

137 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Public Utility District No. 1 of
Snohomish County, Washington

Project No. 2157-195

ORDER DENYING REHEARING AND
GRANTING CLARIFICATION

(Issued December 15, 2011)

1. The City of Everett, Washington, has filed a request for rehearing of Commission staff's September 2, 2011 order¹ issuing a new license to Public Utility District No. 1 of Snohomish County (District) for the continued operation and maintenance of the Henry M. Jackson Hydroelectric Project No. 2157. For the reasons discussed below, we deny rehearing and clarify the September 2 Order.

Background

2. On June 16, 1961, the Commission issued an original license for the Jackson Project to the District and the City of Everett as co-licensees.² The Jackson Project was originally authorized to generate electricity and provide storage for the City of Everett's municipal water supply. The first phase of construction, including the building of Culmback Dam and the creation of the approximately 800-acre reservoir forming Spada Lake was completed in 1965. These facilities were initially used for water storage for the City of Everett, no generating facilities having yet been constructed.³

¹ *Public Util. Dist. No. 1 of Snohomish Cnty.* Washington, 136 FERC ¶ 62,188 (2011) (September 2 Order).

² *Public Util. Dist. No. 1 of Snohomish Cnty. and City of Everett, Washington*, 25 FPC 1160 (1961).

³ September 2 Order, 136 FERC ¶ 62,188 at P 3, 10.

3. The second phase of construction, including the installation of generating facilities, was to have been initiated in 1967 but instead, the licensees filed an application for an amendment to substitute different facilities. On October 16, 1981, the Commission approved the license amendment authorizing construction of a 111.8-megawatt powerhouse and raising Culmback dam by 62 feet to its current crest elevation of 1,470 feet mean sea level.⁴

4. On December 20, 2007, the Commission approved the request by the City of Everett and the District to remove the City as a co-licensee.⁵

5. On June 1, 2009, the District filed an application seeking a new license to maintain and operate the Jackson Project. On October 14, 2009, the District filed a comprehensive settlement agreement, resolving all issues among the signatories related to the relicensing of the project.⁶ The settlement agreement included a number of proposed license articles, including proposed Aquatic License Article 18, which provided that the project be operated so that the City of Everett's water supply and water quality requirements take precedence over generation. Proposed Aquatic License Article 18 states:

Subject to compliance with all other License Articles, the Licensee shall operate the Project so that the City of Everett's water supply and quality requirements shall have precedence over power generation to the extent specified within the Supplemental Agreement Between Public Utility District No. 1 of Snohomish County and the City of Everett, Washington October 17, 2007, Part E. 1 (2007 Supplemental Agreement).

Part E. 1 of the 2007 Supplemental Agreement provides:

The parties hereby expressly agree that the requirements of the City within the water supply service area shall have precedence over any Sultan Project⁷

⁴ *Public Util. Dist. No. 1 of Snohomish Cnty. and City of Everett, Washington*, 17 FERC ¶ 61,056 (1981).

⁵ *Public Util. Dist. No. 1 of Snohomish Cnty. and City of Everett, Washington*, 121 FERC ¶ 61,269 (2007).

⁶ Signatories to the settlement agreement are: the District; National Marine Fisheries Service; U.S. Forest Service; U.S. Fish and Wildlife Service; U.S. National Park Service; Washington Department of Fish and Wildlife; Washington Department of Ecology; Tulalip Tribes of Washington; Snohomish County, Washington; City of Everett; City of Sultan; and American Whitewater.

⁷ The Sultan River Project was renamed the Henry M. Jackson Project in 1984.

requirement for power generation purposes for the term of this Agreement up to a maximum water requirement equal to the City's existing certificated state water rights as of February 27, 2007, provided the City stays within the service area described in Exhibit A. The parties agree that they will cooperate in the storage and release of waters from Spada Lake and from Lake Chaplain so that the water supply requirements of the City may be met.

6. The September 2 Order largely incorporated the proposed license articles submitted with the settlement agreement, including the requirement that the District operate the project consistent with the rule curves agreed to in the settlement.⁸ The rule curves divide water management for Spada Lake into four states that shift throughout the water year. The rule curves help provide incidental winter flood storage, municipal water supply, minimum stream flows, and higher summer lake levels for recreation. The September 2 Order also included the requirement that the District develop and implement an Adaptive Management Plan that documents how it would address water use issues and the process for evaluating and adaptively managing competing water uses within the constraints of the specific environmental measures. The license order noted that the Adaptive Management Plan is required in recognition of the fact that the project has a number of competing demands on available water that make project operations complex when considering drought conditions and changing municipal water supply demand.

