UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Finavera Renwables Ocean Energy, Ltd	Project No. 12751-000

MAKAH INDIAN TRIBE'S PETITION FOR REHEARING OF ORDER ISSUING CONDITIONED ORIGINAL LICENSE

I. INTRODUCTION

The Makah Indian Tribe requests rehearing of two aspects of the Federal Energy Regulatory Commission's ("Commission") December 21, 2007, Order Issuing Conditioned Original License to Finavera Renewables Ocean Energy, Ltd ("Finavera") for the Makah Bay Offshore Wave Pilot Project ("Project"), 121 FERC ¶ 61,288 (Dec. 21, 2007). This petition is filed pursuant to 16 U.S.C. § 825l and the Commission's Rule 713, 18 C.F.R. 385.713.

The Tribe seeks rehearing on the Commission's determination that the National Marine Sanctuary Program (NMSP or "Sanctuary Program") has authority to condition the Project under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), on the basis that the Olympic Coast National Marine Sanctuary ("Sanctuary") is a federal "reservation." The Tribe also seeks a modification of Article 202(b) to bring it into conformity with Section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e)(1).

II. STATEMENT OF ALLEGED ERROR

BACKGROUND

This proceeding involves an application by Finavera (originally, AquaEnergy Ltd) for a license to construct, operate and maintain the Project, a four-buoy, 1.0 megawatt wave energy project located off the northwest coast of Washington State's Olympic Peninsula and within the

usual and accustomed fishing grounds of the Makah Tribe. The Project is designed to demonstrate an emergent hydrokinetic energy technology and evaluate the impacts of such technology on the environment. Since the Project's inception, the Makah Tribe has worked closely with the AquaEnergy, and now Finavera, to advance this Project because of the Tribe's strong interest in developing renewable energy sources and the Project's potential benefits to the Tribe's economic and environmental welfare.

The Project consists of four wave energy buoys and an associated anchoring and mooring system, a transmission cable between the buoys and the shore, and a small shore-based structure on Hobuck Beach connecting the Project to the local utility district's distribution line. The Project is located off of Waatch Point and Hobuck Beach, both of which are within the Makah Indian Reservation, which extends to the low tide mark. The entirety of the aquatic portion of the Project is within the Tribe's adjudicated usual and accustomed fishing grounds reserved by the 1855 Treaty of Neah Bay. The aquatic portion of the Project is located on State-owned aquatic lands and is also within the boundaries of the Sanctuary.

Because of the Tribe's strong interest in the Project, it moved for intervention as a party in the licensing proceeding on February 13, 2007. The Tribe submitted comments on both the Preliminary Draft Environmental Assessment prepared by AquaEnergy and the Commission's May 2007 Environmental Assessment. In addition, the Tribe participated in numerous interagency meetings involving the overlapping federal and state regulatory processes for the Project and a concurrent effort by the parties to reach a settlement agreement regarding mitigation and other conditions for the Project.

On February 16, 2007, the NMSP, which is a program within the National Oceanic and Atmospheric Administration, U.S. Department of Commerce and has management responsibility

for the Sanctuary, intervened in this proceeding and asserted jurisdiction under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), to impose on the license mandatory conditions that it considered necessary for the protection and utilization of the Sanctuary. NMSP Notice of Intervention at 1-2, 11. The NMSP justified its Section 4(e) authority on the grounds that the Sanctuary constitutes a federal "reservation," which Congress has defined to include "lands and interests in lands acquired and held for any public purposes." *Id.* at 11; 16 U.S.C. §§ 797(e), 796(2). Citing a previous Commission decision on the Project, *AquaEnergy Group Ltd*, 102 FERC ¶ 61,242 (¶ 14) (Feb. 28, 2003), the NMSP claimed that the Commission agrees with this position. NMSP Notice of Intervention at 11.

