

143 FERC ¶ 61,247
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Seattle, Washington

Project No. 2144-040

ORDER DENYING REHEARING

(Issued June 20, 2013)

1. On March 20, 2013, Commission staff issued a new license to the City of Seattle, Washington, for the continued operation and maintenance of the Boundary Project No. 2144, located on the Pend Oreille River in eastern Washington.¹ The Public Utility District No. 1 of Pend Oreille County, Washington (District), filed a timely request for rehearing of the March 20, 2013 order, arguing that the order erred in not requiring Seattle to allocate a portion of the project's power to the District. For the reasons discussed below, we deny the District's request for rehearing.

I. Background

2. In 1957, Seattle and the District filed competing license applications for projects on the Pend Oreille River in eastern Washington. The river's entire length within the State of Washington lies within the District's service area. Seattle proposed the 1,003-megawatt (MW) Boundary Project near the Canadian border approximately 300 miles from Seattle's service area. The District proposed the 356-MW Z Canyon Project at a site one mile upstream (south) from Seattle's. The Commission's predecessor, the Federal Power Commission (FPC), conducted a competitive licensing proceeding in 1961 and issued a license to Seattle for the Boundary Project, finding that it was best adapted to a comprehensive plan for developing the Pend Oreille River.²

¹ *City of Seattle, Wash.*, 142 FERC ¶ 62,231 (2013).

² *City of Seattle, Wash.*, 26 F.P.C. 54, at 139-40 (1961).

3. On rehearing, the FPC granted the District's request that Seattle be required to reserve a portion of the project's power to be used in the area where the power resource is located.³ Accordingly, the Commission added Article 49 to the original license, requiring that Seattle make 48 MW of project power available at cost to meet the load requirements of present and potential customers within the District's service area.⁴

4. The new license for the Boundary Project was issued to Seattle on March 20, 2013. The order concluded that the language of Article 49 was inconsistent with the Commission's long-standing policy and practice not to require a specific allocation of power from licensed projects in the absence of a legislative directive of Congress.⁵ Because the Boundary Project is not subject to any treaty or any project-specific legislation, the order did not include the language of Article 49.⁶

5. Seattle and the District have entered into a contract to continue the assignment on the same terms that existed under Article 49. This contract will expire upon the next relicensing of the Boundary Project in 42 years.

6. The District timely filed a request for rehearing on April 19, 2013.

II. Discussion

7. For clarity, we use the term "allocation" in relation to a license article reserving power to a specific recipient, and we use the term "assignment" in relation to a private agreement reserving power to a specific recipient. The core of the District's argument is that the Commission should retain a license article allocating Boundary Project power to the District to avoid the potential unfairness to the District if, at the time of the next relicensing proceeding in 42 years, the private contract assigning the power is not renewed. The District further argues that, at a minimum, the Final Environmental Impact

³ *City of Seattle, Wash., Order on reh'g*, 26 F.P.C. 463 (1961).

⁴ The District and Seattle entered into a settlement agreement establishing terms and conditions for calculating the annual Boundary Project costs and for assigning firm power pursuant to Article 49. The Commission issued an order approving the settlement agreement in 1992. *City of Seattle, Wash.*, 61 FERC ¶ 61,200 (1992).

⁵ *City of Seattle, Wash.*, 142 FERC ¶ 62,231 at P 96.

⁶ *Id.*

Statement (EIS) for the Boundary Project relicensing⁷ violated the National Environmental Policy Act (NEPA) by not considering the potential environmental impacts that would result from the elimination of the power allocation requirement from the new license.

