

103 FERC ¶ 61,073

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The Yakama Nation

Project No. 2114-111

v.

Public Utilities District No. 2
of Grant County, Washington

ORDER DENYING REHEARING

(Issued April 16, 2003)

1. Public Utility District No. 2 of Grant County (Grant County), the Yakama Nation (Tribe), Portland General Electric Company (PGE), and Avista Corporation have filed requests for rehearing of the Commission's November 21, 2002 order,¹ in which the Commission found, with respect to the Tribe's complaint concerning certain provisions of contracts regarding the sale of power from Grant County's Priest Rapids Project No. 2114, that the Commission has no rate jurisdiction over Grant County under Section 20 of the Federal Power Act (FPA),² but that certain provisions violated FPA Section 10(h)(1)'s³ prohibition against restraints of trade, and must be removed from the contracts. For the reasons discussed below we deny rehearing.

BACKGROUND

2. Grant County is the licensee of the Priest Rapids Project No. 2114, located on the Columbia River in Chelan, Douglas, Kittitas, Grant, Yakima, and Benton Counties,

¹101 FERC ¶ 61,197.

²16 U.S.C. § 813.

³16 U.S.C. § 803(h)(1).

Washington. The project, which consists of the 907-megawatt (MW) Priest Rapids Development and the 1,038-MW Wanapum Development, was licensed in 1955 for a 50-year term expiring in 2005.⁴

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. 83-544,⁵ 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.⁶ 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. 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), and ruled that the future licensee of the project 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

⁴Public Utility District No. 2 of Grant County, Washington, 14 FPC 1067 (1955).

⁵68 Stat. 573.

⁶The 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).

⁷*Kootenai 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"

(continued...)

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 Tribe formed a company, Yakama Hydroelectric Project, LLC (Yakama Hydro), for the purpose of preparing and filing a competing application for the project.

6. In February 2002, Grant County negotiated four agreements with various entities, including PacificCorp, (collectively, the Purchasers)⁹ relating to the purchase of power from the Priest Rapids Project, two of which agreements are at issue here: the Priest Rapids Product Sales Contract (Surplus Sales Contract) and the Reasonable Portion Allocation Contract (Reasonable Portion Contract).¹⁰ 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).¹¹ The Reasonable Portion Contract contains additional provisions pursuant to which the Purchasers will

⁷(...continued)

requirement of Pub. L. 83-544. 82 FERC at pp. 61,402-03.

⁸16 U.S.C. § 808(b)(1).

⁹The 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 well as a group of Idaho Cooperatives, comprising Kootenai Electric Cooperative, Inc., Clearwater Power Co., Idaho County Light & Power Cooperative Association, Inc., and Northern Lights, Inc.

¹⁰Existing 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).

¹¹See Surplus Sales Contract, Section 8, and Reasonable Portion Contract, Section 7, Clauses (d), (f), and (g).

assume the costs of generating the Reasonable Portion power and receive the revenues from the sale of that power (cost and revenue allocation provisions).¹²

7. PacifiCorp subsequently withdrew from Yakama Hydro.

8. On March 8, 2002, the Tribe filed a complaint, alleging that the contract terms discussed above, separately or in combination, violate FPA Sections 19, 20, and 10(h), and Section 6 of Pub. L. 83-544. It asserted 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 established a precedent for incumbent licensees to offer illegal rebates in exchange for covenants not to compete.

The Tribe requested that the Commission: (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;" and (4) bar Grant County from applying for a new license. If the Commission were to permit Grant County to apply for a new license, the Tribe requested that residents of the Yakama Reservation be provided with an allocation of cost-based power from Priest Rapids and that the Purchasers be held harmless from any remedies applied to Grant County.

9. Grant County and the Purchasers replied 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 opposed all the requested relief.

10. On November 21, 2002, the Commission issued an order resolving the Tribe's complaint.

11. As an initial matter, the Commission determined that, because Grant County is a municipality which has been expressly granted self-regulatory authority by the State of Washington, the Commission has no rate jurisdiction over the county under FPA Sections 19 and 20.¹³

¹²See Reasonable Portion Contract Sections 2-6.

