



PUBLIC UTILITY DISTRICT NO. 1 of CHELAN COUNTY

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May 2, 2017

Rep. Fred Upton, Chair
Energy Subcommittee
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Rep. Bobby Rush, Ranking Member
Energy Subcommittee
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Upton and Ranking Member Rush:

Public Utility District No. 1 of Chelan County (Chelan PUD) is pleased that the Energy Subcommittee of the House Committee on Energy and Commerce is holding a hearing this week on legislation to address hydropower infrastructure modernization. According to the Committee website, eight hydropower bills will be considered. Chelan PUD appreciates this opportunity to comment specifically on the discussion draft of the Hydropower Policy Modernization Act of 2017.

Chelan PUD is a municipal corporation organized under the laws of the State of Washington and is authorized under Washington state law (RCW Title 54) to engage in the business of generating, transmitting, and distributing electric energy. The utility was formed in 1936 by local voters who wanted affordable power for rural as well as urban residents. Today, Chelan PUD operates three hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC). They generate approximately 10 million MWhs annually of clean, renewable, low-cost energy to 48,000 local customers and to other utilities that serve businesses and residents throughout the Pacific Northwest. Two of these projects, the Rocky Reach (P-2145) and Rock Island (P-943) hydroelectric projects, are located on the Columbia River. The third, the Lake Chelan Hydroelectric Project (P-637) is located on the Chelan River. Chelan PUD’s generation mix is over 99 percent hydropower, with less than 1 percent wind associated with a long-term power purchase contract. Therefore, Chelan PUD has been keenly focused on the regulatory environment for hydropower.

Background

Chelan PUD received new licenses for the Lake Chelan and Rocky Reach hydroelectric projects in 2006 and 2009, respectively.

- For the 59-MW Lake Chelan Project, the relicensing process itself took about 9 years and cost \$7 million. The package of protection, enhancement and mitigation measures proposed for the new 50-year license was approximately \$51 million.

- For the 865 MW Rocky Reach Project, the relicensing process took about 11 years and cost approximately \$16 million. The package of protection, mitigation and enhancement measures proposed for the new license totaled about \$410 million. While Chelan PUD submitted its comprehensive settlement agreement with FERC before the original license expired in mid-2006, the project was put on annual licenses in 2007 and 2008 while awaiting a biological opinion for bull trout from the U.S Fish and Wildlife Service.
- The Rock Island Project license expires in 2028, and was previously licensed in 1989 and 1930.

In addition to the licensing process itself, Chelan PUD has significant experience in navigating other laws and regulations that affect the licensing process. In 2004, Chelan PUD entered into the first Habitat Conservation Plans (HCPs) for hydropower for the Rocky Reach and Rock Island projects¹ under section 10 of the Endangered Species Act (ESA). Under the HCPs, Chelan PUD committed to go above and beyond ESA requirements to reach 100% “no net impact” on salmon and steelhead migrating through the project area. By committing to the HCPs, Chelan PUD avoided a potentially prescriptive requirement from the federal National Marine Fisheries Service, which indicated in its final environmental assessment that without the HCPs, the preferred option would have been to require spill up to 40% of the daily average flow at the projects². Instead, Chelan PUD was allowed the flexibility to pursue the methods it determined were the most effective for meeting the standard. For the Rocky Reach Project, this entailed installing a \$110 million juvenile fish bypass system and reducing spill (as a passage method, the bypass system is much more effective than spill, due to the dam’s unique Z-shape configuration).

As Chelan PUD worked with various federal and state agencies and tribes, at the local and national level, the Council on Environmental Quality was particularly helpful in facilitating a final agreement. When all of the administrative processes were complete, the HCPs became part of the FERC operating license for the Rocky Reach and Rock Island hydroelectric projects in 2004.

The HCPs and Licensing Policy

Chelan PUD’s experience with the HCPs influenced how the utility viewed our upcoming relicensing processes, first for Rocky Reach and Lake Chelan. We supported Section 241 of the Energy Policy Act of 2005 (16 U.S. Code § 823d), which is intended to allow license applicants and others to propose alternatives to mandatory conditions and fishway prescriptions if the Secretary determined the alternative condition provided for the adequate protection and utilization of the reservation, or the alternative prescription was equally protective as the Secretary’s condition or prescription. The alternative would also need to cost less and result in improved electricity production. For Chelan PUD, the potential to suggest alternatives, based on our intimate knowledge of our projects, represented the opportunity to replicate the successes of the HCP in the relicensing process. Our

¹ Anadromous Fish Agreement and Habitat Conservation Plan, Rocky Reach Hydroelectric Project, FERC License No. 2145 and Rock Island Hydroelectric Project, FERC License No. 943. A third HCP covers the upstream Wells Hydroelectric Project, FERC No. 2149.