A. Significance of the Original Boundary Project License

8. The District argues that nothing in the intervening 50 years has changed the circumstances which, at the time of the original license, led the Commission to conclude that the public interest required an allocation of 48 MW of project power to the District.⁸ The Commission and the courts concluded at the time of the original licensing that the allocation would be “equitable,” and that Seattle in fact suggested the 48-MW assignment.⁹ The District argues that award of the license to Seattle explicitly precluded the development of other low-cost power within the District’s service area. The District contends that, absent a power allocation, it would have been left to purchase other higher-cost energy sources and the same is true today. The District concludes that the decision to eliminate Article 49 was arbitrary and capricious because “the agency departed from established precedent without a reasoned explanation.”¹⁰

9. A relicensing proceeding requires a fresh look and a new application of the comprehensive development/public interest standards of sections 4(e) and 10(a) of the Federal Power Act (FPA) in light of today’s facts and policies.¹¹ We balance all public interest considerations relative to the comprehensive development of the waterway when determining whether and, if so, under what conditions to issue a license.¹² The

⁷ Final Environmental Impact Statement, Application for Hydropower License for the Boundary Hydroelectric Project, FERC Project No. 2144-038, Washington, and Application for Surrender of Hydropower License for the Sullivan Creek Project FERC Project No. 2225-015, Washington, issued September 9, 2011.

⁸ Request for Rehearing at 13.

⁹ *City of Seattle, Wash.*, 26 F.P.C. 463, at 464 (1961) (original licensing proceeding); *City of Seattle, Wash.*, 46 FERC ¶ 61,158, *reh’g denied*, 48 FERC ¶ 61,333, at 62,116, (1989), *aff’d*, *City of Seattle v. FERC*, 923 F.2d 713, 717 (9th Cir. 1991).

¹⁰ Request for Rehearing at 3, 13 (*quoting ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995)).

¹¹ *Confederated Tribes and Bands of the Yakama Indian Nation v. FERC*, 746 F.2d 466, 470–71 (9th Cir. 1981), *cert. denied*, 471 U.S. 1116 (1985).

¹² *See, e.g., Public Utility District No. 1 of Pend Oreille County, Wash.*, 117 FERC ¶ 61,205, at P 184 (2006); *Idaho Power Co.*, 110 FERC ¶ 61,242, at P 10 (2005).

Commission does not improperly “depart from established precedent” simply because it reaches a different conclusion on one issue than it did 50 years ago. In fact, as discussed below, the District recognizes that requiring a power allocation is inconsistent with long-standing Commission policy. That being the case, a return here to our general policy is not arbitrary and capricious.

10. The District raises an argument in equity that eliminating the allocation will result in adverse consequences,¹³ claiming that discontinuing the assignment will benefit Seattle, which already has a strong economy and low retail electricity rates, and will burden Pend Oreille County, which has a distressed economy. The District also claims that it would have to replace the assignment with “much higher-cost alternative power” in the form of wholesale contracts with the federal Bonneville Power Administration (BPA) at the “new resource” rate or in the form of newly-constructed generation.

11. The District next claims that the power allocation is necessary to relieve the persistent opportunity cost from the District’s loss in the competitive original licensing proceeding. The District asserts that while Seattle holds the preclusive license for the Boundary Project, the District suffers an opportunity cost that is only partially remedied by the assignment.¹⁴ But for the exclusion of the 356-MW Z Canyon Project, the argument continues, Pend Oreille County would enjoy more industrial development and prosperity, as shown in the counterexample of thriving Grant County, Washington.¹⁵

12. Though positive and negative economic impacts to others in the project area may arise from the Commission’s orders under Part 1 of the Federal Power Act, the Commission is not required to obligate the licensee to compensate persons and entities for the negative economic impacts of the license.¹⁶ We consider economic impacts within the public interest balancing, but we are not obligated to offset economic hardship. Moreover, the District’s unsupported assertions as to the economic effects of Seattle possibly declining 42 years from now to continue the assignment are far too speculative to warrant further consideration or to serve as substantial evidence here. Finally, as discussed in the following section, the District’s request is directly contrary to Commission policy.

¹³ Request for Rehearing at 14–15.

¹⁴ Request for Rehearing at 13.

¹⁵ Request for Rehearing at 2, 13.

