

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

Item No: 6 (Rev. 2)
AGENDA ID: 19556
RESOLUTION E-5153
July 15, 2021

R E S O L U T I O N

Resolution E-5153. Pacific Power Request to Transfer Ownership of the Lower Klamath Project to the Klamath River Renewal Corporation

PROPOSED OUTCOME:

- Approves Pacific Power's request to transfer ownership of the Lower Klamath Project to the Klamath River Renewal Corporation, pursuant to Decision 11-05-002, modified by Decision 17-11-019.

SAFETY CONSIDERATIONS:

- There are no safety considerations associated with this resolution.

ESTIMATED COST:

- There are no costs associated with this resolution.

By Advice Letter 638-E, Filed on January 14, 2021.

SUMMARY

This Resolution approves Pacific Power's request to transfer ownership of the Lower Klamath Project to the Klamath River Renewal Corporation (KRRC), in compliance with Decision 17-11-019.

BACKGROUND

On January 14, 2021, Pacific Power (PacifiCorp) filed Advice Letter (AL) 638-E as a Tier 3 Advice Letter in compliance with Decision (D.) 11-05-002, as modified by D.17-11-019. Together, the Decisions direct PacifiCorp to provide updated

information to the California Public Utilities Commission (CPUC) regarding the implementation of the Klamath Hydroelectric Settlement Agreement (KHSA), as amended in 2016, to enable the CPUC to confirm its previous conditional approval of the transfer to KRRC of four hydroelectric dams (J.C. Boyle, Copco No. 1, Copco No. 2, and Iron Gate, collectively the “Lower Klamath Project”) as well as approximately 8,000 acres of real estate and personal property associated with the Lower Klamath Project dams designated for removal. PacifiCorp is seeking authorization from the CPUC to transfer ownership of the Lower Klamath Project to the KRRC pending approval of an application before the Federal Energy Regulatory Commission (FERC).

In 2016, the KRRC was established as the Dam Removal Entity. PacifiCorp has negotiated a Property Transfer Agreement between itself and KRRC, which provides for the transfer of the Lower Klamath Project to KRRC upon the completion of conditions necessary to prepare for the transfer. Those conditions include, but are not limited to, FERC approval of an amended license surrender application and a new license transfer application for the Lower Klamath Project.

The Klamath Hydroelectric Settlement Agreement (KHSA) – which constitutes agreement by 48 separate parties including PacifiCorp, the states of Oregon and California, several Native American tribes and many other groups and organizations - provides a framework to decommission the four hydroelectric developments comprising the Lower Klamath Project and sets forth requirements related to their operation until removal.

In July 2020, FERC approved a partial transfer of the Lower Klamath Project license from PacifiCorp to KRRC. However, FERC determined that the public interest would be best served by requiring PacifiCorp to remain on as a co-licensee. This represented a significant change from what parties envisaged and agreed to in the KHSA.

PacifiCorp concluded that FERC’s July 2020 order conflicted with the KHSA by not allowing PacifiCorp to be fully discharged from the license. PacifiCorp engaged several stakeholders, and on November 16, 2020, PacifiCorp, the State of Oregon, the State of California, KRRC, the Karuk Tribe and the Yurok Tribe entered into a Memorandum of Agreement (MOA) to implement the KHSA

while satisfying FERC's public interest considerations by adding the States of California and Oregon as co-licensees with KRRC.

Pursuant to the MOA, a new license transfer application was filed with FERC on January 13, 2021. The application notifies FERC that PacifiCorp and KRRC are not accepting the July 2020 Order, but seek an order to remove PacifiCorp from the Lower Klamath Project to be replaced by the States of Oregon and California.

FERC's July 2020 Order expressed desire for further financial assurances. As a result, the MOA creates the possibility of a second contingency fund, shared equally by the State of Oregon, the State of California and PacifiCorp. This secondary fund would be worth \$45 million and would only be called upon in the unlikely scenario that the existing \$50 million contingency fund held by KRRC was exhausted.

PacifiCorp is not seeking cost recovery associated with any potential contingency funding contemplated by the MOA at this time. In the unlikely event that contingency funding is necessary, PacifiCorp will consider whether and how to make any necessary request before the CPUC. PacifiCorp is not seeking any rate relief or cost recovery through this Advice Letter.