² Anadromous Fish Agreements and Habitat Conservation Plan, Final Environmental Impact Statement for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects, National Marine Fisheries Service, December 2002

comments on the draft legislation (below) address problems with the implementation of Section 241, and how the draft bill could affirm these provisions.

Chelan PUD also viewed the HCP as a proactive step that prepared the utility for entering the relicensing process for the Rocky Reach Project. It was amended into the existing project license in 2004, only five years before the new license was issued. Unfortunately, in its order on rehearing³, FERC declined to include the cost of the new juvenile fish bypass system when determining the length of the new license term. Without those costs, FERC found the license to constitute a “moderate” investment⁴. This finding affected the agency’s decision to issue a 43-year license instead of a 50-year license. FERC ordered Chelan PUD to continue implementation of the HCP for purposes of ESA compliance, but remarked that when setting the length of the license term it “evaluates new measures to be included in the license, and does not consider requirements carried over from the prior license.”

While the Rock Island Project license does not expire for more than a decade, Chelan PUD is already beginning to assess its path forward. Based on our experience with the Rocky Reach Project, one issue we are considering is how potential investments we may make in “early actions” could affect the length of a new license for the Rock Island Project. We believe that licensing policy should encourage early investments in hydropower projects, and that the timing of the investment should not put a licensee at risk for a shorter license term.

Our comments on the draft legislation (below) outline how Congress can address this problem, and incentivize “early action” for operational and environmental improvements.

Comments on the Hydropower Policy Modernization Act of 2017

The draft bill before the Subcommittee is poised to address some significant issues that could affect licensees like Chelan PUD. Chelan PUD will address several specific provisions.

- *License Term, Draft Page 4, lines 6 - 14*

This provision would require FERC, in determining the term of a license, to “consider project-related investment by the licensee over the term of the existing license (including any terms under annual licenses) that resulted in new development, construction, capacity, efficiency improvements, or environmental measures, but which did not result in the extension of the term of the license by the Commission.”

Chelan PUD strongly supports this concept of the bill. Currently, FERC bases its license term decision on a number of factors, but largely on the measures that are imposed in the new license.

Unfortunately, FERC has declined, as a matter of policy, to credit a licensee for making investments

³ *Pub. Util. Dist. No. 1 of Chelan County*, 126 FERC ¶ 61,138 at P 150, *order on reh’g*, 127 FERC ¶ 61,152 (2009).

⁴ Section 15(e) of the FPA, 16 U.S.C. § 808(e), authorizes FERC to issue new hydropower licenses upon relicensing for terms between 30 and 50 years. In exercising its discretion, FERC’s 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.” *Consumers Power Co.*, 68 FERC ¶ 61,077, at pp. 61,383-84 (1994).

and conducting improvements *prior* to entering the licensing process. This policy discourages early resolution of issues and encourages licensees to defer improvements until they can be submitted as part of a new license package. FERC's policy should be modernized by removing disincentives for early action, recognizing that hydropower projects are becoming better adapted to their respective waterways, and setting license terms that account for cumulative investment and ongoing stewardship. In November 2016, FERC issued a notice of inquiry (NOI) on whether to revisit how they establish license terms, but has taken no permanent action. A legislative change in this area would be valuable for creating long-term clarity.

While Chelan PUD supports this concept in the discussion draft bill, it recommends that the current language be strengthened. It is our understanding that further discussions at the end of last Congress resulted in a new version of this language, which would, among other things, ensure that FERC appropriately credits early investments by giving them the same or equivalent weight as similar measures proposed in a new license package - rather than merely considering them. In addition, the language could be improved by providing more description around the types of investments that may be considered eligible early action. We would be pleased to provide the Committee with specific suggestions, if requested.

- *Alternative Conditions and Prescriptions, Page 4, beginning line 15*

Section 241 of EAct 2005 added section 33 to the Federal Power Act (16 U.S. Code § 823d). It allows license applicants or other stakeholders to propose an alternative condition when the Department imposes a requirement. The Secretary is required to accept the alternative condition if the Secretary determines that it provides for the adequate protection and utilization of the reservation and will either, as compared to the initial condition, cost significantly less to implement or result in improved operation of the project works for electricity production. The new section 33 of the FPA includes a similar provision allowing alternatives to any mandatory fishway prescribed under FPA section 18.

