UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of	)	Wells Hydroelectric
Douglas County, Washington	)	Project No. P-2149-152

BONNEVILLE POWER ADMINISTRATION AND THE U.S. ARMY CORPS OF ENGINEERS, REQUEST FOR REHEARING OF FERC ORDER ISSUING NEW LICENSE AND REQUEST FOR CLARIFICATION REGARDING ENCROACHMENT CALCULATION

Bonneville Power Administration (Bonneville) and the U.S. Army Corps of Engineers, (Corps) (referred together as "Agencies") hereby file the following Request for Rehearing and Clarification regarding the appropriate calculation of encroachment compensation included in Public Utility District No. 1 of Douglas County's (Douglas) license for the Wells Hydroelectric (Wells), FERC Project No. P-2149-152, issued on November 9, 2012.

The Agencies have had numerous discussions with Douglas regarding encroachment and adverse impacts of the Wells Project on the federally owned Chief Joseph Dam. These discussions resulted in an agreement in principle filed with the Commission on November 9, 2011 (*see Comments of Bonneville Power Administration, the United States Army, Corps of Engineers and Public Utility District No. 1 of Douglas County, on Encroachment Compensation).* Although the Commission incorporated language from the agreement in principle in the new license for Wells (*see* Article 203), the Agencies believe that the language used in the new license mistakenly deviates from the intent of the agreement in principle. As described below (*see* Statement of Issues), a simple editorial change in the new license language will correct this mistake.

In addition, the Agencies are submitting this Request for Rehearing for the Commission to clarify the extent of encroachment payments. Subsequent to the agreement in principle filing, the Agencies and Douglas commenced negotiations for a contract that would reflect the intent of the filing. It has now become apparent that despite numerous attempts to resolve the issue, there is a fundamental disagreement between the Agencies and Douglas regarding appropriate encroachment compensation. In particular, the Agencies and Douglas disagree as to whether the encroachment calculation should include the impact on Chief Joseph as it exists today or as it existed at the time the original Wells license was issued. Based on this impasse, the Agencies are requesting the Commission issue a finding, or include a provision in the new Wells Project license, that clarifies the appropriate approach to encroachment calculation.

I. BACKGROUND AND LICENSE TERMS

Chief Joseph Dam is located approximately thirty (30) miles upstream from Wells. When FERC initially authorized the construction of Wells, it was recognized that encroachment of Chief Joseph would occur. Encroachment occurs when the tailwater elevation of a hydroelectric project is impacted by the forebay elevation of a second hydroelectric project. Energy production from a unit of water is directly proportional to operating head, which is the difference between the forebay elevation and tailwater elevation; the greater distance between a hydroelectric project's forebay elevation and tailwater elevation the greater the project's operating head which in turn increases energy production at the project. If the tailwater elevation is increased or the forebay elevation decreased, a hydroelectric project's generating capacity is reduced.

At the time the Wells project was first authorized, Chief Joseph Dam's generating units 1-16 were completed and plans for generating units 17-27 were well underway. FERC acknowledged the impact of the Wells project on Chief Joseph Dam's tailwater elevation and determined that Douglas must provide compensation for encroachment as a condition of its license. This compensation took two forms: for units 1-16 the loss is "computed on the basis of using the same quantity of water at any given time through the units of the Chief Joseph powerhouse with and without the Wells Project;" for units 17-27 Douglas was required to "compensate the United States for the increased cost of future turbines . . . required to generate the same power under reduced head conditions as a result of the encroachment." Public Utility District No. 1 of Douglas County's Wells Project, FERC License P-2149, Art. 32 (1962).

Pursuant to Douglas' original license requirements, Douglas and the Corps entered into an encroachment agreement that expired concurrently with Douglas' original FERC license for Wells. In addition, because Bonneville is the federal agency responsible for marketing the power generated at Chief Joseph Dam, Bonneville and Douglas executed an agreement covering the delivery of power from Douglas to Bonneville needed to compensate the Agencies for encroachment (both agreements are hereafter referred to as "the Agreements."). In 1982 this arrangement was modified to account for a pool raise at the Wells project that further impacted Chief Joseph's tailwater. Douglas agreed to provide additional compensation for: (1) units 1-16, taking into account planned unit upgrades; and (2) units 17-27 for the forebay elevation of 779-781.

