

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Public Utility District No. 1 of Douglas County, Washington Project No. 2149-119

ORDER APPROVING SETTLEMENT, AMENDING LICENSE, AND GRANTING
APPROVAL UNDER SECTION 22 OF THE FEDERAL POWER ACT

(Issued February 11, 2005)

1. On November 23, 2004, Public Utility District No. 1 of Douglas County, Washington (Douglas PUD), on behalf of itself, the Confederated Tribes of the Colville Reservation (Tribe), and the Wells Power Purchasers (Puget Sound Energy, Inc., Portland General Electric Company, PacifiCorp, and Avista Corporation), filed with the Commission a request for approval of: (1) a settlement agreement between Douglas PUD and the Tribe resolving all claims involving annual charges under section 10(e) of the Federal Power Act (FPA) for use of Indian land for Douglas PUD's Wells Project No. 2149; and (2) a contract for the sale of project power extending beyond the term of the Wells Project license, pursuant to section 22 of the FPA.
2. The Commission issued notice of the request for approval. Comments were filed by the U.S. Department of the Interior. For the reasons discussed below, we are approving the settlement's annual charge provisions as fair and reasonable, amending the license to reflect the charges established by the settlement, and approving the contract for the sale of project power. Our action is in the public interest because it will help Douglas PUD and the Tribe avoid potentially costly and time-consuming disputes.¹

¹ Although Douglas PUD filed these requests on behalf of the Wells Power Purchasers, the filings do not appear to affect the interests of these entities, which are not parties to either the settlement agreement or the power sales contract. The request for approvals indicates that Douglas PUD has existing power sales contracts with the Wells Power Purchasers to supply them 62 percent of the Wells Project's power.

Background

3. The 774.25-megawatt Wells Project is located on the Columbia River in Douglas, Chelan, and Okanogan Counties, Washington. The Federal Power Commission issued Douglas PUD an original license with a 50-year term, effective June 1, 1962.² Thus, the license expires on May 31, 2012. The license order noted that the project would affect tribal lands of the Colville Indian Reservation.

4. Section 10(e)(1) of the FPA³ provides in pertinent part:

when licenses are issued involving the use of . . . tribal lands embraced within Indian Reservations the Commission shall . . . , subject to the approval of the Indian Tribe having jurisdiction of such lands . . . , fix a reasonable annual charge for the use thereof.

The Commission's regulations provide that annual charges for use of tribal lands within Indian reservations will be determined on a case-by-case basis.⁴ The general practice has been that annual charges for such use are negotiated by the licensee and the tribe and are then submitted for Commission approval.⁵

5. Ordering paragraph 10 of the Wells Project license order provides that the amount of the annual charges to be paid "for the purpose of compensating the Indians for the use, occupancy, and enjoyment of tribal lands within the Colville Indian Reservation, should be determined later as hereafter provided." Article 46 of the license provides that the licensee shall pay to the United States "[f]or the use of tribal lands embraced within the Colville Indian Reservation, such reasonable charge (which may include electric service) as may hereafter be specified by the Commission, subject to the approval of the Indian tribe having jurisdiction over such lands as provided by law."

² *Public Utility District No. 1 of Douglas County, Washington*, 28 FPC 128 (1962).

³ 16 U.S.C. § 803(e)(1).

⁴ 18 C.F.R. § 11.4(a) (2004).

⁵ *See, e.g., Public Utility District No. 1 of Pend Oreille County, Wash.*, 77 FERC ¶ 61,146 at 61,553 (1996).

