

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Tacoma, Washington

Project Nos. 2016-092 and -073

ORDER GRANTING INTERVENTION, DENYING BLANKET MOTION TO
INTERVENE, AND DENYING REHEARING

(Issued December 21, 2004)

1. In this order, we grant in part a motion to intervene, filed by the Cowlitz Indian Tribe, Friends of the Cowlitz, and CPR-Fish (Movants), to allow Friends of the Cowlitz and CPR-Fish (Cowlitz Groups) to seek rehearing of the licensee's public information management plan for the Cowlitz River Project. We also grant rehearing of the Secretary's notice of August 11, 2004, which rejected Cowlitz Groups' earlier request for rehearing of the plan. We deny Cowlitz Groups' request for rehearing of the merits of the plan. We also deny, without prejudice, Movants' blanket motion to intervene in all future post-licensing proceedings concerning the project. This order is in the public interest because it clarifies the Commission's policy and precedent concerning intervention and rehearing of compliance matters that arise after issuance of a license.

Background

2. The Commission approved a settlement agreement and issued a new license for the Cowlitz Project on March 13, 2002,¹ which it later stayed to accommodate a state-issued stay of water quality certification for the project. On July 18, 2003, the

¹ *City of Tacoma, Washington*, 98 FERC ¶ 61,274 (2002). The 462-megawatt project is located on the Cowlitz River in Lewis County, and in part on lands within the Gifford Pinchott National Forest.

Commission issued an order denying rehearing and lifting the stay.² Several parties filed petitions for judicial review, and the case is currently pending before the U.S. Court of Appeals for the Ninth Circuit.³

3. On June 10, 2004, Commission staff issued an order approving the licensee's public information management plan, filed pursuant to Article 405 of the new license.⁴ On July 12, 2004, Cowlitz Groups filed a request for rehearing of that order. On August 11, 2004, the Commission Secretary issued a notice rejecting the request for rehearing, because Cowlitz Groups had not filed a motion to intervene and the filing was not one for which the Commission allows an opportunity for post-licensing intervention and rehearing.

4. On September 6, 2004, Movants filed a motion to intervene in all post-licensing proceedings concerning the new license for the Cowlitz Project, effective as of the new license's effective date. On September 10, 2004, Cowlitz Groups filed a motion for reconsideration or, in the alternative, a request for rehearing of the Secretary's notice rejecting their earlier request for rehearing of the June 10 Order. On September 22, 2004, the licensee for the project, City of Tacoma, Washington (Tacoma), filed an answer opposing both the September 6 motion to intervene and the September 10 motion for reconsideration.

5. Movants seek to intervene not only for purposes of appealing the rejection of Cowlitz Groups' earlier request for rehearing, but also for purposes of participating in all post-licensing matters involving implementation of the new license. On rehearing, Cowlitz Groups argue that they were not aware that their intervention in the relicensing proceeding did not continue their party status for post-licensing matters. They request that the Commission reconsider or grant rehearing of the Secretary's rejection of their earlier rehearing request in light of Movants' motion to intervene in all post-licensing proceedings, including their request that intervention be granted retroactively. Tacoma opposes both motions, arguing that consistent with Commission policy and precedent in hydroelectric post-licensing proceedings, the Commission should deny both motions in their entirety.

² *City of Tacoma, Washington*, 104 FERC ¶ 61,092 (2003).

³ *Cowlitz Indian Tribe et al. v. FERC*, No. 03-73225 (9th Cir. filed Sept. 10, 2003).

⁴ *City of Tacoma, Washington*, 107 FERC ¶ 62,225 (2004).

