

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Loup River Public Power District

Project No. 1256-031

**EMERGENCY MOTION FOR STAY OF LOUP RIVER PUBLIC POWER
DISTRICT, OR ALTERNATIVELY FOR EXTENSION OF TIME ON CERTAIN
LICENSE CONDITIONS, AND FOR EXPEDITED CONSIDERATION**

Pursuant to Rule 212 of the Rules of Practice and Procedure¹ of the Federal Energy Regulatory Commission (“Commission”), Loup River Public Power District (“Loup Power District” or “District”) hereby requests that the Commission grant a stay, *ab initio*, of the “Order Issuing New License” issued on May 22, 2017 (159 FERC ¶ 62,198, “New License” or “Order”) for the Loup River Hydroelectric Project (FERC Project No. 1256, “Project”), pending review of the Order on rehearing and on judicial review if taken. The Order contains requirements for the continued operation of the Project that are arbitrary and capricious, and are not supported by substantial evidence in the record of this proceeding. Therefore, an immediate stay of the Order, *ab initio*, is necessary and appropriate to avoid irreparable harm to Loup Power District [including preserving the District’s rights to meaningful review of the Order on rehearing and judicial review, as provided for under Section 313 of the Federal Power Act (“FPA”)²]; is necessary and appropriate to avoid irreparable harm to electric power customers, the public in general, and the environment and fishery resources; is in the public interest; and justice so requires.

In the alternative, Loup Power District requests that the Commission grant a stay, *ab initio*, of the Order with respect to the requirements of at least the following License provisions: Ordering Paragraphs D and E, and License Articles 202, 401-02, 404-07, 409,

¹ 18 C.F.R. § 385.212.

² 16 U.S.C. § 8251.

411, and 413. As more fully discussed herein, justice requires such a partial stay which is necessary to avoid irreparable injury and in the public interest.

Assuming, *arguendo*, that the Commission denies Loup Power District's request for a full or partial stay as supported in this Motion, the District hereby requests that the Commission grant an extension of time for compliance with the following License provisions in the Order, pending review of those provisions on rehearing and on judicial review if taken: Ordering Paragraphs D and E, and License Articles 202, 401-02, 404-07, 409, 411, and 413. Good cause exists to grant such an extension of time, as demonstrated in this Motion.

Loup Power District requests expedited consideration of this Motion to prevent the irreparable harm described herein. Absent expedited action by the Commission, the District would be forced to file a motion in court to ensure that the provisions in the Order are not considered effective and operative.

I. Background

On April 16, 2012, Loup Power District filed its application for a new license to continue to operate and maintain the existing Project, located on the Loup River in Nance and Platte Counties, Nebraska. In its application, the District proposed to continue to operate the Project as originally licensed with no increase the Project's generating capacity. In support of its relicensing proposal, the District has filed extensive documentation including results from all studies performed pursuant to the Commission Staff's Study Plan Determination³ during this proceeding. Studies implemented by the District were based on input from all resource agencies and agreed upon by the Commission and the agencies.

³ Study Plan Determination for the Loup River Hydroelectric Project, Office of Energy Projects, Project No. 1256-029, issued August 26, 2009.

The Commission Staff issued its Draft Environmental Assessment for the Project on May 22, 2014 (“DEA”), with a proposed Staff Alternative for relicensing the Project and with proposed Draft License Articles (“DLAs”). The District filed comments on the DEA and on the DLAs on June 23, 2014, December 5, 2014, and November 5, 2015.

On July 5, 2016, the Commission Staff issued its Final Environmental Assessment for the Project (“FEA”), with a proposed Staff Alternative for relicensing the Project and with proposed Revised Draft License Articles (“Revised DLAs”). Loup Power District submitted comments on the FEA on September 21, 2016, reaffirming its position that the requirements of the proposed Staff Alternative and the proposed Revised DLAs: (i) do not adequately address the arguments of the District; (ii) do not consider the significant operational impediments that restrict the District’s ability to implement and comply with proposed flow modifications; (iii) are unnecessarily burdensome and costly to the Project; (iv) could jeopardize the District’s water right and circumvent water rights administration in the State of Nebraska; (v) are likely to result in economic harm to electric power users; and (vi) are generally arbitrary and capricious and not supported by substantial evidence in the record of this relicensing proceeding.

On December 16, 2016, the U.S. Fish and Wildlife Service (“USFWS”) issued its Final Biological Opinion (“BO”) under the Endangered Species Act (“ESA”).⁴ As part of that BO, USFWS concluded that the relicensing of the Project under the proposed Commission Staff Alternative and proposed Revised DLAs would not jeopardize the continued existence of any threatened or endangered species. The BO also included an Incidental Take Statement with Reasonable and Prudent Measures (“RPMs”) and associated

⁴ A Draft BO was issued by USFWS on May 1, 2015. The District filed comments on that Draft BO with the Commission on June 1, 2015. The Commission Staff forwarded comments on the Draft BO (including the District’s comments) to USFWS on June 5, 2015.

