

121 FERC ¶ 61,269
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Public Utility District No. 1 of Snohomish County,
Washington

Project No. 2157-000

City of Everett, Washington

DECLARATORY ORDER

(Issued December 20, 2007)

1. By petition filed November 1, 2007, as supplemented November 7, 2007, the Public Utility District No. 1 of Snohomish County, Washington (Snohomish PUD) and the City of Everett (Everett), co-licensees for the 111.8-megawatt Henry M. Jackson Hydroelectric Project No. 2157¹ located on the Sultan River in Snohomish County, Washington, request a declaratory order finding that Snohomish PUD has sufficient rights to use those of Everett's properties and facilities that are necessary for project purposes and that Everett need not be a co-applicant for a new license to operate the project after the current license expires in 2011. The Commission issued notice of the joint petition for declaratory order on November 15, 2007.² The co-licensees³ have

¹ 25 FPC 1160 (1961). The name of the project was changed in 1984 from the Sultan River Project to the Henry M. Jackson Hydroelectric Project.

² In response to the notice, the Tulalip Tribes of Washington filed comments stating that they did not oppose the petition.

³ Co-licensees are "jointly and severally liable to fulfill all statutory and regulatory obligations under the license ..., regardless of their varying interests in project property or their contractual obligations to each other regarding project operation." *See Dan River, Inc.*, 48 FERC ¶62,078 (1989).

agreed, as between themselves, that Everett is not necessary as a licensee on the new license. For the reasons discussed below, we declare that Everett need not be a co-licensee for the project.

Background

2. The Henry M. Jackson Hydroelectric Project is a 111.8 megawatt project which produces about 6 to 8 percent of Snohomish PUD's power needs. The original license included plans for the construction of two new dams and powerhouses on the Sultan River upstream of the Everett's existing diversion dam. In addition, the licensees were to modify Everett's diversion dam and add a powerhouse at the outlet of the water supply reservoir, Lake Chaplain. The project was built in two phases. Phase I was completed in 1965 and included the building of Culmback Dam and the creation of the Spada Lake reservoir to increase water supply. After the completion of Phase I, the project was used for water storage, but no electricity was generated. In 1979, the co-licensees filed an amendment application seeking authorization for a reconfigured project. In the amendment application, the powerhouse located at Everett's Lake Chaplain was eliminated. On October 16, 1981, the Commission issued an order amending the license.⁴ Phase II was completed in 1984, including raising Culmback Dam 62 feet, which increased the size of Spada Lake four times. Hydroelectric generation commenced in 1984 and the project has operated in this configuration.

3. On November 20, 2005, Everett and Snohomish PUD filed a Notice of Intent to relicense the project and a Pre-Application Document describing the existing conditions and known stakeholders. The current license expires on May 31, 2011.

4. Everett's water supply is provided by Spada Reservoir, formed by the Culmback Dam on the Sultan River, and a much smaller surface water source, Lake Chaplain. Water from Spada Reservoir flows through a power tunnel to the Jackson Powerhouse where it is either released to the Sultan River or piped to a portal on the shore of Lake Chaplain, where a portion of the flow is diverted to Lake Chaplain for its municipal water supply and through a diversion tunnel and pipeline to the Sultan River immediately above Everett's diversion dam, located about 5.5 miles upstream of the powerhouse, to maintain proper water flows for fish populations in the Sultan River. In 1983, the Commission amended the license to include the diversion dam and tunnel as project works within the project boundary.⁵

⁴ 17 FERC ¶ 61,056 (1981).

⁵ 22 FERC ¶ 61,140 (1983).

5. The co-licensees, in a joint filing, seek to obtain Commission clarification that Everett is unnecessary as a licensee on the new license. They do not request that Everett's status change under the existing license.

Discussion

6. As an initial matter, no entity is ever required to be a licensee. An entity that wishes to generate electric power at a project subject to the Commission's jurisdiction cannot lawfully do so without holding a license under Part I of the Federal Power Act (FPA). The entity may, however, decide not to operate the facilities, in which case it need not obtain a license. An entity that becomes a licensee must, as discussed in more detail below, hold sufficient property rights to operate and maintain project works, and may obtain those rights through agreement or, if necessary, by use of eminent domain.

