UNIVERSAL STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of
Chelan County, Washington
(Lake Chelan Hydroelectric Project)

Project No. 637-022

REQUEST FOR REHEARING AND CLARIFICATION
OF PUBLIC UTILITY DISTRICT NO. 1
OF CHELAN COUNTY, WASHINGTON

Pursuant to Section 313(a) of the Federal Power Act (“FPA”),¹ and Rule 713 of the
Commission’s Rules of Practice and Procedure,² Public Utility District No. 1 of Chelan County,
Washington (“the District” or “Licensee”) hereby requests rehearing and clarification of several
discrete issues in the November 6, 2006 Order On Offer Of Settlement And Issuing New License³
by the Commission’s Director of the Office of Energy Projects in the above-captioned docket.
The District appreciates the action by Commission staff to issue the District a 50-year license
which, for the most part, is consistent with the terms of a Comprehensive Settlement Agreement
submitted to the Commission. Accordingly, District supports the vast majority of the License
Order and is eager to begin implementation of the new license terms. However, the District
believes that the License Order errs on three items where it has made rulings contrary to the
carefully negotiated settlement agreement. The District is concerned that these rulings represent
material changes to the Agreement and could potentially cause undue harm to the balance the
parties achieved between competing power and non-power uses.

³ 117 FERC ¶ 62,129 (“License Order”).
I. STATEMENT OF ISSUES

1. Whether the License Order errs by not including a consensus settlement provision that would make the Licensee’s obligation to provide whitewater boating opportunities in an extremely dangerous stretch of the Chelan River contingent upon the Licensee obtaining appropriate safeguards against liability, especially since those safeguards were agreed upon by the American Whitewater Affiliation. It would be unreasonable and contrary to the public interest under Part I of the Federal Power Act (“FPA”) to require a licensee to assume potential liability for injuries and even deaths that might occur as a result of the licensee providing required water flows for recreational boating in an extremely hazardous area. See, City of Tacoma, Washington, 101 FERC ¶ 61,198 (2002).

2. Whether the License Order errs by refusing to accept reasonable ceilings on the Licensee’s cost responsibility for various mitigation and enhancement measures, when such cost caps would not compromise the ability of the Commission to require a licensee to remedy a project impact, were agreed to by the parties, and would provide beneficial predictability to the Licensee’s financial obligations. The Commission should delete Article 402 from the license. Although it may be necessary in some circumstances for the Commission to reserve its authority to remove cost caps in order to meet its responsibilities under Section 10(a) of the FPA, it would be unreasonable, unlawful and contrary to the public interest under Part I of the FPA for the Commission not to give effect to negotiated cost ceilings included in the Lake Chelan Project relicensing Comprehensive Settlement Agreement for all of the reasons set forth below:

   a. The Commission should not reserve the right to remove settlement cost caps for measures imposed pursuant to Section 4(e) mandatory conditions (particularly when the Commission has held that the 4(e) condition is not required by the public interest); See Escondido Mut. Water Co. v. La Jolla Board of Mission Indians, 466 U.S. 715 (1984).
b. When an indirect project impact is more costly to study than it is to agree to a cost-capped enhancement measure or measure to address indirect impacts of the Project, the Commission should honor that cap;

c. When the settlement parties agree to the Licensee’s share of responsibility for an impact that has multiple causes and to a cost cap on the licensee’s obligation, the Commission should honor that agreement;

d. Even if the Commission deems it lawful and appropriate to reserve its authority to modify the cost caps for any articles, it may do so only after notice and opportunity for hearing. See Pacific Gas and Electric Co., 110 FERC ¶ 61,323 at P 15 (2005).

3. Whether the License Order errs in requiring that all lands on which the Licensee expends funds for wildlife mitigation purposes must be brought within the Project boundary. It would be unreasonable and contrary to Part I of the FPA to require that the licensee bring within the project boundary all lands on which wildlife mitigation and enhancement measures may be carried out. The License Order also should delete the boundary provision of Article 406 from the license and should be modified to clarify the intent of Article 406 as not being applicable to the recreational enhancements.

II. BACKGROUND

The District is a municipal corporation that provides low-cost electricity to its locally-served customers and other Northwest communities. The license for the Lake Chelan Project that had been in effect expired on March 31, 2004 and thereafter the Project was on annual license. On July 6, 1998, FERC approved the District’s request to use the collaborative alternative relicensing procedures for the preparation of its license application. As part of the collaborative process, a total of 115 working group meetings and 39 full relicensing meetings were held between April 1998 and March 2002. The District then filed an application for a new
license for the Project with FERC on March 28, 2002, which was developed in cooperation with
interested agencies and stakeholders.

