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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 2

(Docket No. PL03-4-000; Order No. 635)

Policy Statement on Consultation with Indian Tribes
in Commission Proceedings

(Issued July 23, 2003)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy Statement.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this policy statement to articulate its commitment to promote a government-to-government relationship between itself and federally-recognized Indian tribes. The policy statement recognizes the sovereignty of tribal nations and the Commission's trust responsibility to Indian tribes. The policy statement also establishes a tribal liaison position. Finally, the policy statement establishes certain actions specific to the hydroelectric program.

EFFECTIVE DATE: The rule will become effective **[insert 30 days after publication in the FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Policy Statement on Consultation with
Indian Tribes in Commission Proceedings

Docket No. PL03-4-000

ORDER NO. 635
POLICY STATEMENT

INTRODUCTION

1. To encourage and facilitate involvement by Indian tribes in the areas over which the Commission has jurisdiction, the Commission is issuing this policy statement to articulate its commitment to promote a government-to-government relationship between itself and federally-recognized Indian tribes. The policy statement recognizes the sovereignty of tribal nations and the Commission's trust responsibility to Indian tribes. The policy statement also establishes a tribal liaison position. Finally, the policy statement establishes certain actions specific to the hydroelectric program. Part 2 of the Commission's regulations will be amended to implement the policy.

BACKGROUND

2. This policy statement evolved out of the recent rulemaking proceeding to develop an improved process to prepare and review license applications for non-federal

hydropower projects.¹ To ensure that tribal issues were addressed in the rulemaking, the Commission held special tribal forums in October and November 2002. As a result of several requests at those forums, the Chairman appointed a tribal liaison for the rulemaking proceeding.²

3. After the Notice of Proposed Regulation (NOPR) was issued in February 2003, Commission staff held regional public and tribal outreach meetings in March and April 2003 to discuss the NOPR.³ The Commission also held drafting sessions, including a special tribal session (Tribal Group), to attempt to reach consensus on a number of issues raised in the NOPR. The final rule is being issued concurrently with this policy statement.⁴

4. In written comments and meetings on the hydro rule,⁵ Indian tribes discussed the Commission's trust responsibility as it relates to treaty rights, legislation, and executive orders. Several tribes stated that as sovereign entities, they have government-to-government consultation rights that differ from those applicable to agencies and the

¹Hydroelectric Licensing under the Federal Power Act, RM02-16-000, 68 FR 13988 (Mar. 21, 2003); IV FERC Stats. & Regs. ¶ 32,568 (Feb. 20, 2003).

²Letter dated January 10, 2003, to Tribal Leaders from Chairman Pat Wood, III.

³These regional meetings were held in Portland, Oregon; Sacramento, California; Charlotte, North Carolina; Manchester, New Hampshire; and Milwaukee, Wisconsin.

⁴Hydroelectric Licensing under the Federal Power Act, Docket No. RM02-16-000; Final Rule.

⁵A list of commenters and their abbreviations is attached as Appendix A.

general public, because they must be determined by mutual agreement between the Commission and individual tribes in a case-specific and issue-specific context.⁶

However, the tribes also stated that the Commission should specifically establish its tribal consultation process in its regulations.⁷

5. The Commission, in its NOPR, proposed to establish a tribal liaison for the hydroelectric licensing program. This proposal was supported by all of the commenting tribes and the Advisory Council on Historic Preservation.⁸ One commenter recommended that the liaison should be available not only for hydro matters, but also for other Commission programs.⁹ There was a consensus among the commenters that the liaison should not be a clerical position, but should be a staff person with substantive knowledge of the process that will be followed.¹⁰

6. In addition, commenters suggested various roles and responsibilities for a Tribal Liaison. These include facilitating government-to-government consultation by directing tribes to the right person or persons to deal with substantive or policy issues; ensuring that

⁶S-B, S-P, CRITFC, NW Indians, Nez Perce, Umatilla, GLIFWC, NF Rancheria.

⁷Nez Perce, Menominee, NF Rancheria, S-B, Maidu, NW Indians, CRITFC, S-P, NHA, and Interior agreed.

⁸S-P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, HRC, ACHP, Menominee, Skokomish, Interior, NF Rancheria.

⁹NW Indians.

¹⁰S-P, Nez Perce, NW Indians, CRITFC, Umatilla, GLIFWC, Menominee, Tribal Group.

communications are maintained between tribal representatives and Commission staff throughout the proceeding;¹¹ assisting tribal knowledge of and participation in the Commission's processes;¹² educating Commission staff about tribes and the trust responsibility and treaty obligations,¹³ assisting tribes in learning how to access and effectively use the informational resources of the Commission's website;¹⁴ and informing tribes of activities at a project during licensing and throughout the term of a license that may affect tribal resources on or off the reservation.¹⁵

7. GLIFWC and Menominee stated that, because the process for government-to-government consultation needs to be developed in agreement with each tribe, the roles and responsibilities of the tribal liaison cannot be fully determined at the outset, but must evolve in response to the development of tribal-specific agreements.

