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MEMO

To: Rich Moy, Jack Stults, Tim Hall, DNRC
Warren McCullough, Art Compton, DEQ
Chris Hunter, MFWP

From: Nancy Johnson *NJ*

Date: November 29, 1999

RE: Response of MPC to State of Montana Comments on Final EIS for Missouri-Madison Hydroelectric Project

On November 12, 1999, Montana Power Company filed with FERC a response to State comments on the Final EIS for the Missouri-Madison Hydroelectric Project. Our comments had requested a supplement to the Final EIS to address a State-recommended license condition that would maintain the historic use of water in the upper Missouri River basin.

The attached document provides MPC's response to our comments (see pages 7 through 9) and a response to the motion for late intervention by the Holter Coalition.

This filing, as well as more recent project filings, can also be found at FERC's web site:
www.ferc.fed.us.

Attachment

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BY HAND

David P. Boergers
Secretary
Federal Energy Regulatory Commission
Dockets Room, Room 1-A East
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Washington, D.C.

Deq Metcalf Legal

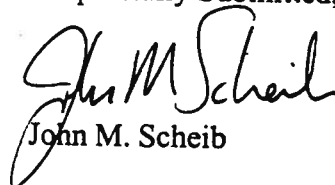
PO Box 200901

Re: Missouri-Madison Project, Project No. 2188

Dear Mr. Boergers:

Submitted herewith are the original and fourteen copies of The Montana Power Company's ("MPC") answer to the Holter Coalition's Motion for Late Intervention and Comments and Comments of the State of Montana on the Final Environmental Impact Statement. We submit this answer pursuant to 18 C.F.R. § 385.213.

Respectfully Submitted,



John M. Scheib

Attorney for The Montana
Power Company

Enclosure

cc: Service list w/ enclosure

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

The Montana Power Company)
Missouri-Madison Project)

Docket No. 2188-30

**ANSWER OF THE MONTANA POWER COMPANY
TO THE HOLTER COALITION'S MOTION FOR
LATE INTERVENTION AND COMMENTS AND
TO THE COMMENTS OF THE STATE OF MONTANA
ON THE FINAL ENVIRONMENTAL IMPACT STATEMENT**

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.213 (1998), The Montana Power Company ("MPC") hereby submits an answer to the motion for late intervention and comment filed in this proceeding on October 27, 1999 by the Holter Coalition ("Coalition"). MPC also responds to the comments of the State of Montana, submitted on October 29, 1999, on the Final Environmental Impact Statement ("EIS") for the Missouri-Madison Hydroelectric Project.¹

As described more fully below, the Commission should deny the motion because the Coalition has failed to justify its late intervention. In any event, MPC's proposal amply addresses the concerns set forth in the Coalition's comments. Similarly, the State of Montana's comments are without merit because, among other things, they address an issue that is outside the Commission's jurisdiction.

¹ The Commission issued the final EIS for the Missouri-Madison project in September 1999.

I. THE COALITION'S MOTION FOR LATE INTERVENTION SHOULD BE DENIED

In reviewing a motion for late intervention, the Commission considers, among other things: whether the movant had a good cause for failing to file the motion within the time prescribed and whether any prejudice to, or additional burdens upon, the existing parties might result from permitting interventions. 18 C.F.R. § 385.214(d) (1998). The Coalition has failed to meet these criteria.

A. The Coalition Has Failed to Demonstrate Good Cause.

The Coalition is almost six years late in filing its intervention and has failed to demonstrate good cause for its tardiness. MPC filed its application for a new license for the Missouri-Madison Project on November 25, 1992. The Commission issued a notice of application on December 9, 1992, establishing November 29, 1993 as the deadline for motions to intervene.

On October 27, 1999, nearly six years after the deadline for filing intervention motions in this proceeding had past, the Holter Coalition filed its motion for late intervention and comments. The essence of the Coalition's position is that its intervention is necessary to protect property values and business interests, both of which are derived from the condition of fisheries. Motion for Late Intervention, Request for Inclusion in the Mailing List, and Comments on the Final Environmental Impact Statement of the Holter Coalition, at 2 (hereinafter "Coalition's Motion").

The Commission has held that "[n]o entity has a right to a late intervention in any proceeding." Utah Power & Light Company, PacifiCorp, and

PC/UP&L Merging Corporation, 59 FERC ¶ 61,035 (1992). The Commission uses a sliding scale in considering late interventions and is more restrictive as the proceeding nears completion. Transcontinental Gas Pipe Line Corporation, 79 FERC ¶ 61,205 (1997); Columbia Gas Transmission Corporation, 61 FERC ¶ 61,365 (1993). All that remains in this case is for the Commission to issue its decision, requiring a restrictive application of the rules. The Coalition, however, cannot provide a plausible reason for its late intervention.

