

134 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Portland General Electric Company

Project No. 2195-025

ORDER ON REHEARING

(Issued March 17, 2011)

1. On December 21, 2010, the Commission issued a new license to Portland General Electric Company (PGE)¹ under sections 4(e) and 15 of the Federal Power Act (FPA)² for the continued operation and maintenance of the 136.645-megawatt Clackamas River Project No. 2195, located on the Oak Grove Fork of the Clackamas River and the mainstem of the Clackamas River in Clackamas County, Oregon. PGE, the State of Oregon, the U.S. Forest Service, the National Marine Fisheries Service (NMFS), and joint petitioners American Rivers, American Whitewater, Trout Unlimited, and Waterwatch of Oregon (Conservation Groups) filed timely requests for rehearing and clarification of the relicensing order. Rehearing is granted in part and denied in part, for the reasons discussed below.

Background

2. The Clackamas Project is located in large part on federal lands within Mt. Hood National Forest under the jurisdiction of the Forest Service and on a reservation of the U.S. Department of Interior's (Interior) Bureau of Land Management (BLM). The new license granted by the December 21, 2010 Order incorporated most of the conditions specified in a settlement agreement entered into by PGE and 32 other state, federal, and

¹ *Portland General Electric Co.*, 133 FERC ¶ 62,281 (2010) (December 21, 2010 Order).

² 16 U.S.C. §§ 797(e), 808 (2006), respectively.

non-governmental entities, including the parties requesting rehearing.³ The license, which does not authorize any change to the project's installed capacity or its annual generation, requires modification of project operations and implementation of measures for the protection of aquatic, terrestrial, and recreation resources in the area of the Clackamas River and its Oak Grove Fork.

Discussion

A. License Term

3. The Commission's general policy is to establish 30, 40, and 50-year terms for projects with, respectively, little, moderate, or extensive redevelopment, new construction, new capacity, or additional environmental measures.⁴ Where parties to a settlement agree on a license term that is shorter than that warranted by the activities proposed to be undertaken in the new license term, there is generally no reason for us not to honor that agreement. However, we will not extend a license term beyond that dictated by the extent of proposed new activities simply because the parties have agreed to such a term.⁵

4. The Settlement Agreement recommends that any new license for the Clackamas Project be given a term of 45 years.⁶ However, the December 21, 2010 Order issuing a new license concluded that the relicensed project would require only a moderate amount of new construction and enhancement measures and therefore set a 40-year term for the new license.⁷

5. All of the requests for rehearing ask that the December 21, 2010 Order be modified to give the new license a 45-year term to conform with the Settlement

³ See Offer of Settlement filed on March 30, 2006 and December 21, 2010 Order, 133 FERC ¶ 62,281 at P 44 (Description of Settlement Agreement).

⁴ See, e.g., *Public Utility District No. 1 of Chelan County, Washington*, 127 FERC ¶ 61,152, at P 10 (2009) (*Chelan County*); *Consumers Power Company*, 68 FERC ¶61,077, at 61,383-84 (1994).

⁵ See *Chelan County*, 127 FERC ¶ 61,152 at P 17 (noting that Commission, in reviewing settlements, looks not only to wishes of settling parties but also to greater public interest).

⁶ See Section 3.5 of the Settlement Agreement filed on March 30, 2006.

⁷ See 133 FERC ¶ 62,281 at P 149.

Agreement. PGE and the Forest Service argue further that, contrary to the finding in the December 21, 2010 Order, the new license as issued requires an extensive amount of resource protection, mitigation and enhancement measures and construction which warrants at least a 45-year license term.

