

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

**PUBLIC UTILITY DISTRICT NO. 1 OF) PROJECT NO. 2149-154
DOUGLAS COUNTY, WASHINGTON) WELLS HYDROELECTRIC PROJECT**

**MOTION FOR LEAVE TO FILE ANSWER AND ANSWER OF PUBLIC UTILITY
DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, TO THE BONNEVILLE
POWER ADMINISTRATION AND THE U.S. ARMY CORPS OF ENGINEERS
REQUEST FOR REHEARING OF FERC ORDER ISSUING LICENSE AND REQUEST
FOR CLARIFICATION REGARDING ENCROACHMENT CALCULATION**

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure,¹ Public Utility District No. 1 of Douglas County, Washington (Douglas PUD), licensee for the Wells Hydroelectric Project No. 2149 (Wells Project), hereby requests leave to file an answer and submits this Answer to the Request for Rehearing of FERC Order Issuing License and Request for Clarification Regarding Encroachment Calculation filed by the Bonneville Power Administration (BPA) and the U.S. Army Corps of Engineers (Corps) on December 10, 2012 (BPA/Corps Request).

The November 9, 2012 FERC Order (Licensing Order) issued a new license to Douglas PUD for the continued operation of the Wells Project located on the Columbia River in Washington. The BPA/Corps Request seeks a correction to an error in the language of new license Article 203 and a “clarification of the extent of encroachment” based upon allegations concerning the status of negotiations between Douglas PUD, BPA and the Corps. Although Douglas PUD agrees that an errata should be issued to correct Article 203, Douglas PUD opposes the introduction of any discussion of the settlement negotiations in the record of this

¹ 18 C.F.R. §§ 385.212 and 385.213 (2012).

proceeding and urges the Commission to reject the BPA/Corps Request for a finding or new provision in the license based upon such inadmissible discussions.

I. MOTION FOR LEAVE TO FILE ANSWER

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure provides that an answer may not be made to a request for rehearing unless otherwise ordered by the decisional authority. The Commission allows the filing of, and considers, such answers when they help clarify the record and assist the Commission in making an informed decision. *See, e.g., Central Vermont Public Service Corp.*, 113 FERC ¶ 61,167 at P 11 (2005) (permitting an answer which was a brief, factual response, did not reargue matters previously raised, and would assist in the development of a full record); *Marysville Hydro Partners*, 63 FERC ¶ 61,271, n.3 at p. 62,735 (1993) (accepting an answer since it contributed to the record on the important issues involved); *Central Nebraska Public Power & Irrigation Dist.*, 51 FERC ¶ 61,257, n.6 at p. 61,737 (1990) (entertaining an answer so as to compile as complete a record as possible); *Weaver's Cove Energy, LLC*, 133 FERC ¶ 61,054 at P 3 (2010). Further, pursuant to Rule 713(d)(2) of the Commission's Rules of Practice and Procedure,² the Commission may afford parties such as Douglas PUD an opportunity to file briefs on issues presented in a request for rehearing.

Allowing Douglas PUD to file an answer to the BPA/Corps Request in this proceeding is clearly appropriate and consistent with the Commission's policy to allow answers when they will help clarify the record and assist the Commission in making an informed decision. As explained below, the BPA/Corps Request proffers privileged information for the record that is not admissible in evidence and contains new requests not previously made in this proceeding. Douglas PUD's Answer provides Douglas PUD's position on BPA/Corps' improper attempt to supplement the record and new requests and thus will be helpful to the Commission in

² 18 C.F.R. § 385.713(d)(2) (2012).

addressing those requests. *See PSI Energy, Inc.*, 52 FERC ¶ 61,260 at 61,965 (1990) (accepting answer to request for rehearing because it responds to new information contained in rehearing request). Accordingly, Douglas PUD respectfully requests that the Commission grant Douglas PUD's motion for leave to file an answer to the BPA/Corps Request and consider the Answer set forth below.

II. ANSWER

A. Douglas PUD Does Not Object to the BPA/Corps Request to Correct the Error in Article 203, But the Proposed Correction Set Forth in Douglas PUD's Request for Notice of Errata More Accurately Reflects the November 9, 2011 Agreement in Principle.

