

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

The Yakama Nation

Project No. 2114-106

v.

Public Utility District No. 2 of
Grant County, WA

ORDER ON COMPLAINT

(Issued November 21, 2002)

1. In this order, the Commission dismisses the complaint of the Yakama Nation against Public Utility District No. 2 of Grant County (Grant County), licensee for the Priest Rapids Project No. 2114. The complaint asserts that certain provisions of contracts executed by Grant County and other entities related to the sale of power from Priest Rapids violate various provisions of the Federal Power Act (FPA)¹ and project-specific federal legislation pursuant to which Priest Rapids was licensed. We find the allegations have merit in part and are ordering Grant County to take appropriate action.

BACKGROUND

2. Grant County is the licensee of the Priest Rapids Project No. 2114. The project is located on the Columbia River in Chelan, Douglas, Kittitas, Grant, Yakima, and Benton Counties, Washington. The license was issued in 1955 and expires in 2005.² The project consists of the Priest Rapids Development, with an installed capacity of 907 megawatts (MW), and the Wanapum Development, with an installed capacity of 1,038 MW.

¹16 U.S.C. § 791a, *et seq.*

²Public Utility District No. 2 of Grant County, Washington, 14 FPC 1067 (1955).

3. The project was originally authorized for federal development by the Flood Control Act of 1950, but when funds were not appropriated for that purpose, Congress in 1954 enacted Public Law No. 83-544,³ which modified the Flood Control Act to permit the development of the Priest Rapids Project pursuant to a license issued under Part I of the FPA.⁴ Section 6 of Pub.L. 83-544 requires the licensee to offer a "reasonable portion" of the project capacity and output for sale within the economic market area in neighboring states. In the event of disagreement over such portions, the Commission "may determine and fix the applicable portion of power capacity and power output to be made available," and the terms applicable thereto.⁵ The Priest Rapids license is subject to this and all other requirements of Pub. L. 83-544.

4. In 1995, certain Idaho utilities filed a complaint against Grant County, asking the Commission to determine and fix the portion of project capacity and output to be made available to them at the expiration of the Priest Rapids license and the existing power sales contracts. In a series of orders, the Commission set the complaint for hearing, determined that the provisions of Pub. L. 83-544 were meant to apply after the issuance of a new license (i.e., after relicensing),⁶ and ruled that the future licensee of the project

³68 Stat. 573.

⁴The history of the development of the project, and Grant County's status under state law are discussed in *Merritt-Chapman & Scott Corp. v. Public Utility District No. 2 of Grant County, Washington*, 319 F.2d 94, 96-99 (2d Cir. 1963).

⁵Section 6 of P.L. 83-544 reads, in pertinent part:

To assure that there shall be no discrimination between States in the area served by the project, such license shall provide that the licensee shall offer a reasonable portion of the power capacity and a reasonable portion of the power output of the project for sale within the economic market area in neighboring states and shall cooperate with agencies in such States to insure compliance with this requirement: Provided, That in the event of disagreement between the licensee and the power marketing agencies (public or private) in any of the other States within the economic market area, the . . . Commission may determine and fix the applicable portion of power capacity and power output to be made available hereunder and the terms applicable thereto.

⁶Id. The order setting the proceeding for hearing also directed entities with an
(continued...)

would be required to make 30 percent of the project's firm power and 30 percent of its non-firm power available to the Idaho utilities and to the other public and investor-owned utilities that participated in the complaint proceeding, pursuant to a non-discriminatory, market-based mechanism that gives these entities preference in the bidding (marketing plan).⁷

5. New license applications for Priest Rapids are due by October 31, 2003. Pursuant to Section 15(b)(1) of the FPA,⁸ Grant County filed on October 2, 2000, notice of its intent to apply for a new project license. Subsequently, PacifiCorp and the Yakama Nation (Tribe) formed a company, Yakama Hydroelectric Project, LLC (Yakama Hydro), for the purpose of preparing and filing a competing application for the project. In October 2001 Yakama Hydro issued an initial consultation document outlining its competing proposal. PacifiCorp subsequently negotiated contracts with Grant County for the purchase of project power when the existing power sales agreements expire,⁹ and withdrew from Yakama Hydro. The Tribe announced that it was assuming sole ownership of Yakama Hydro.

