

112 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Public Utility District No. 2 of Grant County,
Washington

Project No. 2114-126

ORDER GRANTING APPROVAL UNDER SECTION 22 OF THE FEDERAL
POWER ACT

(Issued August 26, 2005)

1. Public Utility District No. 2 of Grant County, Washington (Grant County), licensee for the Priest Rapids Project No. 2114, filed, pursuant to section 22 of the Federal Power Act (FPA),¹ an application for Commission approval of contracts for the sale of a portion of the project's power for a period commencing upon expiration of the existing license until such time as a new license is issued to Grant County for the project. For the reasons discussed below, we grant the application.

Background

2. The Priest Rapids Project was originally authorized for federal development,² but in 1954 Congress opened the site to non-federal development pursuant to a license issued under Part I of the FPA.³ In so doing, Congress required the licensee to offer a reasonable portion of the power capacity and output for sale within the economic market

¹ 16 U.S.C. § 815.

² See the Flood Control Act of 1950, 64 Stat. 170, 179.

³ See Pub. Law No. 83-544, 68 Stat. 573.

area in neighboring states (Reasonable Portion power), and charged the Commission with resolving any disputes arising under this provision.⁴

3. The existing original license for the Priest Rapids Project was issued effective November 1, 1955, and expires October 31, 2005.⁵ The project consists of two developments, the 855-megawatt (MW) Priest Rapids development, and the 900-MW Wanapum development.

4. In 1995, certain Idaho utilities not receiving project power under the existing license filed a complaint against Grant County, asking the Commission to establish an allocation of project power to them upon the expiration of the current license and power sales contracts. The Commission determined that the provisions of P.L. 83-544 apply to any new license for the Project, and held that any future licensee would be required to make 30 percent of the Project's power available to the Idaho utilities and other participants in the complaint proceeding (preference parties).⁶ Grant County or any other new licensee was required to make the 30 percent allocation available pursuant to a non-discriminatory, market-based mechanism that gives the preference parties a preference in the bidding (Marketing Plan).⁷ The licensee may retain up to 70 percent of project power for its own use under the new license.

5. The Commission also determined that Grant County was required by FPA section 22 to obtain Commission approval of contracts for the sale of power and energy from the Wanapum development that extend beyond the 2005 license expiration date (the

⁴ *Id.*, section 6.

⁵ 15 FPC 1067.

⁶ The preference parties consist of the original twelve purchasers, plus ten utilities serving customers in Idaho.

⁷ *Kootenai Electric Cooperative, et al. v. P.U.D. No. 2 of Grant County County, WA*, 82 FERC ¶ 61,112 (1998), *reh'g denied*, 83 FERC ¶ 61,289 (1998), *aff'd*, 192 F.3d 144 (D.C. Cir. 1999) (*Kootenai orders*).

Wanapum contracts extended to October 31, 2009).⁸ By order issued May 20, 1996, the Commission approved Grant County's application for approval of those contracts.⁹

6. Grant County subsequently negotiated new power sales agreements with the preference parties for the 30 percent Reasonable Portion (Preference Agreements) during the term of any new license Grant County may receive. In brief, the Preference Agreements contain provisions under which the preference parties will assume the costs of generating an amount of project power up to the Reasonable Portion and will receive the revenues from the sale of that power.¹⁰ The Commission determined that these provisions are consistent with its prior orders, as long as Grant County offers the 30 percent Reasonable Portion for sale under a market-based, non-discriminatory Marketing Plan approved by the Commission.¹¹

7. Grant County has filed an application for a new license for the project. A draft environmental impact statement is scheduled to be issued in that proceeding in October 2005.

8. Grant County's new license application includes the required Marketing Plan.¹² Under Grant County's proposal, approximately six percent of project power will be initially offered on a market-wide basis to pre-qualified utilities and power marketers. The highest bidder will receive the auctioned power and the winning bid will set the

⁸ *Kootenai Electric Cooperative, Inc., et al.*, 72 FERC ¶ 61,222 (1995), *reh'g denied*, 73 FERC ¶ 61,307 (1995). The Wanapum Development was constructed later than the Priest Rapids Development, and was financed by 50-year bonds and power contracts that commenced in 1959 and terminate in 2009.

