119 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 1 of Chelan County, Washington — Project No. 637-031

ORDER ON REHEARING

(Issued April 19, 2007)

1. Public Utility District No. 1 of Chelan County, Washington (District) filed a request for rehearing of the November 6, 2006 Commission staff order issuing a new license for the continued operation and maintenance of the 48-megawatt (MW) Lake Chelan Hydroelectric Project No. 637, located on the Chelan River in Chelan County, Washington.[1] The District seeks modification or clarification of its license regarding (1) liability protection before allowing whitewater boating, (2) cost caps, and (3) expansion of the project boundary for certain wildlife habitat and recreation improvements. For the reasons discussed below, we grant rehearing in part.

Background

2. The Lake Chelan Project includes Lake Chelan, a 1,486-foot-deep, 55-mile-long natural glacial lake; a 40-foot-high, 490-foot-long dam; a 2.2-mile-long power tunnel; a powerhouse containing two generators with a rated capacity of 24 MW each; and a 1,700-foot-long tailrace that returns project flows to the Columbia River. The project creates a 3.9-mile-long bypassed reach of the Chelan River. The project occupies 465.5 acres of federal lands[2] administered by the U.S. Department of Agriculture's Forest Service (Forest Service), and the U.S. Department of the Interior's National Park Service (Park Service).

[1] 117 FERC ¶ 62,129 (2006).

[2] The federal lands are in the Wenatchee National Forest and the Lake Chelan National Recreation Area of the North Cascades National Park.

3. The new license includes various provisions of a settlement agreement (Agreement) among the District and resource agencies, Indian tribes, and non-governmental organizations. The new license also includes mandatory conditions submitted by the Forest Service, the Park Service, and the Washington Department of Ecology in Appendices B, C, and D, respectively.

Discussion

A. Whitewater Boating Requirement and Liability Protection

4. The quality of the rapids and the warm water temperatures in the project's 3.91-mile-long bypassed reach offer a unique whitewater opportunity.[3] The river drops more than 400 feet along this stretch; and with appropriate flows, it can provide whitewater boating opportunities ranging from Class I to Class V/VI rapids.[4]

5. The bypassed reach is divided into four segments based upon gradient and other river characteristics. Starting just below the project dam and moving downstream, the

[3] *See* 117 FERC ¶ 62,129 at P 68 (2006).

[4] *See* American Whitewater's website, which sets forth the International Scale of River Difficulty, American version. http://www.americanwhitewater.org/archive/safety/safety.html. Briefly, whitewater (either an individual rapid, or the entire river) is classed in six categories from Class I (the easiest and safest) to Class VI (the most difficult and most dangerous). The Classes reflect both the technical difficulty and the danger associated with a rapid. *Class I -- Easy*. Fast-moving water with riffles and small waves, few obstructions. *Class II -- Novice*. Straightforward rapids with wide, clear channels that are evident without scouting. Occasional maneuvering may be required. *Class III --Intermediate*. Rapids with moderate, irregular waves that may be difficult to avoid and that can swamp an open canoe. Complex maneuvers in fast current and good boat control in tight passages or around ledges are often required. *Class IV --Advanced*. Intense, powerful but predictable rapids requiring precise boat handling in turbulent water. Rapids may require "must" moves above dangerous hazards. *Class V --Expert*. Extremely long, obstructed, or very violent rapids which expose a paddler to added risk. Drops may contain large, unavoidable waves and holes or steep, congested chutes with complex, demanding routes. Rapids may continue for long distances between pools, demanding a high level of fitness. What eddies exist may be small, turbulent, or difficult to reach. *Class VI --Extreme and Exploratory*. These runs have almost never been attempted and often exemplify the extremes of difficulty, unpredictability, and danger.

approximate length of the segments and their level of whitewater difficulty at flows up to 500 cubic feet per second (cfs) are as follows: Segment 1 is 2.29 miles of Class II/III whitewater; Segment 2 is 0.75 miles of Class IV whitewater; Segment 3, Chelan Gorge, is 0.38 miles of predominately Class V whitewater, with two rapids that are considered Class VI; and Segment 4 is 0.49 miles of Class I water.[5]

6. Article 11(h) of the Agreement provided that the District will conduct a three-year whitewater boating monitoring study to determine whether, or under what conditions, whitewater releases through the term of the new license are warranted.[6] The study protocol required the District to provide whitewater releases (not to exceed 450 cfs) from the project dam on the second and fourth weekends in July and September, if a number of conditions are met (*e.g.*, a minimum number of kayakers must be present and must sign liability waivers). However, Article 11(h)(10) would delay the whitewater releases and monitoring study until the licensee has obtained liability insurance or until the Washington State Recreational Use statute has been amended to the District's satisfaction, including an explicit extension of the immunity protections of the statute to recreational whitewater releases.