6. On March 8, 2002, the Tribe filed a complaint and request for fast-track processing. In general, the complaint alleges that Grant County's contracts with PacifiCorp and others relating to the sale of power from Priest Rapids unreasonably restrain trade and violate various sections of the FPA and Public Law 83-544, and have harmed it monetarily and otherwise.

⁶(...continued)

interest in the proceeding to participate in it or be foreclosed later.

⁷Kootenai Electric Cooperative, *et al.* v. P.U.D. No. 2 of Grant County, WA, 82 FERC ¶ 61,222 (1995), *reh'g denied*, 83 FERC ¶ 61,307 (1995), *aff'd*, 192 F.3d 144 (D.C. Cir. 1999) (Kootenai Orders). Any applicant for the new license is required to include with its application a marketing plan to implement the Reasonable Portion requirement. 82 FERC at pp. 61,402-03.

⁸16 U.S.C. § 808(b)(1).

⁹Existing contracts for the sale of power from the Priest Rapids and Wanapum Developments expire in 2005 and at the end of 2009, respectively. *See* Public Utility District No. 2 of Grant County, 75 FERC ¶ 61,190 (1996), *reh'g denied*, 75 FERC ¶ 61,318 (1996).

7. On March 14, 2002, the Commission issued public notice of the complaint.¹⁰ Motions to intervene seeking dismissal of the complaint were filed by two groups of utilities that have agreed to new contracts with Grant County for the sale of power; the Purchasers¹¹ and the Idaho Cooperatives (collectively, the Purchasers).¹² Motions to intervene taking no position on the complaint were filed by the National Marine Fisheries Service, State of Washington Department of Fish and Wildlife, Columbia River Inter-Tribal Fish Commission, American Rivers, and Puget Sound Energy.

DISCUSSION

8. Grant County and the Purchasers have negotiated four agreements, two of which are at issue here: the Priest Rapids Product Sales Contract (Surplus Sales Contract) and the Reasonable Portion Allocation Contract (Reasonable Portion Contract).¹³ The Surplus Sales and Reasonable Portion Contracts contain identical clauses in which the Purchasers agree: (1) to support Grant County's new license application; (2) not to file or support any new license application other than Grant County's; and (3) to take no action likely to be construed as adversely affecting Grant County's license application or the authority of the parties to enter into the contracts (collectively, the non-compete clauses).¹⁴ The Reasonable Portion Contract contains in addition provisions pursuant to which the Purchasers will assume the costs of generating the Reasonable Portion power

¹⁰67 Fed. Reg. 12,984 (March 20, 2002).

¹¹The Purchasers are Avista Corporation; City of Tacoma, Department of Public Utilities Light Division, dba Tacoma Power; Eugene Water and Electric Board; PacifiCorp; Snake River Power Association; Forest Grove Light and Power Department; McMinnville Water and Light; City of Milton Freewater, OR; Public Utility District No. 1 of Kittitas County, WA; Cowlitz Public Utility District; and Portland General Electric Company. As of the response date, some of the contracts had been executed, while execution of others awaited certain wording changes and board approvals.

¹²The Idaho Cooperatives are Kootenai Electric Cooperative, Inc., Clearwater Power Co., Idaho County Light & Power Cooperative Association, Inc., and Northern Lights, Inc.

¹³An executed copy of each contract is appended to Grant County's Answer. The Surplus Sales Contract is Exhibit 1, and the Reasonable Portion Contract is Exhibit 2.

¹⁴See Surplus Sales Contract, Section 8, and Reasonable Portion Contract, Section 7, Clauses (d), (f), and (g).

and receive the revenues from the sale of that power (cost and revenue allocation provisions).¹⁵

9. The Tribe alleges that these contract terms, separately or in combination, violate FPA Sections 19, 20, and 10(h), and Section 6 of Pub. L. 83-544. It asserts that the alleged violations have cost it millions of dollars, prevented it from submitting an acceptable competing license application, prevented the Purchasers from proposing environmental enhancements that would adversely affect the economic benefits of the contracts, and establish a precedent for incumbent licensees to offer illegal rebates in exchange for covenants not to compete.

