

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>Public Utility District No. 1 of</b>	)	
<b>Chelan County, Washington</b>	)	<b>Project No. 2145-060</b>
<b>(Rocky Reach Hydroelectric Project)</b>	)	

**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”),<sup>1</sup> and Rule 713 of the Commission’s Rules of Practice and Procedure,<sup>2</sup> Public Utility District No. 1 of Chelan County, Washington (“Chelan PUD” or “Licensee”) hereby requests rehearing regarding alleged errors regarding the license term and inclusion of a reference to bull trout habitat in the February 19, 2009 *Order On Offer Of Settlement And Issuing New License*<sup>3</sup> (“License Order”) in the above-captioned docket. Chelan PUD also requests clarification of several other discrete issues addressed in the License Order.

Chelan PUD appreciates the action by the Commission to issue Chelan PUD a license which, for the most part, is consistent with the terms of a Comprehensive Settlement Agreement (“Settlement Agreement”) submitted to the Commission.<sup>4</sup> Accordingly, Chelan PUD supports the vast majority of the License Order and is eager to begin implementation of the new license. However, the License Order provision providing for a 43-year license term rather than a 50-year term violates the Section 10(a) Federal Power Act (FPA) public interest standard, is counter to Commission precedent, unreasonable, and arbitrary and capricious.

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<sup>1</sup> 16 U.S.C. § 8251(a).

<sup>2</sup> 18 C.F.R. § 385.713.

<sup>3</sup> *Public Utility District No. 1 of Chelan County*, 126 FERC ¶61,138 (License Order).

<sup>4</sup> *See* Final Comprehensive Settlement Agreement for Rocky Reach Project No. 2145-060 (filed March 20, 2006) (Settlement Agreement).

The license term ordered by FERC is contrary to the public interest because it does not take into account the extraordinary and costly mitigation and enhancement measures that Chelan PUD has undertaken to address Project impacts on endangered salmon listed under the Endangered Species Act (ESA) through the landmark Anadromous Fish Agreements and Habitat Conservation Plan (“HCP”)<sup>5</sup> and other license conditions. Based on this fundamental error, the Commission concluded that the new license does not contain extensive environmental mitigation and enhancement measures and thus should not be for a 50-year term.<sup>6</sup>

The HCP includes, *inter alia*, a “no net impact” standard for ESA-listed salmon and steelhead and a state of the art downstream juvenile fish bypass facility that cost more than \$110 million to construct. Moreover, the HCP measures were specifically crafted to satisfy relicensing obligations under Sections 10(a), 10(j) and 18 of the FPA.<sup>7</sup> Therefore, the Commission’s conclusion that the HCP measures are not relevant to the license term determination is simply incorrect.

The Commission’s decision not to fully credit the HCP expenditures when establishing the license term for the Rocky Reach Project sends the wrong message to all licensees about taking proactive steps in advance of a new license to resolve critical environmental issues. If the Commission does not grant rehearing on the Rocky Reach license term, it will have national ramifications for FERC-licensed hydroelectric facilities. In its current form, the License Order indicates to licensees that they will be disadvantaged in regard to the length of their new license,

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<sup>5</sup> *Public Utility District No. 1 of Chelan County, et. al.*, 107 FERC ¶ 61,280 (2004); *Public Utility District No. 1 of Chelan County*, 107 FERC ¶ 61,281 (2004) (Rocky Reach) (HCP Orders).

<sup>6</sup> License Order at ¶ 150.

<sup>7</sup> Application for Approval of Rocky Reach Anadromous Fish Agreement and Habitat Conservation Plan (filed November 24, 2003) (HCP) at Section 9.2.2.

rather than credited, by taking early action to resolve critical relicensing issues. Such a policy will undoubtedly have adverse environmental impacts and will further slow and complicate relicensing proceedings by encouraging licensees to avoid taking any steps to resolve key resource issues before being compelled to do so by the relicensing process. In addition, failure to grant a 50-year license term is contrary to a carefully negotiated Settlement Agreement and FERC's own policies.

The other error and issues for clarification upon which Chelan PUD is requesting rehearing are further described below.

## **I. BACKGROUND**

Chelan PUD is a municipal corporation that provides low-cost electricity to its local customers and other Northwest communities. The license for the Rocky Reach Project expired on June 30, 2006, and thereafter, the Project has operated pursuant to an annual license.

On October 25, 1999, FERC approved Chelan PUD's request to use the collaborative alternative relicensing procedures ("ALP") for the preparation of its license application.<sup>8</sup> As part of the collaborative process, a total of 65 working group meetings and 33 full relicensing meetings were held. Chelan PUD filed an application for a new license for the Project with FERC on June 29, 2004. On February 3, 2006, Chelan PUD and participants in the ALP reached final agreement on a comprehensive Settlement Agreement of all matters addressed in the Rocky Reach relicensing process.

Concurrently, and in coordination with the ALP process, Chelan PUD and key agencies and stakeholders engaged in a parallel negotiating process to resolve critical issues related to the impact of the Project on endangered salmon species. This ultimately resulted in the HCP for the

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<sup>8</sup> Letter from Ann Miles, FERC, Chief of West Branch of Licensing, to Gregg Carrington, Chelan PUD, Relicensing Project Manager, filed October 25, 1999.

Rocky Reach Hydroelectric Project signed by the applicant, NOAA Fisheries Service, the U.S. Fish & Wildlife Service, and several other governmental, tribal, and public entities, which was approved by the Commission on June 21, 2004.<sup>9</sup> The HCP was then incorporated in its entirety and without modification into the new license application for the Rocky Reach Project as well as the Settlement Agreement.

The HCP commits Chelan PUD to a highly ambitious long-term adaptive management program to assure that Rocky Reach has “no-net impact” on listed salmon and steelhead.<sup>10</sup> This is to be accomplished through a combination of fish bypass systems, spill, off-site hatchery programs, and habitat restoration work conducted in tributaries. A central purpose of the HCP was to address Chelan PUD’s relicensing obligations. The HCP specifically provides that at relicensing, the “Agreement shall constitute the Parties’ terms, conditions and recommendations for Plan Species [spring summer and fall Chinook salmon, sockeye salmon, coho salmon and steelhead] under Sections 10(a), 10(j) and 18 of the Federal Power Act...”<sup>11</sup> Therefore, the relicensing Settlement Agreement and the HCP are inextricably intertwined and together comprise the two key elements of the new Rocky Reach license.

The parties entered into the Settlement Agreement with the express condition that the Commission would issue a new license in conformance with it. The development of the Settlement Agreement, its submission to the Commission, and Chelan PUD’s request to incorporate the agreed-upon license conditions into the new license were done in accordance with the alternative relicensing procedures described by the Commission in its Order 596,

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<sup>9</sup> HCP Orders, *supra* note 5.