Terms and Conditions for pallid sturgeon, Interior least terns, and piping plovers. On January 27, 2017, Loup Power District filed comments with the Commission reasserting that the BO was fatally flawed, inconsistent with applicable ESA standards and USFWS policy, and not supported by substantial evidence in the record of this relicensing proceeding.

In its Order issued May 22, 2017, the Commission imposes significant requirements and obligations in the New License for the Project, with an effective date of May 1, 2017. In particular, the Commission includes terms and conditions in the Order requiring changes in Project flows and use of available water which the District has repeatedly demonstrated are not supported by substantial evidence in the record and, in some cases, are not operationally possible. Further, the Order incorporates the BO's RPMs and associated Terms and Conditions through Ordering Paragraph E (included as Appendix A to the Order). The Commission's issuance of the Order with these terms and conditions (including its reliance on the BO) is arbitrary and capricious, and is not based on substantial evidence in the record of this proceeding. Therefore, Loup Power District intends to timely file a request for rehearing of the Order, and may seek judicial review.

As documented below, the requirements of the Order will cause irreparable injury to the District, to its ratepayers, to the public generally, and to the environment. Particularly given the effective date of the New License in the Order, an immediate stay of the Order and its requirements is appropriate, necessary, and in the public interest.

II. The Commission Should Grant an Immediate Stay of the Order.

Given the effective date of the Order, the Commission should grant a stay, *ab initio*, of the Order. As stated in Ordering Paragraph A of the Order, the new license issued to Loup

Power District is effective May 1, 2017. On that basis, the requirements under the Order are effective immediately and the District is required to immediately comply with those requirements. However, as the District has repeatedly told the Commission, it is unclear how a number of those requirements can be implemented – if they can be implemented at all. Furthermore, implementation of certain flow requirements will cause irreparable and unrecoverable injury to the District, to the public, and to the environment, particularly if any of the new requirements are modified on rehearing (or on judicial review). A stay is in the public interest to maintain the *status quo* pending rehearing and potential judicial review of the Order.

A. The Applicable Legal Standard

As often acknowledged by the Commission, it may grant a stay of an order where “justice so requires,” consistent with the Administrative Procedure Act (“APA”), Section 705.⁵ As stated in Section 705: “When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” The courts have affirmed the Commission’s authority to grant a stay,⁶ and stays in cases similar to this proceeding have been found appropriate and in the public interest.

In considering whether to grant a stay, the Commission must balance the equities presented and consider a number of factors, including “whether the movant will suffer irreparable injury in the absence of a stay; whether issuance of a stay would substantially

⁵ 5 U.S.C. § 705. See, e.g., *Utilities Commission and City of Vanceburg, Kentucky*, 41 FERC ¶ 61,027 at 61,073 (1987) (“*Vanceburg*”), citing APA Section 705 and *Aquaenergy Systems, Inc.*, 39 FERC ¶ 61,373 (1987) (“*Aquaenergy*”).

⁶ See, e.g., *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (“*Wisconsin*”); *Washington Metropolitan Area v. Holiday Tours*, 559 F.2d 841, 843-44 (D.C. Cir. 1977) (“*Washington*”).

harm other parties; and where the public interest lies.”⁷ Unrecoverable economic losses particularly count as irreparable injury.⁸ Furthermore, the Commission may grant a stay where justice requires even without a demonstration of irreparable injury.⁹ For example, the Commission has found that justice may require issuance of a stay to maintain the *status quo* pending rehearing.¹⁰ The Commission has also found that a stay was appropriate to avoid the licensee expending substantial sums for “implementation of other significant measures that ultimately might not be required should the movant prevail on appeal.”¹¹

In this proceeding, the Commission must balance the fact that the District, others and the environment will suffer irreparable injury if a stay were denied (as documented in the record in this proceeding and described herein); that such irreparable injury is unrecoverable; that there is a limited possibility of substantial harm to other interested parties to justify denying a stay; and that the public interest generally requires a stay be issued here to maintain the *status quo*. Consistent with the applicable standard and case law, the Commission should find that a stay of the Order is appropriate in this proceeding.