According to a Government Accountability Office report issued in 2010, no applicant alternatives have been accepted under this approach since enactment. Instead of accepting an alternative as required by EAct section 241, agencies modify their original conditions. Moreover, in some instances agencies have avoided the opportunity for other parties to submit alternatives by using other authorities, such as a biological opinion under the Endangered Species Act, to impose license requirements.

Chelan PUD recommends that this section be modified to ensure that it applies to any instance in which a Secretary seeks to propose, modify, or exercise reserved authority to impose or modify a condition under section 4(e) or a prescription under section 18. This section should also apply to any requirement applicable to the project pursuant to any Federal authorization that is within the scope of a Secretary's 4(e) or 18 authorities.

- *Equal Consideration, Page 13, lines 3 - 12*

Section 241 of EAct 2005 required agencies such as Interior to submit into the public record a written statement explaining the basis for their mandatory conditions and prescriptions, and any reasons for not accepting the alternatives. Moreover, the Secretary is to submit a written statement demonstrating

that the Secretary gave equal consideration to the effects of the condition or prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality).

Agencies have taken the position that the requirement for the Secretary to submit a written statement is restricted only to situations where an alternative condition or prescription is offered. This approach is contrary to the plain language of the statute, which requires the “equal consideration” statement whenever a condition or prescription is submitted by the agency. Therefore, this provision of EPOA 2005 has not helped identify the various trade-offs associated with the imposition of agency requirements.

Under Sec. 2 (f) of the draft bill, it appears that this balancing provision is inadvertently eliminated from existing law (this elimination occurs to the amendments to FPA section 33 on page 4, line 24-25, and on page 5, lines 1-3.) Chelan PUD recommends that the problem be remedied by moving the requirement to submit a written statement (whenever a Secretary imposes a mandatory condition or prescription) to the section on Consolidated Record.

- *Trial-Type Hearings, Page 13, beginning line 13*

Section 241 of EPOA 2005 established a trial-type hearing process for resolving disputed issues of material facts relied upon by agencies in support of their mandatory conditions and prescriptions (amends 16 U.S.C. 797(e) and 16 U.S.C. 811).

For several reasons, the trial-type hearings have not offered a meaningful opportunity for licensing participants to resolve key factual disputes in hydropower licensing. Chelan PUD recommends that this section of the draft bill be modified to indicate that trial-type hearings apply when an agency exercises reserved authority, or uses other federal authorizations to impose a condition or prescription within the scope of 4(e) or 18. Finally, it appears that the bill does not include an opportunity for discovery and cross-examination of witnesses – which exists under the current law. This provision should be repaired and standard trial practice followed.

- *Schedule Coordination and Process Improvements, Page 5, beginning line 8*

This section of the draft bill would establish FERC as the lead agency for purposes of coordinating all permits and other authorizations for hydropower project required under federal law and require other resource agencies to cooperate with FERC. It intends to improve schedule discipline by directing FERC to develop a schedule for completing its licensing process, as well as other authorizations required under federal law, and to consult with other resource agencies in developing the schedule.

Chelan PUD is supportive of the bill’s attempt to better coordinate the licensing process. One issue remains unresolved – specifically, how decisions are made if agencies are late with their federal and state authorizations, beyond the extended deadline. The legislation should contemplate an avenue for dispute resolution. We believe there should be a single decision-maker, preferably within the White House (we would suggest the Chair of the Council on Environmental Quality) to convene the relevant agencies and make a final decision.

Conclusion

Hydropower is the nation's premier renewable resource due to its economic and air quality value. Generally speaking, hydropower is the least-cost source of electricity generation and produces virtually no air emissions. As the nation relies increasingly on variable energy resources, there is a growing need for services that hydropower provides which maintain system reliability, such as capacity, storage, frequency reserves, operating reserves, contingency reserves, inertia and black start capability.

The public, therefore, has a vested interest in ensuring projects can be effectively licensed and relicensed. Federal licensing policy should be designed to preserve existing hydropower generation and flexibility, and to encourage upgrades and new facilities. Chelan PUD believes the draft Hydropower Policy Modernization Act of 2017, with suggested changes, will help improve the regulatory environment for hydropower.

Again, we appreciate the opportunity to provide input, and would be happy to answer any questions from the Subcommittee.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Wright", with a long, sweeping underline.

Steve Wright
General Manager