<sup>10</sup> HCP at P. 1, ¶ B.

<sup>11</sup> HCP at Section 9.2.2.

Regulations for Licensing of Hydroelectric Projects,<sup>12</sup> to meet the goal of resolving relicensing issues through a collaborative process involving affected federal and state agencies and other stakeholders. The following parties signed the Settlement Agreement: Chelan PUD, the U.S. Fish and Wildlife Service, the U.S. Bureau of Land Management, the U.S. National Park Service, the Washington State Department of Fish and Wildlife, the Washington State Department of Ecology, the Washington State Parks and Recreation Commission, the Confederated Tribes of the Colville Reservation, the City of Entiat, Alcoa Power Generating, Inc., and Yakama.

## **II. STATEMENT OF ISSUES AS TO ERRORS IN LICENSE ORDER**

A. Whether the Commission erred as a matter of law and fact by granting a new license with a 43-year term when Commission precedent provides for a 50-year term for new licenses with extensive environmental and enhancement measures such as the environmental measures in the new Rocky Reach license, including the HCP.

B. Whether the Commission erred as a matter of law contrary to the public interest standard of Section 10(a) of the FPA in establishing a license term policy in the License Order that disadvantages licensees that take early action to resolve critical environmental issues, including measures to protect ESA-listed anadromous fish species.

C. Whether the Commission acted in an arbitrary and capricious and unlawful manner by directing Chelan PUD in Order 596 to use the Alternative Licensing Process to narrow the range of contested licensing issues and then in the License Order provide for a shorter license term for the Rocky Reach Project, because Chelan PUD took early action through the HCP to address Project impacts on ESA-listed salmon species.

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<sup>12</sup> Regulations for the Licensing of Hydroelectric Projects, Order No. 596, Final Rule, 81 FERC ¶ 61,103 (1997) (Order 596).

D. Whether the Commission erred as a matter of law when it relied in the License Order on *Ford Motor Company*, 110 FERC ¶ 61,236 (2005) as support for not granting a 50-year license term when the *Ford Motor Company* case concerned minor voluntary measures and not substantial obligations to protect ESA-listed fish species that were specifically agreed to by Chelan PUD to satisfy relicensing obligations under Sections 10(a), 10(j) and 18 of the FPA.

E. Whether the Commission erred as a matter of law by not providing for a 50-year license term when it is the Commission's policy to strongly support comprehensive hydroelectric licensing settlements and a 50-year license term is consistent with the Settlement Agreement.

F. Whether the Commission erred as a matter of law by granting higher priority to coordination of license term expiration with the Priest Rapids project license than to the Rocky Reach Settlement Agreement contrary to Commission precedent and policy.

G. Whether the Commission erred as a matter of law and fact by relying on purported coordination benefits in setting the Rocky Reach license to expire at the same time as the Priest Rapids license when, *inter alia*, it is impossible to coordinate the expiration dates of the Mid Columbia Projects (Wells, Rocky Reach, Priest Rapids and Rock Island), because the Rock Island license must be relicensed in 2028 for a term of at least 30 years pursuant to the statutory mandates.

H. Whether the Commission erred as a matter of law and fact and denied Chelan PUD its due process rights by prejudging the length of the Rocky Reach license term in the Priest Rapids Project proceedings when such license term violates Section 10(a) of the FPA, Commission precedent, and is arbitrary, capricious and unreasonable.

I. Whether the Commission erred as a matter of fact by using an incorrect expiration date related to the HCP of February 1, 2052 in deciding that a 43-year license term was

appropriate. For the Rocky Reach license term to correspond with the HCP's term, the license term must extend through at least June 21, 2054 (a 45-year term) and could extend through 2059 (a 50-year term), because the HCP contemplates a license term beyond the term of the HCP.

J. Whether the Commission erred as a matter of law and fact by including in the license order an incorrect statement that ESA critical habitat for bull trout occurs within the Project area.

### **III. STATEMENT OF PROVISIONS OF THE LICENSE ORDER REQUIRING CLARIFICATION**

A. Chelan PUD inadequately described in its recreational management plan a proposed lease (with option to purchase) of land owned by Chelan PUD to the City of Entiat and the License Order at Paragraph 119 incorrectly reflected the nature of that transaction in concluding that Chelan PUD may not sell the property. This provision of the License Order requires clarification.

B. The License Order at Paragraph 88 incorrectly states that Ute Ladies'-tresses are located outside the project boundary. The land upon which the Ute Ladies'-tresses is located is currently within the project boundary, and Chelan PUD is in compliance with the proposed license Article 404. This provision of the License Order requires clarification.

### **IV. ARGUMENTS RELATED TO ERRORS IN LICENSE ORDER**

#### **A. THE COMMISSION ERRED AS A MATTER OF LAW AND FACT BY GRANTING A NEW LICENSE WITH A 43-YEAR TERM WHEN COMMISSION PRECEDENT PROVIDES FOR A 50-YEAR TERM FOR NEW LICENSES WITH EXTENSIVE ENVIRONMENTAL AND ENHANCEMENT MEASURES SUCH AS THE ENVIRONMENTAL MEASURES IN THE NEW ROCKY REACH LICENSE, INCLUDING THE HCP.**

The Commission's "general policy is to establish 30-year terms for projects with little or no redevelopment, new construction, new capacity, or environmental mitigation and

enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures.”<sup>13</sup> Since 2003, the Commission has issued new 50-year licenses pursuant to this policy for the following 19 Projects: Baker River, Swift No. 1, Swift No. 2, Yale, Merwin, Cooper Lake, Niagara, Lake Chelan, Sibley Mill, Enterprise Mill, Price Dam, Box Canyon, Pelton Round Butte, Storage, St. Lawrence-FDR, Lateral 993, Bigfork, Anson, and Abenaki.<sup>14</sup>

Consistent with Commission precedent, Chelan PUD’s request for a 50-year term through 2059 was based upon the extensive protection, mitigation and enhancement measures agreed to by Chelan PUD in the Settlement Agreement, which included the Rocky Reach HCP.<sup>15</sup> In ordering a 43-year license, FERC relied upon the incorrect conclusion that the provisions for protection, mitigation and enhancement measures were only “moderate,” because measures required by the HCP were “a provision of the current license” that should not be “carried over” for consideration in determining the new license term.<sup>16</sup>

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<sup>13</sup> *Public Util. Dist. No. 2 of Grant County, Wash.*, 123 FERC ¶ 61,049 at P. 182 (2008).