Having asserted Section 4(e) jurisdiction over the Project, the NMSP submitted ten conditions that it deemed necessary for the adequate protection and utilization of the Sanctuary, including the reservation of its authority to impose modifications or additional conditions consistent with its Section 4(e) authority. NMSP Notice of Intervention at 20-40; 121 FERC ¶ 61,288 (App. A & Condition 10). The Commission was obligated to include these conditions in the license. 16 U.S.C. § 797(e) (licenses "shall be subject to and contain such conditions" as the NMSP shall deem necessary for the adequate protection and utilization of the federal reservation). The Tribe does not, as a general matter, disagree with the need for the enumerated conditions and considers them important protective measures against the Project's potentially adverse environmental impacts; however, the Tribe does oppose the reservation of authority to modify the listed conditions and impose additional conditions.[1]

Because the terrestrial and tideland portion Project is located on the Makah Reservation, which is held in trust by the United States, the Department of the Interior does have Section 4(e)

[1] If the Commission amends its determination on the NMSP's Section 4(e) authority, these conditions (with the exception of the reservation of 4(e) authority) should remain in the license under the Commission's authority to impose appropriate conditions in this ecologically sensitive area.

authority over the Project. 16 U.S.C. § 796(2) (“reservations” include “tribal lands embraced within Indian reservations”). On February 15, 2007, the Interior Department reserved Section 4(e) authority. Later, the Department clarified its reservation, noting that the Bureau of Indian Affairs had an interest in the Project based on its location on the Makah Indian Reservation. Nov. 28, 2007, letter from Sleeger to FERC. The Department also sought to intervene in the proceeding in early December 2007. The Commission denied the motion to intervene as untimely in its licensing order. 121 FERC ¶ 61,288 (¶ 5).

In its comments on the Commission’s Environmental Assessment, the Makah Tribe objected to the NMSP’s assertion of Section 4(e) jurisdiction, but maintained that the Assessment itself had made no determination as to the validity of the NMSP’s claim. Makah Tribe’s Comments on May 2007 EA (June 28, 2007) at 2. The Tribe briefly explained its basis for disagreeing with the Sanctuary’s 4(e) status, including that the Sanctuary was neither a “reservation” or “interest in land” that falls within the meaning of Section 4(e), but did not request a formal determination of this issue.

In the Order Issuing Conditional Original License, the Commission accepted the NMSP’s assertion of Section 4(e) jurisdiction over the Project and included all ten of the agency’s conditions, including the reservation of authority to add additional conditions, in the license. 121 FERC ¶ 61,288 (¶¶ 23-28). In a footnote, the Commission addressed the Tribe’s objection to the Sanctuary’s claim to 4(e) status. Disagreeing with the Tribe’s contentions, the Commission stated that:

> The Sanctuary consists of not only the “coastal and ocean water” within its boundaries, but also “the submerged lands thereunder.” *See* 15 C.F.R. § 922.150(a) (2007). As we have explained before, by the terms of the Sanctuaries Act, the Secretary of Commerce has jurisdiction to manage and protect such lands and waters. Thus, the Sanctuary represents lands acquired and held for a public purpose. *See AquaEnergy Group LTD*, 102 FERC ¶ 61,242 at P 14 (2003).

121 FERC ¶ 61,288 (¶ 23 n.26).

The Commission's determination that the NMSP has Section 4(e) authority over the Project based on the Sanctuary constituting a federal reservation is an error of law. The Tribe now seeks rehearing on this determination as well as to request modification of Article 202(b) of the licensing order.

ARGUMENT

The Sanctuary Program's assertion of Section 4(e) authority is legally incorrect. The portion of the Project seaward of the low tide mark is located on aquatic lands owned by the State of Washington. The creation of the Sanctuary in 1994 did not transfer ownership of these aquatic lands to the federal government. Accordingly, the Sanctuary is not a federal "reservation" because the aquatic portion of the Project does not occur on lands that the United States has "acquired and held" for a public purpose. Because the Commission's determination that the Sanctuary is a reservation under Section 4(e) of the Federal Power Act is arbitrary, capricious, an abuse of discretion, or not in accordance with law, rehearing should be granted. *California v. FERC*, 966 F.2d 1541, 1549 (9th Cir. 1992). Furthermore, Article 202(b) is not consistent with the express language of Section 10(e) of the Federal Power Act and should be modified accordingly.