Settlement discussions utilizing a professional facilitator continued following the
submission of the application. On October 8, 2003, the District and participants in the alternative
relicensing process reached final agreement on a comprehensive settlement ("Agreement") of all
matters addressed in the Lake Chelan relicensing process, including the water quality
certification issued by the Washington Department of Ecology ("WDOE") under Section 401 of
the Clean Water Act on April 21, 2003.

Section 17 of the Agreement states that the parties entered into the Agreement with the
express condition that the Commission issue a new license in conformance with it. The
development of the Agreement, its submission to the Commission, and the request to incorporate
the agreed-upon license conditions into the new license were done in accord with the alternative
relicensing procedures described by the Commission in its Order 596, Regulations for Licensing
of Hydroelectric Projects, 81 FERC ¶ 61,103 (1997) and meet the goal of resolving relicensing
issues through a collaborative process involving affected federal and state agencies and other
stakeholders. The following parties signed on to the Comprehensive Settlement Agreement: the
District, the USDA Forest Service, the National Park Service ("NPS"), the NOAA Fisheries,
United States Fish and Wildlife Service ("USFWS"), the Washington Department of Fish and
Wildlife ("WDFW"), the Washington Department of Ecology ("WDOE"), the Confederated
Tribes of the Colville Reservation ("CCT"), American Whitewater Affiliation, and the City of
Chelan.
III. DISCUSSION OF ERRORS

A. The License Order Errs by Deleting Licensee’s Right to Obtain Liability Protection Before Allowing Boating Access to a Dangerous Reach of the River.

A significant issue discussed throughout the relicensing process was the concern for public safety and liability associated with proposed whitewater boating in the steep and dangerous Chelan River gorge in the bypass reach between the dam and the powerhouse. The District voiced these concerns to FERC as early as letters dated May 3, 1999, and February 18, 2000, when the American Whitewater Affiliation first requested a kayaking feasibility study for this area, which had not been used for kayaking in the past. The District attached to its May 3, 1999 letter correspondence from the local Sheriff’s Office and Fire District (in letters dated June 22, 1998, April 29, 1999, and April 26, 1999) strongly recommending against allowing kayakers access to the gorge because of the difficult and unsafe rescue situation that would be created. The Fire District’s April 26 letter stated, for example:

The perpendicular walls of much of the lower end of the Gorge make a difficult and dangerous rescue situation. . . . The Chelan River Gorge area has been closed to the public and taxpayers of Chelan County for recreational use, because it is dangerous and unsafe.

The District’s February 18, 2000 letter to FERC cited to a study indicating that “the significant height and length associated with several boulders and relatively low depth or non-existent plunge pools create many dangerous and potentially life-threatening obstacles for kayakers.” The same letter noted the steep and unstable slopes that presented a landslide danger for boaters as well as spectators. Participants in a feasibility assessment of the rapids assigned them Class V, which means exceedingly difficult and only to be attempted by the very experienced. (See Comprehensive Plan at p. 11-39). The Commission Staff’s EA indicates that
the steepest Section of the bypass possesses some even more dangerous Class VI rapids. (Final EA at 173).

Despite these obvious dangers, American Whitewater continued to press for kayaker access, pointing out that whitewater boaters are well trained in river rescue and it is standard practice for boaters to carry rescue gear and effect rescues of fellow paddlers in reaches such as the Chelan River without reliance on outside rescue teams and personnel.

Although the District remains concerned about the safety of people recreating in this dangerous area, it negotiated with American Whitewater to work out a plan to permit water releases from the dam for kayaking, for purposes of a monitoring study, under carefully controlled times and situations that would allow only the most experienced boaters to participate. A critical part of this agreement between the District and boaters was that the District would be permitted to obtain liability protection by statute or through insurance before boating could begin. The terms of this agreement were set out as eleven points in the Comprehensive Plan (Comprehensive Plan at pp. 11-41 to 11-44), and also in the Settlement License Articles at Article 11(h). In Paragraph (11) of these points, the District, American Whitewater, and other interested parties pledged to work together to obtain a state legislative clarification of liability immunity for the types of whitewater release flows contemplated.\(^4\) Paragraph (10) of these points reflected the District’s and American Whitewater’s agreement to work together to obtain liability insurance to protect the District until statutory immunity can be clarified. Paragraph (10) specified that the agreed-upon whitewater flow releases would commence “once such insurance is obtained.”