<sup>14</sup> *Baker River*, 125 FERC ¶ 62,064 (2008); *PacifiCorp*, 123 FERC ¶ 62,260 (2008) (Swift No. 1); *Public Util. Dist. No. 1 of Cowlitz County, Wash.*, 123 FERC ¶ 62,259 (2008) (Swift No. 2); *PacifiCorp*, 123 FERC ¶ 62,257 (2008) (Yale); *PacifiCorp*, 123 FERC ¶ 62,258 (2008) (Merwin); *Chugach Elec. Ass’n*, 120 FERC ¶ 62,148 (2007) (Cooper Lake); *New York Power Auth.*, 118 FERC ¶ 61,206 (2007) (Niagara); *Public Util. Dist. No. 1 of Chelan County*, 117 FERC ¶ 62,129 (2006) (Lake Chelan); *Avondale Mills, Inc.*, 113 FERC ¶ 62,132 (2005) (Sibley Mill); *Enterprise Mill, LLC*, 113 FERC ¶ 62,131 (2005) (Enterprise Mill); *Public Util. Dist. No. 1 of Pend Oreille County*, 112 FERC ¶ 61,055 (2005) (Box Canyon); *Portland General Elec. Co. & Confederated Tribes of the Warm Springs Reservation of Or.*, 111 FERC ¶ 61,450 (2005) (Pelton Round Butte); *Great Lakes Hydro Am., LLC*, 109 FERC ¶ 62,230 (2004) (Storage); *New York Power Auth.*, 105 FERC ¶ 61,102 (2003) (St. Lawrence-FDR); *PacifiCorp*, 104 FERC ¶ 62,059, at P. 62 (2003) (Big Fork); *Madison Paper Indus., Inc.*, 104 FERC ¶ 62,060 (2003) (Anson); *Madison Paper Indus., Inc.*, 104 FERC ¶ 62,061 (2003) (Abenaki).

<sup>15</sup> Settlement Agreement at Section 10.

<sup>16</sup> License Order at ¶ 150.



The Commission’s conclusion is fundamentally flawed. A central purpose of the HCP was to address Chelan PUD’s relicensing obligations. The HCP provides that at relicensing, the “Agreement shall constitute the Parties’ terms, conditions and recommendations for Plan Species [spring summer and fall Chinook salmon, sockeye salmon, coho salmon and steelhead] under Sections 10(a), 10(j) and 18 of the Federal Power Act...”<sup>17</sup> Therefore, rather than being mere “requirements carried over from the prior license” the HCP measures were specifically crafted and agreed by all parties to satisfy Rocky Reach license obligations.

The state-of-the-art downstream juvenile fish bypass is a centerpiece of the HCP and Chelan PUD’s efforts to meet its relicensing obligations to protect anadromous fish. The fish bypass system was completed in 2004 at a cost of over \$110 million. The fish bypass system has been very effective in facilitating the safe and timely downstream passage of juvenile salmon species listed under the ESA. In addition, FERC staff estimated in the Rocky Reach Final Environmental Impact Statement (“Rocky Reach FEIS”) that the capital costs to Chelan PUD of restoration and maintenance of the fish bypass will be over \$130 million, in addition to the \$110 million already spent on bypass construction.<sup>18</sup> Therefore, by any measure, the fish bypass system in and of itself is a very significant indicator that the new license involves extensive environmental mitigation meriting a 50-year license term.

Other examples of extensive environmental measures encompassed by the Settlement include:

- \$88.9 million to implement the HCP, including hatchery operation and maintenance (“O&M”), capital improvements, tributary conservation funds, adult fish ladder O&M, predator control measures, anadromous fish studies, research and development;

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<sup>17</sup> HCP at Section 9.2.2.

<sup>18</sup> Rocky Reach FEIS at P. 218 (filed Aug. 4, 2006).

- \$23.3 million to implement management plans for resident fish, lamprey, sturgeon and bull trout;
- \$55.4 million to implement the recreation resources management plan, including Lincoln Rock State Park and Daroga State Park renovations and enhancements, design and implementation of Entiat Park upgrades;
- \$4.5 million to implement the wildlife resources management plan; and
- \$4.2 million to implement water quality and water resources plan.

Chelan PUD began implementation of HCP mitigation measures prior to issuance of a new Rocky Reach license, even though they were integral parts of Chelan PUD's relicensing effort. Rather than deferring HCP implementation until relicensing was complete, Chelan PUD took a proactive approach that should have been fully credited by the Commission. Furthermore, Chelan PUD's obligations set forth in the HCP require outcome-based measures such as numerous hatchery supplementation plans, rigorous studies, and ongoing monitoring and evaluation programs.

The HCP and Settlement Agreement contemplate known costs associated with the outcome-based measures to carry out the Agreement. But it also is clear that the outcome-based measures required by the HCP and License objectives could also require additional costs for Chelan PUD not accounted for in the calculated costs.<sup>19</sup>

In sum, the Commission has violated its own precedent by concluding that the Rocky Reach license only required "moderate" mitigation and enhancement measures and should only be for 43 years. To be consistent with its prior precedent, the Commission should grant rehearing and order a 50-year license term.

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<sup>19</sup> Rocky Reach FEIS at P. 215-230 (Table 19) at lines 42, 43, 44, 50, 54, 63, 67, 71, 73, 74, 75, 77, 78, 84, 85 which references the "unknown" costs.

**B. THE COMMISSION ERRED AS A MATTER OF LAW CONTRARY TO THE PUBLIC INTEREST STANDARD OF SECTION 10(a) OF THE FPA IN ESTABLISHING A LICENSE TERM POLICY IN THE LICENSE ORDER THAT DISADVANTAGES LICENSEES THAT TAKE EARLY ACTION TO RESOLVE CRITICAL ENVIRONMENTAL ISSUES, INCLUDING MEASURES TO PROTECT ESA-LISTED ANADROMOUS FISH SPECIES.**

Section 10(a)(2) of the FPA requires that hydroelectric projects be licensed in a manner that is “best adapted to a comprehensive plan for improving or developing a waterway”<sup>20</sup> which has long been construed as a “public interest” standard.<sup>21</sup> It is counter to the public interest for the Commission to, as it has here, issue a License Order that will send the wrong message to all licensees. The message from this License Order is clear: a licensee should not take action in advance of relicensing to resolve critical environmental issues, including protection of species listed as threatened or endangered under the ESA. Such a policy will have significant negative environmental impacts and will also increase the complexity and difficulty of the relicensing process because licensees will be discouraged from taking early action to resolve issues.

As thoroughly discussed above, Chelan PUD acted in the public interest by implementing actions to protect threatened and endangered salmon species before the new license was issued. The HCP is a centerpiece of the requirements of the new license. These early actions by Chelan PUD should be rewarded. They certainly should not result in a shorter license term than is warranted by the extensive protection, mitigation and enhancement measures in the Rocky Reach license, including the HCP.