Discussion

A. Participation in Post-Licensing Matters

6. The Commission allows extensive public participation in hydroelectric licensing proceedings. After a license has been issued, however, opportunities for public participation in compliance matters are more limited. The Commission handles many thousands of hydroelectric compliance matters each year. It is both unnecessary and impractical to allow an opportunity for public participation with respect to each and every one of these matters. Instead, the Commission's longstanding policy and practice has been to provide notice and allow an opportunity for intervention and rehearing with respect to only certain types of post-licensing compliance filings. Specifically, the filing must be one that entails a material change in the plan of project development or terms of the license, would adversely affect the rights of a property holder in a manner not contemplated by the license, or involves an appeal by an agency or entity specifically given a consultation role by the license article under which the compliance filing is made.⁵

7. As discussed in greater detail in the *Kings River* case, if a filing (such as a request for a license amendment) would involve a material change to the project or its operation, section 6 of the Federal Power Act (FPA) would require that the Commission provide notice and an opportunity to participate in much the same manner as it does for licensing proceedings. Similarly, if the rights of third-party property holders could be adversely affected by post-licensing actions of the Commission, due process considerations would require that the Commission provide notice and an opportunity to be heard. For other filings that simply involve compliance with the terms of the license, without changing the license requirements or affecting property rights in a manner not contemplated by the license, public notice of the filing would not be required, and there would be no opportunity to intervene and seek rehearing with respect to the filing. As explained in more detail in the *Pacific Gas and Electric* case, the Commission recognizes that entities that are given a consultation role in a particular license article should be allowed to intervene and seek rehearing of matters on which they were required to be consulted. This approach allows the Commission to act on numerous hydroelectric compliance matters in a manner that is both administratively efficient and consistent with the requirements of the FPA and due process.⁶

⁵ See *Kings River Conservation District*, 36 FERC ¶ 61,365 (1986); *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035 (1987).

⁶ See *Kings River*, 36 FERC ¶ 61,365 at 61,181-83.

B. The Blanket Motion to Intervene

8. Movants “request intervention in all post-licensing proceedings concerning the new license, including but not limited to plans submitted for Commission approval under the terms of the new license and all subsequent amendments, modifications, and other actions taken by the Commission with respect to the license or the project.”⁷ They request that intervention be granted *nunc pro tunc*, as of the new license’s effective date, so as to allow them to seek rehearing of the Commission staff’s approval of the public information management plan. They also request notice of all future post-licensing matters, and an opportunity to participate in them through written comments and such other procedures as the Commission’s rules may allow. They assert that their interest in the relicensing proceeding, as well as the pending proceeding on judicial review before the court of appeals, is sufficient to support their intervention in all post-licensing matters involving the Cowlitz Project. They also assert that they have an interest in monitoring the licensee’s compliance with the new license that is not adequately represented by any other party.

9. We deny Movants’ motion to intervene in all future post-licensing proceedings involving the Cowlitz Project. Each post-licensing proceeding is a distinct matter, requiring intervention (if allowed) by those who wish to participate.⁸ In addition, as discussed above, intervention in post-licensing proceedings is limited to filings that would entail material changes to development plans or license conditions, could adversely affect property rights in a manner not previously considered, or pertain to matters for which an entity has a specific consultation role. The Commission does not grant blanket interventions in all post-licensing proceedings, because it cannot determine in advance what proceedings may be commenced or whether compliance or other filings will fall within one of the categories for which intervention is permitted.⁹ Our denial is without prejudice to the filing by these entities of future motions to intervene in post-licensing proceedings, to the extent allowed by Commission policy and precedent as discussed in this order.

⁷ Motion to intervene at 1.

⁸ See *West Penn Power Co.*, 81 FERC ¶ 61,362 at 62,735 (1997).

⁹ See *City of Tacoma, Washington*, 89 FERC ¶ 61,058 at 61,194-95 (1999).

10. Movants suggest that, because they were active participants in the recently-completed proceeding to amend the new license to include conditions to protect several species of fish listed as endangered under the Endangered Species Act (ESA),¹⁰ this demonstrates their interest in all post-licensing matters.¹¹ Although they refer to the ESA consultation and amendment process as a “post-licensing” matter (presumably because it occurred after the new license was issued), in reality this was a limited reopening of the relicensing proceeding, and parties to that proceeding were permitted to seek rehearing without the need to file a new motion to intervene.¹² Thus, Movants’ participation as parties in this aspect of the relicensing proceeding does not provide support for their blanket motion to intervene in all post-licensing proceedings.