6. As the Commission has previously noted, the selection of an appropriate license term is a highly fact-sensitive exercise.⁸ We have reexamined the measures imposed by the license – including the decreased generation resulting from minimum flow requirements at the Oak Grove Development, consideration of which was inadvertently omitted from the license order – and are convinced that the environmental protection and enhancement measures and new construction required by the new license will be extensive. These measures will enhance recreational and fish passage facilities, modify the flow regime in the Oak Grove Fork to improve fish habitat, enhance other aquatic habitat throughout the project area, improve water quality in project reservoirs, and lower water temperatures in the Clackamas River. As a result of the extensive measures that must be taken, we find that a 50-year license term would be appropriate. However, because the licensee voluntarily agreed with the other settling parties to accept a 45-year license term, we will set the term of the new license at 45 years.

B. Project Resource Plans

7. The Settlement Agreement includes eight resource plans that the agreement recommends be incorporated into the new license for implementation.⁹ The December 21, 2010 Order, at Ordering Paragraph (D), approves, with modifications, one of the eight plans, the Project Operating plan, as part of the license. The order, however, does not explicitly approve the other seven plans.

8. The requests for rehearing ask that the December 21, 2010 Order be modified to indicate expressly that all eight plans are approved by the Commission and made part of the new license. The Forest Service asserts that this modification is necessary to remove any uncertainty about enforceability of the eight plans as license conditions. Stating that it is concerned about having obligations to implement plans that are not part of the new

⁸ See *Public Utility District No. 1 of Chelan County, Washington*, 127 FERC ¶61,152, at P 15 (2009).

⁹ The eight resource plans included in the Settlement Agreement as exhibits are the Project Operating Plan (Exhibit C), Fish Passage and Protection Plan (Exhibit D), Terrestrial Resources Management Plan (Exhibit E-1), Vegetation Management Plan (Exhibit E-2), Blue-Green Algae Monitoring Plan (Exhibit F), Recreational Resources Management Plan (Exhibit G), Mitigation and Enhancement Fund Implementation Plan (Exhibit H), and Historic Properties Management Plan (Exhibit J).

license, PGE contends that express approval of all eight plans in addition to clarifying the licensee's obligations would ensure that the Commission must approve any amendments to such plans. PGE and the Forest Service cite as precedent for such an approval the Commission's 2005 order issuing a new license for PGE's Pelton-Round Butte Project No. 2030, which approved as part of that license the resource plans provided for in the settlement agreement filed in that proceeding.¹⁰

9. All eight resource plans are required by the license; given that, express approval of the plans is unnecessary. In this case, Commission staff reviewed the seven plans not expressly approved in the December 21, 2010 Order and concluded that requirements to implement six of the seven plans are included in mandatory conditions imposed pursuant to section 401 of the Clean Water Act, sections 4(e) and 18 of the FPA, or the terms and conditions of NMFS' biological opinion incidental take statement issued under Section 7 of the Endangered Species Act. Because these conditions were included as appendices A through F to the license order and explicitly made part of the license through Ordering Paragraphs (E) through (J), there is no need for us to separately approve or craft additional license conditions regarding them. The seventh plan, the historic properties management plan, is required to be implemented by license Article 406. We find no need to clarify these obligations, other than to confirm that PGE is correct that we must approve any substantive amendments to the plans.¹¹

C. Proposed License Article 3

10. The requests for rehearing assert that the December 21, 2010 Order should have included in the new license the Settlement Agreement's Proposed License Article 3, which would require PGE to notify named federal and state resource agencies, and to take immediate appropriate action, when unanticipated circumstances or emergency situations arise in which fish or wildlife are being killed, harmed, or endangered by any of the project facilities, or as a result of project operation.

11. One of the terms and conditions of NMFS' incidental take statement, included in the Appendix F to the December 21, 2010 Order, states that "All Settlement Agreement provisions that relate to anadromous fish (including, but not limited to, provisions related to passage, provisions that affect habitat conditions (e.g., flows) or provisions related to monitoring) for this Project must be followed by PGE and enforced by FERC." It was not clear that Proposed License Article 3, which does not provide any measures specific

¹⁰ See *Portland General Electric Co.*, 111 FERC ¶ 61,450 (2005).