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<sup>20</sup> 16 U.S.C § 803(a).

<sup>21</sup> *See, e.g., Pacific Gas and Electric Company*, 97 FERC ¶ 61,084 at 61,410 (2001).

**C. THE COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER BY DIRECTING CHELAN PUD IN ORDER 596 TO USE THE ALTERNATIVE LICENSING PROCESS TO NARROW THE RANGE OF CONTESTED LICENSING ISSUES AND THEN IN THE LICENSE ORDER PROVIDING FOR A SHORTER LICENSE TERM FOR THE ROCKY REACH PROJECT BECAUSE CHELAN PUD TOOK EARLY ACTION THROUGH THE HCP TO ADDRESS PROJECT IMPACTS ON ESA-LISTED SALMON SPECIES.**

FERC is barred from acting in an “arbitrary and capricious” manner when issuing a new license order.<sup>22</sup> In order for a change in Commission policy to be lawful the Commission must offer a “reasoned explanation”<sup>23</sup> of its action. In this proceeding FERC has clearly acted in an arbitrary and capricious manner by beginning the FERC relicensing process with a requirement that Chelan PUD seek to narrow the range of contested resource issues and ending the process with the issuance of a License Order setting a 43-year license term rather than a 50-year term, because Chelan PUD took early action to resolve endangered species problems prior to relicensing.

In Order 596 the Commission stated that a goal of the ALP used to relicense Rocky Reach is “not confined to submitting formal offers of settlement among parties on the application when it is filed but includes *any agreement that can be reached that narrows the range of contested issues, both on necessary studies and on mitigation and enhancement measures.*”<sup>24</sup> That is precisely what Chelan PUD has done in this proceeding through the HCP<sup>25</sup> and in the Settlement Agreement.

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<sup>22</sup> 5 U.S.C. § 706(2)(A). *See also Env'tl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991).

<sup>23</sup> *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C.Cir. 1995).

<sup>24</sup> Order 596 at P. 7 (emphasis added).

<sup>25</sup> HCP at Section 9.2.

The HCP Agreement reached in advance of the submission of the Rocky Reach license application and then incorporated in the new license dramatically narrowed the range of contested issues in the Rocky Reach relicensing proceeding by resolving the most important and difficult relicensing issue, the project impacts on ESA-listed salmon species. However, instead of crediting this early action when setting the Rocky Reach license term, the License Order arbitrarily was for a shorter term than warranted by the facts, policies, and Commission precedent. The Commission offers no “reasoned explanation” of why it chose on the one hand to encourage early action in Order 596 and subsequently penalized such action in this License Order.

**D. THE COMMISSION ERRED AS A MATTER OF LAW WHEN IT RELIED IN THE LICENSE ORDER ON *FORD MOTOR COMPANY*, 110 FERC ¶ 61,236 (2005), AS SUPPORT FOR NOT GRANTING A 50-YEAR LICENSE TERM WHEN THE *FORD MOTOR COMPANY* CASE CONCERNED MINOR VOLUNTARY MEASURES AND NOT SUBSTANTIAL OBLIGATIONS TO PROTECT ESA-LISTED FISH SPECIES THAT WERE SPECIFICALLY AGREED TO SATISFY RELICENSING OBLIGATIONS UNDER SECTIONS 10(a), 10(j) AND 18 OF THE FPA.**

The License Order cites to the *Ford Motor Company*<sup>26</sup> order to support the decision not to include “requirements carried over from the prior license” such as the HCP, when establishing the Rocky Reach license term.<sup>27</sup> In *Ford Motor Company*, the licensee claimed that it was entitled to a 40-year license rather than a 30-year license because it “voluntarily” took a number of actions, including investing “\$12.3 million since 1993 on project rehabilitation, upgrades and relicensing costs.”<sup>28</sup> The Commission rejected this reasoning.

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<sup>26</sup> *Ford Motor Company*, 110 FERC ¶ 61,236 (2005).

<sup>27</sup> License Order at ¶ 150.

<sup>28</sup> *Ford Motor Company*, *supra* at ¶ 6.

The Rocky Reach and HCP facts differ dramatically from the facts in *Ford Motor Company*. These differences clearly show that *Ford Motor Company* does not support the Commission's license term decision in the Rocky Reach License Order.

Unlike the license in the *Ford Motor Company* case, Chelan PUD does not seek to be credited for "project rehabilitation, upgrades and relicensing costs." In fact, Chelan PUD did not include those arguments in its request even though it has in recent years incurred very substantial costs to rehabilitate the Rocky Reach turbines and relicense the Project. Rather, Chelan PUD relies upon the HCP and other measures involving substantial obligations to protect endangered fish species, precisely the type of mitigation and enhancement measures that should be credited by the Commission under its license term policy. In addition, a central purpose of the HCP was to address Chelan PUD's relicensing obligations for ESA-listed species under Sections 10(a), 10(j) and 18 of the FPA.

To equate the *Ford Motor Company* situation to the Rocky Reach HCP, which involved a landmark settlement regarding mitigation of Project impacts on ESA-listed salmon and steelhead in the Columbia River on other license requirements, is simply wrong.

**E. THE COMMISSION ERRED AS A MATTER OF LAW BY NOT PROVIDING FOR A 50-YEAR LICENSE TERM WHEN IT IS THE COMMISSION'S POLICY TO STRONGLY SUPPORT COMPREHENSIVE HYDROELECTRIC LICENSING SETTLEMENTS AND A 50-YEAR LICENSE TERM IS CONSISTENT WITH THE SETTLEMENT AGREEMENT.**

The 43-year license term is contrary to the Commission's own policies encouraging a Settlement Agreement reached by all parties. In 1997, when the District began the process to relicense the Rocky Reach Project under the ALP, FERC's policy was quite clear. The objectives of the process are summarized as follows:

- (1) to improve communications among affected entities and to be flexible and tailored to the facts and circumstances of the particular proceeding.
- (2) to encourage the applicant and interested persons to narrow any areas of disagreement and promote settlement of issues raised by the hydropower proposal.
- (3) the goal of encouraging settlement is not confined to submitting a formal offer of settlement among parties on the application when it is filed, but includes any agreement that can be reached that narrows the range of contested issues, both on necessary studies and on mitigation and enhancement measures.<sup>29</sup>

Further, the “Policy Statement Hydropower Licensing Settlements” states that “the Commission looks with great favor on settlements in licensing cases.”<sup>30</sup> Consistent with this policy, the Commission has recognized the importance of honoring the license term provisions of comprehensive hydroelectric relicensing settlement agreements.