¹³16 U.S.C. §§ 812 and 813. See 100 FERC ¶ 61,000 at pp. 61,795-96, citing Municipal Electric Utilities Association of New York State, 10 FERC ¶ 61,001 (1982).

(continued...)

12. Next, the Commission found that the cost and revenue allocation terms of the Reasonable Portion Contract were 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 Commission stated that the cost and revenue allocation terms do not provide for the sale of the Reasonable Portion power, but rather 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. Even if this arrangement did constitute sale of the Reasonable Portion power, the Commission explained, 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.¹⁴

13. The Commission noted that it could not at this juncture determine whether the contracts, viewed in conjunction with Grant County's marketing plan, satisfy the applicable requirements. It therefore dismissed the complaint in this regard, without prejudice to the Tribe's right to contest the contracts and marketing plan when Grant County files a new license application.¹⁵

14. The Commission then turned to the issue of whether certain provisions of the contract violated FPA Section 10(h). The Commission explained that Section 10(h)(2), which deals with conditions to be included in a prospective license in order to prevent anti-competitive activity, was not applicable, because Grant County currently has no

¹³(...continued)

FPA Section 19 provides that the Commission may exercise rate jurisdiction over licensees whose rates and service are not regulated by a state. FPA Section 20 authorizes the Commission, in the absence of state regulation, to ensure that rates and services in connection with sales of energy from licensed hydroelectric projects are reasonable.

¹⁴100 FERC at p. 61,796-97.

¹⁵Id. at p. 61,797. The Commission also dismissed the Tribe's claim that Grant County violated the anti-discrimination requirement of Section 6 of Pub. L. 83-544 by offering cost and revenue allocation provisions only to entities willing to accept non-compete clauses, and by offering Puget Sound Energy a Reasonable Portion Contract with a maximum allowable Reasonable Portion allocation lower than that offered to other Purchasers. The Commission held that the claims did not implicate Section 6, the purpose of which is to prohibit "discrimination between States in areas served by the project." Id. at pp. 61,797-98.

license application before the Commission. The Commission therefore focused on whether any anti-competitive activity was occurring under the existing license and, if so, the appropriate remedy.¹⁶

15. The Commission first concluded that the cost and revenue allocation provisions of the agreements between Grant County and the Purchasers serve legitimate business purposes, and that 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. It found, however, that 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. The Commission therefore required Grant County to remove the portions of the contracts that embody these provisions: Section 8, Clauses (d), (f), and (g), of the Surplus Sales Contract and Section 7, Clauses (d), (f), and (g), of the Reasonable Portion Contracts.¹⁷

16. The Commission stated that Grant County should not be barred from filing an application for a new license, given that there was 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. It also held that it was premature to discuss what, if any, conditions might be imposed on any new license issued to Grant County until the county files a new license application.¹⁸

17. Grant County, PGE, Avista, and the Tribe filed timely requests for rehearing.¹⁹ Grant County, PGE and Avista argue that the Commission's decision to reject the non-compete clause is not supported by legal or factual analysis, and is contrary to established principles of antitrust and contract law. The Tribe, on the other hand, contends that the Commission provided no support for its conclusion that there was no basis to conclude that PacifiCorp's withdrawal from Yakama Hydro LLC was due to the non-compete clauses, did not adequately consider a number of its allegations, and erred in its findings concerning FPA Sections 19 and 20.

¹⁶Id. at p. 61,798.

¹⁷Id. at pp. 61,798-99.

¹⁸Id. at p. 61,800.

¹⁹PGE and Avista are among the Purchasers. See n.9, supra.

18. On January 16, 2003, the Tribe filed a motion for leave to file an answer to Grant County's, PGE's, and Avista's requests for rehearing. Because our rules of practice and procedure generally prohibit answers to requests for rehearing,²⁰ and because the parties to this proceeding have had ample opportunity to present their positions, we will deny the motion.

DISCUSSION

A. Grant County's, Avista's, and PGE's Requests for Rehearing

19. FPA Section 10(h)(1) prohibits "[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."²¹ As the Supreme Court has explained, "[t]he exercise by the Commission of powers otherwise within its jurisdiction clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations" FPC v. Conway Corp., 426 U.S. 271 at 279 (1976) (citation omitted).