\(^4\) It is not entirely clear whether the Washington State Recreational Use statute, RCW 4.24.210, adequately protects the District in the event of a lawsuit. The statute excepts from this immunity liability of landowners for injuries sustained to a user by reason of a “known dangerous artificial latent condition for which warning signs have been not been conspicuously posted.”
The License Order, in a few brief sentences, dismisses the District’s concern for liability protection and removes the agreed-upon protection measures from the license article. (License Order at P 68). The License Order briefly provides two rationales for this action. First, it states that the liability protection mechanism “could unduly delay or obviate the [boating] monitoring study...” Second, it states that the fact that there is risk associated with whitewater boating “has not precluded the Commission from requiring whitewater access and flow releases” in other cases.

The District is, quite frankly, puzzled that the License Order rejects an agreement regarding whitewater boating releases that was reached between the District and the leading whitewater boating advocacy group in the United States, American Whitewater. The District appreciates that American Whitewater took the concerns regarding liability seriously and agreed to settlement terms to address this issue. The District is surprised that the License Order appears less concerned about the District’s liability exposure than the whitewater advocates. Because these risks are so extensive, it is clear that the Settlement Agreement terms on this issue are in the public interest and should be adopted by the Commission pursuant to its public interest responsibility under Section 10(a) of the FPA.

Moreover, it is not at all clear how the liability protection mechanism would unduly delay or obviate the monitoring study, as the License Order suggests. The District has pledged to work with American Whitewater to clarify statutory liability, and in the meantime, to secure liability insurance. The only way the study could be unduly delayed or obviated is if no insurer is willing to provide satisfactory insurance coverage. If this in fact proves to be the case, that would indicate that the liability risks inherent in providing whitewater flows are substantial, and are beyond that which the District should be asked to bear under the public interest standard of
Section 10(a) of the FPA. Accordingly, this rationale for deleting the agreed-upon liability provision is baseless and unreasonable.

As for the License Order's second rationale for deleting the liability protection that refers to Commission precedent, the License Order cites only two cases, both of which were Director's orders and not Commission orders. One of the cases, *Northern States Power Co.*, 79 FERC ¶ 62,170 (1997), does not even discuss whitewater boating issues at all. The other Director's order cited, *Georgia Power Company*, 79 FERC ¶ 62,002 (1996), discusses how flows were provided for whitewater boating, but there is no indication as to the difficulty of the boating to be created, or that any safety or liability concerns were raised with respect to the boating.

Much more significant and relevant than the cases cited by the License Order is the Commission's 2002 order relieving the City of Tacoma from providing whitewater boating releases for its Nisqually Project.5 There was an issue in the *Nisqually* case similar to that presented here, in that whitewater boaters sought flow releases in a narrow and steep canyon in the bypassed reach. After a three-year study during which one kayaker drowned, Tacoma filed a report recommending that whitewater flows be discontinued. In the order, FERC concluded that, "because of the costs of the releases in administrative expense and foregone generation and public safety concerns, we will approve Tacoma's report and will not require further releases for whitewater boating at the Nisqually Project."6 Although there were factors of economics and low boater use also involved in the decision to cease whitewater flows, it is clear that safety concerns and the burdens placed on local rescue agencies were significant factors.7

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6 *Id.* at P 1 (emphasis added).
7 *Id.* at P 18.
Accordingly, it is simply not the case that the Commission has previously required whitewater flows at projects without regard to safety or liability concerns. Moreover, there is a difference between providing flows for Class II or III rapids and providing flows for the much more dangerous Class V and VI rapids that would be created below the Lake Chelan Dam, and the Commission may not just assume that the analysis appropriate in the former situation applies in the latter.

The District is not refusing to release flows for the whitewater monitoring study, but it does request reasonable liability safeguards before it does so. The agreement reached between the District and the whitewater boating community that is reflected in the Comprehensive Plan represents a reasonable compromise on this issue that allows these studies to proceed on a basis satisfactory to all. Moreover, it would be unreasonable and unduly burdensome to expect a licensee to assume significant risks and liabilities from recreational activities in operating a hydroelectric project.

Therefore, the District asks that the Commission include in the license the terms of the Comprehensive Plan on the whitewater boating issue without modification.

B. The License Order Errs by Unduly Eliminating Agreed-Upon Cost Caps With Respect to Certain Mitigation and Enhancement Measures.

As part of the detailed and comprehensive settlement agreement reached by the parties to resolve the issues raised by the Lake Chelan relicensing proceeding, the District agreed to undertake a number of costly mitigation and enhancement measures, but as part of such agreement, the parties agreed to certain spending limitations to put some bounds around the financial liability that the District was undertaking. In response to these measures with cost ceilings, the License Order stated that, while the Director “understand[s] the licensee’s desire to fix the costs that it may incur for resource protection and enhancement measures,” the
Commission cannot agree to such spending caps because it will “constrain the fulfillment of its statutory responsibilities” and that it is the “licensee’s obligation to complete the measures required by the license articles….”\(^8\) As a result of this determination, the License Order adds an Article 402 to the Lake Chelan license that reserves the Commission’s authority to require the licensee to fulfill the requirements of the license “notwithstanding the limitation on expenditures.”