¹⁶ *Portland Gen. Elec. Co. and the Confederated Tribes of the Warm Springs Reservation of Ore.*, 93 FERC ¶ 61,183, at 61,604 (2000).

B. Commission Policy on the Sale of Project Power

13. It has been the practice of the Commission since the issuance of licenses began in 1920 to leave disposition of project power in the hands of the licensee unless Congress has made a legislative directive to the contrary.¹⁷ Of the more than one thousand licenses issued to present, in only two has the Commission reserved power to a specific recipient absent a Congressional directive. Since we eliminated the allocation of power from the St. Lawrence Project No. 2000 in 2004, only the Boundary Project's prior license remained a deviation from uniform practice.

14. The District argues that the Commission should depart from its practice not to allocate power. The District attempts to distinguish this proceeding from precedent in which we eliminated a power allocation on relicensing. The alleged distinction rests, first, on the nature and relationship of the parties in this proceeding and, second, on the nature of the electric industry in the State of Washington.

15. Where a non-licensee requests an allocation of project power, the non-licensee bears the burden to provide supporting evidence. "The heart of the public interest determination with respect to this issue is whether there is any longer a reason to treat the disposition of power from this project differently from any other project."¹⁸ The District has failed to do so.

16. The District attempts to distinguish the present proceeding from two decisions in which we eliminated a power allocation. In 2003, we issued a new license to the New York Power Authority (NYPA) for the St. Lawrence Project No. 2000. We included a power allocation to the State of Massachusetts in accord with its understanding of legislative intent.¹⁹ The Commission stated that its decision "should not be construed as a departure from the consistent policy of this Commission and its predecessor that, in the absence of Congressional intent to the contrary, a licensee may distribute the power from its project in the manner it deems most appropriate."²⁰ On rehearing, we concluded that legislative intent—which we had mistakenly discerned from materials that Congress had never enacted—was insufficient to support an allocation. We deleted the power

¹⁷ See P 16, *infra*.

¹⁸ *Power Authority of the State of New York*, 109 FERC ¶ 61,092 at P 19 (2004).

¹⁹ *Power Authority of the State of New York*, 105 FERC ¶ 61,102 (2003).

²⁰ *Id.* at 61,580.

allocation from the new license.²¹ Massachusetts requested rehearing of this decision, arguing that the allocation to it should continue even without a legislative directive. The Commission denied the request for rehearing, referring again to its “long-term, consistent practice” of allowing licensees to determine how best to dispose of project power, in the absence of a Congressional dictate to the contrary.²²

17. In the second case, in 2007, we issued a new license to NYPA for the Niagara Project No. 2216.²³ Unlike the Boundary and St. Lawrence Projects, operation of the Niagara Project is governed by a treaty and project-specific legislation which requires power allocation for use by public bodies and non-profit cooperatives within New York and neighboring states.²⁴ Several investor-owned utilities within New York argued that they should receive an allocation of project power, regardless that the utilities did not qualify for the legislative preference power, because it would be unfair for them to bear the higher cost of alternative power.²⁵ The Commission declined to allocate power, reiterating its policy “not to require specific allocation of power from licensed projects, but to leave those matters to private contract and, as appropriate, state regulation.”²⁶

18. The District argues that the facts in the Boundary proceeding are distinguishable from those in the St. Lawrence and Niagara licensing proceedings based on the nature and relationship of the parties: (1) the issuance of the Boundary license to Seattle in a competitive proceeding permanently precluded the District from developing its own low-cost hydroelectric project within Pend Oreille County, (2) the allocation was intended to avoid forcing the District to buy higher-cost alternative power, (3) the non-licensee requestor had a competing application, (4) the non-licensee requestor has utility obligations or other interests in the area in which the project is located that were

²¹ *Power Authority of the State of New York*, 107 FERC ¶ 61,259 at PP 15–17 (2004). The licensee entered into a settlement agreement to continue assignments to neighboring states and offered to assign power to Massachusetts on the settlement terms, but Massachusetts rejected the offer. *Id.* P 24

²² *Power Authority of the State of New York*, 109 FERC ¶ 61,092 at P 27 (2004).