The Coalition admits that the Commission's draft EIS, issued in September 1997, addressed the possibility of a drawdown and provided for mitigation measures. Coalition Motion at 7 and 9; see Draft Environmental Impact Statement at 5-13 (1997) (listing development of drawdown criteria for non-emergency drawdowns as a condition in the Water Quality Certification granted by the Montana Department of Health and Environmental Services). The Coalition therefore had notice in 1997 that a drawdown was a consideration. At the latest, it should have filed a motion for intervention when the Commission issued this report, but it did not. Transok, L.L.C., 89 FERC ¶ 61,055 (1999) (denying motion for late intervention and holding that party should have intervened expeditiously after the alleged triggering event).

In essence, the Coalition contends that it assumed that consideration of potential drawdowns of the reservoir would not be addressed in this proceeding. It continued to make this assumption after the Commission issued the draft EIS.

Indeed, it continued to make that assumption after MPC had submitted to the Commission during the summer of 1999 in this proceeding the proposal to draw down the Holter Reservoir to accommodate certain flashboard repairs, a proposal that the Commission placed on public notice on August 12, some two and a half months before the Coalition filed its motion. The Commission has rejected erroneous assumptions, like the one made by the Coalition, as grounds for late intervention. In Southern California Edison Co., 39 FERC ¶ 61,211 (1987), the Commission denied a movant's late intervention. The movant claimed that it believed its interest would be addressed through correspondence with the license applicant. The Commission, however, rejected this contention, noting that the movant was aware of the application and had time to intervene. The Coalition's "lack of foresight" and erroneous belief that its interests would not be affected do not constitute good cause intervention at this late date. See e.g., Transok, L.L.C., 89 FERC ¶ 61,055 at n. 8.

B. The Coalition's Intervention Would Prejudice the Parties.

As noted above, MPC's relicensing application in this proceeding has been pending for almost seven years. With the issuance of the final EIS, the Commission is now in a position to take final action on the application. Grant of the Coalition's motion at this late date can only give rise to additional delay. Such delay, and the attendant uncertainty as to the disposition of contested issues, works to the detriment of all parties.

II. THE COMMISSION SHOULD REJECT THE COALITION'S COMMENTS REGARDING THE FINAL EIS ON THEIR MERITS.

On August 2, 1999, MPC submitted a proposal to lower Holter Reservoir, for a period of two weeks beginning September 20, 1999, to replace the Holter Dam's deteriorating flashboards. The Commission issued a Notice of Application on August 12, 1999. In a letter to the Commission, dated August 27, 1999, MPC requested that the Commission suspend its review process for the drawdown proposal and defer to the plan outlined in that letter. Letter to D.P. Boergers from J.C. Van DaVeer, dated August 27, 1999 (hereinafter "August 27 letter"). MPC also advised the Commission that it was deferring the proposed drawdown until sometime next year.

The plan outlined in the MPC's letter is in accordance with MPC's current license, the Commission's draft EIS and consultations with the Montana Department of Fish, Wildlife and Parks ("MDFWP"). The procedure and schedule were formulated to minimize the potential impacts on resource and recreation interests and were based on comments at MPC-hosted public meetings and elsewhere during the consultation process arising from this proceeding.

As stated in the August 27 Letter, MPC has considered alternatives to a reservoir drawdown for purposes of accomplishing the necessary flashboard replacement. Feasibility, safety and financial considerations of options, including bulkhead installation, led to the conclusion that the drawdown is a feasible alternative.

MPC's plan seeks to minimize the impact on fisheries. MPC developed the drawdown criteria and schedule with an eye toward fishery concerns and consulted with the MDFWP. Thus, MPC believes that its plan amply addresses the Coalition's concerns about the conditions of fisheries. The Coalition nevertheless requests certain clarifications and additional conditions.

First, the Coalition requests that MPC provide the Montana Department of Environmental Quality ("MDEQ") the opportunity to review any proposed non-emergency drawdown and submit drawdown criteria, developed in consultation with MDEQ, to the Commission. Coalition's Motion at 19. As stated in the August 27 Letter, MPC consulted with relevant agencies before proposing the drawdown to repair flashboards. MPC believes that it is appropriate that the licensee consult with relevant State and federal agencies before submitting to the Commission a proposal to draw down the reservoir.

