

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PUBLIC UTILITY DISTRICT NO. 1 OF) PROJECT NO. 2149
DOUGLAS COUNTY, WASHINGTON) WELLS HYDROELECTRIC PROJECT

REQUEST FOR RECONSIDERATION OF PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON

Public Utility District No. 1 of Douglas County (Douglas PUD) hereby respectfully requests reconsideration of the May 16, 2013 Order on Rehearing and Clarification for the relicensing of the Wells Hydroelectric Project (Project). *Public Utility District No.1 of Douglas County, WA*, 143 FERC ¶61,130 (2013) (Rehearing Order). Douglas PUD seeks reconsideration of the Commission's conclusions that the Commission staff reasonably excluded the Habitat Conservation Plan (HCP) measures from the license term analysis, and that the Commission staff did not err by selecting a 40-year term. Douglas PUD requests reconsideration because these conclusions are based upon clearly erroneous statements that are contrary to Commission precedents involving the Wells Project and thus are not supported by substantial evidence.

BACKGROUND

The Director of the Office of Energy Projects (Director) issued a new license for the Wells Project in 2012. *Public Utility District No. 1 of Douglas County, WA* 141 FERC ¶61,130 (2012) (Relicense Order). The Director limited the term of the new license to 40 years rather than the 50-year term recommended by the federal, state and tribal parties to the Aquatic Settlement Agreement and the parties to the other agreements supporting relicensing. Douglas PUD contended that the HCP measures should be included in the license term analysis because it

proactively and voluntarily entered into the 50-year HCP agreement to address salmon and steelhead (anadromous fish) and Endangered Species Act (ESA) issues that would have been raised in the relicensing of the Wells Project. However, the Director decided to exclude the HCP measures on the grounds that they were already required under the existing license, and that the remaining measures were deemed “moderate” under the *Consumers Power* policy.¹ Douglas PUD filed a timely Request for Rehearing of the license term issue, which was denied by the Commission in the Rehearing Order issued May 16, 2013.

REHEARING ORDER FINDINGS AND CONCLUSIONS

In addressing Douglas PUD’s Request for Rehearing, the Commission first stated that it had issued an order in 1979 commencing the Mid-Columbia Proceeding to consider whether to modify operations and flows of the Mid-Columbia project licenses and to consider what fish measures should be required for the remainder of the license terms.² Rehearing Order at P 6.

Next, the Rehearing Order asserts:

“In 2003, Douglas PUD proposed amending its license to include the Habitat Conservation Plan (HCP) for the purpose of settling the Wells portion of the Mid-Columbia Proceeding.” *Id.* at P 7.

As stated in the Rehearing Order, the Wells HCP was approved in 2004.³

The Commission noted that the Relicense Order referred to the order on rehearing in the relicensing proceeding for the Rocky Reach Project⁴ for the proposition that the HCP measures in prior licenses should be excluded when considering the amount of mitigation and enhancement measures contained in the new license. The Rehearing Order then stated:

¹ *Consumers Power Co.*, 68 FERC ¶61,077 at 61,383-84 (1994).

² *Public Utility District No. 1 of Grant County, WA, et al., Docket No. E- 9569, et al.*, 6 FERC ¶61,210 (1979).

³ *Public Utility District No. 1 of Chelan County, WA and Public Utility District No. 1 of Douglas County, WA*, 107 FERC ¶61,280.

⁴ *Public Utility District No. 1 of Chelan County, WA*, 127 FERC ¶61,152 at P 14 (2009).

“As we explain above, Douglas PUD’s obligations under its HCP are meant to address longstanding salmon and steelhead issues. Douglas PUD primarily entered into the HCP for purposes of resolving long-standing ESA issues, not for the purpose resolving relicensing issues early, meaning Douglas PUD had less discretion regarding the HCP than it implies. Douglas PUD was able to reap the monetary benefit of operating its project without these requirements for the more than 20 years that it took to develop appropriate protection measures for the fishery.” *Id.* at P 14.

Based upon the foregoing, the Rehearing Order concluded that “Commission staff reasonably excluded the HCP measures from the license term analysis.” *Id.*

The Rehearing Order also rejected Douglas PUD’s reliance on two New York projects to argue that its measures were extensive under the *Consumers Power* policy. In response the Rehearing Order stated that the measures contained in the Mid-Columbia projects, i.e., Rocky Reach and Priest Rapids, “provide a more appropriate standard for comparing license terms than the two New York projects cited by Douglas PUD.” *Id.* at P 15. Based upon the foregoing, the Rehearing Order determined that “the Commission staff did not err by selecting a 40-year term.” *Id.* at 17.

RELIANCE ON CLEARLY ERRONEOUS STATEMENTS

Each of the key assertions underlying the foregoing conclusions in the Rehearing Order is untrue and contrary to Commission precedents involving the Wells Project.