7. License Article 407 included the substance of Article 11(h), but without the provisions requiring either liability insurance or changes in state liability laws to be in place prior to providing the releases.[7] The order reasoned that whitewater releases dependent on having such liability protection in place could be delayed indefinitely.[8]

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[5] *See* October 2003 Final Environmental Assessment for the project, at 54, and 172-73.

[6] According to the Agreement, the District will conduct surveys, have annual review meetings, and file annual reports with the Commission. At the end of the three-year study, the District will prepare and file for Commission approval a final report, with any recommendations for changes to the whitewater release program.

[7] The license did include the safety measures contained in Article 11(h)(2) of the Agreement, such as requiring that each boater sign a liability waiver form prior to launching his or her kayak in the Chelan River. In addition, only non-motorized, hard-shelled kayaks suitable for the Class V whitewater in the Chelan Gorge are allowed and no kayaker under the age of 18 is allowed on this reach of the river.

[8] *See* 117 FERC ¶ 62,129 at P 68 (2006).

8. On rehearing, the District argues that requiring whitewater boating releases without first obtaining safeguards against liability is unreasonable and contrary to the public interest requirements of Part I of the Federal Power Act (FPA).

9. It has long been the Commission's policy that "licensees whose projects comprise land and water resources with outdoor recreational potential have a responsibility for the development of those resources in accordance with area needs, to the extent that such development is not inconsistent with the primary purpose of the project."[9] When there are safety and liability concerns, it is appropriate to move with caution in order to determine whether whitewater boating releases should be included as part of the license.

10. All whitewater boating poses some risk, including the risk that rescue may be required. The fact that there may be risk involved with whitewater boating or other recreational activities does not obviate a licensee's responsibility to provide recreational opportunities in accordance with area needs.[10] Nor is the question of insurance dispositive. Rather, as is the case here, it is but one factor that we may consider in our determination of whether, or under what conditions, to require a licensee to provide public access to project lands or waters.[11] We agree with the Director's findings in the license order that, given the value of this whitewater resource, the three-year monitoring study is warranted and should not be delayed indefinitely while the licensee seeks to resolve its liability concerns.

11. The District cites to the *City of Tacoma* (*Nisqually)* case[12] as a precedent for relieving a licensee of the requirement to provide whitewater releases.[13] To the contrary, in *Nisqually* the City of Tacoma released the whitewater flows as set forth in its license and completed a three-year study of the releases. The City then recommended that the Commission not require further whitewater releases. Based on the study results, we

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[9] Order No. 313, Recreational Development at Licensed Projects, 34 FPC 1546 (1965).

[10] *See, e.g., New York State Electric and Gas Corporation*, 109 FERC ¶ 61,360 (2004).

[11] *See Public Utility District No. 1 of Lewis County, Washington*, 117 FERC ¶ 61,188 at P 18 (2006).

[12] *City of Tacoma, Washington*, 101 FERC ¶ 61,198 (2002) (Nisqually).

[13] Request for rehearing at 8.

accepted the City's recommendation.[14] Liability insurance was not a prerequisite to the study, nor was it a factor in our final determination in the case.[15] As with *Nisqually*, Article 11(h)(5) (incorporated into license Article 407) requires that the District submit annual reports to the Commission for the initial three years after the effective date of the license. Article 11(h)(6) requires the filing of a final report for Commission approval.

B. Cost Caps

12. Many articles in the Agreement, which are included in the license as mandatory conditions, provide that the licensee shall give funds to an agency to use in the construction and maintenance of facilities or to implement various environmental measures. Other articles require the licensee to implement certain measures, but at a cost not to exceed a specified amount.

13. Article 402 is a global article that reserves to the Commission the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in the license, notwithstanding the limitation on expenditures set forth in the license.

14. The District asserts that the license errs in refusing to accept ceilings on the licensee's cost responsibility for various mitigation and enhancement measures and seeks to delete Article 402 from the license, or in the alternative, to revise the article to add the phrase "after notice and opportunity for hearing."