Since 2003, the Commission granted licenses with 50-year license terms consistent with a comprehensive relicensing settlement for the following Projects: Baker River, Swift No. 1, Swift No. 2, Yale, Merwin, Cooper Lake, Niagara, Lake Chelan, Sibley Mill, Enterprise Mill, Price Dam, Box Canyon, Pelton Round Butte, Storage, St. Lawrence-FDR, Lateral 993, Bigfork, Anson and Abenaki.<sup>31</sup>

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<sup>29</sup> Order 596, *supra* note 12.

<sup>30</sup> Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act, *Policy Statement on Hydropower Licensing Settlements*, 116 FERC ¶ 61,270 at P. 2 (2006).

<sup>31</sup> *Puget Sound Energy*, 125 FERC ¶ 62,064 (2008); *PacifiCorp*, 123 FERC ¶ 62,260 (2008) (Swift No. 1); *Public Util. Dist. No. 1 of Cowlitz County, Wash.*, 123 FERC ¶ 62,259 (2008) (Swift No. 2); *PacifiCorp*, 123 FERC ¶ 62,257 (2008) (Yale); *PacifiCorp*, 123 FERC ¶ 62,258 (2008) (Merwin); *Chugach Elec. Ass’n*, 120 FERC ¶ 62,148 (2007) (Cooper Lake); *New York Power Auth.*, 118 FERC ¶ 61,206 (2007) (Niagara); *Public Util. Dist. No. 1 of Chelan County*, 117 FERC ¶ 62,129 (2006) (Lake Chelan); *Avondale Mills, Inc.*, 113 FERC ¶ 62,132 (2005) (Sibley Mill); *Enterprise Mill, LLC*, 113 FERC ¶ 62,131 (2005) (Enterprise Mill); *Public Util. Dist. No. 1 of Pend Oreille County*, 112 FERC ¶ 61,055 (2005) (Box Canyon); *Portland General Elec. Co. & Confederated Tribes of the Warm Springs Reservation of Or.*, 111 FERC ¶ 61,450

Consequently, there is overwhelming Commission precedent to grant a Rocky Reach license with a 50-year license term because the Rocky Reach Settlement Agreement authorizes Chelan PUD to “seek a license term of 50 years,” and provides that the other settlement parties do not oppose a 50-year license.<sup>32</sup> FERC states in the License Order that the parties did not all support a 50-year term, instead agreeing not to oppose that request by Chelan PUD. We respectfully point out that all the Parties agreed to a minimum term of 47 years. It is thus inappropriate for FERC to reference this provision of the Settlement Agreement as a basis to issue a 43-year license.

In the Pelton-Round Butte relicensing, the Commission issued a new license for a term of 50 years because extensive environmental measures were required and “because the term of license was likely an important element in the negotiations that led to the Settlement Agreement.”<sup>33</sup> Similarly, in the Lake Chelan relicensing, a key basis for the Commission’s decision to issue a 50-year license was the support for such a license term in the Lake Chelan Settlement Agreement.<sup>34</sup> In fact, in the Lake Chelan relicensing, the parties agreed to language similar to that referenced in the Rocky Reach Settlement Agreement regarding the term (not

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(2005) (Pelton Round Butte); *Great Lakes Hydro Am., LLC*, 109 FERC ¶ 62,230 (2004) (Storage); *New York Power Auth.*, 105 FERC ¶ 61,102 (2003) (St. Lawrence-FDR); *PacifiCorp*, 104 FERC ¶62,059, at P. 62 (2003) (Big Fork); *Madison Paper Indus., Inc.*, 104 FERC ¶ 62,060 (2003) (Anson); *Madison Paper Indus., Inc.*, 104 FERC ¶ 62,061 (2003) (Abenaki).

<sup>32</sup> Settlement Agreement at Section 5 specifically provides:

Chelan PUD will seek a license term of 50 years. The Parties other than Chelan PUD agree to support a license term of 47 years and to not oppose a license term longer than 47 years.

<sup>33</sup> *Portland General Elec. Co. & Confederated Tribes of the Warm Springs Reservation of OR.*, 111 FERC ¶ 61,450 at P. 168 (2005).

<sup>34</sup> *Public Utility District No. 1 of Chelan County*, 117 FERC ¶ 62,129 at ¶ 129 (2006).



oppose 50 years with a minimum agreed-upon term of 45 years) and the Commission issued an order approving a 50-year license.<sup>35</sup>

Similarly, the term of the license was an important element in the negotiations that led to the Rocky Reach Settlement Agreement. Indeed, because of the high costs associated with many of the other terms of the settlement, obtaining support for a 50-year license term was Chelan PUD's highest priority in settlement negotiations.

It is also inappropriate to limit the term of the Rocky Reach license to the expiration of the HCP agreements.<sup>36</sup> The parties to the HCP and the Settlement Agreement realized and accounted for the potential of a license with a term longer than the HCP term. The HCP specifically provides that following termination, Chelan PUD "shall continue to implement the last agreed to Measures until the FERC orders otherwise."<sup>37</sup>

**F. THE COMMISSION ERRED AS A MATTER OF LAW BY GRANTING HIGHER PRIORITY TO COORDINATION OF LICENSE TERM EXPIRATION WITH THE PRIEST RAPIDS PROJECT LICENSE THAN TO THE ROCKY REACH SETTLEMENT AGREEMENT CONTRARY TO COMMISSION PRECEDENT AND POLICY.**

Chelan PUD recognizes that it is Commission policy to coordinate the expiration dates of licenses for projects in the same river basin to the greatest extent practicable to facilitate consideration of cumulative impacts.<sup>38</sup> However, in another proceeding, when confronted with essentially the same conflict as arises with the new Rocky Reach license between the coordination, license term and settlement policies, the Commission placed a higher priority on

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<sup>35</sup> Final Comprehensive Settlement Relicensing the Lake Chelan Hydroelectric Project No. 637 (filed October 17, 2003) at Section 5.1.

<sup>36</sup> FERC incorrectly concludes that the HCP expires February 1, 2052. License Order at ¶ 153. The actual expiration of the HCP is June 21, 2054 as discussed in Section IV.I below.

<sup>37</sup> HCP at Section 1.5.

<sup>38</sup> 18 C.F.R. §2.23.

compliance with its license term and settlement policies over any perceived benefits that might accrue from coordinating the expiration dates of projects in the same river basin.