11. Movants also argue that the Commission’s decisions regarding intervention and rehearing in post-licensing proceedings are inapplicable to parties seeking judicial review under section 313 of the FPA,¹³ particularly where the Commission has obtained leave of the court to amend the license during the appeal. Although Movants do not elaborate further, perhaps they mean to suggest that, because they have sought judicial review of the new license, they must also be considered parties to any post-licensing proceedings that may be conducted while judicial review is underway. As we have seen, this is not correct. Post-licensing proceedings are separate from licensing proceedings, and are subject to different procedures.

12. Movants maintain that there is no effective means of monitoring and enforcing the licensee’s compliance with the new license unless they are entitled to participate in and potentially challenge the compliance filings in the new license. As noted, the Commission limits public participation in post-licensing proceedings to those involving only certain types of filings. It is the Commission’s responsibility to monitor and enforce compliance with the hydroelectric licenses it issues.

¹⁰ See *City of Tacoma, Washington*, 109 FERC ¶ 61,198 (2004).

¹¹ Motion to intervene at 1, 3.

¹² See *City of Tacoma, Washington*, 104 FERC ¶ 61324 at P 13 (2003) (characterizing proceeding on remand from the court of appeals for completion of ESA consultation for the Cushman Project as a “remanded relicensing proceeding”).

¹³ 16 U.S.C. § 825-1.

C. The Public Information Management Plan

13. As noted, Movants seek to intervene, as of the effective date of the new license, for the purpose of requesting rehearing of the staff's approval of the public information management plan. Similarly, Cowlitz Groups seek reconsideration or rehearing of the Secretary's notice of August 11, 2004, which rejected their earlier request for rehearing of the plan. Because only parties may seek rehearing under our rules, we first consider whether intervention is appropriate.

14. Movants argue that, with respect to the public information management plan, the Commission should not limit intervention and rehearing rights to consulted entities. They point out that the Commission added Article 405 to the license in response to their complaint that they were being frozen out of actions developed by Tacoma in consultation with the Fisheries Technical Committee and other advisory groups by the terms of the settlement agreement. Cowlitz Groups add that Tacoma was not required to solicit public input on the plan, and that the Commission staff approved it without any public involvement. Because their request for rehearing was the first recognized opportunity for members of the public to comment on the provisions of the plan, Cowlitz Groups urge the Commission to consider their request for rehearing of the plan.

15. The public information management plan does not present any of the circumstances for which post-licensing intervention and rehearing are normally permitted. It does not involve any material changes in the project or its operation, or affect the property rights of third parties in a manner not contemplated by the license. Similarly, Article 405 does not give Movants a consultation role with respect to the plan's preparation. However, the plan is unlike other compliance filings in that its purpose is to require the licensee to make information about the project available to the public. Because Movants are members of the public, they are entities that the plan is intended to serve. As such, they have standing to challenge the plan, and should be permitted to intervene and seek rehearing of its provisions. We therefore grant Movants' motion to intervene for this purpose. For the same reason, we grant Cowlitz Groups' request for rehearing of the Secretary's notice of August 11, 2004, which rejected their earlier request for rehearing of the plan.¹⁴

¹⁴ Because we grant Cowlitz Groups' request for rehearing of the Secretary's notice, we need not rule separately on their request for reconsideration.

16. On rehearing, Cowlitz Groups request four additions to the plan. They assert that these additions are needed to improve their ability, as well as that of other persons outside the settlement group, “to participate effectively in the management actions conducted under the license.”¹⁵

17. First, they request that the plan require Tacoma to notify its public distribution list by electronic or regular mail when it makes documents available on its web site and when it submits reports or plans for approval to the Commission or other regulatory agencies, and to inform the distribution list of any deadlines for comments, extensions of deadlines, and later actions on the matters noticed. Second, they request that the plan require Tacoma to keep its website or other document distribution method fully updated and consistent with its public records and filings. Third, they request that the plan require Tacoma to open meetings of the Fisheries Technical Committee to public attendance and observance, and make its working papers available to the public. Fourth, they request that the plan include a specific schedule for public briefings.