8. The Tribal Group essentially endorsed all of these proposed roles and added several others, including: coordinating with tribal liaisons at other agencies; becoming educated about the rights of Indians; assisting tribes in making known their issues and

¹¹NW Indians, Nez Perce, Umatilla, GLIFWC, Menominee. They indicate that the correct person would depend on the issues under consideration; e.g., a technical issue dealing with a fisheries study would be dealt with by a fishery biologist, while an issue concerning the appropriate elements of government-to-government consultation with the tribe might be directed to senior Commission staff. We agree.

¹²SCE.

¹³GLIFWC, Menominee.

¹⁴GLIFWC.

¹⁵Interior.

views on compliance with treaties; ensuring that tribes are informed of studies and information with cultural-resource or treaty-rights implications; managing communications between the Commission and tribes when the ex parte regulations are applicable; facilitating communications between applicants and tribes; facilitating informal dispute resolution between applicants and tribes; helping to determine which tribes may be affected by likely future hydropower relicensing applications or original license applications; and informing potentially affected tribes about potential future relicensing applications.

9. While most commenters recommended that the tribal liaison should be non-decisional staff, Skokomish and NW Indians proposed that the tribal liaison should play an active role in the substantive resolution of licensing proceedings. NW Indians recommended that the tribal liaison or liaisons should be educated about individual tribes and their interests in specific proceedings and should act as their advocate within the Commission.

10. Various commenters indicated that there are too many tribes and too many tribe-specific, case-specific, and interrelated regional or watershed issues for one person to understand and act upon. Some suggested appointing multiple liaisons based on regions of the country, watersheds or river basins, or sub-regions within a state.¹⁶ Pacific Legacy suggested that the efforts of the Commission's liaison should be complemented by a

¹⁶Pacific Legacy, GLIFWC, Menominee, CRITFC, S-P, California, Interior.

liaison from each tribe for each project, to be funded by the applicant. The Tribal Group stated that the tribal liaison should be a regional position, with an overall coordinator position at the Commission's headquarters.

DISCUSSION

11. The Commission recognizes the unique relationship between the United States and Indian tribes as defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum,¹⁷ departments and agencies of the Executive Branch have been urged to consult with Federally-recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes and should recognize the status of the tribes as governmental sovereigns.

¹⁷Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (issued November 6, 2000); Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (issued May 14, 1998); Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments (issued April 29, 1994), reprinted at 59 Fed. Reg. 22,951; Executive Order 12875, Enhancing the Intergovernmental Partnership (issued October 26, 1993).

12. We are including in Part 2 of the Commission's regulations, "General Policy and Interpretations," a statement of our policy on these matters.¹⁸ It applies to all of the Commission's program areas.¹⁹ For the hydroelectric licensing program, the policy applies to all licensing proceedings, regardless of which process is used. The policy statement was developed from our review of the written policies of other Federal agencies concerning the trust responsibility and government-to-government consultation.²⁰

¹⁸18 CFR 2.1(c)(2003).

¹⁹The Commission's program areas include hydroelectric, oil pipeline, electric power, and natural gas programs. The Commission issues licenses and oversees compliance with those licenses for non-federal hydroelectric projects pursuant to Part I of the Federal Power Act (FPA), the Public Utility Regulatory Policies Act (PURPA), and the Energy Policy Act of 1992 (EPAAct). Under the Interstate Commerce Act and the EPAAct, the Commission regulates the rates and practices of oil pipeline companies engaged in interstate transportation. The Commission's electric power authority is outlined by Part II of the FPA, the PURPA, and the EPAAct. The Commission's electric power responsibilities include: approving rates for wholesale electric sales of electricity and transmission in interstate commerce for private utilities, power marketers, power pools, power exchanges and independent system operators; overseeing the issuance of certain stock and debt securities, assumption of obligations and liabilities, and mergers; reviewing the holding of officer and director positions between top officials in utilities and certain other firms they do business with; reviewing rates set by the federal power marketing administrations; conferring exempt wholesale generator status; and certifying qualifying small power production and cogeneration facilities. The Natural Gas Act (NGA) of 1938, the Natural Gas Policy Act of 1978, the Outer Continental Shelf Lands Act, the Natural Gas Wellhead Decontrol Act of 1989, and the EPAAct are the primary laws the Commission administers to oversee the natural gas pipeline industry. Under the NGA, the Commission regulates both the construction of pipeline facilities and the transportation of natural gas in interstate commerce.