B. Absent a Stay, the District would suffer irreparable injury.

In this proceeding, as documented in the attached affidavit of Neal D. Suess, President/CEO of Loup Power District (Appendix A hereto), absent a stay the District would suffer irreparable injury which is certain and great, actual, and not theoretical.¹² Commission case law has found that a stay, pending review of the requirements on rehearing (and

⁷ *Aquenergy*, 39 FERC at 62,211; *see also, e.g., Eagle Crest Energy Company*, 153 FERC ¶ 61,058 at para. 11 and fn. 8 (2015) (“*Eagle Crest*”); *citing Catamount Metropolitan District*, 149 FERC ¶ 61,242 at para. 35 (2014); *Public Utility District of No. 1 of Snohomish County, Washington*, 147 FERC ¶ 61,215 at para. 31 (2014).

⁸ *See, e.g., Wisconsin*, 758 F.2d at 674; *Washington*, 559 F.2d at 834-44.

⁹ *See, e.g., Montana Power Company*, 80 FERC ¶ 61,175 at fn. 7 (1997) (“*Montana*”).

¹⁰ *See, e.g., Vanceburg*, 41 FERC at 61,073.

¹¹ *Public Utilities District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166 at para. 7 (2005) (“*Pend Oreille*”).

¹² *See, e.g., Eagle Crest*, 153 FERC at para. 12.

potentially in court), is appropriate to avoid such irreparable injury, and is in the public interest.¹³

Specifically, the Order (License Article 404) requires the District to implement minimum flows into the bypassed reach of 275 cfs (or inflow, whichever is less) from April 1 through September 30, and of 100 cfs (or inflow, whichever is less) from October 1 through March 31. In addition, the Order (License Article 406) requires that the District to cap flows into the Power Canal from March 1 through June 30 at an instantaneous rate of 2000 cfs. These flow provisions significantly reduce the water available to the District for power production at the Project, which is an unrecoverable adverse economic impact.

The Order (License Article 405) also requires the District to operate the canal in a run-of-canal mode from May 1 through June 7 with a constant total surface elevation of the Lakes. Furthermore, the Order (through Ordering Paragraph E and Appendix A) adopts the BO RPM1 and associated Term and Condition #1(a) for pallid sturgeon that would require the District to shut down hydrocycling operations if temperatures meet or exceed 93° F. based on real-time temperature readings at the U.S. Geological Survey (USGS) gage at Louisville, causing the District to cease diversion of water into the Power Canal. These provisions further remove the District's ability to produce power when most needed in the grid, *e.g.*, during high energy usage. This is an unrecoverable adverse economic impact.

If the minimum bypass flow requirement, the maximum Canal diversion limitation, and the run-of-canal limitations in the Order are required at the Project, based on the analysis in the FEA the District would lose approximately 14,667 MWh per year in power generation, valued at over \$816,000 per year (using the 2015 contract price of \$55.64/MWh).¹⁴ That

¹³See, *e.g.*, *Montana*, 80 FERC at fn. 7.

¹⁴ See FEA at page 263.

calculation of lost power and revenues does not include the additional losses by reason of the limitation on hydrocycling operations when real-time temperatures have met or exceeded 93 °F, as required under Ordering Paragraph E and Appendix A. These flow provisions substantially affect the District's ability to efficiently use the water resources at the Project and to generate renewable power for sale into the grid.¹⁵ Such loss of flows and associated lost power generation pending review of the Order would not be recoverable if the Order were modified on rehearing or on judicial review.

The modified flow requirements in the Order could also jeopardize the District's water rights and circumvent water rights administration in the State of Nebraska, as discussed in prior submittals to the Commission in this proceeding.¹⁶

The District would also suffer irreparable injury in the cost, at a minimum, of immediately making substantial modifications to existing equipment, and potentially immediately having to purchase and install new equipment required to comply with the Order. Such costs may not be required if the Order were reversed and/or modified on rehearing (or on judicial review) and would also likely not be recoverable. Commission case law has found that a stay is appropriate to avoid the expenditure of costly equipment and/or construction before such a requirement has been reviewed on rehearing and potentially in court.¹⁷

Furthermore, the District would suffer irreparable injury in the unrecoverable commitment of time and resources to comply with the Order requirements, including some of

¹⁵ The License Order (at para. 141) estimates the lost power by reason of the flow requirements at an even higher value. With the differential of power under the existing License compared to the New License of approximately 16,200 MWh, at \$55.64/MWh the annual lost power equates to nearly \$1 million.

¹⁶ See the District's June 23, 2014, comments on the DEA (page 9), and the District's September 21, 2016, comments on the FEA (pages 1-5).