I. The Sanctuary is not a Federal "Reservation" Under Section 4(e) of the Federal Power Act.

A. The Bedlands Under the Project Are Owned by the State.

For a federal agency to assert Section 4(e) authority over a project, the project must occur within a federal "reservation." 16 U.S.C.§ 797(e). The Federal Power Act defines a "reservation" as lands and interests in lands owned by the United States and withdrawn, reserved

or withheld from private appropriation and disposal under the public land laws. *Id.* § 796(2). It explicitly includes national forests, Indian reservations and military reservations and excludes national parks and monuments. The NMSP asserts 4(e) authority under another part of the statutory definition of "reservation" applicable to "lands and interests in lands acquired and held for any public purposes." *Id.*

Under the NMSP's position, the Sanctuary only qualifies as a reservation if it consists of land or an interest in land that is "acquired and held" by the federal government, i.e. the Sanctuary Program may only impose Section 4(e) conditions on the Project if it is located on land owned by the Sanctuary. However, the aquatic portion of the Project is located entirely on an area of the seabed owned by the State of Washington.

The State holds title to the bedlands out to 3 nautical miles (approximately 3.5 statutory miles) from all points of its Pacific coastline. Article 24 of the Washington Constitution establishes the seaward boundary of the State in the Pacific Ocean as "one marine league off shore," which is equivalent to three nautical miles. This boundary is confirmed by the Submerged Lands Act, 43 U.S.C. § 1312 (approving and confirming state boundary claims to three geographical miles, a unit of distance essentially equivalent to three nautical miles). The four buoys, which constitute the most seaward extent of the Project, are 1.9 nautical miles off of Waatch Point.[2] 121 FERC ¶ 61,288 (¶¶ 1, 57). This is well within the seaward boundary of Washington, as claimed by the Washington Constitution and confirmed by federal law. Accordingly, the State owns the bedlands under the Project, not the United States.

[2] Submissions for the Project often refer to another distance – 3.2 nautical miles (3.7 statutory miles) – which is the distance of the buoys from the shore-based station on Hobuck Beach. The beach is further inland than Waatch Point, hence the greater numerical distance. *See* AquaEnergy Preliminary Draft Environmental Assessment (Oct. 2006) at 1-3 (Figure 1-1).

Numerous parties, including the applicant, pointed out this fact to the Commission in the course of this proceeding. *See, e.g.*, AquaEnergy October 2006 Preliminary Draft Environmental Assessment at 5-1 (because of headlands in the area, "state aquatic land ownership boundary extends about 5.3 miles offshore. Consequently, the entire project . . . will be on state-owned aquatic lands"); *id.* at 1-1 ("buoy anchors and underwater transmission cable would lie on state-owned bedlands/seafloor. The project does not occupy any federally-owned land . . . ."); *id.* at 4-9. Washington Department of Natural Resources (DNR), which manages the State's aquatic lands and is also requesting rehearing on the 4(e) issue, emphasized the State's ownership of the bedlands on several occasions. *See id.* at App. A-6 (DNR comments re state ownership of bedlands); DNR June 29, 2007, comments on May 2007 Environmental Assessment at 3-5 & Figures 1, 2 ("entirety of in-water portion of the project will be on or over state owned aquatic lands"); *see also* Makah Tribe's Comments on May 2007 Environmental Assessment (June 28, 2007) at 2 (noting that State claimed jurisdiction over bedlands).

Indeed, although the Sanctuary Program did not address the issue of State-ownership of lands under the Project in its Notice of Intervention, its previous comments on the Project unambiguously acknowledged the State's ownership. In its comments on the December 5, 2005, draft Preliminary Draft Environmental Assessment prepared by AquaEnergy, the Sanctuary stated:

> [T]his should mention that the cable would lie on state owned bedlands/seafloor. Please add the state waters boundary to figures.

Preliminary Draft Environmental Assessment at App. A-8 (Sanctuary's Jan. 3, 2006, comments).