The District submits that the License Order erroneously implements a cost caps policy in a manner that is inconsistent with Commission cost cap precedent and Section 10(a) of the FPA. Moreover, the License Order disregards the carefully balanced set of measures developed by the stakeholders, and allows for the elimination of cost caps in a situation when not required by the FPA or the public interest. If the Commission is to encourage settlements of contentious issues rather than require them to be litigated, it must recognize that cost caps on mitigation and enhancement measures provide an important incentive to the licensee to settle and should be included in a new license if they meet the criteria described below. Although the License Order cites to relatively recent precedents for its policy that the Commission will not be bound by cost caps negotiated by the parties, such cost caps were an important feature of settlements approved in the past, including a settlement involving the District’s Rock Island Project.\(^9\) The Commission’s policy on cost caps could serve to discourage settlements, or at least make them much more difficult and costly to achieve.\(^{10}\)

\(^8\) License Order at P 43.

\(^9\) Public Utility Dist. No. 1 of Chelan County, 46 FERC ¶ 61,033 (1989) (agreement to install bypass system within “specific limitations of cost, safety and loss of generating capacity” approved in the public interest).

\(^{10}\) In response to the Commission’s discussion of its cost cap policy in its recent Policy Statement on Hydropower Licensing Settlements,\(^{10}\) 116 FERC ¶ 61,270 at P 21, Docket No. PL06-5-000 (Issued September 21, 2006), a number of commenters expressed concern about the
The District recognizes that there are some situations in which the Commission must assert its authority to go beyond cost caps in order to ensure that a measure is satisfactorily implemented. Such a situation exists where a particular measure is addressing a direct ongoing project-related impact that the Commission determines must be remedied under Section 10(a) of the FPA. The District believes in those situations, the Commission may later determine, after notice and opportunity for hearing, that additional funds must be expended beyond an originally approved settlement cost cap for that measure. However, there are other cases where it is not appropriate for the Commission to reserve authority to modify settlement cost caps and the cost caps in this Comprehensive Settlement are examples of those cases. The Commission should not modify the agreed-upon cost caps in this proceeding for the reasons discussed below.

1. **The Commission Should Not Reserve the Right to Remove Settlement Cost Caps For Measures Imposed Pursuant to Section 4(e) Mandatory Conditions.**

All of the cost caps in the Lake Chelan license are there as a result of a settlement, and almost all were included as mandatory conditions by the Forest Service or NPS. There are 35 price caps included in the Settlement Agreement, and all but 4 are mandatory Section 4(e) conditions.¹¹

¹¹ The following are the cost caps in the Settlement Articles: Article 3, Large Woody Debris; Article 11(e), NPS dock & recreation and NPS recreation site stabilization; Article 11(e), NPS dock & recreation repair; Article 2, NPS erosion control plan; Article 4(a), Stehekin dust control; Article 4(b), Stehekin Area Plan; Article 5, survey monument replacement; Article 6(a), Food Web Model; Article 6(b), Fish monitoring and evaluation; Article 9(a)(1) and 9(a)(2), Wildlife restoration and acquisition of conservation easements; Article 9(a)(3), Wildlife habitat restoration; Article 9(b)(1), Upland Habitat; Article 9(b)(2), Upland Habitat, noxious weeds; Article 9(b)(3), Upland Habitat surveys; Article 9(c)(1) Upland Habitat at Stehekin;
Sections 4(e) and 18 of the FPA allow certain Federal agencies with resource management responsibilities to mandate that the Commission include within a license conditions to protect reservations and prescriptions that fishways be built. In this case, through the settlement negotiations leading to the Comprehensive Settlement Agreement, the Licensee and the Section 4(e) resource agencies reached an agreement on mitigation measures with a cost cap that the resource agencies deemed appropriate to address the potential impacts of the project on the reservations for which the agencies are responsible. The resource agencies then specified those cost caps as part of their mandatory conditions.