¹⁷ See, e.g., *Pend Oreille*, 113 FERC at para. 7.

which the District has repeatedly informed the Commission are not operationally possible.¹⁸

The Project does not have a dam that allows storage of inflow for use or distribution at a later time. Rather, all flow diverted into the Loup Power Canal is released from the Project within approximately one day's time. This operational condition makes it impossible for the District to comply with exact instantaneous flows of any sort.¹⁹

In addition, operation of the Project Headworks (*i.e.*, the intake gates, sluice gates, and Settling Basin) is an art, not a science. Providing precise instantaneous flows either into the Loup Power Canal or down the Loup River bypass reach cannot be achieved, rendering the proposed limitations to be technically impractical.²⁰ Finally, the USGS stream gages are not suited for the degree of flow measurement and regulation required under the Order. Numerous constraints to implementing the requirements in the Order have been pointed out by the District, including distance between gages and gates, gage reliability and rating, data availability, and ice conditions during winter months.²¹

In addition, the Order (License Articles 401-02, 407, 409, 411 and 413) requires the District to immediately begin to prepare and in the near future implement numerous monitoring and/or management plans. Furthermore, the Order (through Ordering Paragraph E and Appendix A) adopts the BO RPMs and associated Terms and Conditions for additional monitoring and reporting. The District will need to allocate substantial resources for the

¹⁸ See the District's June 23, 2014, comments on the DEA (pages 12-16); the District's June 1, 2015, comments on USFWS's Draft BO, Attachment A; the District's November 5, 2015, comments on the proposed DLAs; and the District's September 21, 2016, comments on the FEA (pages 11-14).

¹⁹ See the District's June 23, 2014, comments on the DEA (page 12); and the District's June 1, 2015, comments on USFWS's Draft BO, Attachment A (page 1).

²⁰ See the District's June 23, 2014, comments on the DEA (page 12); the District's June 1, 2015, comments on USFWS's Draft BO, Attachment A (pages 1-2); and the District's September 21, 2016, comments on the FEA (pages 11-12).

²¹ See the District's June 23, 2014, comments on the DEA (pages 12-16); the District's June 1, 2015, comments on USFWS's Draft BO, Attachment A; and the District's September 21, 2016, comments on the FEA (pages 11-14).

preparation and consultation on these plans. Commission case law recognizes a stay is appropriate to avoid such commitments of time and resources pending review on rehearing during which it may be determined that such work is unnecessary.²²

- C. Absent a stay, electric power users and the public generally would suffer irreparable injury due to loss of hydro power.

The electric customers for the power that the District generates and sells through Nebraska Public Power District (“NPPD”), and the public generally, would also suffer irreparable injury if the Order were not stayed, as documented in the attached affidavit of Neal Suess (Appendix A hereto). In the absence of a stay, the customers that ultimately purchase power generated by the District through NPPD, and the electric grid generally, would have reduced power from the District based on the decreased flows available for generation under the Order²³ and would be forced to obtain the lost power from other sources, likely to be more expensive,²⁴ particularly during periods of high energy use. The License Order acknowledges: (1) that the additional License requirements would reduce hydro power to the electric grid (Order at para. 140 and 141); (2) that the Project power displaces non-renewable sources and thus provides environmental benefits (Order at para. 134); (3) that alternative power sources would be more expensive (Order at para. 139-40); and (4) that hydro power provides unique operational benefits to the electric utility system (Order at para. 142).

Higher costs to ratepayers and the loss of the valuable hydro power resource would be non-recoverable. As acknowledged by Commission case law, ratepayer impact should be

²² See, e.g., *Horseshoe Bend Hydroelectric Company*, 43 FERC ¶ 61,315 at 61,880 (1988).

²³ See FEA at pages 261–263.

²⁴ *Id.*

considered in determining the equities of a stay.²⁵

- D. Absent a stay, the environment and fishery resources in the Canal would suffer irreparable injury.

The minimum bypass flow requirements in the Order (License Article 404), the requirement to cap diversions into the Power Canal in the Order (License Article 406), and the flow restrictions under BO RPM1 and associated Term and Condition #1(a) (as incorporated into the License through Ordering Paragraph E and Appendix A) will substantially reduce the flows in the Power Canal and cause the canal environment and fishery resources to suffer irreparable injury. Regular diversion of water into the Power Canal is needed to maintain the excellent fishery that has been established.²⁶ Reduced, or ceased, diversion of water into the Power Canal would result in stagnant water that could adversely impact the existing canal fishery and could result in the death of thousands of canal fish.²⁷

- E. Absent a stay, the environment generally, and tern and plover nesting habitat in the Bypass Reach specifically, would suffer irreparable injury.

As documented in the record, research by the Platte River Recovery Implementation Program (“PRRIP”) indicates that a short duration high flow (“SDHF”) will not create sandbars to the desired criteria established by the PRRIP.²⁸ Such a SDHF is similar to placing a cap on the maximum diverted amount into the Power Canal (per License Article 406), although likely to a much lesser extent in magnitude and duration. In addition, the PRRIP’s Tern and Plover Synthesis Chapters indicate that any sandbars created by a SDHF

²⁵ See, e.g., *City of Tacoma, Washington*, 110 FERC ¶ 61,140 at para. 44 (2005).