In the Bigfork Project relicensing proceeding,<sup>39</sup> the Commission noted that the issuance of a 32-year license would be needed to coordinate the expiration date of Bigfork and Kerr Project No. 5, which was just downstream of Bigfork. However, the Commission granted a license of 50 years for the project, noting that the new Bigfork license included “many measures to protect fish and enhance recreation at the project,” and the licensee had “reached a Settlement Agreement with most of the interested parties in which a 50-year license was recommended,” and to which no party objected.<sup>40</sup> The Commission concluded that “in light of the expenditures required in this license, and the Settlement Agreement for the project” a 50-year license was appropriate.<sup>41</sup>

Similarly, the Rocky Reach Comprehensive Settlement Agreement provides many measures to protect fish and enhance recreation at the project. No party objects to a term of 50 years. Therefore, consistent with the Commission’s past precedent and policies, the Commission should grant Chelan PUD a 50-year license for Rocky Reach.

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<sup>39</sup> *PacifiCorp*, 104 FERC ¶ 62,059 at P. 61 (2003).

<sup>40</sup> *Id.* at P. 62.

<sup>41</sup> *Id.*

**G. THE COMMISSION ERRED AS A MATTER OF LAW AND FACT BY RELYING ON PURPORTED COORDINATION BENEFITS IN SETTING THE ROCKY REACH LICENSE TO EXPIRE AT THE SAME TIME AS THE PRIEST RAPIDS LICENSE WHEN, *INTER ALIA*, IT IS IMPOSSIBLE TO COORDINATE THE EXPIRATION DATES OF THE MID-COLUMBIA PROJECTS (WELLS, ROCKY REACH, PRIEST RAPIDS AND ROCK ISLAND) BECAUSE THE ROCK ISLAND LICENSE MUST BE RELICENSED IN 2028 FOR A TERM OF AT LEAST 30 YEARS PURSUANT TO THE STATUTORY MANDATE.**

FERC ordered a 43-year license term for the Rocky Reach Project in part due to a desire to coordinate the license terms of the Priest Rapids Project (issued in 2008 for 44 years) and a predicted license term for the Wells Project (license application due in 2010).<sup>42</sup> Linking the expiration of the Priest Rapids license to the Rocky Reach license is not justified or appropriate. That decision is arbitrary and capricious and is based on error of law and fact.

It is impossible to coordinate the license expiration dates of the Mid-Columbia Projects (Wells, Rocky Reach, Rock Island and Priest Rapids). As the Commission noted in the Priest Rapids license order, the Rock Island license expires in 2028, nineteen years from now, and the Commission may not issue a license for a term of less than 30 years.<sup>43</sup> Even if a new Rock Island license was issued as early as 2028, an expiration date of 2052 would result in a 24-year license. Therefore, regardless of any effort by the Commission to coordinate the license expiration dates for the Rocky Reach and Priest Rapids projects, the Rock Island Project will still need to be relicensed in 2028, thus largely defeating the perceived benefit of coordination. This is particularly true because the Rock Island Project is physically located between the Rocky Reach and the Priest Rapids Projects.

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<sup>42</sup> License Order at ¶ 152-153.

<sup>43</sup> *Id.* at P. 185.

Chelan PUD remains concerned that if the Priest Rapids and Rocky Reach licenses expire at the same time, the perceived benefits of coordination will not be achieved due to resource constraints faced by a number of the key agencies. We understand that FERC rejected this argument in the License Order,<sup>44</sup> however, the argument deserves reconsideration in light of the other issues raised herein regarding the appropriate license term. The Rocky Reach relicensing proceeding is a good example of the problems associated with a lack of resources and timing of proceedings. The Settlement Agreement was filed with the Commission in March 2006 and it took FWS nearly three more years to complete the necessary Biological Opinion under Section 7 of the ESA.

**H. THE COMMISSION ERRED AS A MATTER OF LAW AND FACT AND DENIED CHELAN PUD ITS DUE PROCESS RIGHTS BY PREJUDGING THE LENGTH OF THE ROCKY REACH LICENSE TERM IN THE PRIEST RAPIDS PROJECT PROCEEDINGS WHEN SUCH LICENSE TERM VIOLATES SECTION 10(a) OF THE FPA, COMMISSION PRECEDENT AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE.**

When the Commission issued a new license order for the Priest Rapids Project in 2008, the rationale for the 44-year license term included the opportunity to coordinate the expiration of the Priest Rapid's license term with the Rocky Reach and Wells Project license terms and the expiration dates of the HCP for Rocky Reach and Wells.<sup>45</sup> Chelan PUD was not a party to the Priest Rapids licensing proceeding. No facts regarding the Rocky Reach Project were considered nor were the provisions of the HCP addressed by the Commission. The owner of the Priest Rapids Project (Public Utility District No. 2 of Grant County, Washington) is not a party to the HCP. The Mid-Columbia hydroelectric projects all differ from each other in many ways,

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<sup>44</sup> License Order at P. 43, footnote 115.

<sup>45</sup> *Public Utility District No. 2 of Grant County, Wash.*, 123 FERC ¶ 61,049 at PP 182-187.

including their output, physical configuration, reservoirs, physical location and the protective, mitigation and enhancement measures associated with their operations.

The license term rationale of the Priest Rapids order and the errors of law and fact in the license order described herein indicate that the Commission improperly prejudged the Rocky Reach license term issue in the Priest Rapids proceeding without giving due consideration to particular law and facts relevant to the Rocky Reach license term. This error should be corrected by a grant of rehearing on the license term issue. The Commission should issue a 50-year license as requested herein.

Chelan PUD's request for rehearing is also based on fundamental concepts of due process. As stated, Chelan PUD was not a party to the Priest Rapids proceeding. The proceeding for the Rocky Reach license is a separate proceeding. The actions taken and to be taken by Chelan PUD must be fairly and fully considered on their own merits. It is well established law that parties in legal proceedings have a right to due process. As stated by the United States Supreme Court:

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.<sup>46</sup>

Chelan PUD has the right to have a material issue of license term decided in this proceeding based upon the record presented; not prejudged in a different and distinct proceeding.

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<sup>46</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 at 433 (1982).

**I. WHETHER THE COMMISSION ERRED AS A MATTER OF FACT BY USING AN INCORRECT EXPIRATION DATE RELATED TO THE HCP OF FEBRUARY 1, 2052 IN DECIDING THAT A 43-YEAR LICENSE TERM WAS APPROPRIATE. IN ORDER FOR THE ROCKY REACH LICENSE TERM TO CORRESPOND WITH THE HCP'S TERM, THE LICENSE TERM MUST EXTEND THROUGH AT LEAST JUNE 21, 2054 (A 45-YEAR TERM) AND SHOULD EXTEND THROUGH 2059 (A 50-YEAR TERM) BECAUSE THE HCP CONTEMPLATES A LICENSE TERM BEYOND THE TERM OF THE HCP.**

The HCP has staggered effective dates as described in Section 1 of the HCP. Pursuant to Section 1.2.2, the final effective date depended upon the last completed regulatory review and approval.<sup>47</sup> The last of those approvals occurred when the HCP was approved and incorporated into the Rocky Reach Project license by the Commission on June 21, 2004. The duration of the HCP was stated to be at least 50 years after that date, which would be June 21, 2054. There was also a clear understanding stated in the HCP that the parties anticipated that Chelan PUD would be required to continue implementation of the last agreed upon measures until FERC ordered otherwise.<sup>48</sup> This language supports issuance of the requested 50-year license, through 2059.