²⁰We reviewed the policies of other independent agencies, including the Federal Communications Commission, FCC No. 00-207 (June 8, 2000), 16 FCC Rcd 4078; 2000 FCC LEXIS 3245; 20 Comm. Reg. (P&F) 1316; the Federal Emergency Management Agency, "Final Agency Policy for Government-to-Government Relations with American
(continued...)

13. The policy statement recognizes the unique relationship between the Federal government and Indian tribes as defined by treaties, statutes, and judicial decisions. It acknowledges the Commission's trust responsibilities. It states that the Commission will endeavor to work with the tribes on a government-to-government basis and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to trust responsibilities, the statutes governing the Commission's authority,²¹ and in the Commission's environmental and decisional documents. It notes that the Commission functions as a neutral, quasi-judicial body and as such is bound by the Administrative Procedure Act and Commission rules regarding off-the-record communications.²² It states that the Commission will assure tribal issues and interests are considered in making decisions. The policy statement also establishes a tribal liaison position. For the hydroelectric program, it states that the Commission will notify tribes

²⁰(...continued)

Indian and Alaska Native Tribal Government” (Sept. 25, 1998), 64 Fed. Reg. 2096 (Jan. 12, 1999); the Environmental Protection Agency, Memorandum to all EPA Employees from Christine Todd Whitman, EPA Administrator, dated July 12, 2001; and the Nuclear Regulatory Commission, Memorandum to NRC Commissioners from William D. Travers, Executive Director for Operations, dated February 2, 2001. These documents may be found on FERRIS in Docket No. RM02-16-000.

²¹These are primarily the Federal Power Act, the Natural Gas Act, the Public Utilities Regulatory Policies Act of 1978, the Interstate Commerce Act, the Outer Continental Shelf Lands Act, National Environmental Policy Act, and Section 106 of the National Historic Preservation Act.

²²18 CFR 385.2201 (2003).

before or at the time the licensee files its notice of intent, and will consider comprehensive plans prepared by tribes or intertribal organizations.

14. The tribal liaison will seek to educate Commission staff about tribal governments and cultures and to educate tribes about the Commission's various statutory functions and programs. The tribal liaison will work with the tribes during Commission proceedings, to ensure that the tribes' views are appropriately considered at every step of the process. The tribal liaison will act as a guide for the tribes to Commission processes, and will strive to ensure that consultation requirements are met.

IV. ENVIRONMENTAL ANALYSIS

15. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have significant adverse effect on the human environment.²³ The Commission has categorically excluded certain actions from this requirement because they would have no significant effect on the human environment.²⁴ Included among the exclusions are rules that are clarifying, corrective, or procedural, or that do not substantively change the effect of the regulations being amended.²⁵ This policy statement is procedural in nature and therefore falls under this exception. Consequently, no environmental analysis is necessary.

V. REGULATORY FLEXIBILITY ACT

²³National Environmental Policy Act, 42 U.S.C. 4321-4370a, 7101-7352.

²⁴18 CFR 380.1, *et seq.*

²⁵18 CFR 380.4(a)(2)(ii).

16. The Regulatory Flexibility Act of 1980 (RFA)²⁶ generally requires a description and analysis of final rules that will have a significant economic impact on a substantial number of small entities.²⁷ Pursuant to section 605(b) of the RFA, the Commission hereby certifies that this policy statement will not have a significant economic impact on a substantial number of small entities.

VI. INFORMATION COLLECTION STATEMENT

17. The OMB requirements require that OMB approve certain information collection requirements imposed by agency rules.²⁸ However, this policy statement contains no information reporting requirements, and therefore is not subject to OMB approval.

VII. DOCUMENT AVAILABILITY

18. In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (www.ferc.gov) and in the Commission's Public Reference Room during regular business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

²⁶5 U.S.C. 601-612 (2000).

²⁷Section 601(c) of the RFA defines a "small entity" as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A "small business" is defined by reference to Section 3 of the Small Business Act as an enterprise which is "independently owned and operated and which is not dominant in its field of operation" 15 U.S.C. 632(a).

²⁸5 CFR 1320.

19. From the Commission's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and WordPerfect format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number of this docket, excluding the last three digits, in the docket number field.

User assistance is available for FERRIS and the Commission's website during regular business hours. For assistance, contact FERC Online Support at

FERCOnlineSupport@ferc.gov or toll-free at (866) 208-3676, or for TTY, contact (202) 502-8659.

VIII. EFFECTIVE DATE

20. These regulations are effective [**insert date 30 days after publication in the FEDERAL REGISTER**].

The provisions of 5 U.S.C. § 801 regarding Congressional review of Final Rules does not apply to this Final Rule, because the rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties.

