UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas & Electric Company **Project No. 12779**

Project No. 12781

REQUEST FOR REHEARING OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2007), the United States Department of the Interior (the "Department") hereby submits this Request for Rehearing in both Commission Docket proceedings identified above.

BACKGROUND

On March 13, 2008, the Commission issued preliminary permits to Pacific Gas & Electric Company ("PG&E") with respect to two potential wave energy projects proposed off the coast of Northern California, in the vicinity of Humboldt and Mendocino counties, as identified below. On information and belief, these are the first preliminary permits awarded by the Commission since passage of the Energy Policy Act of 2005 that involve project areas that encompass portions of the Federal Outer Continental Shelf ("OCS").

FERC Docket No. P-12779: Proposed wave energy project off the coast of Humboldt County, CA.

FERC Docket No. P-12781: Proposed wave energy project off the coast of Mendocino County, CA.

The Department timely filed notices of intervention in both of these permit proceedings "for the purpose of becoming a party."[1] Pursuant to 18 C.F.R. § 385.214(a)(2), these prior notices of intervention entitle the Department and its component bureaus to party status for purposes of Rule 713 of the Commission's Rules of Practice and Procedure.[2]

In early 2007, the Minerals Management Service ("MMS"), a bureau of the Department, filed with the Commission formal protests in three preliminary permit proceedings where the proposed project area included portions of the Federal OCS, as identified below. Subsequent to the filing of these protests, two of the permit applicants revised their project boundaries to exclude the Federal OCS portion; in effect, rendering any jurisdictional concerns moot.

> *FERC Docket No. P-12752*: Proposed wave energy project off the coast of Coos County, OR.
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> *FERC Docket No. P-12750*: Proposed wave energy project off the coast of Newport, OR.
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> *FERC Docket No. P-12753*: Proposed wave energy project off the coast of Humboldt County, CA.

In November 2007, the Department announced an interim policy for authorizing limited leasing on the OCS for alternative energy resource data collection and technology testing.[3] Through this interim policy, MMS will award leases to companies interested in testing wave and current energy technologies on the OCS. MMS will announce in the

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[1] *See* Notice of Intervention of the United States Department of the Interior, submitted May 31, 2007, for FERC Project No. 12781; and Notice of Intervention of the United States Department of the Interior, submitted June 14, 2007, for FERC Project No. 12779.

[2] *See* 18 C.F.R. § 385.713 (2007).

[3] *See* 72 FED REG 62673 (November 6, 2007).

Federal Register the week of April 14th its intention of authorizing such limited leases off the coast of Northern California in the general areas of the OCS contemplated by the preliminary permits subject to this Request for Rehearing. As required by Section 388 of the Energy Policy Act of 2005 (the "EPAct"), which amended section 8 of the Outer Continental Shelf Lands Act ("OCSLA"), such leases will be awarded competitively if it is determined that competitive interest exists in a particular location. In addition, the statute provides that 27% of all revenues received by the Federal government on such projects that are located wholly or partially within the area extending 3 nautical miles seaward of State submerged lands shall be shared with the affected coastal States.[4]

In the course of implementing this interim policy, MMS has held over one dozen coordinating meetings with relevant federal agencies and state and local governments. Leases authorized under this interim policy will include provisions for necessary bonding or other financial assurance, rental payments to the United States, and tailored provisions for ensuring environmentally safe operations.

Also, in November 2007, the MMS completed its Final Programmatic Environmental Impact Statement ("PEIS") for alternative energy development activities on the OCS. This PEIS provided an important first look at the types and levels of environmental impact associated with all phases of alternative energy development on the OCS. Through the development of this PEIS, which included important consultation with and feedback from other Federal agencies, coastal state governments and other stakeholders, MMS identified 52 "best management practices" that will be individually considered by MMS in authorizing any lease for alternative energy development on the OCS, along with other project-specific conditions and stipulations. These best

[4] *See* 43 U.S.C. 1337(p).

management practices are described in the MMS Record of Decision for the Alternative Energy Program, dated December 21, 2007.

On March 26, 2008, the Department transmitted to the Office of Management and Budget ("OMB") its proposed rulemaking for alternative energy development on the OCS. Once OMB completes its review of the proposed rule, the Department will publish the proposal in the *Federal Register* for public review and comment. The Department expects to complete and publish a final rule by the end of this year, which will set forth the regulatory process for obtaining leases to conduct commercial alternative energy development on the OCS.

STATEMENT OF ISSUES

The Department contests the Commission's authority under Part I of the Federal Power Act ("FPA")[5] to award any authorization that is intended to include portions of the OCS. The aforementioned preliminary permits awarded by the Commission include areas of the OCS, and the Department therefore contests the issuance of these permits, insofar as they include portions of the OCS.