A registered survey of the Project prepared in December 2006 confirmed that the bedlands under the Project are state-owned aquatic lands. *See* Figure G-1, submitted to FERC on

Feb. 15, 2007, Docket # 20070222-0300 (withheld from public view). The survey confirms that "the seabed is owned by the State of Washington." *Id.* With respect to the Project location, the survey concluded that "the Project does not occur in federal waters, but instead is within the state aquatic land ownership boundary." *Id.*

The Commission has repeatedly described the Project's location as 1.9 nautical miles off of Waatch Point, which is well within the 3-nautical-mile boundary of State-owned aquatic lands. 121 FERC ¶ 61,288 (¶¶ 1, 57); May 2007 Environmental Assessment at v, 1. Yet the licensing order never mentions State ownership beyond a bare acknowledgment that the aquatic portion of the Project occupies lands "collectively" of the Sanctuary and the State. 121 FERC ¶ 61,288 (¶ 2). Moreover, the order never specifies the State's undisputed proprietary ownership of those lands. The Commission's failure to address this fact, which even the Sanctuary has acknowledged, demonstrates the weakness of its position.

Because the State boundary encompasses the waters in which the Project is located, it follows that "title to and ownership of the lands beneath [the State's] navigable waters . . . and the natural resources within such lands and waters" are vested in the State of Washington. 43 U.S.C. § 1311(a). For this simple reason, the Sanctuary is not land or an interest in land that was "acquired and held" by the United States. Rather, because the State holds title to the aquatic lands on which the Project is located, the Sanctuary is not a "reservation" for purposes of Section 4(e) of the Federal Power Act.

B. Designation of the Sanctuary Did Not Transfer Ownership of State-Owned Aquatic Lands.

The Commission's primary support for its determination that the NMSP has Section 4(e) authority rests on Commerce Department's "designation" of the Sanctuary, which includes a description of marine waters and the "submerged lands" thereunder. 121 FERC ¶ 61,288 (¶ 23

n.26) (citing 15 C.F.R. § 922.150(a)); *see also* 59 Fed. Reg. 24586, 24603 (May 11, 1994) (designating regulations). But the designation by the Department was for the purpose of managing and protecting the marine resources of the Sanctuary, not transferring title to the bedlands from the State to the United States. For the Sanctuary to own the bedlands under the Project – which it has never claimed – it would require a transfer of proprietary rights to the bedlands. 16 U.S.C. § 1314(a) ("proprietary rights of ownership" not included in rights retained by United States over State's navigable waters). Indeed, the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C.§ 1431 *et seq.*, under which NOAA may designate marine sanctuaries, did not transfer title to the bedlands under such designated sanctuaries, nor did it authorize NOAA to do so when it creates such designations. Absent a transfer, the State continues to hold "title to and ownership of the lands beneath the navigable waters within the boundaries of [Washington]." 43 U.S.C.§ 1311(a).

The Sanctuary itself has acknowledged that the State owns the bedlands under the Project. Preliminary Draft Environmental Assessment at App. A-8 (Sanctuary's Jan. 3, 2006, comments). Further, the Sanctuary's management plan confirms more generally that the State "owns and manages aquatic lands, manages living resources, . . . within state waters of the sanctuary." Sanctuary Management Plan, Part V(B)(4) (resource protection, roles and responsibilities). However, the NMSP's Notice of Intervention fails to address State ownership of the bedlands under the Project. It merely states that the Project occurs "within the boundaries of the [Sanctuary]." NMSP Notice of Intervention at 3. Tellingly, the NMSP's one-paragraph argument in support of its Section 4(e) authority is silent as to ownership of the bedlands, stating in conclusory fashion: "Congress' creation of the [Sanctuary] constitutes a reservation, as the Commission itself has stated . . . ." *Id.* at 11.

The failure of the Sanctuary to satisfy the conditions for reservation status under Section 4(e) contrasts with the adjacent lands of the Makah Reservation. Title to the Reservation is held in trust by the United States for the Makah Tribe. Thus, the Reservation is land owned by the United States and as such, it qualifies under the express provisions of the Federal Power Act as a federal "reservation." 16 U.S.C. § 796(2); *City of Tacoma v. FERC*, 460 F.3d 53, 65-66 (D.C. Cir. 2006). The critical difference between the Sanctuary and the Makah Reservation is that the United States holds title to the latter, but not the former. Because designation of the Sanctuary did not transfer ownership of the bedlands under the Project to the United States, the Sanctuary Program has no Section 4(e) authority.