10. The Tribe requests that we: (1) find Grant County to be in violation of the above-mentioned statutory provisions; (2) assert jurisdiction over its power sales contracts and eliminate any anti-competitive provisions; (3) eliminate any licensee-imposed restrictions on the Purchasers' participation in "this docket;"¹⁶ and (4) bar Grant County from applying for a new license. If we permit Grant County to apply for a new license, the Tribe requests that we provide residents of the Yakama Reservation with an allocation of cost-based power from Priest Rapids and hold the Purchasers harmless from any remedies applied to Grant County.

11. Grant County and the Purchasers reply that the Tribe mischaracterizes the contracts, and that the non-compete clauses and cost and revenue allocation provisions serve legitimate business purposes and are not intended to and do not harm competition. They therefore oppose all the requested relief.

12. As discussed below, we conclude that the Tribe's allegations with respect to the non-compete clauses have merit, and we are ordering Grant County to remove those clauses from the contract. There is also a potential violation of FPA Section 10(h)(1), depending on the particulars of the marketing plan that accompanies Grant County's license application. A decision on that element is however premature, as the marketing plan has not yet been filed. Accordingly, we will terminate the complaint, but without prejudice to the Tribe's right to challenge Grant County's marketing plan in any new license application that Grant County files.

¹⁵See Reasonable Portion Contract Sections 2-6.

¹⁶It is not clear whether the Tribe means the complaint docket or any proceeding involving the Priest Rapids Project.

Federal Power Act Sections 19 and 20

13. FPA Sections 19 and 20 were enacted in the Federal Water Power Act of 1920.¹⁷ At that time, there was no federal regulation of wholesale electric rates and services in interstate commerce.¹⁸ These sections reflect that state of affairs, and a Congressional policy judgment at that time that the tradition of state utility regulation should continue with respect to power production licensed under the federal act.¹⁹

14. Section 19 provides that every non-municipal licensee is subject to state regulation of its electric rates and services.²⁰ The second sentence provides that, if there

¹⁷The Federal Water Power Act of 1920 became Part I of the Federal Power Act in 1935.

¹⁸Since all the sales and services at issue in this case are in interstate commerce, we make no further reference to their interstate nature.

¹⁹See *United States v. Public Utilities Commission of California*, 345 U.S. 295, 302-03 (1953).

²⁰FPA Section 19, 16 U.S.C. § 812, states in pertinent part that:

every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project . . . shall abide by such reasonable regulation of the services . . . and of the rates . . . as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered That in case of the . . . distribution . . . by any licensee hereunder or by its customer . . . within a State which has not authorized and empowered a commission . . . to regulate . . . the services to be rendered by such licensee or by its customer . . . or the rates and charges . . . therefor, . . . it is agreed . . . that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control

FPA Section 3(4), 16 U.S.C. § 796(4), defines a "person" as an "individual or corporation." Section 3(3), 16 U.S.C. § 796(3), defines "corporation" as including "associations" but excluding "municipalities." Section 3(7), 16 U.S.C. § 796(7), defines

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is a licensee whose rates and services are not regulated by the state, jurisdiction is conferred on the Commission to regulate such licensee until such time as the state establishes regulation.²¹

15. Section 20 provides that the rates and services in connection with sales of energy generated at licensed hydroelectric projects shall be reasonable to the customer. If there is no state regulation of such sales, then jurisdiction is conferred on the Commission to regulate the sales.²²

²⁰(...continued)

"municipality" as a political subdivision of a state authorized under state law to develop, transmit, use, or distribute power. Thus, Section 19 does not apply to a "municipality."

²¹The Commission has held that the second sentence of Section 19 applies to municipal as well as non-municipal licensees, because unlike the first sentence it does not define licensee to exclude municipalities. See Brazos River Authority, 28 FPC 151 (1962), cited in Municipal Electric Utilities Association of New York State, 10 FERC ¶ 61,001 at p. 61,005 n. 11 (1982) . See also South Carolina Public Service Authority, 19 FERC ¶ 61,014 (1982).