Although the Department contests the Commission's authority on the OCS under Part I of the FPA, the Department continues to commend and support the Commission's initiatives to encourage wave energy development on state submerged lands. The Department remains committed to working with the Commission to provide an efficient process for applicants to seek approval for alternative energy projects in state and federal offshore lands and waters.

[5] 16 U.S.C. §§ 791(a) – 825(r).

1. The Commission's jurisdictional authority under Part I of the Federal Power Act does not extend to projects located outside the traditional three-mile boundary of the United States territorial sea.

Section 23 of the FPA defines those facilities that are required to be licensed by the Commission:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in *any of the navigable waters of the United States* . . . except under and in accordance with . . . a license granted pursuant to [the FPA].[6]

The FPA defines "navigable waters" as:

> those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.[7]

To the extent this definition includes ocean waters, it cannot be interpreted to include any waters beyond the traditional three mile boundary of the United States territorial sea. This limitation is evident in other federal statutes and associated implementing regulations—

The Clean Water Act (33 U.S.C. 1251 et seq.):

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[6] 16 U.S.C. § 817 (emphasis added).

[7] 16 U.S.C. § 796(8).

> The term "navigable waters" means the waters of the United States, including the territorial seas.[8]
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> The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along the portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.[9]

The Oil Pollution Act of 1990 (33 U.S.C. 2701 et.seq.):

> The term "navigable waters" means the waters of the United States, including the territorial sea.[10]
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> The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along the portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.[11]

For purposes of permitting pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403):

> The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf (See 33 CFR 322.3(b)).[12]

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[8] 33 U.S.C. § 1362(7).

[9] 33 U.S.C. § 1362(8).

[10] 33 U.S.C. § 2701(21).

[11] 33 U.S.C. § 2701(35).

[12] 33 C.F.R. § 329.12 (2006). Section 4(e) of the OCSLA (43 U.S.C. § 1333(e)) extended the authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the OCS. *See* 33 C.F.R. §§ 320.2(b), 322.3(b) (2006). There is no similar provision in either the FPA or the OCSLA that expands the Commission's jurisdiction under Part I of the FPA.

For purposes of the Artificial Reef Program of the National Fishing Enhancement Act of 1984 (33 U.S.C. 2101 et seq.):

> The term "waters covered under this chapter" means *the navigable waters of the United States and the waters superjacent to the Outer Continental Shelf* as defined in section 1331 of Title 43, to the extent such waters exist in or are adjacent to any State.[13]

On December 27, 1988, President Reagan issued a Proclamation that extended the territorial sea to twelve (12) miles from the coastal baseline to conform with accepted international law.[14] However, the Presidential Proclamation states that "*[n]othing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom. . . .*" (emphasis added). Accordingly, as evidenced above, most federal statutes continue to refer to the territorial sea's original three-mile boundary. Therefore, absent subsequent legislation expanding its authority beyond the traditional three-mile boundary, the Commission's hydropower licensing jurisdiction could not extend into the OCS.

2. *Through the passage of EPAct, Congress intended for the Department to have lead federal regulatory authority over wave and current energy projects sited on the OCS.*

Section 388(a) of the EPAct (P.L. 109-58), amended section 8 of the OCSLA (43 U.S.C. § 1337) to authorize the Secretary of the Interior (the "Secretary") to grant leases, easements or rights-of-ways authorizing activities on the OCS that produce or support production, transportation, or transmission of energy from sources other than oil and

[13] 33 U.S.C. § 2105(3) (emphasis added).

[14] Presidential Proclamation No. 5928, 54 Fed. Reg. 777.

gas.[15] The Secretary has delegated this authority to the MMS. To implement this authority, now codified in 43 U.S.C. § 1337(p), MMS has undertaken a series of actions as described in the "Background" section above.

Though the Department's authority under subsection 8(p) of the OCSLA is not intended to displace or repeal existing authority under the Deepwater Port Act, the Ocean Thermal Energy Conversion Act, *or other applicable law*,[16] the FPA cannot be interpreted to come within this statutory exception. If Congress had intended the detailed and comprehensive hydroelectric licensing provisions of the FPA, and the Commission's implementing regulations, to come within the general exception for "other applicable law," it would have clearly stated so.

It is reasonably clear that Congress, when drafting the EPAct, did not believe the FPA granted the Commission the authority over wave and current energy projects on the OCS that it currently asserts. Notwithstanding the fact that the EPAct amends and makes several references to the FPA, including references to the provisions containing the Commission's hydroelectric licensing authority,[17] there is no reference in Section 388, Subtitle C, or elsewhere in the EPAct, suggesting that the FPA would somehow apply to wave and current energy projects on the OCS. Even though a complete subtitle of the EPAct is dedicated to the Commission's hydroelectric authority,[18] Congress did not see fit to except or even reference such authority within Section 388, despite including explicit exceptions for other less pervasive statutes such as the Ocean Thermal Energy

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[15] 43 U.S.C.A. § 1337(p)(1)(C) (Thomson/West Supp. 2006).