15. The Commission prefers to see conditions that address resource needs by requiring the licensee to implement specific measures, rather than simply providing funding to

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[14] In our *Nisqually* order, 101 FERC ¶ 61,198 at P 18 (2002), we concluded that:

> Given that there has not been extensive use of the whitewater boating opportunities at the Nisqually Project, that there are comparable whitewater runs available in Washington State, that the whitewater events have proven to be significantly more expensive than originally expected, and that responding to whitewater boating incidents has placed a heavy burden on local rescue agencies, we will accept Tacoma's final report, and will not require additional whitewater boating releases at the Nisqually Project.

[15] *Id.*

another entity to undertake the activities.[16] Because certain articles are required under the mandatory conditions, we have no choice but to include the funding measures as part of the license. However, while we have no authority to modify any mandatory conditions in the license, we do have authority to add provisions that are supplemental to, or more stringent than, the mandatory conditions.[17] Limiting enhancement and protection measures to a specified funding level could result in incomplete implementation of the needed measure or termination of a program when the dollar value has been met.

16. As the Director said in the license order, it is likely that the specified funding will be sufficient for the measures in question. However, the Commission cannot constrain the fulfillment of its statutory responsibilities by agreeing to such spending caps.[18] The Commission has stated that it is the licensee's obligation to complete the measures required by the license articles, in the absence of authorization from the Commission to the contrary, and that dollar figures agreed to by settlement parties are not absolute limitations.[19] Our concern is not extraction of a financial contribution from a licensee, but rather fulfillment of the project purpose for which the financial contribution is

[16] *See* Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act, 116 FERC ¶ 61,270 at P 16, 25-26 (2006).

[17] For example, when a mandatory condition requires a certain funding level for a specific measure, the Commission may not reduce that amount, but we can increase it to allow for successful implementation of the measure, assuming no inconsistency with other mandatory conditions. *See Southern California Edison Company*, 109 FERC ¶ 61,018 (2004).

[18] *See City of Seattle, WA*, 71 FERC ¶ 61,159 at 61,535 (1995), and cases cited therein.

[19] *See Virginia Electric Power Co.*, 110 FERC ¶ 61,241 (2005); and *Portland General Electric Company and Confederated Tribes of the Warm Springs Reservation of Oregon,* 111 FERC ¶ 61,450 (2005).

intended.[20] We will, however, modify the article as the District requests to clarify that Article 402 includes notice and opportunity for hearing for any change in funding levels for specific measures.[21]

17. The preceding discussion applies to measures that we have determined to be required by the FPA. However, the license order concluded that a number of funding provisions would not be required under the comprehensive development standard of section 10(a)(1) of the FPA,[22] but nevertheless must be included in the license because they were mandatory conditions submitted by the agencies. The District contends that when a settlement cost cap is included in a mandatory condition that we determine is not required pursuant to FPA section 10(a)(1), the reservation of authority in Article 402 should not apply to those cost caps. We agree. There would be no reason for the Commission to consider increasing a cost cap related to a measure that we conclude is not needed to meet the section 10(a)(1) standard.[23]

C. Project Lands

1. Wildlife habitat lands (Article 406)

18. License Article 406 requires the District to file for Commission approval a wildlife habitat plan for upland and riparian habitat improvements in the Lake Chelan basin. The

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[20] *See Portland General Electric Company and Confederated Tribes of the Warm Springs Reservation of Oregon*, 117 FERC ¶ 61,112 (2006).

[21] This is consistent with the language of many of the license's standard articles. *See* Form L-1, "Terms and Conditions of License for Constructed Major Project Affecting Lands of the United States," 117 FERC ¶ 62,129 at 64,376-80 (2006). These articles contain broad reservations of the Commission's authority to require alterations in the public interest to project works and operations, after notice and opportunity for hearing.

[22] Agreement Article 3 (large woody debris fund), Agreement Article 9(a)(1)-(3) (funds relating to conservation easements), Agreement Article 11(a)-(f) (recreation funds), and Agreement Article 12(f) (contingency funds). No party has challenged the Director's findings in this regard, which we affirm.

[23] The standard license articles give the Commission ample reserved authority to ensure that the project will continue, through the term of its license, to meet the comprehensive development/public interest standard of the FPA. *See* n. 21, *supra*.

licensee shall file an updated plan every five years. The plan must identify the measures, the location of the lands where the measures will be implemented, and a description of any lands that will require ongoing maintenance to ensure the success of the habitat improvements. Lands requiring ongoing maintenance must be brought into the project boundary.