NOTICE

Notice of AL 638-E was made by publication in the CPUC's Daily Calendar. PacifiCorp states that a copy of the Advice Letter was mailed and distributed in accordance with Section 4 of General Order 96-B.

PROTESTS

Advice Letter 638-E was protested.

PacifiCorp's Advice Letter 638-E was timely protested by the Klamath Water User's Association (KWUA) and by the County of Siskiyou, the Siskiyou County Flood Control and Water Conservation District and the Siskiyou Power Authority (collectively, Siskiyou County).

KWUA's protest argues that the CPUC should deny the relief requested in this Advice Letter until FERC has issued an order on the currently-pending license transfer application for PacifiCorp's Lower Klamath River Project and the related application for license surrender. Further, KWUA argues that PacifiCorp should not be permitted to seek rate recovery of any costs it incurs under the November 16, 2020 MOA, or be able to seek any additional cost recovery for the removal of the Lower Klamath Project.

KWUA's protest rests largely on the belief that PacifiCorp's Advice Letter is premature, arguing that the conditions provided in D.17-11-019 for filing the Advice Letter include FERC approval of the license transfer. As FERC has not yet approved the now-pending application for license transfer or surrender, KWUA argues the CPUC should not prejudge the outcome of the modified application for license transfer or the application of surrender.

KWUA also protests PacifiCorp's alleged removal of the cost cap approved in the KHSA, arguing the cap is a pillar of both the KHSA and CPUC's order authorizing the surcharge. KWUA argues Advice Letter 638-E removes the cost cap and cites language from the Advice Letter that discusses a \$45 million contingency fund provided by PacifiCorp, California and Oregon to be utilized only in the unlikely event the funds available to the Renewal Corporation need to be augmented to ensure completion of dam removal.

The Siskiyou County joint protest of Advice Letter 638-E urges the CPUC to reject the Advice Letter because 1) the license transfer has not yet occurred; 2) the Advice Letter raises significant questions about whether the transfer will occur; and 3) the Advice Letter raises questions about the adequacy of the current funding.

Siskiyou County argues the CPUC should retain its authority to review the transfer of the project assets until PacifiCorp has secured FERC approval for the license transfer. Additionally, Siskiyou County believes there is significant uncertainty as to whether FERC will allow PacifiCorp to transfer its license to KRRC, even with the addition of the states of Oregon and California as proposed co-licensees.

Siskiyou County also argues that FERC declined to transfer the project license to KRRC citing its limited finances. They further argue that the new funding

commitments made by the states in the MOA appear to be necessary, but posit that the appropriations are still subject confirmation by state legislatures.

On February 10, 2021, the California Natural Resources Agency (CNRA) responded to PacifiCorp Advice Letter 638-E to clarify the use of bond money in support of the KHSA. California's contribution to the \$45 million contingency fund is provided by Proposition 68, which has been appropriated to the CNRA from the California Legislature. CNRA has the funds available and they can be encumbered until 2022. After 2022 the funds can be re-encumbered if needed. CNRA reiterates that it believes it is unlikely that KRRC will need access to the additional contingency fund, and the fund was not created to address deficiencies in existing funding.

On February 18, 2021 The Karuk Tribe expressed support for PacifiCorp Advice Letter 638-E and the CPUC's approval of property transfer from PacifiCorp to KRRC. The Karuk Tribe argues that the approval of this advice letter would assure the satisfaction of the conditions adopted by the CPUC when it approved the KHSA, and move this important process forward.

On February 26, 2021, the Yurok Tribe responded in support of PacifiCorp Advice Letter 638-E. The Tribe's present-day reservation spans the lower forty-five miles of the Klamath River in Northern California. The Yurok Tribe notes that the CPUC has already determined that implementation of the KHSA is in the best interest of PacifiCorp's customers and notes that approval of the land transfer to KRRC is the critical next step in implementing the KHSA.

PacifiCorp did not reply to the responses in support of the Advice Letter from the California Natural Resources Agency and the Yurok Tribe.