18. These changes are unnecessary. Article 405 requires that the plan describe how the licensee will share and disseminate information and solicit public comments on implementing the settlement agreement, and specifies that the information to be provided shall include any recommendations and reports produced by the Fisheries Technical Committee and Habitat Advisory Group. The plan provides for dissemination of information through Tacoma’s web site, a distribution list, public briefings, news releases, a newsletter, bulletin boards, tours and presentations, and open houses. The plan provides that Tacoma’s web site will be regularly updated, and offers to provide copies of draft implementation plans, reports, and public briefing notices by regular mail service to the distribution list, concurrent with listing on the web site, as they become available for review and comment. Thus, members of the public can obtain information about the project by checking the web site and requesting that their names be placed on the distribution list. The schedule for compliance filings is set forth in the new license, and opportunities for public participation are listed in the plan. There is no need to require that Tacoma take the additional step of providing notice whenever it makes

¹⁵ Request for rehearing at 4 (filed July 12, 2004).

documents available on its web site, or submits reports or plans to the Commission for approval.¹⁶ Similarly, we need not require that Tacoma keep its web site fully consistent with its public records and filings. This would duplicate information already available from the Commission's public information system.¹⁷

19. Nor do we find that Tacoma should be required to open meetings of the Fisheries Technical Committee to public attendance and observance, or to make the Committee's working papers available to the public. Movants made a similar request, which we denied, in comments on the settlement agreement and on rehearing of the new license.¹⁸ The Committee is an advisory group. Tacoma's plan provides that summaries of all Committee meetings will be posted on its web site, and that the Committee's recommendations will be made available for public review and comment in the form of draft implementation or design plans and study or monitoring reports. These procedures are sufficient to allow members of the public to obtain information about the Committee's meetings and to provide comments on its recommendations.

20. Finally, we need not require that Tacoma include a specific schedule for public briefings. In response to comments on the plan, Tacoma concluded that an advance schedule for public briefings is not practical because there are too many variables involved. In determining when to hold public briefings, Tacoma will consider the level of public interest in a given plan or action, the ability to schedule a briefing within a time frame that facilitates public comment, and the availability of meeting facilities, as well as recommendations of the Fisheries Technical Committee, Habitat Advisory Group, or Cowlitz Wildlife Coordinating Committee. We agree with the Commission staff's assessment in the June 10, 2004 order that, in light of the plan's other measures for public information and involvement, it is reasonable to allow Tacoma the flexibility to determine when to schedule its public briefings.

¹⁶ Members of the public can receive an email notification of compliance filings by using the Commission's eSubscription service. Further information on this service is available on the Commission's web site at www.ferc.gov/docs-filing/esubscription.asp.

¹⁷ Information on all filings concerning a particular project, as well as all documents that are publicly available concerning the project, can be obtained by using the Commission's eLibrary service, which is also available on the Commission's web site at www.ferc.gov/docs-filing/elibrary.asp.

¹⁸ See *City of Tacoma, Washington*, 98 FERC ¶ 61,274 at 62,094 (2002) and 104 FERC ¶ 61,092 at P 47 (2003).

The Commission orders:

(A) The motion to intervene filed in this proceeding on September 7, 2004, by the Cowlitz Indian Tribe, Friends of the Cowlitz, and CPR-Fish, is granted in part to allow Friends of the Cowlitz and CPR-Fish to seek rehearing of the licensee's public information management plan. The blanket motion to intervene in all post-licensing proceedings concerning the Cowlitz Project is denied, without prejudice, as explained in this order.

(B) The request for rehearing filed in this proceeding on September 10, 2004, by Friends of the Cowlitz and CPR-Fish, is granted.

(C) The request for rehearing filed in this proceeding on July 12, 2004, by Friends of the Cowlitz and CPR-Fish, is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.