The License Order, however, states that the HCP will terminate on February 1, 2052.<sup>49</sup>

The Commission chose to issue a license term to coincide with the expiration date of the

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<sup>47</sup> “Upon Completion of Regulatory Reviews. The remainder of this Agreement shall be come effective on the *later of the following dates* (the latter date is the “Effective Date”) that: (1) the FERC issues a final order approving this Agreement and incorporating it into the Project’s license, (2) the NMFS issues the District a Permit for the Project based upon this Agreement, and (3) the USFWS completes necessary consultations under the ESA.” FERC approved agreement and incorporated it into the Project on June 21, 2004. HCP at Section 1.2.2(emphasis added). See NOAA Fisheries Permit for Incidental Take of Endangered/Threatened Species – Rocky Reach Hydroelectric Project, Permit No. 1392, signed by D. Robert Lohn, NOAA, Regional Administrator, on August 20, 2003.”

See USFWS biological and conference opinions regarding their review of the proposed license amendment to incorporate the Rocky Reach, Rock Island and Wells Anadromous Fish Agreements filed May 13, 2004.

<sup>48</sup> HCP at Section 1.5.

<sup>49</sup> License Order at ¶ 153.

HCP<sup>50</sup> issuing the license for a period of 43 years.<sup>51</sup> This conclusion is contrary to the HCP's actual effective date and duration and explained above.

This is an understandable oversight and one that Chelan PUD<sup>52</sup> and USFWS<sup>53</sup> has made in the past, but the record is clear that the effective date of the HCP was June 21, 2004. The following documents, in addition to the terms of the HCP itself, clearly support this conclusion:

- NMFS Terms and Conditions filed March 9, 2005, which states on page 14, Article 2, License Term, "The term of the new license shall not extend beyond June 21, 2054, the term of the Anadromous Fish Agreement and Habitat Conservation Plan for the Rocky Reach Hydroelectric Project, attached herein.... The HCP's effective date is June 21, 2004, with a 50-year term expiring in June 21, 2054."<sup>54</sup>
- The HCP application filed with the FERC on November 24, 2003, Attachment E, Page S-23 and Section S.5.3.2.<sup>55</sup>
- The Final Environmental Impact Statement (FEIS) filed by NMFS (in which the Commission participated as a cooperating agency) in December, 2002<sup>56</sup> states, "As a result, the effective date of the agreements would be the later of when (1) FERC issues a final order approving and incorporating the agreements in the

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at Ordering Paragraph (A).

<sup>52</sup> Letter from Richard Riazzi, Chelan PUD, General Manager, to Kimberly D. Bose, FERC Secretary, filed October 14, 2008.

<sup>53</sup> Letter from Preston A. Sleeper, U.S. Department of Interior, Regional Environmental Officer, to Magalie R. Salas, FERC Secretary, filed March 14, 2005, P. 2-3; Letter from Preston A. Sleeper, U.S. Department of Interior, Regional Environmental Officer, to Magalie R. Salas, FERC Secretary, filed June 2, 2005, P. 29-30.

<sup>54</sup> NMFS's Motion to Intervene, Comments, Recommended Terms and Conditions, and Preliminary Fishway Prescriptions (filed March 9, 2005).

<sup>55</sup> Application for Approval of the Rocky Reach Anadromous Fish Agreement and Habitat Conservation Plan (filed November 24, 2003).

<sup>56</sup> HCP FEIS at P S-23 (Section S.5.3.2 HCP Term) (issued December 2002).

project licenses, (2) NMFS issues an incidental take permit, and (3) the USFWS completes the necessary consultation under the Endangered Species Act.”<sup>57</sup>

- Incidental Take Permits issued by NMFS issued in August, 2003 (Permit Number 1392) at page 2 states that the period of the permit is fifty years from the Effective Date of the HCP. NMFS then stated: “Thus, the likely expiration of this Permit will be sometime in 2053 or 2054.”<sup>58</sup> This statement obviously was based upon the expectation that FERC would issue a Final Order approving the HCP sometime in 2003 or 2004. FERC issued the order on June 21, 2004.

Thus, even if the Commission determines the license term should be commensurate with the term of the HCP, that would result in at least a 45-year term, expiring in June 2054. Further, the HCP itself supports a 50-year license term due to its provisions requiring Chelan PUD to implement agreed-upon measures until FERC orders otherwise and the extensive environmental measures required by its provisions.

As described above, the HCP is the cornerstone of the extensive Settlement Agreement for the new Rocky Reach license. It is a travesty that the HCP, under which extensive investments in environmental measures are made, is now being used as the justification for granting Rocky Reach a license term of less than 50 years.

**J. THE COMMISSION ERRED AS A MATTER OF LAW AND FACT BY INCLUDING IN THE LICENSE ORDER AN INCORRECT STATEMENT THAT ESA CRITICAL HABITAT FOR BULL TROUT OCCURS WITHIN THE PROJECT AREA.**

The License Order at Paragraph 56, incorrectly states: “...the bull trout, listed as threatened, and its designated critical habitat also occur in the project area.” As discussed in the U.S. Department of Interior’s USFWS Biological Opinion on the Effects of the Rocky Reach

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<sup>57</sup> USFWS biological and conference opinions regarding their review of the proposed license amendment to incorporate the Rocky Reach, Rock Island and Wells Anadromous Fish Agreements filed May 13, 2004.

<sup>58</sup> NOAA Fisheries Permit for Incidental Take of Endangered/Threatened Species – Rocky Reach Hydroelectric Project , Permit No. 1392, signed by D. Robert Lohn, NOAA, Regional Administrator, on August 20, 2003.



Hydroelectric Project Relicensing on Bull Trout<sup>59</sup> the critical habitat for bull trout does not occur within the Project area.

The License Order, Paragraph 56 should be corrected to read as follows:

The Upper Columbia River (UCR) spring-run Chinook salmon and the UCR steelhead are federally listed as endangered and occur in the project area, as does designated critical habitat of these species; the bull trout, listed as threatened, also occurs in the project area. Critical habitat for bull trout does not occur within the project area. In the EIS, staff addressed the project's effects on these species and their critical habitat.