PacifiCorp replied to the protests of Siskiyou County and KWUA on February 10, 2021. PacifiCorp's reply argues that (1) the recent MOA signed by stakeholders in the dam removal process addresses the recent concerns raised by FERC; (2) the MOA assures satisfaction of the conditions adopted by the CPUC; and (3) the dam removal project is ready to proceed and adequately funded.

PacifiCorp states that stakeholders negotiated the MOA in response to the July 2020 FERC Order that would have required PacifiCorp to remain a co-licensee

for purposes of dam removal. PacifiCorp also argues that the MOA includes substantial protections for PacifiCorp's customers, as California and Oregon have agreed to step into the role of project co-licensees with KRRC. FERC's July 2020 decision indicated a desire for an entity with strong financial backing to remain a co-licensee of the project, which is satisfied by the states becoming co-licensees.

In D.11-05-002, the CPUC found dam removal under the KHSA to be more prudent than relicensing and approved the property transfer under Public Utility Code Section 851, subject to the Decision's conditions. In D.17-11-019, the CPUC narrowed those conditions to just three: (1) that PacifiCorp and the States are reasonably satisfied that KHSA section 7.1.4¹ obligations are met, (2) FERC has issued a transfer order; and (3) that adequate funding to support the KHSA budget is available.

PacifiCorp acknowledges that conditions (1) and (2) above are still to be met, and that they will remain prerequisites to transfer of ownership of the asset. However, PacifiCorp pushes back on the idea raised by KWUA's and Siskiyou County's protests that the creation of a contingency fund constitutes inadequate funding for the project. The dollars in the contingency fund are not projected to be needed. The independent Board of Consultants convened at FERC's behest concluded that the current funding for the project has a "high likelihood of being adequate." KRRC already has a significant buffer of \$50 million built into its funding, and the contingency funding in the MOA is additional. Should PacifiCorp be required to seek further funding and decide to seek cost recovery for it, the request would be made through a proceeding and would offer all the procedural protections afforded in any other rate case.

In sum, PacifiCorp replies to the protests of KWUA and Siskiyou County by arguing that the prerequisite conditions of FERC approval and KHSA 7.1.4 obligations remain in place before an actual transfer of ownership would take place. Further, PacifiCorp remains confident that the funding provided to KRRC and agreed to in the KHSA will remain adequate for completing the project.

¹ KHSA 7.1.4 sets several conditions that KRRC must meet to the satisfaction of PacifiCorp and the States of California and Oregon and that must be satisfied before the license can be approved for transfer.

DISCUSSION

The CPUC has reviewed the Advice Letter, the protests, and the responses, and finds that PacifiCorp's request to transfer ownership of the Lower Klamath Project to the KRRRC constitutes a compliance filing pursuant to D.11-05-002 and D.17-11-019 and should be approved.

We do not agree with KWUA and Siskiyou County that the conditions for filing have not been met by PacifiCorp. Contrary to KWUA's assertion, approval by the CPUC would not prejudice FERC's disposition of the pending application. PacifiCorp needs separate approval from the CPUC for authority to transfer the Lower Klamath Project, and we do not require FERC's authorization in order to issue our own. Our authorization is an independent action focused on the effects to PacifiCorp ratepayers, which PacifiCorp must secure before being allowed to transfer the assets. PacifiCorp's request for approval from the CPUC to transfer ownership of the Lower Klamath Project to KRRRC is a prerequisite before the transfer of ownership between the parties can be ultimately approved by FERC.

We agree with all parties that FERC approval and the fulfillment of KHSA 7.1.4 obligations remain in place before an actual transfer of ownership between PacifiCorp and KRRRC would take place. However, there is no reason why the CPUC should delay the transfer process by requiring PacifiCorp to seek authorization only after FERC has issued an order approving the transfer. We have already found the transfer to be in the best interests of PacifiCorp ratepayers. We recognize stakeholders have been working towards this goal for more than a decade and reaffirm that the removal of the Lower Klamath Project is the best outcome for customers of PacifiCorp. We also recognize that significant safeguards including the fulfillment of KHSA 7.1.4 obligations and FERC approval have been in place to protect PacifiCorp ratepayers throughout the entire process.

