

104 FERC ¶ 61,324
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Tacoma, Washington

Project Nos. 460-021 and 460-027

ORDER HOLDING IN ABEYANCE MOTION TO PARTIALLY LIFT STAY,
DIRECTING APPOINTMENT OF A SETTLEMENT JUDGE FOR A PROCEEDING
ON INTERIM CONDITIONS, AND
DENYING PETITION FOR DECLARATORY ORDER
AND MOTION FOR SUMMARY DISPOSITION

(Issued September 24, 2003)

1. Pending before us are two filings of the Skokomish Indian Tribe (the Tribe), requesting that we take certain actions in this remanded relicensing proceeding for the Cushman Hydroelectric Project No. 460. On March 3, 2003, the Tribe filed a motion to partially lift the stay of the new license for the Cushman Project to establish interim conditions to benefit two salmon species listed as threatened under the Endangered Species Act. On April 24, 2003, the Tribe filed a petition for a declaratory order and motion for summary disposition regarding the validity of the licensee's certifications for the project under the Coastal Zone Management Act and the Clean Water Act. For the reasons discussed below, we hold in abeyance the motion to partially lift the stay, direct the appointment of a settlement judge for a proceeding on interim conditions, and deny the petition for a declaratory order and motion for summary disposition.

I. BACKGROUND

2. The Commission issued a new license to the City of Tacoma, Washington (Tacoma) for the Cushman Project on July 30, 1998, and issued an order on rehearing on March 31, 1999.¹ Tacoma, the Tribe, and the National Marine Fisheries Service (NMFS) filed petitions for judicial review. On May 21, 1999, the Commission stayed the new

¹City of Tacoma, Washington, 84 FERC ¶ 61,107 (1998), on reh'g, 86 FERC ¶ 61,311 (1999).

license pending such review.² Evolutionarily significant units of two salmon species were subsequently listed as threatened under the Endangered Species Act (ESA), and the Commission entered into formal consultation with NMFS concerning the effects of the Cushman Project on those species. On October 30, 2000, the U.S. Court of Appeals for the District of Columbia Circuit remanded the case to the Commission for completion of formal consultation under Section 7 of the ESA.³ At that time, the court observed that NMFS planned to issue its biological opinion in late October 2000.

3. Shortly thereafter, the Commission staff entered into formal consultation with the U.S. Fish and Wildlife Service (FWS) concerning the Cushman Project's effects on bull trout, another fish species that was listed as threatened after issuance of the Commission's order on rehearing. To date, neither consultation has been completed. Thus, the new license remains stayed pending further Commission order, and the Commission continues to await receipt of biological opinions from both NMFS and FWS.

4. On March 3, 2003, the Tribe filed a motion to partially lift the stay to establish interim conditions pending judicial review. The Tribe requests that Tacoma be required to operate the Cushman Project in accordance with four articles of the new license: Article 407, which requires a minimum flow of 240 cubic feet per second (cfs) in the North Fork Skokomish River; Article 404, which requires periodic flushing flow releases to help maintain the channel conveyance capacity of the mainstem Skokomish River; Article 418, which requires Tacoma to monitor the tailrace during operation of Powerhouse No. 2; and Article 408, which requires coordination of water releases to maintain flood control and recreation levels in Lake Cushman.

5. On April 24, 2003, the Tribe filed a petition for a declaratory order and motion for summary disposition. The Tribe requests that the Commission declare invalid both the water quality certification for the project under Section 401 of the Clean Water Act (CWA), and Tacoma's certification of consistency for the project under the Coastal Zone Management Act (CZMA). The Tribe further requests that Tacoma be required to obtain a new water quality certification and provide a new opportunity for the state to review the licensee's certification of consistency with the CZMA and the state's coastal zone management program.

²87 FERC ¶ 61,197 (1999).

³City of Tacoma, Washington, et al. v. FERC, Nos. 99-1143, et al. (D.C. Cir. Oct. 30, 2000).

6. Tacoma filed responses in opposition to both of the Tribe's filings. NMFS, Washington Department of Ecology (Ecology), Washington Department of Fish and Wildlife (Washington DFW), and American Rivers filed responses in support of the Tribe's motion to partially lift the stay.