## **V. DISCUSSION OF PROVISIONS OF THE LICENSE ORDER REQUIRING CLARIFICATION**

### **A. CHELAN PUD INADEQUATELY DESCRIBED IN ITS RECREATIONAL MANAGEMENT PLAN A PROPOSED LEASE (WITH OPTION TO PURCHASE) OF LAND OWNED BY CHELAN PUD TO THE CITY OF ENTIAT AND THE LICENSE ORDER, THEREBY INCORRECTLY REFLECTING THE NATURE OF THAT LEASE IN CONCLUDING THAT CHELAN PUD MAY NOT SELL THE PROPERTY.**

Chelan PUD has proposed to lease 9.32 acres of Chelan PUD-owned land to the City of Entiat with an option to purchase such land in 2012. A majority of this land (six acres) is not within the Project boundary and is located some distance away from Entiat Park. The upland portion of the property, which is outside the Project boundary, is being used as a gravel mining operation. Clearly, the lease/sale of the land outside the project boundary does not require FERC approval.

The License Order incorrectly concludes that this parcel is within or is associated with the Entiat Park and thus Chelan PUD may not sell the land.<sup>60</sup> Chelan PUD did not provide sufficient information to clearly describe that the six acres of land owned by Chelan PUD is

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<sup>59</sup> USFWS Biological Opinion on the Effects of the Rocky Reach Hydroelectric Project Relicensing on Bull Trout (FERC No. 2145) filed December 8, 2008, at P. 124, last paragraph and cover letter at P. 2, ¶ 6.

<sup>60</sup> License Order at ¶ 119.

outside the Project boundary and not part of Entiat Park in the Preliminary Draft Environmental Assessment, dated June 30, 2004,<sup>61</sup> nor the Recreation Management Plan.<sup>62</sup>

There was a different and distinct transaction pursuant to which Chelan PUD was obtaining land from the City of Entiat so that Chelan PUD would own in fee title all park property. This transaction included an exchange of land with the City of Entiat. That transaction has been previously submitted to FERC for approval.<sup>63</sup>

Chelan PUD is requesting that the License Order be corrected to reflect the nature of this lease and sale of the 9.32 acres to the City of Entiat. Accordingly, we are requesting that the License Order,<sup>64</sup> Paragraph 119, be changed to read:

Chelan PUD included in its Recreation Management Plan a decision to lease (with an option to purchase) 9.32 acres of land to the City of Entiat. This land is not part of the Entiat Park and the majority of this land is located outside the project boundary. Consequently, Chelan PUD's decision to sell or lease the land located outside the project boundary is unrelated to project purposes. It is our policy that licensees retain ownership and the rights necessary and appropriate for the construction maintenance, and operation of the project. Therefore, Chelan PUD will retain ownership rights to that portion of the property that is currently within the project boundary. The remainder of the parcel located outside the project boundary is not subject to FERC's approval for its disposition. Chelan PUD may lease and sell the land outside its Project boundary as it deems appropriate.

License Article 406 requires Chelan PUD to file with the Commission, within one year of license issuance, a revised Rocky Reach Recreation Resources Management Plan. Chelan PUD will make this same correction in the filed Recreation Resources Management Plan.

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<sup>61</sup> Final Preliminary Draft Environmental Assessment for the Rocky Reach Hydroelectric Project No. 2145 (filed June 29, 2004).

<sup>62</sup> Settlement Agreement at P. 9-37 (Section 4.5.4).

<sup>63</sup> Application for Approval of Exchange of Project Lands under P-2145 (filed June, 9, 2008).

<sup>64</sup> License Order at ¶ 119.

**B. THE LICENSE ORDER INCORRECTLY STATES THAT UTE LADIES'-TRESSES ARE LOCATED OUTSIDE THE PROJECT BOUNDARY. THE LAND UPON WHICH THE UTE LADIES'-TRESSES ARE LOCATED IS CURRENTLY WITHIN THE PROJECT BOUNDARY AND CHELAN PUD IS IN COMPLIANCE WITH THE PROPOSED LICENSE ARTICLE 404.**

The License Order at Paragraph 88, states: “One of the four populations occurs on lands outside of Chelan PUD’s control at a location known as Howard Flats... Staff also agreed with Chelan PUD’s proposal to acquire a conservation easement to protect this population. Thus, the licensee must bring this area into the project boundary.”<sup>65</sup> Additionally, Article 404(4) issued by the Commission requires Chelan PUD acquire through conservation easement, fee-title, or other instrument sufficient rights to implement the above measures and protect the population located at Howard Flats for the term of the license... Upon acquisition of such rights, all lands covered under the agreement shall be brought into the project boundary (to the extent that these lands are not already within the project boundary) and shown on revised drawing.”<sup>66</sup>

In its August 2006 FEIS,<sup>67</sup> FERC staff noted on page 146, Rare Plant Species, that the rare plant survey conducted during 1999-2000 by Calypso Consulting did not differentiate whether populations were within or just outside of the Project boundary. Therefore, it is evident the FERC staff did not have sufficient evidence to make a determination as to whether the Ute Ladies’-tresses located at Howard Flats were within or outside the project boundary. The Ute Ladies’-tresses populations are located well within the Project boundary. Supplemental information documenting the location of Ute Ladies’-tresses within the Project boundary will be provided to the Commission if required.

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<sup>65</sup> License Order at ¶ 88.

<sup>66</sup> *Id.*

<sup>67</sup> Rocky Reach FEIS (filed Aug. 4, 2006).

The License Order at Paragraph 88 should be corrected to read as follows:

FWS and Washington DFW recommended that Chelan PUD implement its management plan to protect and monitor four populations of the Ute ladies'-tresses, which are located on lands along the reservoir hydraulically connected to the project reservoir, subject to reservoir fluctuations, and potentially threatened by invasive plants. One of the four populations occurs within the project boundary on private land at a location known as Howard Flats. Commission staff agreed with this recommendation because weed control would protect the existing populations from competition with invasive weeds and monitoring would provide information to help determine the species habitat requirements and the influences of water fluctuations on those requirements. Staff also agreed with Chelan PUD's proposal to acquire a conservation easement to protect this population.

## VI. CONCLUSION

For the reasons expressed above, Chelan PUD respectfully requests that the Commission grant rehearing of the license term (increasing the license term to 50 years) and the bull trout habitat issues. Chelan PUD further requests the Commission to clarify the order with respect to the lease and sale of land outside the Project boundary and the land upon which the Ute Ladies'-tresses are located as identified herein.

Dated this 20th day of March 2009.

Respectfully submitted,



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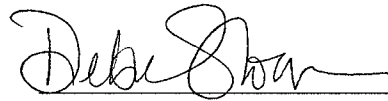
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**CERTIFICATE OF SERVICE**

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 20th day of March 2009.



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