[16] *See* 43 U.S.C. 1337(p)(1).

[17] *See, e.g.*, Subtitle C—Hydroelectric to Title II—Renewable Energy of EPAct, §§ 241 – 246.

[18] *Id.*

Conversion Act. The Department contends that Congress did not deem such an exception necessary because the Commission was not thought to have such authority under the FPA to regulate the development or operation of wave and current energy facilities on the OCS.

The Department is aware of Commission staff's 2003 decision in *AquaEnergy Group, Ltd.*, 102 FERC ¶ 61,242 (2003), which was not subject to judicial review pursuant to 16 U.S.C. § 8251(b). In *AquaEnergy,* the Commission concluded that it had authority under Part I of the FPA to require a license for a wave energy project proposed to be located 3.17 miles off the coast of the State of Washington. On information and belief, *AquaEnergy* was the first time in the 88-year regulatory history of Part I of the FPA (and its predecessor statute, the Federal Water Power Act of 1920) that the Commission ever asserted jurisdiction under the FPA for a wave energy project on the OCS. The Department respectfully asserts that the Commission is not permitted to expand its own authority under the FPA to include the OCS.[19]

CONCLUSION

While the Department contests the Commission's jurisdiction <u>*on the OCS*</u> under Part I of the Federal Power Act, the Department fully commends and supports the Commission's initiatives to encourage wave energy development on state submerged lands. The Department looks forward to working with the Commission to provide an efficient process for applicants to seek approval for alternative energy projects in both state and federal offshore lands and waters. The MMS has undertaken similar initiatives

[19] *See, e.g., Little Falls Fibre Company v. Henry Ford & Son*, 249 N.Y. 495, 501 (1928), aff'd 280 U.S. 369 (1929) (referring to the Federal Power Commission, "excess of jurisdiction is a necessary ground for judicial review to maintain the supremacy of law and keep administrative boards to the exercise of their delegated powers.").

to encourage such development on the OCS, through completion of its Programmatic EIS for Alternative Energy, its announcement of an interim policy for authorizing alternative energy resource data collection and technology testing, and through its extensive stakeholder outreach efforts.

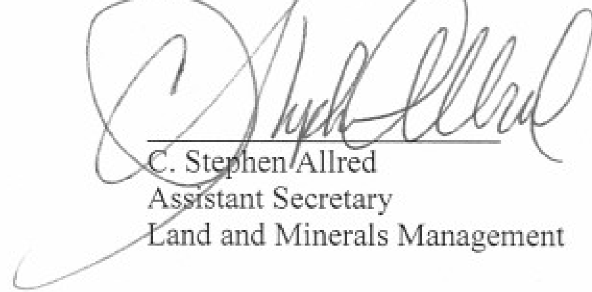
The Department continues to support cooperation between the agencies to ensure that a federal regulatory framework is established that encourages development of these nascent technologies that may someday provide a significant new source of clean power for our Nation. The Department shares the Commission's concern that a regulatory process be established that is efficient, avoids unnecessary regulatory burdens, takes proper account of other competing uses, and ensures that environmental concerns are properly identified and mitigated.

To that end, the Department remains fully in favor of working with the Commission to develop an interagency process for reviewing and authorizing wave, current and tidal energy project proposals in which project areas overlap the boundaries of each agency's respective statutory authority.

However, for the reasons discussed above, the Department respectfully contends that the Commission does not have authority to permit or license these types of ocean energy projects to the extent they include portions of the OCS, including the aforementioned proposed projects for which the Commission has issued these preliminary permits. Such activities on the OCS are expressly authorized and regulated by the MMS, through delegation of the Secretary, pursuant to subsection 8(p) of OCSLA, as amended by Section 388 of the EPAct. Accordingly, the Department requests from the Commission a rehearing on the issuance of these preliminary permits, or, in the

alternative, asks that these preliminary permits be modified such that they exclude areas of the OCS outside the Commission's jurisdiction under Part I of the Federal Power Act.

Respectfully submitted,



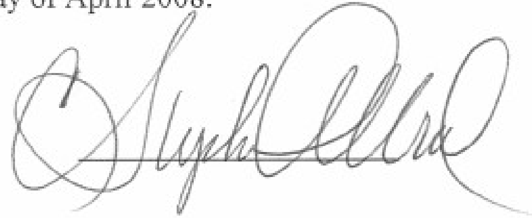
C. Stephen Allred
Assistant Secretary
Land and Minerals Management

Dated: April 14, 2008

CERTIFICATE OF SERVICE

I certify that I have on this day caused a copy of the foregoing Request for Rehearing to be served upon each person designated on the official service list compiled by the Commission's Secretary in this proceeding.

Dated in Washington, D.C., this 14 day of April 2008.



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