These mandatory conditions, including the cost caps, should represent the total obligation by the licensee with respect to mitigating that impact. If the Commission reserves the right to exceed the price cap in the mandatory condition, or imposes its own separate condition addressing the same impact with cost requirements in excess of the cost cap, the Commission would in effect be unlawfully modifying the mandatory condition.\(^\text{12}\) With respect to these conditions, the District negotiated with the appropriate Federal resource agency to achieve a funding measure to address an impact or potential impact, and the Commission has no independent statutory authority or responsibility to determine whether the settlement cost cap

Article 9(c)(2)a-c, Riparian Habitat Improvements; Article 10(j), Public Education; Article 11(c), Recreation Enhancements USDA FS; Article 11(c), Recreation Enhance USDA FS; Article 11(d), Recreation Enhancements USDA FS; Article 11(f), NPS Recreation Enhancements; Article 11(g), Rec Use Study; Article 11(j), Reach 1 Access Trail*; Article 11(k), Riverwalk trail extension*; Article 11(l), O&M of parks*; Article 11(a), Docks of the USDA-FS; Article 11(b), in-kind engineering for USDA FS; Article 12, Unforeseen Resources; Article 14, Upper Col Chinook / Steelhead Conservation Measures*. An asterisk means not mandated Section 4(e) condition.

will continue to be sufficient to address that impact on that reservation.\textsuperscript{13}

With respect to a number of cost caps in the Lake Chelan Section 4(e) conditions, it
would be nonsensical for the Commission to reserve the right to exceed the cost cap for a
measure, because the Commission was not able to conclude that such measures are required by
the standards in Section 10(a) of the FPA. Consequently, the Commission would not have even
included them in the license but for the statutory requirement that the mandatory conditions must
be included. In the Lake Chelan license articles, 11 of the total 35 cost caps are contained in
mandatory conditions that the License Order specifically found are not shown to be necessary for
the purposes of Section 10(a).\textsuperscript{14} When a settlement cost cap is included in a mandatory
condition that Section 10(a) does not require, the rationale that the Commission must reserve its
authority to remove or modify cost caps to retain its Section 10(a) oversight does not hold true.
The Commission should hold on rehearing that it is not reserving the right to remove or modify
the settlement cost caps in such license articles.\textsuperscript{15}

Even in the situation where a project impact on a reservation is remedied by a Federal
resource agency through a mandatory Section 4(e) condition with a cost cap, and where the
Commission also finds the impact needs to be remedied under Section 10(a), the Commission

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} Large woody debris (License Order, P 46); acquisition of wildlife conservation easement per
Settlement Article 9(a)(1) (P 56); wildlife easement fees per Settlement Article 9(a)(2) (P 56);
improve shrub-steppe habitat (P 56); recreation Settlement Articles 11(a) and 11(b) (P 60);
recreation Settlement Articles 11(c) and 11(d) (P 62); NPS dock and recreation enhancement
(Settlement Article 11(e) (P 63-65); Settlement Article 12(f) two contingency funds.

\textsuperscript{15} \textit{See Portland General Electric Company and Confederated Tribes of the Warm Springs
Reservation of Oregon, 117 FERC ¶ 61,112 at P 49-51 (2006) (agreement and mandatory
condition about licensee providing funds for roads included in license even though Commission
would not have included on its own).}
has no authority to override the mandated condition relating to that impact.\textsuperscript{16} Of the 35 cost caps agreed upon by the parties, 12 fall within this category,\textsuperscript{17} and the License Order concluded that more information was required as to eight provisions\textsuperscript{18} to make this determination. The Commission would unlawfully override a mandatory condition that includes a cost cap in any situation where it attempts to remedy the same impact through additional measures or reserves the right to require the licensee to exceed the cost cap. An example of this in the Lake Chelan license is the Stehekin Area mitigation. Article 9(c) of the Settlement Articles addresses the District’s responsibility for mitigation and contains cost caps that are part of NPS mandatory conditions. The Commission added Article 403 also dealing with Stehekin Area mitigation, but does not contain cost caps. In this case, Article 403 must be subject to whatever conditions that NPS has mandated in Settlement Article 9(c), including the cost caps. The Commission should hold on rehearing that is not reserving the right to exceed settlement cost caps where the cost caps are mandated pursuant to Section 4(e).

2. \textbf{When an Indirect Project Impact Is More Costly to Study Than It Is to Agree to a Cost-Capped Enhancement Measure or Measure to Address Indirect Impacts of the Project, the Commission Should Honor That Cap.}

There are sometimes indirect impacts caused by a project where the existence or extent of an impact may not be easily determined and it is not worth the effort or money to study the

\textsuperscript{16} See Escondido, supra.

\textsuperscript{17} Article 2, NPS erosion control plan; Article 4(a), Stehekin dust control; Article 4(b), Stehekin Area Plan; Article 5, survey monument replacement; Article 6(a), Food Web Model; Article 6(b), Fish monitoring and evaluation; Article 10(j), Public Education; Article 11(a), Docks of the USDA-FS; Article 11(b), in-kind engineering for USDA FS; Article 11(e), NPS dock & recreation and NPS recreation site stabilization; Article 11(e), NPS dock & recreation repair; Article 11(g), Rec Use Study.