Second, the Coalition states that any drawdown to replace flashboards is a "non-emergency activity" that should be delayed until completion of fisheries and water quality studies. Coalition's Motion at 19. MPC notes that the flashboards in question are already buckling and in need of repair work. In any event, it is unnecessary to determine now whether specific studies or mitigation measures need to have been completed before the Commission approves a future drawdown. The Commission can consider what studies or mitigation measures, if

any, are appropriate under the circumstances that exist when MPC submits a specific drawdown proposal to it in the future.

Third, the Coalition asks the Commission to recommend that the licensee consult with the Coalition, local organizations, local governments and resource agencies in planning future drawdowns. Id. As stated above, MPC believes it appropriate that the licensee engage in such consultations with the relevant resource agencies. Public meetings to discuss the proposal may also be appropriate, and MPC, as noted in the August 27 Letter, conducted such meetings in connection with its drawdown proposal. See August 27 letter. However, MPC strongly believes that it would be inappropriate to incorporate in the license a condition that the licensee consult separately with individual non-governmental organizations such as the Coalition prior to submitting any future drawdown proposal. As private citizens, its members can and should participate in the public processes concerning future drawdowns in the same manner, and on the same footing, as other private citizens. In particular, to the extent that the Coalition suggests that it should be entitled to participate in consultations with state and federal resource agencies concerning the disposition of mitigation funding, that proposal should be rejected.

III. THE COMMISSION SHOULD NOT ADOPT THE PROPOSALS IN THE STATE OF MONTANA'S COMMENTS ON THE FINAL EIS.

The State of Montana's comments on the final EIS are misplaced. Montana is concerned about the impact of the project on water users and requests

a supplement to the final EIS addressing the impact of a call by the licensee on water users or a license condition preserving the historical use of water in the upper Missouri River basin. See Comments of the State of Montana on the Final Environmental Impact Statement for the Missouri-Madison Hydroelectric Project, submitted October 29, 1999.

MPC has already addressed these concerns in its reply comments of March 30, 1998 on the draft EIS. As stated there, junior water users know that their water rights are subject to all senior water rights, not just the licensee's. Any time a senior water rights holder curtails a junior water rights holder, an existing beneficial use of water, like existing irrigation, is impaired. The mere possibility that an impact may occur does not constitute an impact or consequence of project operations that warrants specific consideration in the EIS and mitigating conditions. In short, there is no tangible impact or actual harm to consider, only a speculative harm.

Even if the licensee were unable to enforce its rights, junior water users would still be affected by more senior water users who chose to enforce their senior rights.² In every year and without a call by the licensee, many junior users are curtailed by senior users, affecting irrigated acreage. In a water short year, even more junior users would likely be curtailed, thereby affecting existing water

² Indeed, MPC does not hold the most senior rights in the basin and therefore uses its water subject to those senior rights, many of which are consumptive irrigation rights.

developments in the basin. The ability to affect and curtail existing junior water uses and users is a foundation principle of the prior appropriation doctrine. It forms the heart of Montana water law and is an essential element of a water right acquired under Montana law. There is nothing unique about the licensee's water rights.

Finally, the Commission does not have the statutory authority to approve the conditions proposed by the State. Section 27 of the Federal Power Act provides:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

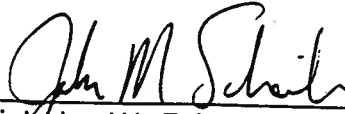
16 U.S.C. § 821. The Supreme Court has made clear that Section 27 protects state laws regarding proprietary rights from "supersedure." First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 175-176 (1946); see also California v. FERC, 495 U.S. 490, 496 (1990). A license condition negating the seniority of the licensee's vested water rights in relation to those of other users would collide squarely with the language and purpose of Section 27.

IV. CONCLUSION

MPC respectfully requests that the Commission deny the Coalition's motion for late intervention. The Coalition's comments should, in any event, be

rejected on their merits. Likewise, the Commission should deny the relief requested in the State of Montana's comments.

Respectfully Submitted,



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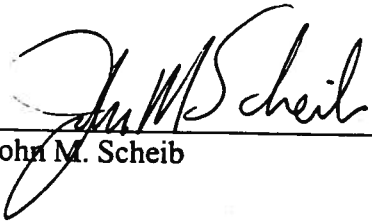
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November 12, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of November, 1999, served by first class mail, postage prepaid, a copy of the foregoing upon all parties listed on the service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.



John M. Scheib