II. MOTION TO PARTIALLY LIFT STAY

A. Parties' Positions

7. In its motion, the Tribe requests that Tacoma be required to implement four articles of the new license for the Cushman Project. To benefit salmon species listed as threatened pursuant to the ESA, the Tribe requests that Tacoma be required to release a minimum flow of 240 cfs or inflow, whichever is less, as required by Article 407 of the license. To help maintain the channel conveyance capacity of the mainstem Skokomish River, the Tribe requests that Tacoma be required to provide, for five years, a total of up to 25,000 acre feet of water to be released as flushing flows to the North Fork Skokomish River, to supplement flows in the mainstem so that they reach 2,500 cfs for five continuous days each year, as provided in Article 404 of the license. The Tribe further requests that Tacoma be required to file and implement a tailrace monitoring plan during operation of Powerhouse No. 2, as provided in License Article 418. Finally, the Tribe requests that Tacoma be required to coordinate all water releases as necessary to maintain flood control and recreation levels in Lake Cushman, as provided in License Article 408.

8. The Tribe argues that these interim conditions are needed because operation of the Cushman Project without the mitigation measures included in the new license is harming the fisheries, the Tribe, and its Reservation. The Tribe points out that, even after NMFS issues its biological opinion, the Commission will need to determine whether to modify the license, and parties are likely to object and seek rehearing. Once the Commission issues its final decision, parties will likely seek judicial review. Thus, the Tribe asserts, there is "no end in sight," and the Commission must partially lift the stay in order to impose these interim measures.

9. NMFS supports the Tribe's motion, noting that the interim relief requested "would partially implement NMFS's previous recommendations for protection of anadromous species and would not preclude additional or different protection, if necessary."⁴ NMFS gives no indication of when it might complete its biological opinion. Similarly, NMFS

⁴NMFS's response at 1 (filed March 21, 2003).

expresses no opinion about whether completion of ESA consultation might be required before we could partially lift the stay. Ecology and Washington DFW state that the Cushman Project is causing harm to anadromous fish resources and that interim measures to ameliorate the harm would be appropriate. They add that the interim measures that the Tribe requests are consistent with their previous recommendations in the relicensing proceeding. American Rivers also supports the Tribe's motion, arguing that the requested conditions "would provide the mitigation necessary to ensure at least a minimum level of protection while the proceedings progress."⁵

10. Tacoma responds that the Tribe has submitted no new information or changed circumstances that would warrant modifying the Commission's stay order. Tacoma points out that, in granting a stay, the Commission found that the costs of the new license are substantial, and would be largely unrecoverable if the license requirements were significantly altered on judicial review.⁶ Tacoma reiterates that, if the Commission were to require the requested interim conditions, Tacoma would have no choice but to reject the new license and immediately shut down the project, thus foreclosing any meaningful opportunity for judicial review. Finally, Tacoma points out that the Tribe's motion would preempt the outcome of the Commission's formal consultation with NMFS under Section 7 of the ESA.

B. Discussion

11. When it appears that ongoing operation of a hydroelectric project may have adverse effects on listed species, a necessary first step is to determine whether and how the project may be affecting the species, and what changes may be needed to the project or its operation to address any adverse effects.⁷ To assist in developing this information, our staff's usual course of action is to direct the licensee to consult informally with the FWS or NMFS, as appropriate, as well as other interested entities, to examine project

⁵American Rivers' response at 4 (filed March 17, 2003).

⁶See 87 FERC at 61,734-35.

⁷See *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (Commission abused its discretion by refusing to explore the possible need for interim protective measures for endangered species); *Platte River Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992) (affirming Commission's subsequent decision to require interim protective measures in one license, which contained a reservation of authority to allow such changes, but not in another license, which did not).

effects and any proposed changes. In many cases, the licensee agrees to serve as the Commission's non-federal representative for purposes of informal ESA consultation and preparation of a draft biological assessment, and the parties are able to reach agreement on what changes, if any, are needed to benefit listed species. If the proposed changes require a license amendment, the Commission will institute an amendment proceeding. Depending on what changes are proposed, formal ESA consultation may be required for the license amendment. This process generally works well, but requires sufficient time for development of the facts and negotiations among the parties. In some cases, it can take a year or more for the parties to reach consensus on a proposed license amendment.

12. In this case, however, the delay that has occurred in completing ESA consultation on the new license has now far exceeded the time that we originally anticipated might be required for judicial review. In the interim, the only condition to benefit listed species has been the 60 cfs minimum flow that Tacoma has voluntarily agreed to provide. In addition, the record already contains substantial evidence about the long-term effects of the project on listed species. As a result, we do not think it would be in the public interest to expend the additional time that would likely be required for informal ESA consultation on possible interim measures. Rather, in these circumstances, we believe the best course of action is to require a more structured and expedited approach to the issues involved. To that end, we will hold the Tribe's motion to partially lift the stay in abeyance and direct the appointment of a settlement judge to conduct an expedited proceeding on interim conditions in order to develop a factual record and assist the parties in evaluating possible interim solutions.