20. Grant County and PGE argue that the Commission failed to conduct an appropriate antitrust analysis before finding that the non-compete clauses constituted a restraint of trade. Specifically, Grant County asserts that the Commission was required, pursuant to the Sherman Antitrust Act, to provide evidence that the restraint created by the non-compete clauses was either a per se violation of Section 1 of the Sherman Act or that it failed a rule of reason analysis, and to define relevant geographic and product markets and examine the competitive impacts of the clauses on those markets by considering market power, market concentration, intent or purpose, and competitive justification. In related arguments, Grant County contends that neither the licensing process nor the process of competing for a license are subject to the antitrust laws, while PGE asserts that the antitrust laws do not protect entities, such as the Tribe, which are competing for a lawful monopoly.

21. These arguments, while possibly germane to proceedings brought under the federal antitrust laws, are not pertinent here. While it is true, as Grant County points out, that the courts have stated that Section 10(h)(1) "does indeed virtually restate the

²⁰See 18 C.F.R. § 3385.213(a)(2) (2002).

²¹16 U.S.C. § 803(h)(1).

Sherman Act,"²² nothing in the FPA binds the Commission, in its examination of whether particular actions violate Section 10(h), to conduct the same analysis as would a federal court in acting on a Sherman Act complaint.²³ The purpose of our examination is not to determine whether the antitrust laws have been violated (a matter reserved to the courts), but rather to ensure that actions taken pursuant to Part I of the FPA comport with the pro-competitive mandate of Section 10(h). Indeed, we did not, in the November 21, 2002 order, find that the non-compete clauses violated antitrust law. Rather, we determined, in the context of Section 10(h) and Part I of the FPA, that the non-compete clauses were an undue restraint of trade.²⁴

22. We firmly believe that the electric power market is best served when competition is encouraged as widely as possible.²⁵ Consistent with this general principle, we conclude that it is likewise in the public interest to encourage competition for hydroelectric licenses. Competition can provide the impetus for license applicants to cut costs and to give greater consideration to the varying interests of stakeholders affected by the outcome of licensing proceedings. While it is typically not the case that there is more than one applicant for a new license for a given hydroelectric project, we nonetheless do not want to allow artificial restraints on competition.

23. Where one prospective competitor discourages, through non-compete clauses, a significant segment of the market for project power from supporting other competitors or from itself competing, this may tend to discourage such competitors from pursuing the

²²See *Pennsylvania Water & Power Company v. F.P.C.*, 193 F.2d 230, 237 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

²³In fact, it is not completely clear to what extent the Sherman Act applies to a municipality or other state sub-division. See *Parker v. Brown*, 317 U.S. 341 (1943); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978).

²⁴See 101 FERC at pp. 61,799-800. This being the case, we need not reach the arguments regarding whether the process of licensing a project is subject to the antitrust laws and whether those laws do or do not protect competitors for monopoly franchises. In this case, our determinations are made solely under the FPA. For the same reason, there is no need for additional hearings, as requested by Grant County and PGE, to define the relevant market and make other antitrust findings.

²⁵See, e.g., *Investigation of Electric Bulk Power Markets*, 92 FERC ¶ 61,160 (2000) ("The Commission's long-standing goal has been to promote and maintain competition in the Nation's electric bulk market").

difficult and expensive licensing process. While, as discussed below, there is no evidence in this record to support the contention that the non-compete clauses at issue here have prevented competition in this case, we nonetheless hold that such clauses as a general matter represent potential undue restraints on trade and, where we have Part I authority over the contracts that contain them, we will require their elimination.²⁶

24. Grant County and Avista contend that the non-compete clauses amount to no more than a recognition of the state common law implied covenant of good faith and fair dealing among parties to a contract.²⁷ However, they do not demonstrate that this covenant is of necessity so broad as to justify the full sweep of the non-compete clauses. It is not clear, for example, that such covenants necessarily imply in all cases exclusive support for one competitor over another. It logically would appear possible for a potential purchaser to sign in good faith power purchase agreements with two or more entities competing for a hydropower license, with their effectiveness depending on which was actually awarded the license, and to support all of the license applications. In any event, whether or not the parties to the contracts at issue here ultimately meet their mutual obligations, whether implied or explicit, is a matter that if necessary can be resolved by the courts pursuant to Washington law. Our requirement that the portions of the contracts be deleted does not remove these state common law or statutory obligations between the parties.