¹¹ PGE states in its rehearing request that it "recognizes its obligations under the new licensee to 'implement' these other plans, as the implementation of each is a specific requirement of at least one mandatory condition of the license."

to listed species, was a part of the settlement that NMFS considered necessary to be included in the license. However, NMFS has clarified the matter in its request for rehearing.

12. Accordingly, to comply with the incidental take statement, the requirements of Proposed Article 3 will be incorporated into the new license, as the provisions of the article relate, at least in part, to anadromous fish. We conclude further that it is reasonable to require PGE to follow these procedures with regard to other fish and wildlife species.

13. We will revise the December 21, 2010 Order to include Proposed Article 3 as Article 411, modified, however, to require that PGE also within 24 hours notify the Commission of the occurrence of any unanticipated or emergency situations in which fish or wildlife are being killed, harmed, or endangered, and to reserve the Commission's authority to require changes to project operations or facilities in those circumstances.¹²

D. License Article 408(a)(4) – Recreation Resources Management Plan

14. Article 408 of the new license requires PGE to file detailed plans and schedules for project recreation measures identified in the Recreation Resources Management Plan in Exhibit G to the Settlement Agreement. PGE and the Forest Service correctly note that subpart (a)(4) of the article improperly requires a site plan for recreation facilities at Clackamas Lake Campground, which the parties did not intend be included in the license. The campground is located at a lake outside the project boundary and is not a project

¹² Conservation Groups asserts incorrectly that the December 21, 2010 Order fails to include in the license the Settlement Agreement's Proposed License Articles 12(a), 15(a), 15(c), 15(d), 35, 14, and 46. Ordering Paragraph (D) of the order, which approves and makes part of the license sections 1 through 11 and 13 of the Settlement Agreement's Exhibit C Project Operating Plan, requires implementation of Proposed Articles 12(a), 15(a), 15(c), and 15(d), in the operating plan at item 5A at page C-10, item 8A at page C-15, item 10 at page C-22, and item 11 at page C-23, respectively. Similarly, Ordering Paragraph (E) of the order, which makes the license subject to conditions of Oregon Department of Environmental Quality's water quality certification for the project, requires implementation of Proposed Article 14 and 35 in certification condition 8(l) and 8(f), respectively, set forth in Appendix A to the order. Implementation of Proposed Article 46 is required in item IX at page 84 of the Settlement Agreement's Exhibit D Fish Passage and Protection Plan, which is required to be implemented under Article 19 of NMFS' prescribed terms and conditions for fishways, set forth as mandatory license conditions in Appendix D to the December 21, 2010 Order as required by Ordering Paragraph (H) of the order.

related facility. We will revise Article 408 to remove any filing requirement regarding the campground.

Errata

15. PGE and the State of Oregon also ask the Commission to address a number of minor errors in the December 21, 2010 Order which we correct in this order.

16. In Ordering Paragraph (B) of this order we revise the December 21, 2010 Order to indicate the correct installed capacities of the project generating facilities.

17. Additionally, we note that the reference in paragraph 89 of the order to “Washington DOE’s water quality certification” should instead be to “Oregon Department of Environmental Quality’s water quality certification.” Finally, the Confederated Tribes of the Warm Springs Reservation of Oregon and joint intervenors Alder Creek Kayak Supply, Inc., All Star Rafting, Inc., American Whitewater, Blue Sky Whitewater Rafting, Inc., Destination Wilderness, Inc., Playboatingnorthwest.com, and River Drifters Whitewater Tours, Inc. should be added to the list of intervenors in paragraph 4 of the order.¹³

The Commission orders:

(A) The requests for rehearing and clarification addressed in this order are granted to the extent provided for the ordering paragraphs below and are otherwise denied.

(B) The December 21, 2010 Order issuing a new license for the Clackamas Project No. 2195 is revised as indicated.