²⁶ See, e.g., Final License Application, Volume 2, Exhibit E, Section E.6.3.2. *see also* the FEA at pages 66–67.

²⁷ See Final License Application, Volume 2, Exhibit E, Section E.6.3.2; and the District’s June 23, 2014, comments on the DEA (pages 4-5).

²⁸ See the District’s January 27, 2017, comments on the Final BO (page 2); and the District’s September 21, 2016, comments on the FEA (page 8).

will be inundated during the nesting season by storm events during most years.²⁹ As a result, the PRRIP is considering alternative methods to mechanically create and maintain on- and off-channel nesting habitat. Based on studies performed by the District and confirmed by the PRRIP, capping the amount of flow diverted into the Canal will not create desired habitat, and any habitat created would be inundated by subsequent storm events, which will be detrimental to the terns and plovers.

F. Agricultural and industrial operations would suffer irreparable injury if a stay is not granted.

Agricultural and industrial interests would also be adversely impacted and would suffer irreparable and unrecoverable loss due to the minimum flow requirement for the Loup River Bypass Reach under the Order. In times of low overall flow, the minimum flow requirements in the Loup River Bypass Reach and the flow restrictions under BO RPM1 and associated Term and Condition #1(a) under the Order would result in periods of no diversion into the Power Canal. During such periods agricultural interests would suffer irreparable injury by the loss of available water for irrigation during weather conditions that likely require irrigation for sustaining crop growth.³⁰ In addition, sand operations on the Power Canal would suffer irreparable injury with such restrictions on diversions into the Power Canal and resulting lower sediment removal, potentially costing jobs.³¹

G. A stay would protect the District's right to a meaningful review of the Order.

Under FPA Section 313, the District has a right to a meaningful opportunity for

²⁹ See the February 25, 2015 PRRIP Interior Least Tern and Piping Plover Habitat Synthesis Chapters available online at [https://www.platteriverprogram.org/PubsAndData/ProgramLibrary/PRRIP_2015_Tern and Plover Habitat Synthesis Chapters.pdf](https://www.platteriverprogram.org/PubsAndData/ProgramLibrary/PRRIP_2015_Tern_and_Plover_Habitat_Synthesis_Chapters.pdf); a copy of that Report has been filed in this proceeding on June 1, 2015.

³⁰ See Final License Application, Volume 2, Exhibit E, Section E.1.7.

³¹ See the Final License Application, Volume 1, Exhibit B, Section B.1.3.

review of the Order (on rehearing and potentially in court).³² Commission case law recognizes that a stay is appropriate to prevent any limitation of a party's right to meaningful review under the FPA.³³ A stay of the Order protects that important statutory right of the District, and is in the public interest.

H. No party will be harmed if a stay is granted.

In contrast, there is no substantial record evidence of irreparable harm if a stay of the Order were granted. Under a stay of the Order, the District would operate the Project as it has in the past – maintaining the *status quo*.

No party has filed in opposition to the relicensing of the Project as proposed by the District in its Application. To the contrary, the District's proposal for relicensing the Project has been supported by the Nebraska Public Power District, City of Columbus, Columbus Area Recreation Trails ("CART"), American Bird Conservancy, and members of the public who are interested in irrigation and recreation (including Jim Donaghue, Bill Shanle, Jim Shanle, Frankie Shanle, Carrie Heesacker, Mike Engle, Judy Trautwein, Tim Rodehurst, Monica Lee-Buss, Van Wurst, Monte Swantek, Arthur Spenner, Randall Haskell, and Jason Buss).³⁴

Furthermore, there is no clear, irrefutable record evidence that any threatened or endangered species would be harmed without the increased flows under the Order. As documented in the District's comments on the USFWS' Draft BO³⁵ and other District filings in this proceeding, and supported by over 4,500 pages of data in the record, the Project with

³² 16 U.S.C. § 8251.

³³ See, e.g., *Bangor Hydro-Electric Company*, 70 FERC ¶ 61,216 at 61,680 (1995).

³⁴ See FERC's January 12, 2009, public scoping meeting transcript, and FERC's March 27, 2009, Scoping Document 2; see also letter filed by the American Bird Conservancy in response to the Draft EA, dated December 18, 2014; and see Comments filed online by the City of Columbus in response to the Draft EA on June 18, 2014.

³⁵ See the District's June 1, 2015, comments on USFWS' Draft BO (pages 3-6).

current operations does not impact the survival or recovery of threatened or endangered species that are discussed in the Order and the BO.