²²FPA Section 20, 16 U.S.C. § 813, states in pertinent part that when power from projects licensed under Part I:

shall enter into interstate or foreign commerce the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee, for sale and distribution or use in public service shall be reasonable . . . to the customer . . .; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State . . . or such States are unable to agree through their properly constituted authorities on the services . . . or on the rates . . ., jurisdiction is hereby conferred upon the Commission . . . to regulate . . . so much of the services . . . and . . . rates . . . therefor as constitute interstate or foreign commerce . . .

Both Sections 19 and 20 were enacted at a time when transmission of electric energy was largely short-range, and local utilities had not yet undergone the integration into large centralized systems which later came about. See United States v. Public Utilities Commission of California, 345 U.S. at 302.

16. In 1927, the Supreme Court determined in the Attleboro²³ decision that the Commerce Clause forbids state regulation of wholesale utility rates in interstate commerce. In order to fill this "Attleboro gap," Congress in 1935 enacted Part II of the FPA,²⁴ a comprehensive scheme for regulation of the interstate transmission and sale for resale of electric energy. As a consequence, the states retained authority to regulate retail sales, and the Commission was authorized to regulate wholesale sales. Section 20(f) however excluded governmental entities from regulation under Part II except as specifically provided in Part II. As a consequence, governmental entities' power rates are not regulated by the Commission under Part II.

17. Grant County is a municipality, a governmental entity.²⁵ The Tribe contends that Grant County's rates and services are not regulated by the state, and that therefore these are subject to our jurisdiction under Sections 19 and 20.

18. Grant County responds that Sections 19 and 20 do not apply to it, because unlike these provisions' reference to a state which has not "authorized and empowered a commission" to regulate electric utilities, the State of Washington has expressly granted Grant County self-regulatory authority with respect to its power sale rates and services.²⁶

²³Public Utilities Commission v. Attleboro Steam and Electric Co., 273 U.S. 83 (1927).

²⁴16 U.S.C. §§ 824e-824k.

²⁵16 U.S.C. § 824(f).

²⁶Grant County cites Wash. Rev. Code section 54.16.040 (Exhibit 7 of its March 28, 2002 filing) at 13. Under Washington law, a public utility district is an instrumentality of the state Revised Code of Washington, Section 54.04.020 defines public utility districts to be municipal corporations, vested with, among other powers, "full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price [of power that it purchases or generates itself], free from the jurisdiction and control of the utilities and transportation commission"

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19. Grant County is correct that the Commission has no rate jurisdiction over a municipality which the state has expressly granted self-regulatory authority.²⁷ Consequently, Sections 19 and 20 do not apply to it.

²⁷See *Municipal Electric Utilities Association of New York*, supra. Compare *Brazos River Authority*, supra (Brazos had not been granted any self-regulatory authority by the state legislature).

In *Pennsylvania Water & Power Co. v. Federal Power Commission*, 193 F.2d 230 (D.C. Cir. 1951), the court rejected licensee Power Company's assertion that the Commission could not regulate its electric wholesale rates and services because Sections 19 and 20 of FPA Part I govern regulation of the wholesale sales of licensees. In rejecting this argument, the court stated that Part II authorizes the Commission to regulate the wholesale sales of "all public utilities" which own and operate facilities engaged in such service, and that Part II

occup[ied] the entire field of regulation of interstate wholesale rates, whether those of licensees or non-licensees. . . . Thus, even if Part I was intended to confer jurisdiction upon the states or the . . . Commission to regulate interstate wholesale rates, it was to that extent repealed by Part II.

193 F.2d at 239. While affirming the D.C. Circuit's conclusion that the Power Company was subject to FPA Part II regulation, the Supreme Court noted that Part II of the FPA "makes all 'public utilities'" subject to Commission jurisdiction, "[w]ith some express exceptions not here relevant." 343 U.S. 414, 418 (1952). One such exception is municipalities. Moreover, the Supreme Court did not state that Part II repealed the wholesale rate provisions of Part I. Rather, it stated:

Part II . . . provides for a more expansive federal regulation than that authorized under Part I. It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation. It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one.