We do not agree with Siskiyou County or KWUA that there is significant risk to PacifiCorp ratepayers resulting from the November 2020 MOA. PacifiCorp customers in California have already completed their payment obligation for the project, and KRRRC has a \$50 million contingency fund in place. The additional contingency fund in the MOA represents an effort by the signatories to provide further assurance to FERC that the project is in the best interest of all PacifiCorp customers. Additionally, the MOA adds the States of California and Oregon to the License Transfer application as co-signees with KRRRC. In adding California

and Oregon to the license transfer agreement, they can add the legal and technical expertise that FERC was concerned KRRC lacked.

PacifiCorp has a high degree of confidence that the additional contingency funding will not be needed in order to complete the Lower Klamath Project removal. FERC recently found that, "...based on [its] prior review, that the \$450 million provided for in the Amended Settlement Agreement should be sufficient. However, the commitment by the States and PacifiCorp to provide a contingency fund and to cover any costs overruns provides further funding assurance.² In the unlikely event that PacifiCorp needs to provide its share of the \$45 million contingency funding and it decides to request rate relief for its \$15 million share, it would need to seek authorization in a full ratemaking proceeding before the CPUC.³ Thus, we find Siskiyou County and KWUA's concerns about the adequacy of funding and risks to ratepayers to be speculative.

To further protect ratepayers, if project needs dictate that additional contingency funding is needed, and PacifiCorp chooses to seek recovery of those costs in rates, PacifiCorp must seek authorization to create a Memorandum Account to track all costs associated with the funding of the Lower Klamath Project contingency costs. This Resolution does not authorize PacifiCorp to create said Memorandum Account.

We have found that removal of the Lower Klamath Project is in the best interest of PacifiCorp customers in prior decisions, and reaffirm our belief that it continues to be in the best interest of those customers.

² FERC ORDER APPROVING TRANSFER OF LICENSE; 175 FERC ¶ 61, 236, p. 12; (Issued June 17, 2021)
https://elibrary.ferc.gov/eLibrary/filelist?document_id=14965404&accessionnumber=20210617-3060

³ The secondary contingency fund created by the MOA between Oregon, California and PacifiCorp divides the total \$45 million evenly between each of the aforementioned parties, or \$15 million each.

COMMENTS

Public Utilities Code section 311(g)(1) provides that this Resolution must be served on all parties and subject to at least 30 days public review. Any comments are due within 20 days of the date of its mailing and publication on the Commission's website and in accordance with any instructions accompanying the notice. Section 311(g)(2) provides that this 30-day review period and 20-day comment period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day review and 20-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the CPUC's agenda no earlier than 30 days from today.

On June 22, 2021, Siskiyou County filed timely reply comments on the Draft Resolution, reiterating their protest of PacifiCorp 638-E, and bringing new information regarding FERC's June 17 "Order Approving Transfer of License." Siskiyou County argues that the Resolution fails to discuss "far greater" financial obligations under the MOA than the \$15 million contribution to the contingency fund. Siskiyou County posits that PacifiCorp will be responsible for one-third of any cost overruns that may occur in excess of the contingency fund. Siskiyou County goes on to argue that FERC relies heavily on PacifiCorp's open-ended financial commitment to justify transfer of the Lower Klamath Project. As a result, Siskiyou County feels that PacifiCorp has violated the terms of the Settlement Agreement by not fully relieving itself of liability associated with the proposal. Siskiyou County requests a full formal proceeding, as the terms of the MOA are both controversial and raise important policy questions.

On June 23, 2021 the Ridges to Riffles Conservation Fund filed timely comments in strong support of the Draft Resolution, and responding to the protests of KWUA and Siskiyou County. The Conservation Fund argues that Lower Klamath Project Stakeholders have been working toward the goal of removing the dams for over a decade and believe that removal remains the best outcome for PacifiCorp customers in California and tribal communities who are counting on progress being made "to restore the lifeway of the Klamath River."

We thank both Siskiyou County and the Ridges to Riffles Conservation Fund for their timely comments on the Draft Resolution. Siskiyou County's arguments

against the Draft Resolution appear to be based on the faulty premise that this advice letter grants PacifiCorp rate relief or somehow guarantees rate relief for potential cost overruns during the removal of the Lower Klamath Project. This Resolution does neither. While this resolution does provide a pathway for PacifiCorp to track possible cost overruns through a subsequent Advice Letter filing, those costs would be subject to a full reasonableness review in a proceeding where concerned stakeholders would be able to participate, should the need arise.