I. A stay would defer triggering of the USFWS Biological Opinion.

Under Ordering Paragraph E (and Appendix A) of the Order, as discussed above, the Commission incorporates the RPMs and associated Terms and Conditions proposed by the USFWS in the BO. However, a grant of a stay as requested by the District is not problematic with respect to the RPMs and associated Terms and Conditions set forth in the BO. The federal action addressed in the BO is the issuance by the Commission of an effective new license for the Project. A stay would maintain the *status quo* prior to issuance of the New License pending review of the Order (*i.e.*, no new license) and would prevent the Order requirements for a new license from becoming effective. Therefore, the BO is not an impediment to the Commission granting the stay of the Order, in total and *ab initio*, as requested by the District here.

As the District has argued in prior filings at the Commission (and will present in its request for rehearing of the Order), the BO is fatally flawed, inconsistent with applicable ESA standards and USFWS policy, and is not based on substantial record evidence. As the District will argue on rehearing, the Commission is not required to adopt a BO which does not comply with ESA standards, is not based on substantial record evidence, and is arbitrary and capricious. In fact, as recognized by the courts, acceptance of such a fatally flawed BO by the Commission is itself arbitrary and capricious.³⁶ As stated by the court in *Tacoma v. FERC*, “the action agency must not blindly adopt the conclusions of the consultant agency, citing that agency’s expertise.”³⁷ The Commission’s inclusion of the RPMs and associated

³⁶ See, e.g., *City of Tacoma, Washington v. FERC*, 460 F.3d 53 at 75-76 (D.C. Cir. 2006) (“*Tacoma v. FERC*”).

³⁷ *Id.* at 76.

Terms and Conditions from the BO in the Order is arbitrary and capricious. Requiring that these provisions be implemented immediately causes irreparable injury to the District as discussed above.

J. Summary

In summary, a grant of a stay of the Order in its entirety, *ab initio*: (i) would avoid irreparable injury to the District, the public and the environment; (ii) would ensure that the District has meaningful rights to review of the Order as provided under the FPA; (iii) would ensure certainty in the Order requirements before they are implemented; (iv) would not cause irreparable harm to any other party; and (v) is in the public interest. Justice clearly requires issuance of a stay of the Order.

III. At a Minimum, the Commission Should Grant an Immediate Stay of Certain Requirements of the Order.

The most efficient and reasonable action is for the Commission to stay the Order in its entirety, *ab initio*. However, at a minimum, the Commission should partially stay the Order, *ab initio*, with respect to Ordering Paragraphs D and E, and License Articles 202, 401-02, 404-07, 409, 411, and 413. As the District has argued in submittals to the Commission (and will argue again in its request for rehearing of the Order), the provisions in License Articles 404-06 and in Ordering Paragraph E (incorporating the BO RPMs and associated Terms and Condition, through Appendix A) are particularly arbitrary and capricious, and are not supported by substantial evidence in the record as required under the FPA³⁸ and the APA.³⁹ Furthermore, as discussed above, requiring that the new flow requirements be implemented immediately causes irreparable injury to the District, the public and the

³⁸ 16 U.S.C. § 8251.

³⁹ 5 U.S.C. § 706.

environment. Furthermore, the provisions of Ordering Paragraphs D and E and License Articles 202, 401-02, 407, 409, 411, and 413 above have time deadlines that do not adequately permit a full review of the License requirements on rehearing (and potentially on judicial review).

As discussed above, in the Order under License Articles 404, 405, and 406, and through the incorporation of the USFWS BO's RPMs and associated Terms and Conditions (through Ordering Paragraph E and Appendix A) the Commission imposes restrictions in the diversions allowed into the Power Canal and to the Project powerhouses (through minimum bypass flows, maximum diversions into the Canal, restrictions on flows through the Canal, and limitations on fluctuations at Lake Babcock and Lake North). These flow restrictions reduce substantially the amount of renewable electric power that the District can produce, creating irreparable injury to the District and the public as discussed above.

Also under License Articles 404-06 in the Order, as discussed above, the Commission requires a change to operations that will require the District to modify existing equipment/facilities and may also require the District to acquire and install new equipment. Requiring that these facilities be installed/modified prior to review of the requirements on rehearing (and possibly in court) creates irreparable injury to the District as discussed above.

Under Ordering Paragraph (D) and License Article 202, the District is directed to file revised Exhibit drawings within 45 days of issuance of the Order. Further, under License Articles 401-02, 407, 409, 411, and 413 in the Order and through the incorporation of the USFWS BO's RPMs and associated Terms and Conditions (through Ordering Paragraph E and Appendix A), as discussed above, the Commission requires the District to develop and implement numerous monitoring and/or management plans based on the requirements of the

New License. Requiring that these plans be developed and implemented prior to review of the requirements on rehearing (and possibly in court) creates irreparable injury to the District as discussed above.