7. The September 2 Order declined to include the proposed Aquatic License Article 18, finding that it was unnecessary to include a provision stating that the City of Everett's water supply and water quality needs have priority over generation. The order explained:

it is unnecessary to include such a requirement in the license. While the license does require the licensee to operate the project consistent with various measures to which all parties have agreed, the license does not establish minimum generation requirements. Thus, to the extent that the licensee is in compliance with the conditions of the license, it can elect at any time to forego generation in order to provide water supply. As discussed next, the licensee has agreed to, and [the order adopts], operating conditions based on revised reservoir rule curves that balance competing uses of Spada Lake water (Appendix A, condition 5.2 (A-LA 14) as modified by Article 406), in conjunction with an adaptive management plan (required by Appendix A, condition 5.2 (A-LA 15) and Appendix B,

⁸ The September 2 Order modified state 3, the "discretionary" zone where the project may be operated between the extremes of states 2 and 4. Commission staff's modification to the state 3 rule curve added measures to improve the Spada Lake recreational fishery and continued boating access on the lake.

condition 2 (A-LA 15)) that establishes water use priorities and operational procedures for managing water when there are competing demands on that water, such as during drought conditions.⁹

8. On September 30, 2011 the City of Everett filed a request for rehearing, objecting only to the failure to include proposed Aquatic License Article 18.¹⁰

Discussion

A. Proposed Article 18

9. The City of Everett asserts that the Commission's decision to not include Aquatic License Article 18 is inconsistent with the public interest standard under section 10 of the Federal Power Act (FPA).

10. FPA section 10 requires that the Commission determine that any licensed project is:

best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e)....¹¹

⁹ September 2 Order, 136 FERC ¶ 62,188 at P 107.

¹⁰ On October 6 and October 7, 2011, respectively, the Tulalip Tribes and the District filed letters in support of the City of Everett's rehearing request.

¹¹ 16 U.S.C. § 803(a)(1) (2006). FPA section 4(e), 16 U.S.C. § 797(e), provides, in pertinent part:

The Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

11. The comprehensive development standard outlined in FPA section 10 clearly states that water supply is one of the beneficial public uses that the Commission should consider when issuing a license. Section 10 does not, however, prescribe the weight that we must give to each element of the standard, nor does it suggest that water supply should be given precedence over power generation. The September 2 Order explains that the District operates the project to satisfy the City of Everett's municipal water supply needs, protect aquatic resources, maintain Spada lake levels for summer recreation, and generate electricity.¹² As stated above, although the order declined to adopt Aquatic License Article 18, the license incorporated a project operation scheme that recognizes the need to balance competing uses of Spada Lake. The license operating conditions are based on revised reservoir rule curves agreed to by the settling parties, as modified by Article 406.

12. The City of Everett argues that the decision to not include Aquatic License Article 18 is inconsistent with Commission precedent of including license conditions that establish priority for municipal water supply over generation.¹³ We note that it is not unusual that licensed projects serve purposes in addition to, or even in preference to power generation.¹⁴ However, while the importance of water supply has been recognized in Commission licenses, including those cited by the City of Everett, these cases do not establish precedent for the inclusion of broad, general language establishing the priority of water supply. In fact, they tend to support the opposite.

13. In *Appomattox River Water Authority*,¹⁵ the Commission included, in response to the licensee's concern that future licensees might take actions that would adversely affect water supply, an article that stated, *inter alia*, that the project's primary purpose was water supply. However, the operative portion of the article was a specific requirement that the licensee design and develop new project works in consultation and cooperation with the Authority. The Commission declined to provide that articles giving preference to water supply would supersede other license obligations, finding that such "iron-clad assurances" would be inconsistent with the Commission's statutory obligations.¹⁶

¹² September 2 Order, 136 FERC ¶ 62,188 at P 18.

¹³ Request for Rehearing at 9-11.

¹⁴ For example, generation is always a secondary purpose at licensed projects located at U.S. Army Corps of Engineers or Bureau of Reclamation dams.

