

River Commission (CRC). The amendment requires the CRC to pay an energy charge that is at least equal to Nevada Power's system incremental cost of energy.

Copies of this filing were served on CRC and the Nevada Public Service Commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before August 4, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Secretary.

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[Docket No. RP95-391-000]

**Ozark Gas Transmission System;
Notice of Petition for Waiver**

July 24, 1995.

Take notice that on July 18, 1995, Ozark Gas Transmission System (Ozark) filed a request for waiver of the requirement in Order No. 563 to provide electronic file downloading of capacity release data according to Electronic Data Interchange (EDI) standards.

Ozark states that the exit fee stipulations between Ozark and its only two firm shippers have been approved. Ozark states that, as a result, seventy days after the Effective Date of the stipulations, it will have no firm shippers and there can be no releases of firm capacity on Ozark. Ozark further states that there will be no releases of firm capacity on Ozark. Ozark further states that there will be no benefits to shippers by requiring Ozark to implement EDI and any costs associated with the EDI standards on Ozark will necessarily outweigh the benefits.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Emergency Commission, 825 North Capitol Street, N.E., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the

Commission's Rules and Regulations. All such motions or protests should be filed on or before July 31, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,
Secretary.

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[Project No. 2643-001]

PacifiCorp; Notice of Availability of Navigability Report for the Deschutes River, Request for Comments, and Notice of Pending Jurisdictional Inquiry

July 24, 1995.

PacifiCorp has filed an application for a subsequent license to continue operating its Bend Hydroelectric Project No. 2643. The project is located on the Deschutes River in the City of Bend, Deschutes County, Oregon. As part of its review of PacifiCorp's relicensing application, the Commission staff is investigating the jurisdictional status of the project and has prepared a navigability report for the Deschutes River. The navigability report concludes that the Deschutes River is not navigable in the vicinity of the Bend Project. If the Commission accepts the staff's conclusions regarding navigability, the likely outcome will be a Commission determination that the project is not required to be licensed pursuant to Section 23(b)(1) of the Federal Power Act (FPA). Because this determination may affect the resolution of matters at issue in the relicensing proceeding, all parties and interested persons are being given notice of the pending jurisdictional inquiry and an opportunity to comment on the navigability report. Comments may be filed no later than September 29, 1995.

Jurisdiction

The Commission recently explained its licensing jurisdiction as follows:¹

Under the FPA, the Commission has two types of licensing jurisdiction: permissive and mandatory. Permissive licensing is authorized rather than required, and is

¹ 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).

governed by Section 4(e) of the FPA. Mandatory licensing is governed by Section 23(b)(1) 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)(1).

Under Section 23(b)(1) 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.

The Commission staff has determined that the Bend Hydroelectric Project would not be located on federal lands or make use of a government dam. Therefore, whether licensing is required depends on whether conditions (1) or (4) above are met.

Regarding (4) above, the Commission staff has concluded that the Bend Hydroelectric Project is located on a non-navigable Commerce Clause stream within the meaning of Section 23(b)(1) of the FPA.³ Because the Bend Project generates power for the interstate electric grid, the project affects the interests of interstate commerce within the meaning of Section 23(b)(1).⁴ However, the project was constructed in 1913, and the Commission staff has found no evidence of any significant construction or major modification of the project after 1935.

Navigability

In these circumstances, whether licensing is required depends on whether the Bend Hydroelectric Project is located on a "navigable river of the United States." The staff's navigability report concludes that the Deschutes River is not navigable in the vicinity of the Bend Hydroelectric Project. It finds that, although portions of the Deschutes River are used by recreational boaters, especially white water rafters, both above and below the project site, the river is not navigable in the vicinity of

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

³ The Deschutes River flows into the navigable Columbia River. It is well-settled that Commerce Clause streams include the headwaters and tributaries of navigable rivers. See 70 FERC ¶ 61,325 at p. 61,994.

⁴ See *Federal Power Commission v. Union Electric Co.* ("Taum Sauk"), 381 U.S. 90, 97 (1965).