343 U.S. at 418-19. The Court went on to hold that the Power Company was subject to regulation under both Parts II and I of the FPA.

P.L. 83-544, the Kootenai Orders, and the Reasonable Portion Contract

20. In the Kootenai Orders we determined that under a new license the Priest Rapids Project's Reasonable Portion power should be offered for sale based on market forces, in light of our finding that cost-based rates would be "inherently inefficient, unfair, and discriminatory."²⁸

21. Under the Reasonable Portion Contract, each Purchaser selects a percentage allocation of the costs and proceeds from the sale of the Reasonable Portion power.²⁹ For example, if a Purchaser selects ten percent of the Reasonable Portion power, it is responsible for ten percent of the costs of generating the Reasonable Portion power, and will receive ten percent of the revenues from its sale under the marketing plan.³⁰ The Purchaser can receive its revenue allocation in the form of energy and capacity or in cash.³¹ Each Purchaser is obligated to pay its respective share of the project costs regardless of whether the power can be sold at a profit, whether the Purchaser takes the power, or whether the project is able to generate power.³² The Reasonable Portion Contract also states that nothing in the contract is intended to affect or in any way limit

²⁸83 FERC at p. 62,209.

²⁹If the Purchasers select allocation percentages totaling more than 100 percent, the allocations are adjusted pursuant to a formula based on one or more of the following factors: whether the Purchaser is a party to the existing 1956 and/or 1959 contracts, or is an Idaho Cooperative; the time period at issue (*i.e.*, November 1, 2005, through October 31, 2009, or November 1, 2009, forward); and the proportion of the Purchaser's retail electric customers to all retail electric customers located in the Pacific Northwest. Reasonable Portion Contract, Section 3(e).

³⁰The Purchaser's revenue allocation is developed annually in accordance with Section 4. The allocated costs are developed in accordance with Section 5. Section 6 provides for the payment to Grant County of the Purchaser's cost allocation attributable to its revenue allocation. Section 8 provides for the payment by Grant County to the Purchaser of its allocation of the proceeds.

³¹If a Purchaser elects to receive its allocated share of the proceeds in capacity and energy, Section 3(a) provides for Grant County to use the Purchaser's allocation of the proceeds from the sale of Reasonable Portion power to purchase capacity and energy for the Purchaser. Reasonable Portion Contract Sections 3(d) and (e).

³²Grant County response at 7.

the right of Grant County to develop and file the marketing plan in a manner it determines is consistent with the Kootenai orders.³³

22. The Tribe characterizes the cost and revenue allocation provisions as a "rebate" which will result in the Reasonable Portion power being sold to the Purchasers at cost, in contravention of the Kootenai orders. Grant County responds that the provisions do not provide for the sale of the Reasonable Portion power, but rather allocate responsibility for the cost of generating that power and the division of proceeds from its sale, under the marketing plan to be filed with its application.

23. The Purchasers also contest the characterization of these provisions as a rebate. They state that nothing in the contracts depends on, or operates differently, if a Purchaser later purchases or does not purchase Reasonable Portion power under the marketing plan; that the contracts do not price Reasonable Portion power; and that the contracts do not prejudice or limit how the Reasonable Portion power will be marketed or which potential Purchasers will have priority.

24. The cost and revenue allocation terms are not on their face inconsistent with the requirements of Section 6 of Pub.L. 83-544 or the Kootenai orders' directive that the Reasonable Portion power be offered for sale based on market forces and in a non-discriminatory manner. The terms do not provide for the sale of the Reasonable Portion power; rather, they provide for the Purchasers collectively to obtain from Grant County energy and capacity, or its cash equivalent, equal to the amount of Reasonable Portion power, at the cost of producing the Reasonable Portion power.