6. Douglas PUD has claimed that it acquired fee title to all of the property on the Colville Reservation that is within the project boundary, either from allottees and heirs or pursuant to resolution of the Business Council of the Colville Tribes, in each case with the approval of Interior's Bureau of Indian Affairs (Bureau). Douglas PUD has also claimed that it acquired occupancy rights to the riverbeds of the Columbia and Okanogan Rivers, which riverbeds are owned by the state of Washington.⁶ In 1970, Douglas PUD filed revised exhibits with the Commission and indicated that it had acquired all of the project property in fee title, with exceptions not involving the Tribe. In 1971, pursuant to a request for comments from the Commission, the Bureau confirmed that, according to its records, Douglas PUD had acquired 900 acres of Indian-owned lands as part of the project, Indian title to those lands had been extinguished, and federal responsibility for those lands had terminated. Since the 1970's, the Commission has not sought to collect, and Douglas PUD has not paid, annual charges for the project's use of Indian lands.

7. The Tribe has maintained that it owns the riverbed land, that tribal lands were purchased improperly, and that Douglas PUD continues to have an Article 46 obligation to pay annual charges for the use of tribal lands. In early 2003, the Tribe presented Douglas PUD with a claim for past and future annual charges. By letter of March 26, 2003, Commission staff informed Douglas PUD that an annual charge for the use of Colville Indian Reservation lands had never been determined for the Wells Project. Staff stated that this situation had to be corrected and requested periodic status reports of ongoing discussions between Douglas PUD and the Tribe.

8. Douglas PUD and the Tribe state that the Colville Settlement Agreement, which resulted from those discussions, is intended to "fully, finally, and irrevocably resolve any disputes and contests" between them regarding who should obtain a new license for the project. They also intend that the agreement establish the terms upon which Douglas PUD will sell a share of the project's output to the Tribe and provide other compensation. In addition, they intend that the agreement settle all claims regarding past, present, and

⁶ The project's dam is located on the Columbia River, but the reservoir impounded by the dam extends about 30 miles up the Columbia and about 14 miles up the Okanogan River, which flows into the Columbia upstream of the dam. *See Public Utility District No. 1 of Douglas County, Washington, 28 FPC 128 at 130.* The project boundary extends around the impounded portions of the rivers.

future section 10(e) payments for the use of tribal lands within the project boundary as of the effective date of the agreement for the duration of the original license and of any new license.⁷

9. Under Article III of the agreement, the Tribe “grants, consents and affirms all land rights previously conveyed by the Tribe to the PUD” and “to the extent it owns the same, grants to the PUD, its successors and assigns, the right to impound upon, overflow, and submerge the bed of the Okanogan and Columbia Rivers and any first or second class shorelands on and adjacent to Tribal Lands up to the ordinary high water mark where the rivers front on the Colville Reservation” and are within the project boundary, as of the effective date, and for the duration, of the agreement. Article II provides that the agreement shall be binding upon the successors and assigns of Douglas PUD as an owner and licensee of the project and shall attach to the land and be binding upon the successors in interest of the Tribe. Further, the rights, duties, and obligations set forth in the agreement are to “run with the ownership and license” of the project. In the event that the project is sold, transferred, or conveyed by Douglas PUD, the obligations of Douglas PUD to the Tribe are to become obligations of Douglas PUD’s successor in interest.

10. In connection with the settlement agreement, Douglas PUD and the Tribe entered into a power sales contract, entitled the Colville Power Sales Contract, that would extend beyond the termination date of the present license. Section 22 of the FPA⁸ provides, in 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 new licensee . . . shall assume and fulfill all such contracts.

⁷ The agreement provides that Douglas PUD would make additional annual charge payments if in the future it were to use tribal lands not now within the project boundary.

⁸ 16 U.S.C. § 815.

11. Under the Colville Power Sales Contract, Douglas PUD would be required to sell to the Tribe, at cost, 4.5 percent of the project's output through August 31, 2018, and 5.5 percent beginning September 1, 2018. The contract provides that it is to be in full force and effect from its effective date, defined as the date of Commission approval of the contract and the settlement agreement, and for as long as Douglas PUD holds any license from the Commission or thereafter if provided by Commission section 22 approval. Article IV of the settlement agreement provides that the benefits of the power sales contract, Douglas PUD's transfer of certain non-project real property to the Tribe, and Douglas PUD's payment of \$13.5 million to the Tribe represent the sole and exclusive compensation to the Tribe for the rights granted to Douglas PUD in the agreement and for any and all claims relating to past, present, and future payments of section 10(e) annual charges.