C. The Commission Incorrectly Relied on Its Flawed 2003 Order Addressing Land Ownership Under the Project.

In 2003, prior to the submission of the license application and the initiation of this proceeding, AquaEnergy sought rehearing on the issue of whether the Project was required to be licensed under Part I of the Federal Power Act. The Commission's order on rehearing addressed the primary question of whether the Project is located in navigable waters of the United States, one of four independent conditions for requiring a license. 16 U.S.C. § 817(1); *AquaEnergy Group, Ltd*, 101 FERC ¶ 62,009 (¶ 5) (No. DI02-3-001 Oct. 3, 2002). The order also briefly addressed AquaEnergy's contention that the Project would not occur on federal land, a separate condition triggering the license requirement. The Commission concluded that because "submerged lands" were included in the Sanctuary designation and because the National Marine Sanctuaries Act granted the NMSP jurisdiction to manage and protect the resources of the Sanctuary, the Sanctuary "represents lands acquired and held for a public purpose." 102 FERC ¶ 61,242 (¶ 14). This determination was based in part on the Outer Continental Shelf Lands Act of

1953, which declares federal ownership of the seabed beyond state boundaries, i.e. beyond 3 navigable miles. *Id.* (¶ 14 n.13) (citing 43 U.S.C. § 1332(a)).

The Commission's 2003 decision with respect to federal lands is cited by the NMSP and the Commission's licensing order as support for the NMSP's Section 4(e) authority. 121 FERC ¶ 61,288 (¶ 23 n.26); NMSP Notice of Intervention at 11. However, such reliance is unwarranted because in addition to being unnecessary for the Commission's determination that a license was required for the Project, the conclusion that the aquatic portion of the Project was located on federal lands was legally incorrect.[3] As discussed above, the Sanctuary's designation including "submerged lands" did not transfer ownership of the bedlands under State waters to the federal government. Moreover, the Outer Continental Shelf Lands Act has no application to this Project because is it located no more than 1.9 nautical miles off of Waatch Point, well within the State's seaward boundary.[4] Neither the Tribe nor DNR participated in this proceeding, and none of the parties made the argument presented here – that the Project is located on State lands, not federal lands.[5]

Finally, the NMSP's regulatory authority to manage and protect the Sanctuary is also insufficient to establish it as a "reservation" of land. In a 1960 case, the Supreme Court held that

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[3] The NMSP submitted a brief in the rehearing proceeding, but never argued that the Project was located on federal lands. The NMSP's primary contention was that, regardless of whether the Project was 1.9 or 3.17 nautical miles offshore, it was located within "Commerce Clause waters." National Ocean Service Brief in Response to AquaEnergy Request for Rehearing at 4 (No. DI02-3 Nov. 22, 2002).

[4] Some confusion regarding the exact location of the Project and its distance from shore likely contributed to the Commission's erroneous citation to the Outer Continental Shelf Lands Act because AquaEnergy's rehearing petition suggested that the Project had been moved further seaward, 3.17 nautical miles from Waatch Point. *See* AquaEnergy's Request for Rehearing at 6, Figure 5 (No. DI02-3 Nov. 1, 2002). This appears to have been an error regarding the reference point on land, not a change in the actual Project location. In AquaEnergy's response to the NMSP's brief on rehearing, it stated that the Project was 3.17 nautical miles *off of Hobuck Beach*, which is further inland than Waatch Point. *See* AquaEnergy's Response to National Ocean Service Brief at 2 (No. DI02-3 Feb. 6, 2003). Regardless of this prior conflicting information, the Commission now acknowledges that the Project is located 1.9 nautical miles off of Waatch Point. 121 FERC ¶ 61,288 (¶ 1). As a point of clarification, it is the Tribe's understanding that the Project is located 1.9 nautical miles off of Waatch Point *and* 3.2 nautical miles (3.7 statutory miles) off of Hobuck Beach. The two distances merely reflect different reference points on land.