First, Douglas PUD did not propose amending its license to include the HCP for the purpose of settling the Wells portion of the Mid-Columbia Proceeding. The Commission’s 2004 order approving the HCPs cited by the Rehearing Order correctly states:

“Long term settlement agreements on anadromous fishery issues were approved in 1989 and 1991 with respect to Rock Island and Wells, respectively. ... **The order approving the Wells Agreement incorporated that agreement into the Wells license, which expires in 2012, and terminated the Mid-Columbia proceeding as to the Wells Project.**” (emphasis added). *Public Utility District No. 1 of Chelan County, WA and Public Utility District No. 1 of Douglas County, WA*, 107 FERC ¶61,280 at P 10 (2004). (HCP Order).

The 1991 Commission order cited in the HCP Order confirms that the 1990 Wells Agreement “emerged from our consolidated proceeding on anadromous fish issues on the mid-Columbia River” and was a comprehensive, uncontested, long-term settlement of such issues arising out of the operation of the Wells Project. *Public Utility District No. 1 of Douglas County, WA*, 54 FERC ¶61,056 at 61,208 (1991). The Wells Agreement had a term from its execution date in 1990 to the expiration of the initial license (2012) plus any annual licenses. Douglas PUD was obligated to provide juvenile and adult fish passage and a hatchery program to mitigate fish passage losses at the Project. The settlement also provided for continued studies and evaluations of the various program measures.

The Joint Fishery Parties to the 1990 Wells Agreement agreed that the Wells Project portion of the Mid-Columbia Proceeding should be terminated. The Joint Fishery Parties also stated that Douglas PUD’s performance of its responsibilities under the Wells Agreement “satisfies Douglas PUD’s fish protection and compensation obligations under the Federal Power Act and all other applicable laws and regulations.” The Commission found that the Wells Agreement was in the public interest and balances the continued operation of the Wells Project with “an effective, long-term program for the protection, mitigation and enhancement of the fishery resources affected by the project.” *Id.* at 61,209. As a result, Ordering Paragraph (B) provided “**the Wells Project No. 2149 portion of the proceeding in Docket No. E-9569 is terminated.**” (emphasis added.) *Id.* at 61,210.

It is important to recognize that the Mid-Columbia Proceeding was still pending in 2004 with respect to the Rocky Reach Project when the HCPs were filed with FERC. HCP Order at PP 18, 29-30. Unlike the Wells Project, the Commission’s approval of the HCP for the Rocky

Reach Project was the basis for terminating the Mid-Columbia Proceeding insofar as it pertained to the Rocky Reach Project. *Id.* at P 30 and Ordering Paragraph (F).⁵

Subsequently, when the issue of whether the Rocky Reach HCP measures should be included in the license term analysis for the Rocky Reach Project, the Commission's Order on Rehearing and Clarification held that such measures should be excluded based on the following:

“As explained above, Chelan PUD's obligations under the HCP are meant to address salmon and steelhead issues that arose in a process that began in 1978. In addition, Chelan PUD acted in order to bring itself into compliance with the ESA, not simply for the purpose of resolving relicensing issues early, as suggested in its rehearing request. Chelan PUD was able to reap the monetary benefit of operating its project without these requirements for the more than 20 years that it took to develop appropriate protection measures for the fishery. Consequently, when it comes to determining the term under the relicensing proceeding, the Commission properly adopted a forward-looking approach that excluded measures adopted under the previous license, consistent with precedent.”
Public Utility District No. 1 of Chelan County, WA, 127 FERC ¶61,152 at P 14 (2009). (Rocky Reach Order on Rehearing).

The quoted language from the Rocky Reach Order on Rehearing is virtually identical to Paragraph 14 of the Order on Rehearing in this proceeding. However, such language is clearly untrue with respect to the Wells Project because the Wells portion of the Mid-Columbia Proceeding had already been terminated over 20 years ago based upon the Commission's approval of the Wells Agreement in 1991.

The foregoing Commission precedents involving the Wells Project establish that the Rehearing Order relied upon clearly erroneous findings and assumptions in reaching the conclusion that Commission staff reasonably excluded the Wells HCP measures from the license term analysis and did not err by selecting a 40-year license term. As established above, Douglas PUD did not enter into the HCP for the purpose of settling the Wells portion of the Mid-

⁵ Because fishery issues had not been resolved at Priest Rapids, the Commission left the issue of terminating the portion of the Mid-Columbia Proceeding pertaining to the Priest Rapids Project to the discretion of the Chief Administrative Law Judge. HCP Order at P 30.

Columbia proceeding or for settling long-standing ESA issues. The Commission had previously terminated the Wells portion of the Mid-Columbia Proceeding in 1991 based on its approval of a comprehensive settlement agreement for the remainder of the initial license term. Thus, appropriate long-term anadromous fish measures were already in place for over two decades and the Wells HCP was not entered into for the purpose of resolving any long-standing issues. Since Douglas PUD already had an approved comprehensive agreement for the remainder of the license term, it did not enter into the HCP agreement for the purposes alleged in the Rehearing Order and the assertion that Douglas PUD “had less discretion regarding the HCP than it implies” is simply untrue.