25. Even if we did consider this arrangement to constitute sale of the Reasonable Portion power, it differs significantly from ordinary power sales agreements, in that the Purchasers have agreed to bear the market and operating risks of the Reasonable Portion power. If the market price for the power exceeds its cost, the Purchasers will profit, but if the cost exceeds the market price, the Purchasers will bear the loss. This is consistent with the intent of the Kootenai orders, as long as the Reasonable Portion power is offered for sale under a market-based, non-discriminatory marketing plan approved by the Commission. At this juncture, of course, we cannot determine whether these contracts, viewed as a whole in conjunction with Grant County's marketing plan, satisfy the applicable requirements.³⁴ We will therefore dismiss the complaint in this regard, but

³³Surplus Sales Contract, Section 3(f); Reasonable Portion Contract, Section 3(h).

³⁴For instance, a marketing plan that is designed to ensure that Reasonable Portion
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without prejudice to the Tribe's right to contest the contracts and marketing plan when Grant County files a new license application.

26. The Tribe further alleges that Grant County violated the anti-discrimination requirement of Section 6 of Pub.L. 83-544 and its license by offering the cost and revenue allocation provisions only to entities willing to execute the contracts with the non-compete clauses, and by offering Puget Sound Energy a Reasonable Portion Contract that sets the maximum allowable Reasonable Portion allocation at half the maximum allocation offered to other Purchasers, assertedly as punishment for filing a judicial challenge to Grant County's interpretation of the "right of first refusal clause" in the 1956 and 1959 Contracts.³⁵ Whether or not these actions, which Grant County evidently does not deny, were improper, they do not implicate Section 6, which states that its purpose is to prohibit "discrimination between States in areas served by the project." Here, there is no such discrimination.

FPA Section 10(h)

27. So far, we have denied the Tribe's request that we find Grant County in violation of FPA Sections 19 and 20, Pub.L. 83-544 (which is also a license condition), and the Commission's orders under Pub.L. 83-544. This leaves only FPA Section 10(h) to provide any basis for granting the Tribe's requested remedies, which, as noted, are that we (1) assert regulatory jurisdiction over Grant County's contractual and other relationships with all power purchasers and invalidate all contract clauses that restrain or prohibit competition for the new license; (2) relieve any Purchaser from any obligation imposed by Grant County not to participate fully and freely in this docket; and (3) prohibit Grant County from applying for the new project license.

28. Although the Commission is not empowered to enforce the federal antitrust laws, it must, like other federal agencies, consider the anticompetitive consequences of matters

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power is sold "in the market" at cost or sold preferentially to the Purchasers at cost-based rates would not pass muster.

³⁵Puget Sound Energy filed in Washington State court a request for a declaratory judgment with respect to interpretation of the right of first refusal clauses in its contract with Grant County. The Reasonable Portion allocation offered to the other Purchasers was set at "twice the average" of the Purchasers' participation in the existing power purchase contracts, while the allocation offered to Puget Sound Energy omitted the word "twice." See Complaint at 16 and Exhibit 3.

that come before us.³⁶ FPA Section 10(h)(1) states that "[c]ombinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."³⁷

Section 10(h)(2) provides:

[prohibited] conduct under the license . . . shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with Section 15 of this Part.

29. The Tribe alleges that Grant County's cost and revenue allocation provisions and non-compete clauses separately or together restrain trade,³⁸ as demonstrated by PacifiCorp's decision to accept the contracts rather than continue to pursue the license. It asserts that no license conditions can adequately remedy the consequent harm to competition and the public interest, and therefore asks the Commission to invoke its broad remedial authority to bar Grant County from filing a relicense application.

30. Under Section 10(h)(2), we cannot at this point impose corrective conditions on a new license,³⁹ or even deny Grant County's license application, since no license

³⁶See *Federal Power Commission v. Conway Corp.*, 426 U.S. 271 at 279 (1976); *Pacific Power & Light Co.*, 25 FERC ¶ 61,052 at p. 61,202 (1993). The Commission's ability to grant relief may however be limited, in which case summary disposition of the antitrust charges may be appropriate. See *Northern California Power Agency v. Federal Power Commission*, 514 F.2d 184 (D.C. Cir. 1975).

³⁷16 U.S.C. § 803(h)(1).

³⁸The agreements plainly are not designed to limit the output of electrical energy or to fix, maintain, increase prices for electricity, and the Tribe makes no such allegation.