In summary, the requirement for the District to immediately implement the License provisions as set forth in the Order, before they are reviewed on rehearing (and potentially in court), would cause immediate and non-recoverable irreparable injury to the District, to the public, and to the environment, as discussed above. Therefore, it is in the public interest for the Commission to stay these License provisions pending review on rehearing (and potential judicial review), and justice requires that a stay of these License provisions be granted.

IV. If a Stay is Not Granted, the Commission Should Grant an Extension of Time for Compliance with Certain Requirements of the Order.

Assuming, *arguendo*, that the Commission does not find that a full or partial stay of the Order is required, the Commission should, nevertheless, grant an extension of time for the District to comply with the requirements of Ordering Paragraphs D and E, and License Articles 202, 401-02, 404-09, 411, and 413 until the rehearing process (and potential judicial review) is completed.

The Commission has readily acknowledged its ability to issue an extension of time as to requirements of its orders.⁴⁰ As discussed in detail above, the requirement for the District to implement these License provisions immediately would cause irreparable harm to the District, the public, and the environment. Accordingly, the time for implementation of these provisions of the Order should be extended until after the review process (rehearing and

⁴⁰ See, e.g., *Pend Oreille*, 113 FERC at para. 6-7 and fn. 8. Although the *Pend Oreille* case distinguished extensions of time where ESA issues were involved, contrary to that case in this proceeding no immediate risk exists to ESA species in the continued operation of the Loup Project pending rehearing, or potential judicial review.

judicial review, if taken) is completed.

In summary, good cause exists to grant such an extension, which is in the public interest for the reasons discussed above.

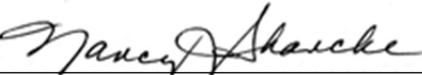
V. Conclusion

WHEREFORE, the District requests that the Commission grant a stay, *ab initio*, of the Order in its entirety pending rehearing, and potential judicial review, thereof. In the alternative, at a minimum, the District requests that the Commission grant a stay, *ab initio*, of the provisions of the Order as described above. Assuming, *arguendo*, that the Commission will not grant a full or partial stay of the Order as requested, the District requests that the Commission grant an extension of time for implementing the provisions of the Order described above until the rehearing process (and potential judicial review) is completed.

Respectfully submitted,

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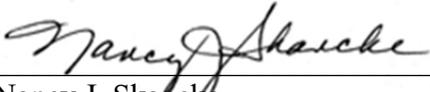
By 

Nancy J. Skancke
NJS Law PLC
1025 Conn. Ave., N.W.; Suite 1000
Washington, D.C. 20036-5417
Counsel for Loup River Public Power District

CERTIFICATE OF SERVICE

The undersigned certifies that she has served the foregoing document upon each person designated on the Commission's official service list for this proceeding, pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C., this 23rd day of May, 2017.

By 

Nancy J. Skancke
NJS Law PLC
Counsel for Loup River Public Power District

Affidavit of Neal D. Suess in Support of Emergency Motion for Stay

I, Neal D. Suess, President/CEO of Loup River Public Power District, do here declare as follows:

1. I am a licensed Professional Engineer and have served as President/CEO of Loup River Public Power District ("Loup") since January 2006.
2. In my capacity as President/CEO of Loup, I have been asked to confirm the potential adverse impacts of the requirements contained in the New License issued by the Federal Energy Regulatory Commission ("FERC") on May 22, 2017 (159 FERC ¶ 62,198, "New License" or "New License Order"), for the Loup River Hydroelectric Project ("Project") and, to the extent possible, to estimate the costs of implementing the requirements under the New License.
3. The effective date of the New License issued for the Project is May 1, 2017. Therefore, I understand that Loup is required to implement the requirements including operational changes contained in the New License immediately. However, Loup does not agree that the changes to the operation of the Project under the New License are appropriate, in the public interest, or consistent with the mandate of the Federal Power Act. Therefore, Loup is filing the Emergency Motion for Stay of the New License Order (to which this Affidavit is attached), and will be timely filing a request for rehearing of the New License Order.
4. Based on my knowledge of the Project and its operations, I believe that the immediate implementation of the New License requirements will cause adverse impacts on Loup, the public, and the environment. In many of the situations, such adverse impacts would be irrecoverable, as explained in detail in the Emergency Motion for Stay.
5. In support of the Emergency Motion for Stay, I have estimated the adverse economic impact of certain of the new flow limitations contained in the New License. In addition, I have estimated the cost of implementing the requirements under the New License over the first two years following the effective date of the New License when rehearing of the New License Order would be pending. As part of my analysis, I have reviewed the cost estimates that are included in the FERC Staff's Final Environmental Assessment ("FEA") issued on July 5, 2016, and reference those estimates where appropriate.
6. The New License requires Loup to implement three types of flow restrictions that will cause Loup to lose significant water for power production: the minimum bypass flows, the maximum Canal diversions, and the run-of-canal requirements; an additional flow restriction based on the U.S. Fish and Wildlife Service Biological Opinion ("USFWS