Douglas PUD entered into the HCP Agreement to address future anadromous fish issues that would reasonably be raised when the 1990 Wells Agreement and the initial license both expired in 2012. As an alternative to the HCP, Douglas PUD could have chosen to rely on the relicensing process and the associated ESA Section 7 consultation to identify the new, long-term anadromous fish measures necessary to support relicensing. If it had done so, such measures would surely have been included in the license term analysis. Since the HCP was voluntary and intended to accomplish the same long-term objectives, its measures should also be included. The fact that Douglas PUD voluntarily filed for a license amendment in 2004 to approve the HCP and facilitate early implementation should not detract from the fundamental importance of the HCP to satisfy all requirements for anadromous fish for the term of the new license.

The allegation that Douglas PUD was able to reap the monetary benefit of operating its Project for more than 20 years without appropriate protection measures is also untrue. Commission precedent establishes that the Commission found the 1990 Wells Agreement provided a long-term and effective program for the protection, mitigation and enhancement of

fishery resources affected by the Project. The Joint Fishery Parties stated that compliance with that agreement would satisfy all of Douglas PUD's obligations under the Federal Power Act and all other applicable laws and regulations. Thus, the Wells Project has borne the cost of operating since at least 1991 subject to approved, comprehensive measures and Douglas PUD clearly did not reap any monetary benefit from the absence of such measures as alleged in the Rehearing Order.

The foregoing review also shows that it is not appropriate to exclude the Wells HCP measures from the license term analysis based upon the Rocky Reach precedent instead of the record pertaining to the Wells HCP. Unlike the Wells HCP, the approval of the Rocky Reach HCP in 2004 provided the basis for termination of the Rocky Reach portion of the Mid-Columbia Proceeding. Thus, the approval of the Rocky Reach HCP is more comparable to the approval of the 1991 Wells Agreement because they both resolved long-standing fishery issues under the initial license. The same cannot be said for the Wells HCP. It was entered into proactively and voluntarily to ensure ESA compliance for a term of 50 years as well as to satisfy all of the anadromous fish protection, enhancement and mitigation requirements for the term of the new license for the Wells Project. The Wells HCP is therefore exclusively forward looking and this important difference provides a reasonable basis to distinguish the Rocky Reach precedent and to include the Wells HCP measures in the license term analysis consistent with established Commission policy.

RECONSIDERATION OF LICENSE TERM ISSUES

In view of the foregoing Douglas PUD requests that the erroneous statements in the Rehearing Order be eliminated, and that the Rehearing Order be revised to be accurate and consistent with Commission precedents involving the Wells Project. Douglas PUD further

requests that the Commission reconsider its conclusions that are based on such erroneous statements, i.e., that Commission staff reasonably excluded the HCP measures from the license term analysis and did not err by selecting a 40-year term. For the reasons set forth above and in its Request for Rehearing, Douglas PUD submits that the HCP measures should be included in that analysis, and that such measures (\$9 million annually) combined with the other relicensing measures are extensive and warrant a 50-year term under the *Consumers Power* policy.

Douglas PUD recognizes that a 50-year license term may be reduced under the Commission's policy to coordinate license expiration dates to better consider cumulative impacts. However, the potential for cumulative impacts resulting from the Wells Project is very limited due to its high fish survival rates and location at the upstream terminus of the migration. *See* Douglas PUD Request for Rehearing at 12-15. Moreover, the Washington Department of Ecology and the Washington Department of Fish and Wildlife have explicitly recommended that the Wells license expiration **not** be coordinated with Rocky Reach and Priest Rapids. *See* Douglas PUD Request for Rehearing at 15-17. In this context Douglas PUD believes that the Commission should also re-evaluate whether its coordination policy should be applied to limit the license term for the Project notwithstanding that it qualifies for a 50-year term under *Consumers Power*.

CONCLUSION

Wherefore, Douglas PUD respectfully requests the Commission to grant reconsideration of its Order on Rehearing to correct the erroneous statements contained therein and to reconsider the conclusions based upon such statements with respect to the license term issues accordingly.

Respectfully submitted,

/s/ James B. Vasile

James B. Vasile
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20006-3401
(202) 973-4200
jamesvasile@dwt.com

/s/ Shane Bickford

Shane Bickford
Natural Resources Supervisor
Public Utility District No. 1 of Douglas County
East Wenatchee, WA 98802
(509) 881-2208
sbickford@dcpud.org

DATED: June 12, 2013

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.

Dated at East Wenatchee, Washington, this 12th day of June, 2013.

/s/ Mary Mayo

Mary Mayo

Administrative Assistant - Relicensing

Public Utility District No. 1 of Douglas County

East Wenatchee, WA 98802

(509) 881-2208

sbickford@dcpud.org

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