\textsuperscript{18} Article 9(b)(1), Upland Habitat; Article 9(b)(2), Upland Habitat, noxious weeds; Article 9(b)(3), Upland Habitat surveys; Article 9(c)(1) Upland Habitat at Stehekin; Article 9(c)(2)a-c, Riparian Habitat Improvements.
impact over an extended period. During settlement negotiations between all interested resources agencies, it may be agreed that rather than expend money in an inefficient study, the licensee will provide a fund that the resource manager can use to address the impact. When the interested parties agree that a fund that can be used to off-set the impact is the preferable remedy for that impact, the Commission should accept that as reasonable and not reserve its right to later exceed that settlement cost cap. This is exactly what occurred in this proceeding and the parties' agreement to benefit the resource, including a cost cap on the Licensee's obligation, should be honored.

One example of this type of situation is in the agreed-upon funds and cost-caps for the Lake Chelan food web model and monitoring and evaluation included in Settlement Articles 6(a) and (b). With respect to the Lake Chelan resident fisheries, the Project has at most an indirect effect. In such a case, endless studies to determine the impact of the project, if any, on the Lake Chelan resident fishery could be conducted, but a more reasonable alternative is for the Licensee to not litigate regarding impacts and provide funds for better understanding and improving the fishery. It is simply more beneficial for the resource to provide funds to improve it than to spend funds on litigating impacts of the project. When a licensee and the settling parties all agree that this is the preferable approach, and when the licensee voluntarily assumes responsibility for an agreed-upon contribution to enhance the resource, it would be unreasonable for the Commission to reserve the right to require a greater contribution from the licensee.

3. **When the Settlement Parties Agree to the Licensee’s Share of Responsibility for an Impact That has Multiple Causes and a Cost Cap on Licensee’s Obligation, the Commission Should Honor That Agreement.**

There are a number of instances when the project may have an impact on a resource, but that it is only one of multiple causes contributing to the impact. This is the perfect situation for
parties to negotiate to assign responsibility for the impact. If, as a result of those negotiations, the parties agree what the licensee’s maximum financial liability for its share of the impact is, the Commission should honor that and not reserve the right to change the licensee’s share. The License Order itself recognized the concept of the Licensee’s share of responsibility for an impact. For example, with respect to the boat dock maintenance, staff found that “project reservoir fluctuations are responsible in part for increased operation and maintenance, but the project’s share was much less” than the funds required in the USFS mandatory condition. (License Order at P 60). In such a situation, the Commission should not reserve the right to increase the District’s financial obligation over the agreed-upon cost cap.  

4. Even if the Commission Deems it Lawful and Appropriate to Reserve Its Authority to Modify the Cost Caps for Any Articles, It May Do So Only After Notice and Opportunity for Hearing.

Even if, contrary to all of the arguments set forth above, the Commission deems it may lawfully preserve its authority to modify any of the settlement cost caps to meet its oversight obligations under Section 10(a) of the FPA, it should identify which ones meet this criteria, and specify that caps would be changed only after proper procedures for modifying a license are followed. The Commission’s more recent pronouncements with respect to cost caps, including what was stated in the License Order, seem to allow for a less considered rejection of settlement cost caps than was evident in the precedents that are cited as the basis for the policy. The first cases that addressed cost caps in settlements noted that those caps had to be subject, as is virtually every other article in the license, to the Commission’s reservation of authority, after notice and opportunity for hearing, to address future resource issues if circumstances warrant. For example, in the City of Seattle case cited in the License Order at footnote 40 to support the

19 Other examples where the District agreed to contribute a share to address the resource are the cost caps in Settlement Articles 9 and 11.
cost cap discussion, a number of cost caps were included as license articles as a result of settlements. The Commission’s response was:

while the parties may stipulate that the Settlement Agreement satisfies their concerns regarding the project, and while the Commission is accepting the Agreement, the new license remains subject to articles reserving the Commission’s authority, after notice and opportunity for hearing, to address resource issues if future circumstances warrant.\(^{20}\)

Likewise, in the *New York Power Authority* case cited by the Commission’s Settlement Policy Statement to support price cap restrictions, the Commission stated that agreed-upon cost limits “do not limit the Commission’s reserved authority to require additional measures, as future circumstances may warrant.”\(^{21}\) For this proposition, the Commission cited to its order in *Southern California Edison Company*, where the Commission noted that accepted settlement terms are subject to the Commission’s reserved authority, “after notice and opportunity for hearing, to address resource issues if future circumstances warrant.”\(^{22}\)

Accordingly, whereas the Commission’s original cases discussing cost caps in settlements stated that such caps had to be subject to the Commission’s reserved authority to change mitigation measures after notice and opportunity for hearing, the most recent Commission orders, including the Article 402 added to the Lake Chelan license, seem to give the Commission authority to ignore the cost caps “as may be appropriate and reasonable.” This is an additional and unjustified weakening of the weight to be given to negotiated cost limitations in a comprehensive settlement agreement. The reservation of authority to exceed approved settlement cost caps is subject to no less procedural protection than any other reservation of

\(^{20}\) *City of Seattle*, 71 FERC ¶ 61,159 at 61,535 and note 30 (1995) (emphasis added).