⁹ 75 FERC ¶ 61,190.

¹⁰ The contracts are more specifically described in *The Yakima Nation v. P.U.D. No. 2 of Grant County, WA*, 101 FERC ¶ 61,197 at P 8 and 21 (2002) (*Yakama v. Grant County*), *reh'g. denied*, 103 FERC ¶ 61,073 (2003), *appeals filed*, *Yakama Nation v. FERC* (9th Cir. No. 03-71825, April 4, 2003) and *P.U.D. No. 2 of Grant County v. FERC*, 9th Cir. No. 03-73428, April 24, 2003).

¹¹ *Yakama v. Grant County*, 101 FERC ¶ 61,197 at P 20-25.

¹² The Marketing Plan is Volume MP of Grant County's new license application. No other new license applications were filed.

market price for the preference parties.¹³ Each preference party, should it elect to purchase power at the winning bid price, is to receive a share of the available Reasonable Portion representing the proportion of the amount of the Reasonable Portion it requests to the total requests for Reasonable Portion power by all of the preference parties.¹⁴

9. As we understand the contracts, each preference party may elect to purchase an allocation of the Reasonable Portion power on a year-ahead basis. The price it will pay is subsequently determined by the aforementioned auction. The amount of power auctioned from year-to-year to establish the market price will depend on how many preference parties elect to purchase an allocation and how much power each party agrees to purchase. For instance, in a future year auction, the preference parties might elect to purchase only 20 percent of project power, instead of the entire 30 percent reasonable portion. The portion of the Reasonable Portion not subscribed by preference parties would be auctioned to establish the market price applicable to the preference parties who committed to purchase Reasonable Portion power that year.

10. In each year, the preference parties, including those who did not elect to purchase Reasonable Portion power in that year, will receive all of the revenues from the sale of the Reasonable Portion, less the cost of producing the Reasonable Portion. They will share the revenues less costs in proportion to their contractual allocations, which add up to the Reasonable Portion (i.e., 30 percent of project power). If the revenue exceeds the cost of production, they will profit. If the revenue is less than the cost of production, they will owe Grant County the difference, likewise in proportion to their contractual allocations.

11. On July 8, 2005, Grant County submitted its application under section 22 for approval of two contracts for the purpose of marketing the Reasonable Portion of the Priest Rapids power from expiration of the current license until a new license is issued.

¹³ Grant County held the auction for the initial contract to be effective November 1, 2005, on July 21, 2005. Thirteen bids were received. *See* gcpud.org/powerauction/default.htm and gcpud.org/aboutus/newsreleases05/news072505Auction/htm. Constellation Energy Commodities Group, Inc. (Constellation), filed the successful bid and, on August 8, 2005, Grant County filed a copy of an executed contract with Constellation.

¹⁴ Because the existing contracts for Wanapum power extend to October 31, 2009, only the Priest Rapids portion of the 30% Reasonable Portion is to be sold pursuant to the Marketing Plan until that date. Thereafter, the Marketing Plan will apply to power from both developments. Marketing Plan at 4.

The Commission issued public notice of Grant County's application.¹⁵ Timely motions to intervene were filed by Eugene Water and Electric Board, McMinnville Light and Power, Public Utility District No. 1 of Kittitas County, Washington, City of Milton-Freewater, Oregon, and the City of Forest Grove, Oregon.¹⁶ All of these entities support Grant County's application.

Discussion

12. Section 22 of the FPA provides in pertinent part:

That whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the Commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, . . . and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

13. The legislative history of section 22, which is not extensive, indicates that the Commission is to use its sound discretion in approving contracts beyond the term of the license.¹⁷ The Commission has previously approved applications under section 22 in order to accommodate situations where, in the absence of a power sales contract extending beyond the license termination date, the licensee would be unable to sell the project power and thereby finance the project,¹⁸ to give effect to a United States-Canada

¹⁵ 70 Fed. Reg. 47,188-9 (August 12, 2005).