19. The District seeks revision of Article 406 to delete the provision for bringing lands into the project boundary. The District contends that lands requiring ongoing maintenance to ensure the success of the wildlife habitat measures need not be brought into the project. The District explains that any federal or state-owned lands would continue to be managed by the relevant agency, and that the agencies do not want their lands to be included within the project boundary.

20. The Commission has regulatory authority only over the licensee, and thus can administer and enforce the terms of the license only through the licensee and the licensee's property rights. Project boundaries are used to designate the geographic extent of the lands, waters, works, and facilities that the license identifies as comprising the licensed project and for which the licensee must hold the rights necessary to carry out project purposes. The establishment of a project boundary makes it easier for the Commission, the licensee, and other interested parties to understand the geographic scope of a project. All facilities, lands, and waters needed to carry out project purposes should be within the project boundary. A project boundary does not change property rights, nor does the conveyance of a property right change a project boundary. [24]

21. It may be the case here that, with respect to some of the lands to be identified in the wildlife habitat plan, the licensee will have a continuing obligation to ensure the success of the measures to be implemented. If that turns out to be the case, then the Commission may require that those lands be brought into the project boundary.[25] That the lands in question may not be contiguous with the project or are located some distance from the project does not warrant a different result.[26] The proper test is whether those lands are

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[24] *See, e.g., Wisconsin Public Service Corp.*, 104 FERC ¶ 61,295 at P 16 (2003).

[25] *See, e.g., PacifiCorp*, 105 FERC ¶61,237 at P 114 (2003) (noting that licensee would have to amend project boundary to include lands previously outside of project boundaries, on which activities are required by the license). This requirement is not, as the District contends, inconsistent with the mandatory conditions submitted pursuant to FPA section 4(e), but is in addition to those requirements.

[26] *See, e.g., Consumers Energy Company and Detroit Edison Co.*, 84 FERC ¶ 61,147 (1998), *reh'g denied*, 87 FERC ¶ 61,150 (1999).

needed for project purposes and whether the licensee has sufficient rights to implement the requirements of the license. Such a determination will be made when the wildlife habitat plan is approved. We therefore deny rehearing on this issue. The District also asks for clarification that wildlife habitat areas created by one-time plantings and left to evolve naturally thereafter do not need to become part of the project. We so clarify. We generally do not require lands on which one-time measures are implemented to be included within project boundaries.[27]

2. Recreation lands (Article 407)

22. Under Agreement Article 11(a) through (f), the District is to make funds available to the Forest Service and the Park Service for specified recreation facility improvements, and for operation and maintenance of specified facilities within or adjacent to the Lake Chelan basin at Park Service and Forest Service sites. License Article 407 requires that the licensee file a recreation management plan that includes, *inter alia,* "the enhancements set forth in Article 11 (a) through [f]…."

23. The District notes that the license order concluded that the measures related to these funding requirements would not have been included in the license under the FPA comprehensive development standard, but are mandatory conditions submitted by the Forest Service and the Park Service under FPA section 4(e). The District asks that we clarify whether we intend to include within the project boundary the Forest Service and Park Service lands associated with these funding requirements. We do not.[28]

The Commission orders:

(A) The request for rehearing filed on December 6, 2006, by the Public Utility District No. 1 of Chelan County, Washington, is granted to the extent discussed in this order and in Ordering Paragraphs (B) and (C) below, and is denied in all other respects.

[27] *See, e.g., Portland General Electric Company and Confederated Tribes of the Warm Springs Reservation of Oregon*, 117 FERC ¶ 61,112 at P 58 (2006).

[28] Since the licensee's obligation with respect to these facilities is limited to funding, there is no need to include the facilities in the recreation plan, and we will modify Article 407 accordingly.

(B) Article 402 is revised to read:

Article 402. *Funding*. Notwithstanding the limitation on expenditures as expressed in the mandatory conditions and included in this license, the Commission reserves the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in this license, after notice and opportunity for hearing.

(C) The first paragraph of Article 407 is revised to read:

Article 407. *Recreation Resources Management Plan.* Within one year of the issuance date of the license, the licensee shall file for Commission approval, a Recreation Resources Management Plan, including an assessment of recreational use and needs within the Lake Chelan basin. The plan shall include the enhancements set forth in Article 11(g), (h)(1) – (9), (i), (j), (k), (m), and (p) of the Lake Chelan Settlement Agreement (attached as Appendix A); and the elements set forth below.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.