On November 9, 2012, the Commission granted Douglas a new 40 year license for the Wells Project. The new license includes a provision requiring Douglas to provide compensation for encroachment that is consistent with the Federal Power Act and with the November 9, 2011 agreement in principle filing submitted to FERC by the Agencies and Douglas.

II. APPLICABLE LAW

The continued encroachment of Chief Joseph Dam by the operation of Douglas' Wells Project is compensable pursuant to 16 USC §803 of the Federal Power Act, "Conditions of License Generally." 16 USC §803(c) requires the following:

> *Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefore.*

FERC initially found that the construction, maintenance and operation of Wells "damaged" the ability of Chief Joseph Dam to generate power because of the encroachment. In the years following the issuance of the initial license, there has been no reduction in the damage. In fact the impact of the Wells encroachment is now greater than when the original license was issued because of changes to the capacity and operations of Wells and Chief Joseph. It is therefore appropriate to continue the requirement that Douglas compensate the United States for lost generation in the new license.

FERC is not bound to the terms of the original license. 16 USC §808(a)(1) provides that:

> *[t]he commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations. . .*

It is clear from these provisions that FERC is authorized to issue license terms that are appropriate at the time of relicensing, including a directive to provide for compensation even if those terms deviate from the original license. Douglas has acknowledged FERC's authority in its license application "The FERC may substantially alter any past measure as a condition to a new license, or drop it entirely, if it believes current circumstances justify such modification or elimination." *Wells Hydroelectric Project No. 2149 Final Relicensing Application*, at H-21 (May 27, 2010).

III. NEGOTIATIONS BETWEEN THE AGENCIES AND DOUGLAS

In response to Douglas' relicensing application and FERC's *Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions* for the relicense application, the Agencies filed comments on July 29, 2010 that listed several recommended provisions. Included in this list of recommendations was a request that FERC require Douglas to provide compensation for the encroachment on Chief Joseph Dam. Douglas in turn filed a response to the Agencies recommendations, disagreeing with the proposal, and submitted its own recommendation. See *Douglas PUD's NREA Reply Comments for Wells Project 2149,* at 3 (November 23, 2010).

In an attempt to resolve this issue, the Agencies and Douglas met on several occasions. In October of 2011, an apparent consensus was reached on principles for an agreement and comments describing these principles were filed with the Commission on November 9, 2011. Five principles were discussed in the filing: (1) compensation for Units 1-16; (2) compensation for units 17-27; (3) compensation during Chief Joseph Spill Operations; (4) one-time payment; and, (5) timing of replacement power.

Subsequent to the filing, the Agencies and Douglas worked on finalizing a contract that would incorporate the principles and last through the duration of the new license. Although progress and apparent agreement has been made on principles 2, 4 & 5, it has become clear that there is a fundamental disagreement regarding principles 1 and 3. It is now evident that an agreement on appropriate compensation, without additional guidance from FERC, is not feasible

IV. STATEMENT OF ISSUES

A. Error in License Language

The November 9, 2011 principles of agreement filing proposed that:

> *Douglas would continue to provide encroachment payments for Units 17 – 27 for forebay elevations 779 – 781. In addition, because additional water must be passed through the larger units 17 – 27 to generate the same power under reduced head conditions as a result of encroachment of the Wells pool on Chief Joseph tailwater, Douglas would provide compensation for the excess water use for forebay elevations 771 – 779. Compensation would be based on the amount of water used in units 17 – 27 in excess of the hydraulic limit of the smaller units that would have been installed without the Wells Project.*

In comparison, Article 203 of the new issued license states:

> *For Chief Joseph Units 17-27, the licensee will provide compensation for the excess water use between forebay elevations 779 and 781 feet mean sea level. Compensation will be based on the amount of water used by Chief Joseph Units 17-27 in excess of the hydraulic limit of the smaller units that would have been installed without the Wells Project.*