7. A non-licensee holding title to project works (for example, someone holding title to a project dam) that are the subject of a license held by another entity need not necessarily be a co-licensee. The licensee may be able to obtain sufficient rights in the project works through something less than fee ownership, such as through an easement or a lease, and then nothing further is required.⁶ A non-licensee owner of project works does bear the risk that the Commission will require the licensee to obtain a level of rights in the project works that may be greater than the non-licensee prefers. Thus, an entity that is not interested in the generation of hydropower may nonetheless elect to be a co-licensee if it wishes to retain a complete interest in project works it owns, and wants to ensure that the Commission does not require the licensee to obtain a level of interest in those works that the entity views as inimical to its interests. While no entity is required to be a co-licensee under such circumstances, it is perfectly permissible that it do so.

8. Standard Article 5, which we include in all project licenses, requires licensees to acquire and retain sufficient interests in all non-federal lands and other property

⁶ *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 at P 30 (2006). See, e.g., *Appalachian Power Company*, 112 FERC ¶ 61,026 (2005); *Trafalgar Power Inc*, 107 FERC ¶ 61,160 (2004); *FPL Energy Maine Hydro LLC*, 88 FERC ¶ 61,116, at p. 61,274 (1999); *PacifiCorp*, 80 FERC ¶ 61,334, at pp. 62,113-14 (1997); *Great Northern Paper, Inc.*, 77 FERC ¶ 61,066, at pp. 61,247-48 (1996); *Niagara Mohawk Power Corp.*, 77 FERC ¶ 61,306, at p. 62,391 (1996); *Georgia Power Co.*, 32 FERC ¶ 61,237 (1985).

necessary or appropriate to carry out project purposes.⁷ The licensee may obtain these property interests by contract or, if necessary, by means of federal eminent domain pursuant to FPA section 21.⁸ Sufficient property rights, as the term is used in Article 5, may be either ownership of property or the right to use it in perpetuity. A licensee's property interest can range from fee simple to perpetual or renewable leases, easements and rights-of-way.⁹ The point is that a licensee must have sufficient control over project lands and works to enable the Commission, through the licensee, to carry out regulatory responsibilities with respect to the project.¹⁰

9. In consequence, there exists no requirement that Everett continue to be a co-licensee for any new project license. To the extent that it is necessary, we waive any of our regulations that could be read to affect Snohomish PUD's status as incumbent licensee resulting from Everett's decision not to be a co-licensee.

⁷ Standard Article 5 appears in what are called "L-Forms," which are published at 54 FPC 1792-1928 (1975) and are incorporated into project licenses by an ordering paragraph. *See* 18 C.F.R. § 2.9 (2007). Article 5 states in pertinent part:

The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. . . .

⁸ 16 U.S.C. § 814 (2000).

⁹ *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, *supra*, 116 FERC ¶ 61,270 at P 30 (2006). *See, e.g., Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295 (2003).

¹⁰ *See City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (1981).

10. With respect to Lake Chaplain, Everett's water supply reservoir, no powerhouse was constructed there and the 1981 order amending the license removed the co-licensees' authorization to do so. The water from the project flows into the Lake Chaplain reservoir after passing through the Henry M. Jackson Project powerhouse, and, according to the co-licensees, the lake is not used in any way for project generation. Assuming that this is the case and that the lake is not required for non-generation project purposes, such as recreation, flood control, or environmental measures, it would appear that the lake may well not need to be included as a project work in any new license.¹¹

11. The co-licensees explain that the diversion dam, the diversion tunnel, and related appurtenances, on the other hand, do serve project purposes in that they provide mitigation for the project's impact on fisheries by releasing additional fishery flows to the Sultan River below the diversion dam. That being the case, it appears that these facilities will have to be retained as project works in any new license we might issue for the project.

12. The co-licensees ask us to make a determination whether the property rights granted to Snohomish PUD are sufficient for it to construct, maintain and operate the project. In 1960, 1981, and 2007 agreements between Everett and Snohomish PUD granted the rights to use and or operate Everett's diversion dam, tunnel and appurtenances for project purposes.¹² The 1960 agreement pertains to the parties' rights and obligations with respect to the project as originally licensed; the 1981 agreement amended the 1960 agreement, in light of the 1981 amendment of the license; and the 2007 agreement supplemented the 1960 and 1981 agreements with respect to certain relicensing obligations.

13. In order for the agreements to constitute an acceptable deviation from the strict project ownership requirements of standard license Article 5, they must vest in Snohomish PUD sufficient rights to accomplish all project purposes; secure the

¹¹ See *City of Fort Smith*, 42 FERC ¶ 61,362 (1988). A final determination as to what works will be necessary for project purposes will be made in the relicensing proceeding.

