i).

Under Section 23(b)(i) 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, 1935.² If those conditions are not met, 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.³

¹ See enclosed FERC Accession No. 19951228-0052, *Order Finding Licensing Not Required* for P-2643, page 6 cites 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).

² *Ibid.* See *Farmington River Power Co. v. Federal Power Commission*, 455 F.2d 86 (2d Cir. 1972).

³ *Ibid.* page 7, Section 4(e) provides, in pertinent part: The Commission is hereby authorized and empowered-- (e) To issue licenses for the purpose of 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 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).

The Commission may have permissive rather than mandatory jurisdiction over the P-606 project, and the jurisdictional status of the project affects whether the project must be decommissioned once the licensee is prohibited from seeking a new license. In other words, it is my belief that PG&E may not be required to take any action upon the expiration of its license and valuable time of the Commission may be saved by terminating the present license surrender proceedings by acknowledging that it is no longer in the public interest for the Commission to exercise jurisdiction over this project.

It appears that the P-606 project is not subject to mandatory licensing under Section 23(b)(i) of the FPA, because it: (1) is NOT located on "navigable waters of the United States";⁴ (2) does NOT occupy lands or reservations of the United States; (3) does NOT use the surplus water or water power from a government dam; AND (4) [...] has NOT undergone construction or major modification after August 26, 1935.⁵

The circumstances cited for P-2643 are similar to the present⁶: The original P-606 license has expired and PG&E will not be accepting a new 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

⁴ When compared with the referenced P-2643, the Old Cow Creek waters are also far less navigable by any standard.

⁵ Modifications to the P-606 project since 1935 are clearly no more substantive than those cited as proposed for P-2643 without being considered "major modifications." *Ibid.* page 14: "PacifiCorp has proposed to rehabilitate the existing project by: (i) 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. (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.) 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) (i) of the FPA."

⁶ *Ibid.* pages 15-16. The Commission further states: "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."

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, state, or local laws may be applicable.”

We request presently that the Commission review the P-606 project to determine whether the corresponding action taken by the Commission in P-2643⁷ is similarly warranted for P-606, that a finding be made that the P-606 facilities are NOT required to be licensed pursuant to Section 23(b)(i) of the Federal Power Act and the corresponding application for license surrender requires no further consideration by the Commission.

In the case of P-2643, the Commission staff questioned whether it makes sense for the Commission and parties to continue devoting resources to the licensing process in light of their finding that licensing is not required. We request the same approach here, that the Commission review with PG&E their opportunities in the face of limited Commission and environmental agency resources. We believe similarly, assuming the P-606 license surrender is not required, that the lengthy delays associated with compliance with the National Environmental Policy Act, subsequent challenges, and legal processes to save the Kilarc facility from destruction are not in the interest of the fish, the Community, nor the sustainability of our planet.

Davis Hydro submitted a proposal in 2007 in response to PG&E’s solicitation for post-license use of the project that PG&E rejected before the question of FERC jurisdiction was ever raised. Davis Hydro is immediately approaching PG&E for the purchase and modification of at least the Kilarc portion of the P-606 project into a facility for the continued production of green power, spawning steelhead and funding for on- and off-site fisheries research and habitat improvement projects.

⁷ *Ibid.* page 17. In P-2643, the Commission ordered the former licensee to either withdraw its application or confirm intent to pursue a new voluntary license.

Davis Hydro stands ready to implement its full fish enhancement plan with or without a license, to produce a win-win situation respectful of the need to minimize PG&E's operating costs while making strides forward towards the recovery of Endangered Species Act-listed species.

Allow us to repeat. We will proceed, if allowed by the FERC and permitted by the agencies, to negotiate with PG&E to take over the facility and to establish a targeted effort to:

- A. Reconstruct the ancestral population diversity in Old Cow Creek and the larger watershed to which it is tributary,
- B. In concert with appropriate geneticists, induce a program of directed genetic drift to enable anadromy in these fish,
- C. Use 25-30% of the profits of the hydropower to improve the habitat and fish populations in the Cow Creek area, and
- D. Meet all community needs and goals.

We are committed to build a facility that PG&E, the fish resource agencies, research entities, and the community can be proud of. We are committed to build a strong fish resource supported financially by green hydropower and request Commission support of these goals as well.

Sincerely,



Kelly W. Sackheim, Principal

KC Hydro, a partnership of Davis Hydro LLC and Sackheim Consulting

Cc: CarLisa Linton-Peters, FERC; Lisa Whitman, PG&E; FERC P-606 Service List

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing document by first class mail postage prepaid or email upon each person designated on the official service list compiled by the Secretary of the Commission in this proceeding.

Dated at Fair Oaks, CA this 25th day of January 2010.

Kelly W. Sackheim

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