12. Under Article VII of the agreement, the Tribe covenants to take no further steps to compete with Douglas PUD for any new Commission license for the project⁹ and agrees to support any new license application filed by Douglas PUD. Article IX provides that the agreement shall continue through the term of any new license issued to Douglas PUD by the Commission, or thereafter if the Commission imposes the agreement on a successor licensee. If the Commission does not issue Douglas PUD a new license, the agreement would terminate between Douglas PUD and the Tribe, but such termination would not affect the rights of the Tribe as to Douglas PUD's successor if the Commission were to impose the agreement on such a successor or were to approve the power sales contract.

13. Article VII of the agreement provides for Douglas PUD and the Tribe to seek Commission approval of both the settlement agreement and the power sales contract, as well as of the transactions contemplated by those documents, to the extent of the Commission's jurisdiction. As specified by Article VII, such Commission approval is to

⁹ This statement implies that the Tribe has expressed an interest in competing with Douglas PUD for a new license for the project, but Douglas PUD and the Tribe do not elaborate on this. Under section 15(b)(1) of the FPA, 16 U.S.C. § 808(b)(1), an existing licensee is required to notify the Commission of its intention to seek a new license no less than 5 years before expiration of the existing one, and, under section 15(c)(1), applications filed by the existing licensee or any other entity for a new license must be filed at least 24 months before such expiration. As to the Wells Project, those dates would be May 31, 2007, and May 31, 2010, respectively.

include, in particular, a determination that the compensation to be paid to the Tribe under the agreement would completely satisfy Douglas PUD's obligations to the Tribe under section 10(e) for the period beginning with the effective date of the original license and continuing for the full term of any new Commission license.

Discussion

14. As noted above, the Commission looks in the first instance to the licensee and the Indian tribe for a negotiation of reasonable annual charges for a project's occupancy of tribal reservation lands. Sometimes the negotiated agreements set a formula for an annual or other periodic payment, but the Commission has also approved tribal land use settlements involving one-time, lump-sum payments¹⁰ and transfers to the tribe of project shares.¹¹

15. In this case, the negotiated settlement provides for a lump sum payment, the transfer of non-project property, and the sale of a specified percentage of project power over the term of the present license and any new license. Since the provision of project power that would be accomplished by the power sales contract is an integral part of the negotiated settlement of the annual charge issue and is effectively incorporated into the settlement agreement, the agreement and the power sales contract must be considered together.

16. Douglas PUD and the Tribe have negotiated a settlement containing terms that are meant to apply for the remainder of the existing license and for any new license. These include not only the provision of project power to the Tribe, but also the licensee's right to occupy tribal lands for the project and the Tribe's commitment to forego any future claims for section 10(e) charges for use of tribal lands within the existing project boundary. Approval of the settlement agreement as a resolution of the annual charge issue will, therefore, require both an amendment of the current license and our approval,

¹⁰ See *Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation of Oregon (Portland General Electric)*, 93 FERC ¶ 61,183 (2000); *Wisconsin Valley Improvement Company*, 86 FERC ¶ 61,153 (1999); *Southern California Edison*, 14 FERC ¶ 61,022 (1981).

¹¹ *Portland General Electric*, 93 FERC ¶ 61,183 (2000).

in advance of action on any application for new license that may be filed, of the compensation package as fulfillment, for the entire term, of the tribal land use payment requirement of any new license for the project.