²⁶Grant County asserts that our ruling as to the non-compete clauses is inconsistent with *Carolina Power & Light Co.*, 67 FERC ¶ 61,074 (1994), where we approved a settlement that included withdrawal of a competing license application. That case is not apposite. The fact that we accepted an entity's decision not to pursue a filed license application (indeed, we have no authority to require anyone to compete who does not wish to do so) does not mean that we cannot remove pre-filing barriers to competition, such as the non-compete clauses, where appropriate. The county also cites Section 10 of the Electric Consumers Protection Act (ECPA) (PL99-495), in which Congress established a process that included buyouts by incumbent, non-municipal licensees of competing municipal applicants. Section 10 of ECPA applies by its terms to a limited class of enumerated relicensing cases that were pending as of the enactment of ECPA, which amended the FPA to deny municipal preference at relicensing, and does not represent a general policy regarding competition.

²⁷See, e.g., *Lonsdale v. Chesterfield*, 99 WA.2d 353, 387, 662 P.2d 385 (1983) ("it is well established that in every contract, there is an implied covenant of good faith and fair dealing . . . [requiring] each party to cooperate with the other so that [each] may obtain the full benefit of performance").

25. Grant County, Avista, and PGE maintain, referring to the Supreme Court's Noerr-Pennington doctrine,²⁸ that forced removal of the non-compete clauses violates their right to petition the government and to exercise free speech. Noerr-Pennington provides antitrust immunity for entities that combine, even in anti-competitive ways, in order to persuade the government to take a particular course of action.²⁹ Thus, if a court were to conclude that the non-compete clauses constituted part of a campaign to convince the Commission to issue a new license to Grant County, Noerr-Pennington might dictate a finding that the antitrust laws had not been violated by the execution of the contracts.

26. Since, as we have explained, we have decided this case under the FPA, rather than the antitrust laws, the Noerr-Pennington doctrine is not applicable here. Nothing in that doctrine indicates that the Commission, as a regulator examining the merits of the contracts pursuant to Congressional mandate, is in any way constrained from determining whether the non-complete clauses are in the public interest.³⁰ Moreover, deletion of the clauses at issue will not prevent any of the contracting parties from making any arguments they choose to make before the Commission or any other regulatory or legislative body. It simply means that they cannot, through the contracts, formalize an agreement not to compete.

27. Grant County and Avista assert that the Commission erred by not addressing their contention that the Tribe's complaint is an impermissible collateral attack on a ruling by the King County Superior Court. As we have discussed above, our finding here that the non-compete clauses are a restraint of trade is based on our construction of the FPA, not on a ruling as to the Sherman Act. Therefore, the rulings of the state court, which has no authority to construe the FPA, cannot circumscribe our ruling on the Tribe's complaint. And while Grant County cites cases to the effect that federal courts must give full faith and credit to state decisions, it provides no support for the proposition that the rulings of a state court will be binding on a federal administrative agency in carrying out matters reserved exclusively to it by Congress.³¹

²⁸See United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents Conference v. Noerr Freight, Inc., 365 U.S. 127 (1961).

²⁹See 365 U.S. at 136.

³⁰Rejection of the non-compete clauses likewise does not implicate the free speech rights of any of the contracting parties.

³¹There are also open questions, which we need not reach, as to whether the Tribe
(continued...)

28. Grant County also argues that the Commission's order was overbroad, in that, by requiring the county to remove from the contracts subparagraphs (d), (f), and (g) of Section 8 of the Surplus Sales Contracts and of Section 7 of the Reasonable Portion Contracts, the Commission excluded from the contracts certain provisions having nothing to do with competition for a license, such as those requiring the Purchases to provide reasonable assistance to Grant County in obtaining necessary permits, reserving the rights of the contracting parties to file comments with the Commission, and requiring the Purchasers to provide reasonable assistance to Grant County to request Commission approval of the contracts.