[5] The *AquaEnergy* proceeding also did not involve an assertion of Section 4(e) authority, so both the parties' briefing and the Commission's ruling had no reason to address the issue of land ownership in that legal context.

the Government's strong fiduciary interest in fee land owned by an Indian tribe (but not held by the United States in trust) was insufficient to qualify the land as a reservation for purposes of the Federal Power Act. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). Because the land in question was owned by the tribe and not held in trust by the federal government, it did not constitute "lands and interests in lands owned by the United States" and consequently was not a "reservation" under the Federal Power Act. *Id.* at 111; *see also City of Tacoma v. FERC*, 460 F.3d at 65. Likewise, the United States does not own the submerged lands under the Project, and the Sanctuary's regulatory authority alone cannot satisfy the criteria for asserting Section 4(e) authority.

II. Article 202(b) of the License Is Contrary to Section 10(e) of the Federal Power Act.

The Tribe also seeks rehearing regarding Article 202(b) of the license which reads:

> The licensee shall, subject to approval by the Commission, negotiate with the Makah Tribe a reasonable annual charge for the purpose of reimbursing the Makah Tribe for the use, occupancy, and enjoyment of 1 acre of its lands within the Makah Indian Reservation. Such payment agreement shall be filed with the Commission within six months of the effective date of the license. *In the event that no agreement is reached by such time, the Commission will take appropriate action to establish the annual charge, after notice and opportunity for hearing*.

121 FERC ¶ 61,288 (Article 202(b)) (emphasis added). The Tribe objects to this language because it appears to reserve to the Commission the *unilateral* power to establish annual charges for the use of Tribal land without the consent of the Tribe.

An assertion of unilateral power to establish annual charges for the use of Tribal land is contrary to the express language of Section 10(e) of the Federal Power Act, which provides:

> [W]hen licenses are issued involving use of . . . tribal lands embraced within Indian reservations the Commission shall . . . in the case of such tribal lands, *subject to the approval of the Indian tribe having jurisdiction of such lands* as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof.

16 U.S.C. § 803(e)(1) (emphasis added). Section 10(e) of the Federal Power Act thus plainly requires the consent of the Tribe to any charge established by the Commission.[6]

The Tribe notes that it has reached an agreement in principle with Finavera on the annual charges for the use of Tribal land and does not anticipate seeking Commission resolution of this issue. However, to conform the terms of the license with the requirements of the Federal Power Act, the Tribe requests that the language of Article 202(b) be modified to insert the words "and subject to the approval of the Makah Indian Tribe" at the end of the last sentence of that article.

CONCLUSION

For the foregoing reasons, the Makah Tribe respectfully requests that the Commission grant the request for rehearing, amend its determination regarding the Sanctuary Program's Section 4(e) authority and modify Article 202(b) as described above.

Respectfully submitted, this 18th day of January, 2008,

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM

/s/ Brian C. Gruber
John B. Arum, WSBA # 19813
Brian C. Gruber, WSBA # 32210
2101 Fourth Ave, Suite 1230
Seattle, WA 98121
(206) 448-1230/(206) 448-0962 (fax)

[6] The Tribe acknowledges that similar language has been used by the Commission in other licensing orders. *See Minnesota Power & Light Co.*, 75 FERC ¶ 61,131, 61449 (May 1, 1996). However, the issue of Tribal consent was not raised in those proceedings. Furthermore, the Commission's prior practice cannot override the express language of the Act.

PROOF OF SERVICE

I hereby certify that I have served the foregoing Makah Indian Tribe's Petition for Rehearing of Order Issuing Conditioned Original License upon each person designated on the official service list by e-filing this document with the Secretary.

DATED at Seattle, Washington this 18th day of January 2008,

/s/ Brian C. Gruber

Brian C. Gruber
2101 Fourth Ave, Suite 1230
Seattle, WA 98121
(206) 448-1230