²³ *Power Authority of the State of New York*, 118 FERC ¶ 61,206 (2007).

²⁴ *Id.* P 30.

²⁵ *Id.* PP 70–71.

²⁶ *Id.* P 73.

adversely affected by the issuance of the license to the licensee, and (5) the licensee and non-licensee both consented to continue the license article allocating power.²⁷

19. We disagree. These facts do not warrant a departure from long-standing Commission precedent. As stated above, a successful licensee bears no obligation to compensate a competitor for negative economic impacts that flow from the license.²⁸ The first four distinguishing facts have importance only if one assumes that the Commission must correct negative economic impacts. Regarding the fifth distinction, it is true that previous disputes over power allocations lacked consent between the licensee and non-licensee, which is not the case here. But, even aside from the fact that our decision here does not preclude Seattle and the District from continuing the assignment as a matter of private contract, the Commission has no obligation to include a condition in a license that is inconsistent with Commission policy and practice merely because the licensee and interested entities consent to the condition. We went well beyond the constraints of our consistent policy by allocating at-cost power to the District 50 years ago. Whatever the merits of that decision, the District makes no arguments here that have not been made and rejected in the above-cited cases, and that would justify requiring a licensee to make a specific power sale, in the absence of federal legislation requiring such a remedy.

20. Moreover, we do not accept the District's argument that the circumstances of the electric industry in Washington differ from those of the wholesale electric industry in New England in a way that makes the Boundary proceeding distinguishable from the St. Lawrence proceeding with respect to the issue at hand. In the St. Lawrence proceeding, we explained that the electricity industry had developed a dramatically different structure in the intervening years since the original license order such that customers are able "to buy power in competitive markets from a variety of sellers."²⁹

21. While conditions in the Northwest may differ in some respects from those in the Northeast, customers in the Northwest also have other options to buy power. The District makes no showing to the contrary.³⁰ Therefore, there is not sufficient rationale to support a continued deviation from our policy to avoid exercising control over sales of generation

²⁷ Request for Rehearing at 15–17.

²⁸ *Portland Gen. Elec. Co. and the Confederated Tribes of the Warm Springs Reservation of Ore.*, 93 FERC ¶ 61,183, at 61,604 (2000).

²⁹ *Power Authority of the State of New York*, 109 FERC ¶ 61,092 at P 21.

³⁰ The Commission's jurisdiction does not extend to the local distribution and sale of electricity at retail, so we need not consider the District's assertions about retail competition.

from licensed hydropower projects. As we note elsewhere in this order, general arguments about lost opportunity costs and the impacts of speculative actions 42 years in the future do not support action here, and any such arguments can be raised in a future relicensing proceeding.

C. Adequacy of the EIS

22. The District next contends that the EIS for the Boundary Project relicensing is inadequate under NEPA and under the Council on Environmental Quality's implementing regulations because it "failed to discuss the interrelated socio-economic and environmental effects of the alternative of discontinuing the assignment of power to the District."³¹ We disagree. The purported socio-economic effects are so speculative as to be beyond the scope of our NEPA review.

23. The District states that the EIS, rather than providing a socio-economic analysis of a scenario in which it no longer received at-cost power, merely stated that a change in allocation effects a net-zero balance between the burden to the former recipient and the benefit to the new recipient.³² The EIS characterized the District's no-assignment scenario as raising an unknowable question about whether a future specific power sales contract would be renewed.³³ The District argues that this conclusion is incorrect because it ignores the effect that eliminating the allocation would be all-benefit for Seattle's strong economy and all-loss for the District's weak economy. The District claims it would have to develop new resources or purchase power at much higher cost.³⁴

24. The District's arguments regarding impacts on its and Seattle's economies parallel those made by Massachusetts in the St. Lawrence relicensing and should be similarly rejected. Massachusetts argued that low-cost power had greater continued economic significance to its customers than to other recipients.³⁵ We explained that we will not make judgments regarding the relative importance of cost-based project power to two economies because "[a]ny [entity] can reasonably argue that low-cost power is vital to its economic well-being."³⁶ The same logic applies here.