BO”) is discussed in paragraph 7 below. In the FEA, the FERC Staff estimates that the loss of power by reason of these three flow restrictions is approximately 14,667 MWh/year (equating to over \$816,000 per year. I believe that the FEA estimate may not reflect the full value of the lost power to Loup as a result of these three flow restrictions. However, even assuming that the FEA estimate is accurate, the economic cost to Loup from these flow restrictions is very significant and is unrecoverable as the water is forever lost for power production.

7. In addition, by incorporating USFWS BO Reasonable and Prudent Measure #1, Term and Condition #1(a) (through Ordering Paragraph E and Appendix A of the New License Order), the New License imposes an additional flow restriction when the water temperature is at or above 93° F. based on real-time temperature readings at the U.S. Geological Survey (USGS) gage at Louisville. The costs of this restriction by reason of reduced power production would be additional to that discussed in paragraph 6 above; the FEA did not address the impact of the USFWS BO flow restriction.
8. Although the precise source of replacement power to the grid (*i.e.*, the power production from other sources when Loup is unable to produce at prior levels due to the new flow restrictions) is difficult to predict, I believe that it is likely that replacement power would be from non-renewable resources. In addition, I have not attempted to estimate the cost of that alternative power to consumers, but the power lost by reason of the flow restrictions would be when most needed, *e.g.*, during high energy use periods.
9. The flow restrictions to the Canal under the New License will also adversely impact agricultural users, industrial/sand users, and fishery resources on the Canal as discussed in the Emergency Motion for Stay as there will be less water in the Canal under the new flow restrictions.
10. Water rights could be adversely affected by the new flow restrictions as Loup has explained in prior filings with the FERC.
11. The additional recreation requirements under the New License will cost Loup over \$400,000, as affirmed by Loup’s License Application and as discussed in the FEA. This estimate does not address the costs of the new requirement for Loup to operate and maintain the Headworks Off-Highway Vehicle (“OHV”) Park without the assistance of the Nebraska OHVA (as required by License Article 413 and as discussed at paragraph 118 of the New License Order).
12. Although Loup still needs to determine how to implement some of the New License requirements including the flow restrictions, I expect that these new requirements could require Loup to immediately acquire, install and operate new equipment and would, at a minimum, require Loup to make significant modifications to existing equipment.
13. In the FEA, the FERC Staff estimates the costs of developing each of the new monitoring/operational plans required under the New License and separately estimates the annual costs of implementing those plans. Based on our estimates, the costs listed in

the FEA are substantially underestimated. We believe that the development of the plans required under the New License as discussed in the FEA would be approximately 30 percent more than estimated in the FEA, and the actual annual costs to implement the plans required under the New License would be 30-40 times what are estimated in the FEA. In addition, the analysis of costs in the FEA did not include an estimate of the significant costs for the monitoring and reporting required by the USFWS BO Reasonable and Prudent Measures and associated Terms and Conditions (incorporated into the New License Order through Ordering Paragraph E and Appendix A).

14. The imposition of these new costs and the loss of power production to Loup by reason of being required to implement the New License requirements immediately, despite review pending of that New License Order on rehearing, would be a substantial burden and significant harm to Loup.
15. As explained above and in the Emergency Motion for Stay, in addition to the adverse impacts on Loup of immediate implementation of the New License requirements, there would be significant adverse impacts on the public and to the environment.
16. On the other hand, in my opinion, there is no risk of substantial harm to other interested parties if the Emergency Motion for Stay requested by Loup is granted given that under a stay Loup would continue to operate the Project as it has before issuance of the New License Order.
17. Therefore, in my opinion the harm that would result to Loup, the public and the environment from immediate implementation of the New License substantially outweighs the harm if the Emergency Motion for Stay were granted pending rehearing (and potential judicial review) of the New License Order.

I declare under penalty of perjury and under the laws of the state of Nebraska that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated this 23rd day of May, 2017.

Respectfully submitted,

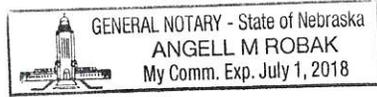
By


Neal D. Suess, President/CEO
Loup River Public Power District
2404 15th Street
P. O. Box 988
Columbus, Nebraska 68602-0988

State of Nebraska
County of Platte

Subscribed and sworn to or before me this 23rd day of May, 2017.

SEAL



Angell M. Robak
Angell Robak
Notary Public for the State of Nebraska
My Commission Expires: 7-1-18