\(^{22}\) *Southern California Edison Company*, 77 FERC ¶ 61,313 at n. 46 (1996).
authority by the Commission in the license. The right of a licensee to test the validity of future Commission action under a reservation of authority has been recognized by the Commission and the courts. The Commission has stated:

A reservation of authority is not self-executing, and it does not give the Commission any ongoing discretionary involvement or control over the licensee's day-to-day operation of its project pursuant to the license. Rather, a reopener clause provides the Commission with the necessary authority, after notice and an opportunity for a hearing, to reopen the license and require changes to project facilities and operation, provided that those changes have a nexus to project effects and are supported by substantial evidence, as required by Section 313 of the FPA.

At a minimum, in order to encourage settlements and provide for appropriate due process, if the Commission determines in its order addressing the settlement that the cost caps are a reasonable estimate of the costs necessary to complete the measure, such caps should be accepted subject only to the Commission’s reserved authority to require additional funds after notice and opportunity for hearing. This would balance the need of licensees for a degree of certainty in the terms of their settlement agreements with the need of the Commission to retain authority to oversee and assure the implementation of the measures.

For these reasons, the District asks the Commission on rehearing to delete Article 402 from the license and modify the discussion in the License Order about cost caps. In the alternative, and at a minimum, the District requests that the Commission amend Article 402 to add the phrase “after notice and opportunity for hearing” to the end of Article 402.

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C. The License Order Errs by Requiring Unnecessary Lands to be Brought Within the Project Boundary.

The settlement agreement by and between, among others, the District, the U.S. Forest Service, the National Park Service, and the Washington Department of Fish and Wildlife incorporated the Lake Chelan Comprehensive Plan, which, in Chapter 9, set forth a Wildlife Habitat Plan. The Plan is the basis for the provisions contained in Settlement Article 9 addressing wildlife habitat adopted by the License Order. The Plan provides that the District will provide upfront funding of specified amounts to certain resource agencies for broadly defined habitat improvements, and in some instances provides for annual payments for broadly defined habitat purposes. Both the Forest Service and the NPS referenced the Comprehensive Plan requirements as their mandatory conditions under Section 4(e) of the FPA, which the Commission has no authority to alter.

The License Order states that the Commission generally does not favor such funds “but prefers to require licensees to undertake specific measures.” However, the License Order acknowledges that the funding provisions are part of mandatory Section 4(e) conditions. In addition to including the Settlement Article 9, the License Order also includes an Article 406 in the license to address wildlife habitat. Article 406 requires the District to submit within one year a Wildlife Habitat Plan for upland habitat improvements and riparian habitat improvements, including detailed descriptions of the measures and locations of the measures. Moreover, Article 406 specifies that “All lands requiring annual or periodic maintenance to ensure the success of the habitat improvements shall be brought into the project boundary. . . .” The text of the License Order recites this requirement also.26

25 Order at P 58.
26 Id.
The Commission should delete this “boundary” requirement because it is overly vague and contradicts the settlement agreement and thereby the Forest Service and NPS conditions. The Comprehensive Plan agreed to and mandated by the Forest Service and NPS does not identify specific land to use for wildlife habitat improvement. Rather, the hallmark of the Comprehensive Plan is flexibility to use the funds throughout a wide area where they can provide the most benefits to wildlife, which may change from year to year.

Apparently, the License Order expects that the District and the resource agencies will identify specific land parcels that will be set aside and periodically “maintained” by the District for wildlife habitat. This is not what is contemplated to occur under the Comprehensive Plan. Rather, what is likely to occur are areas where wildlife habitat is created by establishing certain plantings one time and thereafter the area is left to naturally evolve. The District assumes that this is not the type of area that Article 406 would require to be brought within the project boundary, so Article 406 is unnecessary in this context.