³⁹*Cf. Municipal Electric Association of Massachusetts v. Federal Power Commission*, 414 F.2d 1206, 1209 (D.C. Cir. 1969) (Commission granted license on

applications have been filed, nor are they due until October 2003.⁴⁰ Our examination must therefore focus on whether any anticompetitive conduct has occurred or is occurring under the existing license, and if so, whether denying Grant County the opportunity to file a new license application for its project, or conditioning any new license, is an available and appropriate remedy.

31. Grant County asserts that, at bottom, the Tribe's complaint "is simply that it has lost the partner it thought it had in its joint venture pursuit of a new license for the Project because Grant [County] made an offer that was too attractive for Pacificorp to refuse, and the Tribe has decided neither to seek another partner nor to pursue the license on its own."⁴¹ These allegations do not reach what in Grant County's view is the subject matter of Section 10(h): the distribution and sale of electricity.⁴² Nor, it notes, is the Tribe asserting that Grant County is using the federal licensing process to create or maintain a position of market dominance in the sale and distribution of electric power.

32. Grant County and the Purchasers contend that the non-compete clauses are in the context of a private joint venture arrangement of the type approved by the Commission in Pacific Northwest Power Co., 31 FPC 247 (1964). In that case, the Commission rejected the claim that a joint venture by the four largest investor-owned utilities in the Pacific Northwest for a project license was a combination in restraint of trade prohibited by FPA

³⁹(...continued)

condition that licensee make excess project power available on a non-discriminatory basis).

⁴⁰Under FPA Section 15(c)(1), all applications for a new license must be filed no later than two years prior to the expiration of the existing license.

⁴¹Grant County's reply at 21 (footnotes omitted). It also states that its contracts with Pacificorp are in all material respects the same as the contracts it negotiated with the other Purchasers.

⁴²Grant County also asserts that the Tribe is collaterally estopped from arguing before the Commission that the non-compete clause constitutes an anticompetitive and unlawful restraint of trade. Grant County states that Pacificorp made the same restraint-of-trade argument before the Superior Court in King County, Washington, and obtained an adverse ruling (see Grant County's reply, Exhibit 6); that the Tribe is in privity with Pacificorp on this issue; and that under the "full faith and credit" provision of federal law the Tribe is therefore precluded from raising the argument before the Commission. Grant County's reply at 15-20.

Section 10(h). Rather, the Commission noted (*id.* at 274) that, while the antitrust laws applied to the utilities, individually and jointly,

the anti-trust laws do apply differently to regulated companies. . . . Utilities are [in 1964] necessarily monopolies within their areas Of course, [the joint venture] seeks to gain control over the [proposed project site], but this type of control is inherent in licenses issued under the Act and was clearly intended by Congress.

33. Grant County and the Purchasers state that the non-compete clauses at issue serve the interests of their customers, since they cannot ensure that these customers will receive the benefits of Priest Rapids power pursuant to a long-term power supply under reasonable terms unless Grant County obtains a new license. Grant County adds that nothing in the Kootenai orders restricts what it can do with the proceeds from the sale of the Reasonable Portion power.⁴³

34. We conclude that the cost and revenue allocation provisions of the agreements between Grant County and the Purchasers serve legitimate business purposes.⁴⁴ There is nothing improper in Grant County using the cost and revenue allocation provisions to allocate to the Purchasers the economic risks and benefits of the Reasonable Portion power, making them in essence joint venturers with respect to such power. We cannot conclude, based on the information before us, and without Grant County's proposal for marketing the Reasonable Portion power, that the arrangements between Grant County

⁴³Grant County adds that the cost and revenue allocation provisions were negotiated in part to satisfy certain Purchasers' rights of first refusal to purchase power upon expiration of the existing 1956 and 1959 contracts (the 1956 and 1959 contracts grant those Purchasers rights of first refusal to purchase power surplus to Grant County's needs under succeeding contracts; the Surplus Sales and Reasonable Portion contracts extinguish those rights) and in order to allocate the risk of unforeseen market and operational conditions over the term of any new license.