The BPA/Corps Request asks the Commission to correct an error in the language of license Article 203 directing Douglas PUD to enter into an agreement with the Corps regarding compensation for encroachment on the Chief Joseph Project. The BPA/Corps Request proposes revised language for Article 203 that would capture the intent of the parties expressed in the joint filing of November 9, 2011, wherein BPA, Corps and Douglas PUD provided a summary of their agreement in principle on appropriate compensation calculations (Agreement in Principle).

Douglas PUD is seeking essentially the same revision to Article 203 in its Request for Issuance of Errata Notice, which is contained within Douglas PUD's Request for Rehearing of the Licensing Order filed December 10, 2012. Although Douglas PUD does not object to the BPA/Corps request for correction of Article 203, Douglas PUD believes that the proposed correction set forth in Douglas PUD's Request for Issuance of Errata Notice more accurately reflects the language used in the Agreement in Principle and should be adopted instead.

B. The Commission Should Reject the BPA/Corps Request for a Finding or New Provision in the License that Clarifies the “Appropriate” Approach to Encroachment Calculation Because It is Based Upon New Information That is Privileged and Not Admissible in Evidence.

BPA/Corps also attempts to supplement the record by providing inaccurate information concerning the status of negotiations between Douglas PUD, BPA and the Corps on the terms of the final agreement to be executed and included in the license pursuant to Article 203.

BPA/Corps asserts that these negotiations have identified a fundamental disagreement or impasse between Douglas PUD and BPA/Corps regarding “appropriate” encroachment compensation. Based upon this alleged impasse, BPA/Corps requests the Commission to issue a finding or include a provision in the new license that clarifies the “appropriate approach to encroachment calculation” as dictated by BPA/Corps.

The BPA/Corps attempt to supplement the factual record is contrary to the Commission’s longstanding policy proscribing the introduction of new evidence or issues at the rehearing stage because the parties are unable to challenge them. *See, e.g., Cargill Power Markets, LLC v. Public Service Company of New Mexico*, 141 FERC ¶ 61,141 at P 21 (2012). For these reasons, the Commission should reject the BPA/Corps supplement to the record and deny the BPA/Corps Request for new findings and provisions. *See, e.g., Southern California Edison Co.*, 137 FERC ¶ 61,016 at P 11 (2011) (excluding new testimony at rehearing stage); *FPL Energy Marcus Hook L.P. v. PJM Interconnection L.L.C.*, 108 FERC ¶ 61,171 (2004) (excluding additional evidence from the record and dismissing arguments based solely on it).

More importantly, the information proffered by BPA/Corps describes the substantive issues and the positions of the parties in the negotiations, which are privileged and confidential. Rule 602(e)(2) of the Commission’s Rules of Practice and Procedure³ provides that any

³ 18 C.F.R. § 385.602(e)(2) (2012).

discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence. The BPA/Corps Request improperly reveals such discussions of the parties with respect to a proposed agreement, which will be filed with the Commission as an offer of settlement for approval and inclusion in the license. Accordingly, the new information concerning the negotiations proffered by BPA/Corps is not admissible in this proceeding and the BPA/Corps Request for a further finding and/or new provision in the license based upon such information must be rejected as contrary to Rule 602. Moreover, it is clearly improper to ask the Commission to interfere with confidential negotiations by resolving an issue according to the dictates of BPA/Corps and thereby unfairly prejudicing the interests of Douglas PUD.

Douglas PUD also disagrees with the description of the issues, negotiations and positions of the parties presented in the BPA/Corps Request. However, Douglas PUD will not respond to the BPA/Corps allegations or otherwise state its position in the negotiations, because such information is privileged and Douglas PUD wants to protect its rights under Rule 602 and avoid any risk of waiver of such rights through rebuttal.

III. CONCLUSION

Wherefore, Douglas PUD respectfully requests that the Commission: (1) grant its motion for leave to file this Answer, (2) consider Douglas PUD's Answer set forth herein, (3) grant the BPA/Corps Request for correction of license Article 203 consistent with Douglas PUD's Request for Issuance of Errata Notice, (4) exclude the BPA/Corps discussion of the status of negotiations from the record as inadmissible under Rule 602 and (5) deny the BPA/Corps Request for a finding or new provision clarifying the encroachment calculation based upon such inadmissible discussion.

Respectfully submitted,

/s/ James B. Vasile

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DATED: December 14, 2012

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 14th day of December, 2012.

/s/ Mary Mayo

Mary Mayo

Administrative Assistant - Relicensing

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