29. The clauses in question read as follows:

(d) Purchaser covenants that it shall provide reasonable support, cooperation and assistance to the District in the District's acquisition of a New and Annual FERC License, any necessary federal, state or local permits relating to the Priest Rapids Project, [and] FERC approval of this contract, if FERC approval is requested by the District; provided, however, that nothing in this contract shall preclude the purchaser from filing comments with FERC to protect the Purchaser's economic benefits provided by this contract.

* * *

(f) Purchaser covenants that it shall refrain from filing or supporting any FERC license application for the Priest Rapids Project other than that filed by the District and refrain from filing or supporting any effort that would lead to modification of the FERC decisions on Public Law 83-544 contained in the PL 83-544 Orders, unless such a request or petition is filed by the District and the Purchaser agrees with that request or petition. For purposes of this Section [7(f) or 8(f)], "refrain from supporting" means prepare no documentation, submit no testimony, sign no other agreement or contract other than this contract for Priest Rapids Project Output or for other products or that is contingent upon a party other than the District

³¹(...continued)

was in sufficient privity with PacifiCorp, a plaintiff in the state proceedings, so as to estop it from raising similar matters in other proceedings, and as to the scope and effect of the state order, which was not a full decision on the merits, but rather an order summarily granting a motion by Grant County for partial summary judgment.

receiving a license from FERC to operate the Priest Rapids Project, engage in no lobbying and provide no funding.

(g) The Purchaser covenants that it will not take any action which, in the opinion of a neutral third party, would likely be construed as: (i) having a material adverse effect on the District's ability to obtain an Annual FERC License or a New FERC license or on the anticipated economic benefits of this contract or (ii) constituting a judicial challenge to the authority of the District of the Purchaser to enter into and implement the provisions of this contract. This covenant does not apply to anticipated economic benefits under other agreements between the District and third parties, such as with the Bonneville Power Administration.

30. While Grant County's arguments regarding particular sections of the clauses at issue might seem reasonable in the abstract, we must view the contract as a whole to determine the potential impact of the individual clauses. In the absence of clause (f), clauses (d) and (g) might appear to be garden-variety agreements to support a fellow contracting party in carrying out the aims of the contract. However, given the existence of clause (f), which Grant County concedes is designed to preclude competition for the project license, and the county's vigorous effort to retain the non-compete clauses, we cannot view clauses (d) and (g) purely in the abstract. Thus, we note that actions which a neutral third party might construe as having a material adverse effect on Grant County's ability to obtain a new license, as referenced in clause (g), arguably might include supporting, or acting as, a competitor. Likewise, "reasonable support, cooperation and assistance," as referenced in clause (d), could be read to preclude actions that fostered competition. Because we cannot be sure that all three clauses were not intended, and might not be used, to restrain trade, we must reject them as a group, to protect the public interest.³²

B. The Tribe's Request for Rehearing

31. The Tribe argues that the Commission erred in concluding that the decision of the Purchasers not to pursue license applications was prompted only by the favorable contract terms they were able to negotiate with Grant County. According to the Tribe, record evidence in its complaint shows that non-compete clauses were the primary reason that the Purchasers and other potential competitors failed to pursue the Priest Rapids

³²As noted above, to the extent that the covenants of good faith and fair dealing impose obligations on the Purchasers under Washington law, those obligation remain.

license or to support Yakama Hydro. We have found no credible evidence in the record, nor any allegations that, if more fully developed, would likely lead to such evidence, that demonstrates that the Purchasers were forced to enter into the contracts, or that they could not, had they believed it to be in their interest, have chosen to forego contracting with Grant County in favor of dealing with the Tribe or another competitor. The fact that Grant County was able to offer the Purchasers sufficient incentives to sign the contracts may have adversely affected Yakama Hydro's ability to compete successfully for the license, but the Tribe has not made a credible threshold showing that the county's actions represented an improper exercise of monopoly power or other unlawful act.³³

32. The Tribe claims that its complaint demonstrates that Grant County used monopoly power (its license) to improperly maintain its monopoly, in that, for example, "Grant PUD knew that Purchasers, if forced to choose, would pick Grant PUD over any challenger because its incumbent (monopoly) advantage made Grant PUD the probable winner,"³⁴ and that Grant County forced the Purchasers to accept non-compete clauses with the primary intent of eliminating competition. The fact that the Commission, as required by Section 15(a)(2) of the FPA,³⁵ grants a marginal tie-breaker preference to incumbents during relicensing is hardly a restraint of trade by Grant County. Moreover, the Tribe in no way supports its allegations that the Purchasers were "forced" to sign contracts, *i.e.*, that they could not have purchased power from other sources or could not have supported a competitor, instead of reaching agreement with Grant County, had they considered those courses of action to be in their best interests.³⁶