¹⁵ 60 FERC ¶ 61,083 (1992) (*Appomattox*).

¹⁶ *Id.* at 61,263.

Similarly, in *Appalachian Power Company*,¹⁷ the Commission included specific license articles to ensure that the project would operate consistent with water supply operations, but, citing *Appomattox*, refused to include a provision that water supply operations would take priority over all other license requirements.¹⁸ In *City of Augusta, Georgia*,¹⁹ the Commission did not include a license article stating that water supply took priority over other uses. Rather, in an order affirming the dismissal of a license application for a project involving power development along a canal that was used for municipal water supply, the Commission recognized that water supply was a high-priority use, and that any license that ultimately was issued would be expected to protect that use. This is no more than we have done in the license here. In *PacifiCorp*,²⁰ the Commission recognized existing agreements and case law regarding water use, and made clear that license articles dealing with minimum flows, ramping rates, and whitewater boating flows were conditioned on the availability of water above and beyond that needed to meet existing water rights contracts. While relatively unusual,²¹ this conclusion does not amount to the blanket statement regarding the precedence of water supply that the City of Everett seeks in this case.²²

14. The City of Everett also argues that Commission staff's decision to not include Aquatic License Article 18 undermines the settling parties' effort to implement a comprehensive settlement agreement, citing *Portland Gen. Electric Co. and Confederated Tribes of the Warm Springs Reservation*²³ for the proposition that the

¹⁷ 66 FERC ¶ 61,316 (1994) (*Appalachian*).

¹⁸ *Id.* at 61,956.

¹⁹ 74 FERC ¶ 61,261 (1996).

²⁰ 105 FERC ¶ 62,207 (2003).

²¹ We note that *PacifiCorp* was a delegated order and thus not binding on the Commission.

²² In *City of Portland, Oregon*, 6 FERC ¶ 61,257 (1979), the Commission included a license article that required the licensee to operate the project in whatever manner was necessary to ensure municipal water supply, a broad provision that appears in accord with what Everett seeks here. This older case is not consistent either with *Appomattox* and *Appalachian* or with our current practice of establishing enforceable obligations through specific license articles.

²³ 111 FERC ¶ 61,450 (2005).

Commission will accept proposed elements of a settlement agreement if they were important in the settlement negotiations.

15. In the cited case, we issued a new license for a term of 50 years; the same term proposed by the settlement. In addition to noting that the license authorizes extensive environmental measures including new construction, we also noted that the term of the license was likely an important element in the negotiations that led to the settlement agreement. The Commission's acknowledgement of the interests of signatories to a settlement agreement in our decisions regarding license terms does not stand for the much broader proposition that all elements of a settlement agreement that a signatory finds important must be adopted by the Commission.²⁴

16. The Commission has made clear that, while it looks favorably on settlements in licensing cases, it cannot automatically accept all settlements, or all provisions of settlements.²⁵ The Commission's role in overseeing license compliance makes it important that license conditions be clear and enforceable.²⁶ Conditions that do not clearly outline the licensee's responsibilities and establish the parameters governing required actions may be difficult or impossible to enforce.²⁷ Measures should be as narrow as possible, with specific measures preferred over general measures.²⁸

17. The Commission typically only includes in license articles specific measures with which the licensee must comply – minimum flows, recreation measures, etc. In general, the Commission does not reach conclusions as to which project purposes are more important than others. Doing so would serve no useful purpose. Rather, we establish specific, enforceable measures with which a licensee must comply, based on our balancing of developmental and environmental considerations.

18. Including a general proposition such as Proposed Aquatic License Article 18 could well lead to confusion. The 2007 Supplemental Agreement referred to in the article

²⁴ In fact, if a settlement includes a license term that we believe is not supported by the record, we will not accept it. *See Portland General Electric Company*, 134 FERC ¶ 61,206, at P 3 (2011).

²⁵ *See Policy Statement on Hydropower Licensing Settlements*, 116 FERC ¶ 61,270, at P 2-3 (2006).

²⁶ *Id.* P 4.

²⁷ *Id.* P 6.