Even if there are specific lands of the Forest Service, NPS, or State that are identified as beneficial habitat that require periodic maintenance, there is no reason to require that such lands be brought within the project boundary if those agencies assume continuing wildlife management responsibility and do not want the lands to be placed within the project boundary. It was not the intent of the parties in negotiating the Comprehensive Plan that additional wildlife habitat lands would be brought within the boundary. For the Commission to seek to require the agencies to place their reservation lands within the project boundary when the agencies’ mandatory conditions provide otherwise is beyond the Commission’s authority due to the broad authority of the resource agencies pursuant to Section 4(e).
The Commission does not generally require project boundary expansion to include lands on which one-time obligations are to be undertaken, and this policy properly applies where a licensee has no continuing responsibility to maintain the improvements that it has made or funded. For example, in *Public Utility District No. 1 of Chelan County*, 107 FERC ¶ 61,280 at P 148 (2004), the Commission determined that sites on which activities were required to be undertaken under a tributary enhancement program would not need to be included in the project boundary because they might involve small areas or one-time actions. Likewise, in *Power Authority of the State of New York*, 107 FERC ¶ 61,259 at P 45 (2004), the Commission held that small areas outside of a project boundary that are needed for such project purposes as a nest platform or a fenced area to protect riparian vegetation, as well as lands on which one-time actions would occur, would not need to be within a project boundary.

In *Pacific Gas and Electric Company*, 97 FERC ¶ 61,084 at n. 48 (2001), the Commission required a licensee to add spawning gravel to a creek, remove portions of a weir, build spawning channels, and install terraced planting sites, but did not require inclusion of these lands and facilities in the project boundary because they were “basically one-time requirements.” The Commission has stated that there is a distinction between the creation of recreation facilities, which may require maintenance to be useful, and these types of one-time habitat improvements.

Perhaps the most relevant precedent is *PacifiCorp*, 106 FERC ¶ 61,306 (2004), where there was funding for off-site activities, as here, and the Commission did not require expanding the project boundary to include the lands on which they occur. The facts of *PacifiCorp* were

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28 *Portland General*, supra, 117 FERC at n. 46.
very similar to the present case. There, the licensee, through a settlement agreement, had established funds for implementing habitat enhancement projects along with other resource protection and mitigation measures. In the licensing order, the Commission stated that the project boundary would have to be amended to include the lands on which the mitigation was carried out. The licensee argued against the boundary modification on rehearing, asserting that the funds were to be used for protection, mitigation, and enhancement activities throughout the basin, not only for activities near the project, and that a requirement to include all such activity areas within the project boundary would impair the flexibility to put those funds to their best uses within the watershed. In its rehearing order, the Commission reversed the requirement to put the lands on which mitigation was funded in the boundary, stating:

Our general statement regarding the need to expand the project boundary therefore applies only to the extent the license itself requires the licensee to conduct ongoing activities on lands or waters that are not already within the project boundary. We therefore clarify that PacifiCorp’s performance of any activities funded pursuant to license Article 405 will not, without more, require any changes in the project boundary.  

The Commission later emphasized that a factor that distinguished PacifiCorp from other situations where a boundary modification was required was that the funds in question were to be used for protection, mitigation, and enhancement projects throughout the whole river basin, not just for ones near the hydropower project for which the license was being issued.  

Likewise, the Comprehensive Plan for Lake Chelan also calls for the wildlife habitat funds to be used on a flexible basis throughout a large geographic area, and the same conclusion as to project boundary is appropriate here.

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29 *PacifiCorp*, supra, at P 10.

30 *Id.*
The District notes that the License Order was silent as to whether it intends to include within the Project boundary Forest Service and National Park Service lands associated with recreation facility improvements that will be funded by the District, even some for which annual operating and maintenance funds will be provided.\textsuperscript{31} The District assumes that different result occurs because the License Order stated that the Director would not have required those funds be spent but for the Section 4(e) condition, and therefore was not required under Section 10(a).

Accordingly, the District asks that the Commission delete the provisions in Article 406 requiring that all lands requiring annual or periodic maintenance for habitat improvements be brought within the project boundary. At a minimum, the Commission should clarify Article 406 as discussed herein, including the clarification that it does not apply to the recreational enhancements.

\textsuperscript{31} License Order at P 61-62.
IV. CONCLUSION

The District respectfully requests that the Commission issue an order on rehearing remedying the errors identified herein. First, the Commission should accept the liability protection provisions that were agreed to by all relevant parties to the proceeding as a basis for providing whitewater flows in the dangerous bypass reach of the Chelan River. Second, the Commission should honor the cost caps that were carefully negotiated as part of the comprehensive settlement herein, and mandated under Section 4(e). Third, the Commission should not require that lands upon which habitat improvements will be funded pursuant to the Comprehensive Settlement Agreement be brought within the project boundary.

Respectfully submitted,

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December 6, 2006
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon each person designated on the official service list compiled by the Secretary in this proceeding via first-class mail.

Dated at Washington, D.C., this 6th day of December, 2006.

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