33. The Tribe maintains that the Commission erred by failing to find whether use of the non-compete clauses actually, as opposed to potentially, eliminated potential

³³While the Tribe views the sequence of events preceding its complaint as showing anti-competitive activity by Grant County, it is at least as likely that the Purchasers were using putative support for Yakama Hydro to obtain leverage in their negotiations with the county.

³⁴Tribe Request for Rehearing at 14.

³⁵16 U.S.C. § 808(a)(2).

³⁶The Tribe also contends, Request for Rehearing at 15-16, that, by signing contracts with the Purchasers, Grant County was denying the Tribe access to "essential facilities," in violation of Section 2 of the Sherman Act. The Tribe provides no support, nor are we aware of any, for its unique definition of potential customers as an essential facility.

competitors (specifically Yakama Hydro). As we have discussed above, while we do not favor non-compete clauses as a matter of policy, nothing in the record here demonstrates anything other than that Grant County convinced willing purchasers to enter into the contracts in question, nor do the Tribe's allegations warrant further proceedings.³⁷

34. The Tribe further alleges that because Grant County makes sales outside of the State of Washington, we erred in determining that we have no rate jurisdiction over the county under FPA Section 20. Section 20 specifically limits the Commission's rate jurisdiction to instances in which "any of the States directly concerned" does not exercise regulatory control over the rates charges and the services rendered by a licensee. The Commission is aware of no state in the region that does not regulate retail electric rates and related services. In consequence, the Tribe has made no showing that there exists here a regulatory gap that the Commission must fill.

35. The Tribe avers that the Commission has failed to protect the public interest by not imposing a substantive remedy, by "cutting short innovative thinking with regard to regional water issues" and by ignoring alleged harm to the Tribe. We have taken the step necessary to protect the public interest by requiring that the non-compete clauses be removed from the contracts. No further remedy is required or appropriate. As we explained in the November 21, 2002 order, the Tribe and any other interested parties may present any "innovative thinking" for Commission consideration in the upcoming licensing proceedings.³⁸ And while the Tribe alleges that PacifiCorp's withdrawal from Yakama Hydro cost the Tribe employment opportunities, the opportunity to take over part of PacifiCorp's distribution system, and the ability to better control environmental conditions on its lands, we cannot agree with its contention that these are matters to be addressed by the Commission, rather than with PacifiCorp.

36. The Tribe asks the Commission to withdraw Grant County's incumbent preference as a remedy. We have previously explained that we consider such a remedy to be overly

³⁷Much of the Tribe's argument rests on its contentions that PacifiCorp's withdrawal from Yakima Hydro was the result of Grant County's allegedly anti-competitive actions. We find these allegations to be purely speculative, and, as we noted in the November 21, 2002 order, 101 FERC at p. 61,799, the effect of PacifiCorp's actions on the tribe's ability to pursue a license application is a contractual matter between them.

³⁸101 FERC at p. 61,799, n.46.

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harsh.³⁹ We are requiring Grant County to remove from the contracts those clauses that we deem to be undue restraints of trade. This is a complete remedy, and no more is required. The Tribe further requests that we require Grant County to sell project power to the Tribe. Even assuming that we have the authority to impose such a remedy, we see no reason to do so in the absence of any showing by the Tribe that it has been treated differently than other, similarly-situated entities with respect to the purchase of power from the project.⁴⁰

The Commission orders:

The requests for rehearing, filed on December 19, 2002, by Confederated Tribes and Bands of the Yakama Indian Nation, and on December 23, 2002, by Public Utility District No. 2 of Grant County, Avista Corporation, and Portland General Electric Company, are denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³⁹Id. at p. 61,800.

⁴⁰Also, as we stated in the November 21, 2002 order, 101 FERC at p. 61,797, the Tribe will have the opportunity to contest the contracts and Grant County's proposed power marketing plan when the county files its license application.