We decline Siskiyou County's request to open a formal proceeding on an issue that has been fully litigated and re-litigated over a more-than ten-year period. A formal proceeding will be opened in the unlikely event that PacifiCorp is responsible for paying cost overruns and decides to seek rate-recovery for those costs.

FINDINGS

1. D.11-05-002, modified by D.17-11-019, directed PacifiCorp to file an Advice Letter seeking authorization to transfer the Lower Klamath Project to the Klamath River Renewal Corporation.
2. In November 2020, PacifiCorp, the States of California and Oregon, the Karuk Tribe, the Yurok Tribe and the Klamath River Renewal Corporation entered into a Memorandum of Agreement on how to proceed with the Lower Klamath Project Removal.
3. PacifiCorp, the States of California and Oregon, the Karuk and Yurok Tribes and the Klamath River Renewal Corporation negotiated the Memorandum of Agreement in response to the July 2020 FERC Order that would have required PacifiCorp to remain a co-licensee for purposes of dam removal.
4. PacifiCorp remaining a co-licensee would violate the terms of the Klamath Hydroelectric Settlement Agreement.
5. The Klamath Water Users Association protested PacifiCorp 638-E on the grounds that PacifiCorp's Federal Energy Regulatory Commission license-transfer application is still pending, and PacifiCorp should not be allowed to collect its \$15 million contingency fund obligation in rates.
6. Siskiyou County protested PacifiCorp AL 638-E arguing that the filing was premature given the pending license-transfer application before the Federal Energy Regulatory Commission.
7. The California Natural Resources Agency, The Karuk Tribe, and the Yurok Tribe filed responses supporting PacifiCorp AL 638-E, citing more than ten

- years of collaboration, CPUC decisions supporting the removal of the Lower Klamath Project and the November 2020 Memorandum of Understanding.
8. PacifiCorp's reply to the protest of both the Klamath Water Users Association and Siskiyou County clarifies that PacifiCorp must still gain authorization from FERC and complete all of its Klamath Hydroelectric Settlement Agreement Section 7.1.4 obligations before any license transfer would occur.
 9. PacifiCorp's request to transfer ownership of the Lower Klamath Project to the Klamath River Renewal Corporation constitutes a compliance filing pursuant to D.11-05-002 and D.17-11-019 and should be approved.
 10. PacifiCorp's request for approval from the CPUC to transfer ownership of the Lower Klamath Project to KRRC does not constitute an actual transfer of ownership between the parties.
 11. The funding secured by the Klamath River Renewal Corporation and agreed to by all parties is likely adequate and already contains a \$50 million contingency fund over the forecasted project costs.
 12. The additional \$45 million contingency fund in the MOA represents an effort by the signatories to provide further assurance to FERC that the project is in the best interest of all PacifiCorp customers.
 13. A ratemaking proceeding would be necessary in order for PacifiCorp to collect from its ratepayers in California the proportional share of the \$45 million contingency obligation in the Memorandum of Agreement.
 14. To facilitate a ratemaking proceeding and transparency for stakeholders, PacifiCorp should create a Memorandum Account to track costs associated with the contingency fund, should the need for the fund arise.
 15. Removal of the Lower Klamath Project continues to be in the best interest of PacifiCorp customers.
 16. PacifiCorp's request for authorization to transfer ownership of the Lower Klamath Project to the Klamath River Renewal Corporation should be approved.

THEREFORE IT IS ORDERED THAT:

1. The request of PacifiCorp to transfer ownership of the Lower Klamath Project as requested in Advice Letter 638-E is approved.
2. If PacifiCorp intends to seek rate relief for its \$15 million contingency fund obligation, it shall file an Advice Letter to open a Memorandum Account to track all costs associated with California ratepayer's share of the contingency fund, with recovery of any balance in the memorandum account subject to

approval of the California Public Utilities Commission in a ratemaking proceeding.

3. PacifiCorp must file a Tier 1 Advice Letter informing the California Public Utilities Commission within 30 days of executing the license transfer for the Lower Klamath Project to the Klamath River Renewal Corporation.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on July 15, 2021; the following Commissioners voting favorably thereon:

Rachel Peterson
Executive Director