17. We have stated that, as a rule, we will not consider requests to pre-approve a condition of a license prior to taking action on the entire license application, since licensing decisions regarding a hydropower project's proposed use of the nation's lands and waters should, whenever possible, not be piecemealed. However, we have approved a tribal lands use annual charge settlement that would apply to an as-yet unissued new license. In doing so, we have noted that such an annual charge determination is distinguishable from most other licensing decisions, in that annual charges are not directly dependent on the engineering or environmental reviews that are conducted in a license proceeding.¹²

18. Section 22 of the FPA provides for the Commission to approve power sales contracts extending beyond the term of an existing license when justified by the public interest. We have approved such contracts, for instance, where the licensee sought to provide power through the Bonneville Power Administration to Canada in accordance with a treaty scheduled to expire after the expiration of the existing license,¹³ and where, in the absence of such a power contract, the licensee would have been unable to sell project power and thereby finance its project.¹⁴

19. Douglas PUD and the Tribe state that, in the absence of the settlement, it could take years to determine whether and how much compensation is owed to the Tribe for the project's use of tribal lands, since there are disputed legal issues as to property ownership and valuation. It would be in the public interest to avoid protracted litigation over this dispute. Further, although more than seven years remain in the existing license term, a

¹² *Portland General Electric, 93 FERC ¶ 61,183 at 61,602-3 (2000).*

¹³ *Public Utility District No. 1 of Douglas County, Washington, 83 FERC ¶ 61,126 (1998); Public Utility District No. 2 of Grant County, Washington, 81 FERC ¶ 61,363 (1997).*

¹⁴ *Public Utility District No. 1 of Pend Oreille County, Washington, 87 FERC ¶ 61,095 (1999).*

resolution of the annual charge dispute that pertained only to the existing license term could lead to a resurrection of the dispute when a new license application is due to be filed. We see no reason to adopt only a short-term solution to this problem, particularly as it is clear that Douglas PUD is willing to accept the compensation terms only if it is assured that the Tribe will make no further claims for the use of tribal lands as long as Douglas PUD holds a license for the project. Accordingly, we find that the settlement agreement provides fair and reasonable terms for resolving the annual charge dispute as to both the existing license and any new license that is issued to Douglas PUD for the project.¹⁵ For the same reason, we conclude that approval of the power sales contract for the term of any new license is in the public interest.

20. Section 10(e) provides that the Commission may readjust tribal land use charges at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter, upon notice and opportunity for hearing. Douglas PUD and the Tribe request that we waive our authority to readjust the charges at 10-year intervals. As we have explained elsewhere, and as Douglas PUD and the Tribe acknowledge, section 10(i) of the FPA¹⁶ precludes such a waiver, but our exercise of this authority is discretionary.¹⁷ Since the agreement is intended to establish the compensation to the Tribe through a new license term, there should be no reason to revisit the tribal land use charges under a new license.

¹⁵ In its comments in response to the notice, Interior agreed that the settlement agreement appears to offer an efficient resolution of the dispute over compensation for use of tribal lands. However, Interior emphasized that the agreement does not deprive it of its authority to submit conditions on relicensing to protect the Colville Reservation pursuant to section 4(e) of the FPA. In response, Douglas PUD commented on the extent to which the project would include lands under the jurisdiction of Interior at relicensing. As both entities acknowledge, the extent of Interior's section 4(e) authority is a matter to be determined in a future relicensing proceeding and is not before us in this proceeding.

¹⁶ 16 U.S.C. § 803(i).

¹⁷ *Portland General Electric*, 93 FERC ¶ 61,183 at 61,603. Section 10(i) authorizes the Commission to waive most provisions of Part I of the FPA for projects with an installed capacity of 1.5 MW or less. The capacity of the Wells Project disqualifies it from such a waiver.