³¹ Request for Rehearing at 20.

³² Final EIS at C-25.

³³ *Id.*

³⁴ Request for Rehearing at 23.

³⁵ *Power Authority of the State of New York*, 105 FERC ¶ 61,102 at P 114.

³⁶ *Id.* P 135.

25. In its comments on the draft EIS,³⁷ and again in its request for rehearing,³⁸ the District asserts that both environmental and socio-economic impacts will arise from the higher-cost alternative power that the District hypothetically might have to obtain to replace the assigned power. It argues that we should consider both of these sets of impacts, specifically requesting an analysis of the socio-economic effects of a hypothetical scenario where the assignment of power from the Boundary Project would not exist.

26. The scope of socio-economic impacts that must be considered under NEPA is limited to those impacts which are “reasonably foreseeable.” Section 1508.8 of the Council on Environmental Quality regulations implementing NEPA requires that the effects to be considered in an EIS include “Indirect effects, which are caused by the action and are later in time or farther removed in distance [than direct effects], but are still reasonably foreseeable.”³⁹ It is true that NEPA requires agencies to engage in “reasonable forecasting,”⁴⁰ and that an agency may not delay consideration of cumulative impacts to some future date if meaningful consideration is possible now.⁴¹ But the law does not “require the government to do the impractical, if not enough information is available to permit meaningful consideration.”⁴² It would be impossible for the Commission to estimate the socio-economic impacts of a scenario so speculative and so remote as the possible non-renewal of a power sales contract 42 years in the future. Accordingly, the Commission had no obligation to analyze this matter in the EIS.

27. For the above reasons, we deny rehearing and affirm Commission staff’s decision to not include in the Boundary Project relicense order a requirement to allocate power to the District.

³⁷ Comments on DEIS at 8.

³⁸ Request for Rehearing at 22.

³⁹ 40 C.F.R. § 1508.8 (2012) (emphasis added).

⁴⁰ *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Cf. *Northern Plains Res. Council v. Surface Transp. Board*, 668 F.3d 1067 (9th Cir. 2011) (holding that agency should have considered cumulative impacts of further development of coal-bed methane related to proposed rail line specifically intended to serve specific coal mines).

⁴¹ *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006) (internal quotation marks and citations omitted).

⁴² *Id.*

The Commission orders:

The request for rehearing filed by the Public Utility District No. 1 of Pend Oreille County, Washington, on April 19, 2013, in this proceeding is denied.

By the Commission. Commissioner Moeller is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

City of Seattle, Washington

Project No. 2144-040

(Issued June 20, 2013)

MOELLER, Commissioner, *concurring*:

As today's order notes, the City of Seattle, Washington, has entered into an agreement with Public Utility District No. 1 of Pend Oreille County, Washington (District), to provide the District at cost with 48 Megawatts of output from the Boundary Project located within the District's service territory. Although in the past, the provision of such power was required by the original project license, the parties have now mutually agreed to this sharing of project power. The contract will expire in 42 years upon the next relicensing of the Boundary Project, and I'm confident the City of Seattle will continue the agreement again.

Although the Public Utility District would prefer that the assignment of output be placed in the license, I had to consider the effect of such a decision on the licensing of future projects. My concern is that such action would encourage other entities to demand power allocations from other hydropower facilities. Such a request is contrary to our policy and would further complicate an already burdensome licensing process. In turn, this would ultimately hinder the continuation and expansion of this essential industry.

Accordingly, I respectfully concur.

Philip D. Moeller
Commissioner