List of subjects in 18 CFR Part 2

General policy and interpretation.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission amends part 2, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 2-GENERAL POLICY AND INTERPRETATIONS

The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 601; 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C.792-825y, 2601-2645; 42 U.S.C. 4321-4361, 7101-7352.

Section 2.1c is added to read as follows:

§ 2.1c Policy statement on consultation with indian tribes in Commission proceedings

(a) The Commission recognizes the unique relationship between the United States and Indian tribes as defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum, departments and agencies of the Executive Branch have been urged to consult with federally-recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes and should recognize the status of the tribes as governmental sovereigns.

(b) The Commission acknowledges that, as an independent agency of the federal government, it has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes.

(c) The Commission will endeavor to work with Indian tribes on a government-to-government basis, and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to the Commission's trust responsibility, the Federal Power Act, the Natural Gas Act, the Public Utility Regulatory Policies Act, Section 32 of the Public Utility Holding Company Act, the Interstate Commerce Act, the Outer Continental Shelf Lands Act, Section 106 of the National Historic Preservation Act, and in the Commission's environmental and decisional documents.

(d) As an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on applications filed with it, and resolving issues among parties appearing before it, including Indian tribes. Therefore, the provisions of the Administrative Procedure Act and the Commission's rules concerning off-the-record communications, as well as the nature of the Commission's licensing and certificating processes and of the Commission's review of jurisdictional rates, terms and conditions, place some limitations on the nature and type of consultation that the Commission may engage in with any party in a contested case. Nevertheless, the Commission will endeavor, to the extent authorized by law, to reduce procedural impediments to working directly and effectively with tribal governments.

(e) The Commission, in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources.

(f) The Commission will seek to engage tribes in high-level meetings to discuss general matters of importance, such as those that uniquely affect the tribes. Where appropriate, these meetings may be arranged for particular tribes, by region, or in some proceedings involving hydroelectric projects, by river basins.

(g) The Commission will strive to develop working relationships with tribes and will seek to establish procedures to educate Commission staff about tribal governments and cultures and to educate tribes about the Commission's various statutory functions and programs. To assist in this effort, the Commission is establishing the position of tribal liaison. The tribal liaison will provide a point of contact and a resource for tribes for any proceeding at the Commission.

(h) Concurrently with this policy statement, the Commission is issuing certain new regulations regarding the licensing of hydroelectric projects. In this connection, the Commission sets forth the following additional policies for the hydroelectric licensing process.

(i) The Commission believes that the hydroelectric licensing process will benefit by more direct and substantial consultation between the Commission staff and Indian tribes. Because of the unique status of Indian tribes in relation to the Federal government, the Commission will endeavor to increase direct communications with tribal

representatives in appropriate circumstances, recognizing that different issues and stages of a proceeding may call for different approaches, and there are some limitations that must be observed.

(j) The Commission will seek to notify potentially-affected tribes about upcoming hydroelectric licensing processes, to discuss the consultation process and the importance of tribal participation, to learn more about each tribe's culture, and to establish case-by-case consultation procedures consistent with our ex parte rules.

(k) In evaluating a proposed hydroelectric project, the Commission will consider any comprehensive plans prepared by Indian tribes or inter-tribal organizations for improving, developing, or conserving a waterway or waterways affected by a proposed project. The Commission will treat as a comprehensive plan, a plan that: (1) is a comprehensive study of one or more of the beneficial uses of a waterway or waterways; (2) includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan; and (3) is filed with the Secretary of the Commission. See generally 18 C.F.R. 2.19.

Note: the following Appendix will not be published in the Code of Federal Regulations.

APPENDIX A

List of Commenters

Indian Tribes

Affiliated Tribes of Northwest Indians - Economic Development Corporation (NW Indians)

Confederated Tribes of the Umatilla Indian Reservation (Umatilla)

Columbia River Inter-Tribal Fish Commission (CRITFC)

Shoshone-Paiute Tribes of Nevada and Idaho, Duck Valley Reservation (S-P)

Shoshone-Bannock (S-B)

Great Lakes Indian Fish and Wildlife Commission (GLIFWC)

Maidu-Enterprise Tribe (Maidu)

Menominee Tribe of Wisconsin (Menominee)

Nez Perce Tribe

North Fork Rancheria of Mono Indians of California (NF Rancheria)

Skokomish Indian Tribe (Skokomish)

Licensees

National Hydropower Association (NHA)

Southern California Edison Company (SCE)

Non-governmental Organizations

Hydropower Reform Coalition (HRC)

Federal Agencies

Advisory Council on Historic Preservation (Advisory Council)

Dept. of the Interior (Interior)

States/State Agencies

California Resources Agency, California EPA, State Water Resources Control Board,

Department of Fish and Game, State of California Office of the Attorney General

(California)

Other

Pacific Legacy