21. Douglas PUD and the Tribe intend that the settlement agreement and power sales contract apply for the remaining term of the existing license and for the term of any new license, even if such a license were to be issued to an entity other than Douglas PUD. Section 22 of the FPA provides that an approved power sales contract would apply to a new licensee that is not the original licensee, and, as we have indicated here, we will accept the compensation provisions of the agreement as complete satisfaction of the section 10(e) tribal lands annual charge requirement for both the existing license and any new license whose issuance will occur upon the expiration of the existing one.¹⁸ However, by its references to “any new license,” the settlement raises the possibility that the compensation terms could be construed to apply in perpetuity. The issuance of a new license upon expiration of the present one, though several years away, is sufficiently foreseeable to warrant adopting, at this time, tribal lands compensation terms that will become conditions of that new license. In contrast, we do not think that the public interest would be served by committing the Commission now to imposing section 10(e) terms on licenses that might be issued after the next one. Consequently, we will adopt the compensation terms only for the existing license and any new license whose issuance will occur upon the expiration of the existing one.¹⁹

¹⁸ Nevertheless, it is worth pointing out that the Commission has no authority to compel any new licensee to enter into or assume Douglas PUD’s position in the settlement agreement negotiated by Douglas PUD and the Tribe. Nor do we have any authority to compel actions by any entity other than a licensee, so that we could not compel enforcement of any obligations that the agreement places on the Tribe.

¹⁹ As noted, under the settlement agreement, the Tribe promises to forego competing with Douglas PUD for any new license. Douglas PUD asserts that this provision should not conflict with our rejection of “non-compete” provisions as an impermissible restraint of trade under FPA section 10(h) in *The Yakama Nation v. Public Utility District No. 2 of Grant County, Washington*, 101 FERC ¶ 61,197 (2002), order denying reh’g, 103 FERC ¶ 61,073 (2003), review pending, *Yakama Nation et al. v. FERC, Nos. 03-71825, et al.* (9th Cir., filed April 28, 2003) (*Yakama*). Douglas PUD argues that the circumstances of that proceeding were different from those in the present one, in that the licensee there had contracted with a number of power purchasers to supply power in exchange for their promise not to seek a new license, thereby, as we stated, having the potential to “unreasonably diminish the pool of potential new license applicants” and to discourage a “significant segment of the market for project power” from competing for a new license. *Yakama*, 101 FERC ¶ 61,197 at P 35; 103 FERC ¶61,073 at P 23. We agree that a promise by the Tribe not to compete for a new license does not rise to the level of trade interference with which we were concerned in *Yakama*.

22. Section 22 provides that power sales contracts extending beyond the license termination date must be approved by both the Commission and the public service commission or other similar authority in the state in which the sale or delivery of power is made. We remind Douglas PUD that it must obtain such state approval for entering into the Colville Power Sales Contract.

The Commission orders:

(A) The Colville Settlement Agreement, dated August 18, 2004, between Douglas County Public Utility District No. 1 and The Confederated Tribes of the Colville Reservation, and filed with the Commission November 23, 2004, in this proceeding, is approved.

(B) The request for approval of the Colville Power Sales Contract for the Wells Project No. 2149 for the period extending through the term of any new license issued upon expiration of the existing license for the project on May 31, 2012, is granted.

(C) Article 46, subpart (iii), of the license for the Wells Project No. 2149, issued July 12, 1962, is amended to read as follows:

(iii) For the use of tribal lands embraced within the Colville Indian Reservation, compensation to The Confederated Tribes of the Colville Reservation pursuant to the terms of the Colville Settlement Agreement and the Colville Power Sales Contract, dated August 18, 2004, between Douglas County Public Utility District No. 1 and The Confederated Tribes of the Colville Reservation, and filed with the Commission November 23, 2004, constitutes payment in full.

(D) For the purposes of any new license issued upon expiration of the current, original license for the Wells Project No. 2149, all annual charges under section 10(e) of the Federal Power Act that accrue during the term of such new license for the project's use of tribal reservation lands, to the extent that such lands were included in the project boundary on the effective date of the Colville Settlement Agreement, shall be deemed satisfied by fulfillment of the applicable terms of the Colville Settlement Agreement and the Colville Power Sales Contract, as approved herein.

(E) This authorization of the Colville Power Sales Contract 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.

(F) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to section 313(a) of the FPA.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.