⁴⁴We also note that our regulations (at 18 C.F.R. § 16.8) require a potential applicant for a new license to undertake a three-stage pre-filing consultation process. New license applicants typically require a minimum of two years to complete pre-filing consultation and prepare their applications. Under the most optimistic scenario, any potential competitor for a new license for Priest Rapids would have to have commenced pre-filing consultation at least two years prior to the application deadline date, *i.e.*, by the fall of 2001. The only entity to express any interest in competing for the new license was Yakama Hydro.

and the Purchasers would unreasonably diminish competition with respect to the sale of the power.⁴⁵ The Tribe may be correct that the timing of PacifiCorp's decision to abandon pursuit of the license diminished its opportunity to find another partner, but that is a contractual matter between the Tribe and PacifiCorp and is not within the Commission's purview.⁴⁶

35. While some types of non-compete clauses may serve legitimate business purposes without violating Section 10(h)(1), we do find that, in the circumstances of this case, the non-compete clauses violate Section 10(h)(1)'s prohibition on agreements to restrain trade, because they could unreasonably diminish the pool of potential new license applicants. We will therefore require Grant County to remove these provisions from the Reasonable Portion and Surplus Sales Contracts.⁴⁷ We do not however conclude that

⁴⁵The Tribe complains that contract provisions under which Grant County will reduce the amount of power it sells to the Purchasers as its retail load grows will result in Grant County enjoying an increasing proportion of the project's economic benefits (assuming that over time the cost of project power remains lower than the power's market price). We fail to see how the public interest is harmed by this agreement, which, moreover, is not in conflict with Section 6 of Pub.L. 83-544. That provision requires only that the Reasonable Portion power be offered on a non-discriminatory basis to entities in neighboring states. It does not require Grant County to share any economic benefits it may derive from differences between the cost of generation and market prices.

⁴⁶The Tribe asserts that the Grant County's alleged restraint of trade in this respect will harm the public interest by preventing "innovative thinking" with regard to resolution of regional water use issues. Innovative thinking about such issues will not be precluded if Yakama Hydro or some other entity does not file a competing license application. The Tribe and others are free to participate in the relicensing proceeding and recommend those conditions they believe will advance all aspects of the public interest, including regional water use. FPA Section 10(a)(1), 16 U.S.C. § 803(a)(1), authorizes the Commission, before granting a license application, to require such project modifications as will secure a project best adapted to a comprehensive plan for improving or developing a waterway for beneficial public uses, both developmental and environmental.

⁴⁷Specifically, the clauses referred to above in note 14. Our authority to order this remedy is found in Section 10(h)(1)'s prohibition on agreements in restraint of trade, and in P.L. 83-544, Section 6 of which requires Grant County to offer reasonable portion power on a non-discriminatory basis to certain entities in neighboring states. Both of

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Grant County should be barred from filing an application for a new license. As discussed above, there is no basis to find that the decision of the Purchasers not to pursue license applications was prompted by anything other than the favorable terms for an allocation of Reasonable Portion power they were able to negotiate with Grant County. To bar Grant County from competing for a new license under these conditions would be unduly harsh. It is also premature to discuss what, if any, conditions might be imposed on any new license issued to Grant County until Grant County files a new license application.

Conclusion

36. The challenged contract provisions do not violate FPA Sections 19 or 20. The identified provisions do, however, as discussed above, violate FPA Section 10(h)(1)'s prohibition against restraints of trade, and must be removed from the contracts. The potential also exists for a violation of Section 6 of P.L. 83-544's requirement to offer Reasonable Portion power for sale in neighboring states on a non-discriminatory basis, or possibly 10(h)'s prohibition on agreements or understandings to restrain trade, depending on how Grant County designs the Reasonable Portion power marketing plan to be submitted with its relicense application. The Tribe will be able to protect its interests by participating in that proceeding.

The Commission orders:

Grant County is directed to remove Section 8 from the Surplus Sales Contract and Section 7, clauses (d), (f), and (g), from the Reasonable Portion Contract.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.

⁴⁷(...continued)

these provisions are incorporated by reference into Grant County's license. See 14 FPC at 1072. These agreements were entered into by Grant County as a necessary incident of its existing license and its efforts to obtain a new license, both of which (assuming a new license is obtained by Grant County) include these requirements.

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