(1) The first sentence in Ordering Paragraph (A) is revised to read as follows:

¹³ We also acknowledge as requested by PGE that there are three minor errors in the Settlement Agreement’s Exhibit C Project Operating Plan, approved with modifications in Ordering Paragraph (D) of the December 21, 2010 Order. First, the Project Operating Plan’s Table 4 at page C-8 should indicate that the maximum elevation of Frog Lake is “1989.0 PGE datum,” not “1988.0 max.” Second, the plan’s Table 8 at page C-12 should indicate that the maximum elevation of the Faraday Dam Reservoir should be “528.0 PGE datum,” not “526.0 max.” Third, the second sentence in Section 8A (Lake Levels) at page C-15 of the plan should state that flashboards increase maximum water level elevation from “386 to 389.3 PGE datum,” not “386 to 389.”

This license is issued to Portland General Electric Company (licensee), for a period of 45 years, effective the first day of the month in which this order is issued, to operate and maintain the Clackamas River Hydroelectric Project.

(2) Ordering Paragraph (B)(2)(a) is revised to indicate that the installed capacity of the Oak Grove Powerhouse is 40.825 MW.

(3) Ordering Paragraph (B)(2)(b) is revised to indicate that the installed capacity of the North Fork Powerhouse is 40.8 MW.

(4) Ordering Paragraph (B)(2)(c) is revised to indicate that the installed capacity of the Faraday Powerhouse is 35.92 MW.

(5) Ordering Paragraph (B)(2)(d) is revised to indicate that the installed capacity of the River Mill Powerhouse is 19.1 MW.

(6) Article 201(a) is revised to state that the authorized installed capacity of Project No. 2195 is 136.645 MW for purposes of reimbursing the United States for the cost of administration of Part I of the Federal Power Act.

(7) Article 408 at section 408(a) is revised to delete listed item 4 (a site plan for equestrian and restroom facilities at Clackamas Lake Campground) and renumber the sixteen subsequently listed items accordingly as items 4 through 19.

(8) Article 411 is added to read as follows:

Article 411. Emergency or Special Conditions

(a) If at any time, unanticipated circumstances or emergency situations arise in which Endangered Species Act (ESA) listed fish or wildlife are being killed, harmed or endangered by any of the project facilities or as a result of project operation, including the operation of fish facilities, the licensee shall immediately take appropriate action to prevent further loss in a manner that does not pose a risk to human life, limb, or property. The licensee shall, within 6 hours, notify the nearest office of the following resource agencies: Oregon Department of Fish and Wildlife (Oregon DFW), National Marine Fisheries Service (NMFS), and U.S. Fish and Wildlife Service (FWS), and within 24 hours, notify the Commission. The licensee shall comply with any restorative measures required by the resource agencies to the extent

such measures do not conflict with the conditions of this license. Within 10 days after each occurrence, the licensee shall file with the Commission and the resource agencies a written report describing the nature of the occurrence and restorative measures taken. The licensee shall provide a copy of the report to the Fish Committee, Oregon Department of Environmental Quality (Oregon DEQ), and Oregon Water Resources Department (Oregon WRD). The Commission reserves the right to require changes to project operations or facilities based on information contained in the report and any other available information.

(b) If at any time, unanticipated circumstances or emergency situations arise in which non-ESA listed fish or wildlife are being killed, harmed or endangered by any of the project facilities or as a result of project operation, the licensee shall immediately take appropriate action to prevent further loss in a manner that does not pose a risk to human life, limb, or property. The licensee shall, within 24 hours notify the Commission, and with 48 hours, notify the nearest office of the Oregon DFW, NMFS, and FWS, as appropriate, and comply with any restorative measures required by the resource agencies to the extent such measures do not conflict with the conditions of this license. Within 10 days after each occurrence, the licensee shall file with the Commission and the resource agencies a written report describing the nature of the occurrence and restorative measures taken. The licensee shall provide a copy of the report to the Fish Committee, Oregon DEQ and the Oregon WRD. The Commission reserves the right to require changes to project operations or facilities based on information contained in the report and any other available information.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.