Although the provision included in the new license is similar to the proposal by the Agencies and Douglas, the differences between the two has impacts not likely foreseen by the Commission. The Agencies therefore recommend revised language that will capture the intent of the principles set for in the November 9, 2011 filing. In that filing, the parties agreed that encroachment compensation for Units 17 – 27 would consist of the incremental cost of future unit replacements, compensation for encroachment losses for the 779 – 781 feet mean sea level range, and the excess water use of the larger turbines for forebay elevations 771 – 779 feet mean sea level. Without a revision to the new license provision, the federal government would not be properly compensated for encroachment losses in the 779 – 781 feet mean sea level range nor the additional compensation for excess water use in the 771 – 779 feet mean sea level range.

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Therefore, the Agencies request that Article 203 of the new license be revised to include the following:

> *For Chief Joseph Units 17 – 27, the licensee will provide compensation for encroachment losses between forebay elevations 779 and 781 feet mean sea level. In addition, the licensee will provide compensation for the excess water use for forebay elevations 771 – 779 feet mean sea level. Excess water use compensation will be based on the amount of water used by Chief Joseph Units 17 – 27 in excess of the hydraulic limit of the smaller units that would have been installed without the Wells Project.*

B. Clarification of the Extent of Encroachment

The basis of the disagreement between the Agencies and Douglas is whether encroachment calculations should be based on Chief Joseph as it existed in 1962, when Douglas received its original license for the Wells Project, or as it exists when the new license was issued on November 9, 2012. In 1962, Chief Joseph units 1-16 each had an 80 MW generating capacity. Since that time the units have been upgraded to be capable of generating 96 MW of energy. Although these upgrades occurred in the 1980s, the Agencies did not request additional compensation at that time because of limitations in the terms of the original Agreements between the Agencies and Douglas. In May 2010, the Corps began upgrading the units to 106 MW with an estimated completion date in Fiscal year 2014.

Now that Douglas has a new license for the Wells Project the Agencies believe it is appropriate to calculate encroachment as it exists in 2012, the time of relicensing. When Douglas filed its application for relicense, it was aware that it would be responsible for compensating the Agencies for the damages caused by encroachment of the Wells project on Chief Joseph. However, Douglas' approach has been to artificially limit compensation by looking at Chief Joseph operations in the 1960s, rather than its current operations. That approach results in uncompensated injury to the Agencies. Douglas' liability for damages under 16 USC §803(c) is not limited to conditions that existed at the time of the original license and it should be required to provide full compensation.

Without guidance on whether Chief Joseph encroachment should be calculated based on current operations or on 1962 operations, the Agencies and Douglas are at a standstill in its contract negotiations. The Agencies respectfully request that FERC issue a finding, or include a provision in the new Wells license, that states Douglas is responsible for compensating the Agencies for the full impact of its project on Chief Joseph dam as it exists today.

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Thank you for considering Bonneville and the Corps Request for Rehearing and Clarification.

Dated this 10th Day of December, 2012.

Respectfully submitted,

/s/ Julee A. Welch (by electronic filing)

Julee A. Welch, Attorney
Office of General Counsel, LP-7
Bonneville Power Administration
PO Box 3621
Portland, OR 97208-3621
Phone: (503) 230-7348
jawelch@bpa.gov

/s/ Virginia K. Ryan (by electronic filing)

Virginia K. Ryan, Assistant District Counsel
Seattle District, U.S. Army Corps of Engineers
P.O. Box 3755
Seattle, WA 98124-3755
Phone: (206) 764-3642
virginia.ryan@usace.army.mil

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2011), I hereby certify that I have, on this day, served an electronic or hard copy of the foregoing document upon each person designated on the service list established in Project No. P-2149-152.

Dated this 10th day of December, 2012.

\s\ Julee A. Welch
Julee A. Welch, Attorney
Office of General Counsel, LP-7
Bonneville Power Administration
PO Box 3621
Portland, OR 97208-3621
Phone: (503) 230-7348
jawelch@bpa.gov