¹² On November 7, 2007, Snohomish PUD filed the three agreements dated July 22, 1960; November 17, 1981; and October 17, 2007, as a supplement to the declaratory order petition.

Commission's ability to carry out its regulatory functions; and vest control that is perpetual and transferable.¹³

14. We believe that the agreements provide the type of property rights that are an acceptable deviation from the strict requirements of Article 5 for fee simple or perpetual property rights, subject to certain modifications of the agreements and the determination on relicensing of the scope of project property and operations. In pertinent part, Article II, Section 3 of the 1981 agreement states: “. . . the District shall have the right to use any and all such real property and improvements, easements, licenses, permits, right-of-way, the use of the diversion dam and diversion tunnel with outlet, and other rights for any purpose consistent with the provisions and intent of this Agreement.” Article VIII, Section 3 provides, in part, “The term of this contract shall be for a period of years equal to the duration of the existing license, and for such additional time for which such license be extended, renewed, or a new license issued by FERC or its successors”

15. However, while the quoted provisions provide Snohomish PUD with a certain level of control over project operations with respect to those project features of Everett’s that the parties propose to include in a new license for the project, the agreements include wording that could impermissibly limit Snohomish PUD’s control over such features¹⁴ and the agreements fail to include provisions to fully accommodate the rights of any

¹³ See, e.g., *Menominee Company and N.E.W. Hydro, Inc.*, 72 FERC ¶ 62,065 (1995), *order denying hearing*, 74 FERC ¶ 61,023 (1996) (*Menominee*).

¹⁴ For example, Article II, Section 3 of the 1981 agreement, which as noted, serves to provide Snohomish PUD with rights in Everett’s project features, includes an ambiguous limitation: “for any purpose consistent with the provisions and intent of this Agreement.” Additionally, Article II, section 2 of the 1981 agreement, as modified by section E. 1. of the 2007 agreement, provides that “the requirements of Everett within the water supply service area shall have precedence over any Sultan Project requirement for power generation purposes. . . .” With respect to the latter provision, the Commission has in certain cases included license provisions to ensure that project operations would not interfere with municipal water supply operations. See, e.g., *Appomattox River Water Authority*, 60 FERC ¶ 61,083 at 61,262 (1992) and the orders cited there. However, with the limited record before us, we cannot draw any definitive conclusions concerning the effect of the water supply provisions of petitioners’ agreements on relicensing of the project, notwithstanding the additional contractual provisions we find necessary here to address certain project-control issues. The impact of the water supply provisions of the agreements on the project’s operational scope, and the related project control issues those provisions raise, must be more fully addressed on relicensing.

future licensees for the project other than Snohomish PUD. Therefore, each of the agreements must be modified to include a provision that make them transferable by Snohomish PUD without the consent of Everett,¹⁵ and, to serve to ensure that Everett cannot encumber Snohomish PUD's compliance with license requirements with respect to Everett-owned licensed project features. Each agreement must be further modified to include a so-called Linweave clause, which states that notwithstanding any other of the respective agreement's provisions, Snohomish PUD shall have the right to perform any and all acts ordered by the Commission.¹⁶

16. The described modifications to the agreements will help to provide Snohomish PUD with sufficient control over Everett-owned project features that petitioners intend to include in any new license for the project. However, as noted, our findings here are not intended to be dispositive of all project control issues that may arise on relicensing.

¹⁵ See, e.g., *Menominee, supra*, 74 FERC ¶ 61,023 at 64,115 (1996).

¹⁶ See *Linweave, Inc.*, 23 FERC ¶ 61,391 (1983), where the Commission first used the provision to modify a long-term lease of project property to prevent the nonlicensee/lessor from controlling rights necessary to accomplish project purposes and to ensure that the licensee/lessee would possess all such rights. The provision reads as follows:

Notwithstanding any provision contained herein, [the licensee, as it is designated in the document] their successors and assigns, have the right to perform any and all acts required by an order of the Federal Energy Regulatory Commission or its successor affecting the [the projects, as they are designated in the document], without the prior approval of any party to this document or any other person.

See also *Trafalgar Power Inc.*, 87 FERC ¶ 61,207 at 61,796 (1999), *Duke Energy Corporation, et al.*, 97 FERC ¶ 61,177, *supra*, at 61,825 (2001), and the orders cited therein describing the Commission's use of the provision.

The Commission orders:

The City of Everett, Washington is not required to be a co-licensee for the Henry M. Jackson Hydroelectric Project No. 2157.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.