²⁸ *Id.* P 12.

includes the language, “parties agree that they will cooperate in the storage and release of waters from Spada Lake and from Lake Chaplain so that the water supply requirements of the City may be met.” While a laudable goal, this statement lacks the specificity needed for effective Commission oversight and enforcement. The 2007 Supplemental Agreement also conditions the precedence afforded to the City of Everett’s water supply requirements on the City staying within a specified service area. Consequently, Commission enforcement of the provision could require the Commission to undertake the difficult task of determining whether the City of Everett has exceeded the specified service area. In addition, proposed Aquatic License Article 18 provides that the City of Everett’s needs with regard to water quality also have precedence over generation to the extent provided in the 2007 Supplement Agreement. However the 2007 Supplemental Agreement does not set water quality standards. Accordingly, there would be no standard for the Commission to apply in deciding whether the District was meeting the City of Everett’s water quality needs.²⁹

19. Further, the 2007 Supplemental Agreement referred to in Aquatic License Article 18 specifies that the requirements of the City of Everett shall have precedence over any project requirement for power generation purposes up to a maximum water requirement equal to the City’s existing certificated state water rights as of February 27, 2007. In *City of Tacoma, Washington*, the Commission responded to a request that it add new license articles concerning state water rights by explaining that the Commission lacks the authority under section 27 of the FPA to adjudicate water rights.³⁰ The inclusion of the requested article could put the Commission in the position of determining the extent of the City of Everett’s state water rights, which we lack the authority to do. A

²⁹ Everett contends that the exclusion of Aquatic License Article 18 would undermine the implementation of other articles, which assumes the inclusion of that article. Request for Rehearing at 7. Given that we enforce articles based on their specifics, rather than on abstract principles, this does not appear to be the case.

³⁰ *City of Tacoma, Washington*, 110 FERC ¶ 61,140, at P 57 (2005). Section 27 of the FPA states:

nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein. 16 U.S.C. 821 (2006).

settlement provision that extends beyond the Commission's jurisdiction to require or to enforce cannot become a lawful term in a license.³¹

20. Moreover, the fact that the Commission does not include certain provisions in a license does not mean that they are precluded from being included in a settlement.³² The City of Everett states that the purpose of proposed Aquatic License Article 18 is to convert what would otherwise be a simple contract into a license condition enforceable by the Commission, stating without further explanation, that the provision would be difficult to enforce in a state court proceeding.³³ It is our impression that parties entering into settlements generally take care to ensure that they are fully enforceable in court. However, the fact the City of Everett is not certain as to whether this will be the case is not by itself sufficient cause for us to include in the license a condition that we have deemed inappropriate.

21. It is perfectly acceptable for parties to a licensing proceeding to agree on their priorities in project operation, and to develop proposed operational conditions consistent with their goals. We are inclined to accept such conclusions, provided that they do not conflict with the public interest or with applicable statutory requirements, and we conclude the parties to the licensing proceeding have satisfied this standard here through establishment of the rule curve stages, which are embodied in license Article 406, and which we believe will effectuate the parties' intention to protect the City's water supply.

B. Errata

22. On September 30, 2011, the District filed a request for the correction of errata. By Errata Notice issued October 6, 2011, the Commission accepted the District's requested corrections, with the exception of a recommended change to Article 406. In its request for rehearing, the City of Everett seeks to add language to License Article 406 that would make the state 3 reservoir rule curve requirements subject to meeting the City's water supply requirements and other conditions of the license. Because this language is consistent with the operating scheme incorporated into the license that already recognized the need to balance competing uses of Spada Lake under criteria specified in the operating scheme, and because the language would not elevate one use above all others as a general principle, we will add the language to Article 406 as the District and the City of Everett request.

³¹ *Policy Statement on Hydropower Licensing Settlements*, 116 FERC ¶ 61,270 at P 14.

³² *Id.* P 7.

³³ City of Everett Request for Rehearing at 6.

The Commission orders:

(A) The City of Everett's request for rehearing, filed on September 30, 2011, is denied.

(B) The first sentence of the second paragraph of License Article 406 of the September 2 Order issuing new license is modified to read:

When Spada Lake is in State 3, subject to meeting the City of Everett's water supply requirements and the other conditions of this license, the licensee shall maintain a minimum impoundment water surface elevation in Spada Lake above 1,430 feet mean sea level (msl), as measured at U.S. Geological Survey gage no. 12137300, Spada Lake near Startup, Washington, between July 1 and August 15.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.