¹⁶ Since these motions to intervene were timely and unopposed, they were automatically granted pursuant to 18 C.F.R. § 385.214(c)(1) (2005).

¹⁷ See debate on H.R. 3184, which was introduced in the 66th Congress by Representative Esch and became the Federal Water Power Act of 1920. 58 Cong. Rec. 2240-41 (July 1, 1919).

¹⁸ See, e.g., *Sabine River Authority of Texas and Sabine River Authority of Louisiana*, 31 FPC 885 (1964) and *P.U.D. No. 2 of Grant County County, WA*, 75 FERC ¶ 61,190.

treaty¹⁹ regarding the sharing of power benefits from Columbia River hydropower projects,²⁰ and to resolve litigation on the extent of licensee's liability under FPA section 10(e)²¹ to pay annual charges for the use of tribal lands on Indian reservation.²²

14. Here, Grant County seeks approval of the "Contract for Open-Market Sale of Priest Rapids Development Power," which would be executed by Grant County and the winning bidder, and the "Contract for Meaningful Priority Sale of Priest Rapids Project Power," to be executed by Grant County and each preference party that elects to buy a share of the Reasonable Portion at the price determined by the auction (together, the Interim Contracts). The Interim Contracts essentially provide for implementation of the Marketing Plan from current license expiration until a new license is issued. The contracts would be executed initially for a period of 14 months (November 1, 2005 – December 31, 2006). If a new license with an approved Marketing Plan is not issued by the end of the initial term, there would be subsequent sales for one-year terms until a new license is issued and the outstanding Interim Contracts have expired.

15. We conclude that it is in the public interest to approve Grant County's application. The current Priest Rapids development contracts expire on October 31, 2005, concurrent with the expiration of the current license. Those contracts provide that, upon their expiration, the purchasers have a first right of refusal to purchase a defined portion of the power surplus to Grant County's needs at that time. The meaning of this provision was the subject of litigation between Grant County and various purchasers under the existing contracts, but was resolved by execution of the Preference Agreements.²³ Approval of the Interim Contracts will prevent that and other issues from arising during the interim

¹⁹ Treaty between Canada and the United States of America Relating to Cooperative Development of The Water Resources of the Columbia River Basin (January 17, 1961), 15 U.S.T. 1555.

²⁰ *P.U.D. No. 1 of Chelan County, WA*, 81 FERC ¶ 61,364 (1997). The contract was extended to match the termination date of the treaty, approximately 18 years after license expiration.

²¹ 16 U.S.C. § 803(e).

²² *P.U.D. No. 1 of Douglas County, WA*, 110 FERC ¶ 61,128 (2005).

²³ See "Response of Public Utility District No. 2 of Grant County, Washington in opposition to complaint filed by the Yakama Nation," filed March 28, 2002, in P-2114-106 at 5-6.

period until a new license with an approved Marketing Plan is issued. We are also aware of no entity which would be harmed by implementation of the Marketing Plan on a temporary basis. We caution, however, that our temporary approval of these contracts in the context of Grant County's section 22 application should not be construed as pre-judgment concerning the merits of Grant County's proposed Marketing Plan. Certain parties to the new license proceeding have raised issues related to the Marketing Plan which will be considered in the license application proceeding.

The Commission orders:

(A) Public Utility District No. 2 of Grant County, Washington's application filed July 8, 2005 for approval of the "Contract for Open-Market Sale of Priest Rapids Development Power and the "Contract for Meaningful Priority Sale of Priest Rapids Project Power during the period from the expiration of the existing license for Priest Rapids Project No. 2114 until a new license is issued for the project is approved.

(B) This authorization is without prejudice to the authority of this Commission, or any other regulatory body, with respect to rates, service, accounts, valuation, estimates or determinations of cost, or any other matter whatsoever now pending or which may come before this Commission or any other regulatory body.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.