13. We direct the Chief Administrative Law Judge or his designee to appoint an administrative law judge (ALJ) to conduct and facilitate a non-adversarial fact-finding proceeding on interim measures to protect threatened fish species affected by operation of the Cushman Hydroelectric Project. The scope of the proceeding will be limited to an assessment of the conditions in the lower North Fork Skokomish River downstream of Cushman Dam No. 2 and any interim protective measures, including minimum flows, that may be needed to improve conditions. In particular, the ALJ should assist the parties in developing a factual record that considers: (1) the effects of operation of the Cushman Project on the listed species for the near term; that is, the two-to-three year period that will likely be required for completion of the remanded relicensing proceeding and any subsequent judicial review; (2) the views of the parties regarding interim protective measures that may be considered necessary or desirable to address those effects, including possible changes in project facilities or operation; (3) information on the cost of implementing those interim protective measures, including capital cost, value of foregone generation, effect on rates, and cost to Tacoma's customers; and (4) whether

there is any basis for agreement among the parties on possible solutions to the issue of interim protective measures.

14. The presiding judge should convene a conference no later than fifteen days from the date of this order, and conduct such proceedings as may be necessary to compile a factual record and assist the parties in addressing the foregoing issues. We direct the presiding judge to provide us with a report within ninety days from the date of this order. Parties may offer written comments or conclusions that will be appended to the ALJ's report. The report will not be an initial decision, so we will not entertain the filings of briefs on or opposing exceptions. Further, we do not anticipate the need for cross-examination of witnesses. The judge need not create an exhaustive record, but may work with the parties to create a record that provides a thorough picture of the facts, problems, and possible solutions. After reviewing the report and the parties' comments, we will reconsider the Tribe's motion to partially lift the stay in light of the information developed in this proceeding on interim conditions.

III. PETITION FOR DECLARATORY ORDER

15. On April 25, 2003, the Tribe filed a petition for a declaratory order and motion for summary disposition regarding Tacoma's certifications under the CZMA and the CWA. The Tribe argues that both these certifications are defective, and that we should invalidate them in response to the court's remand. The Tribe further requests that we require the licensee to submit a new CZMA certification, and also to obtain a new CWA certification from Ecology.

A. Coastal Zone Consistency Certification

16. The Tribe asserts that the 1997 CZMA consistency certification is invalid, and the Commission must refrain from issuing a license until after Tacoma submits a new CZMA certification pursuant to a legal certification process. In support, the Tribe cites the 1999 decision of the Washington Court of Appeals in Skokomish Indian Tribe v. Fitzsimmons.⁸ In that case, the court held that Ecology's waiver of the Cushman consistency review was arbitrary and capricious, because Ecology also found that Tacoma's proposal for the project did not comply with the state's coastal zone program, and would not be conducted in a manner consistent with the program requirements. In essence, the Tribe argues that, because the court found Ecology's waiver internally

⁸Skokomish Indian Tribe v. Fitzsimmons, 97 Wash. App. 84, 982 P.2d 1179 (1999). On January 5, 2000, the Supreme Court of Washington denied Ecology's petition for review. 143 Wash. 2d 1018 (2000).

inconsistent, we must now require that Tacoma obtain a new certification or waiver from the state.

17. Tacoma responds that the Tribe's petition does little more than rehash arguments that the Commission rejected in its previous orders. Tacoma points out that Ecology expressly declined to object to Tacoma's consistency certification within the 6-month statutory time limit. In response to the Tribe's request for review of Ecology's determination, the U.S. Department of Commerce, which administers the CZMA, found that Ecology's failure to object meant that its concurrence "is conclusively presumed" under the statute. The Commission reviewed these facts and found that the relicensing order complied with the CZMA. Tacoma adds that, because the Fitzsimmons decision concerned Ecology's compliance with the state's coastal zone management program, it did not address the Commission's compliance with the CZMA, and could not be used to require the Commission to reopen its relicense orders.

18. Tacoma and the Tribe do not mention Ecology's response to the Fitzsimmons decision. On February 9, 2000, Ecology informed Tacoma by letter of its response to the court's direction that Ecology issue a response to Tacoma's consistency certification for the Cushman Project.⁹ Ecology stated that the Cushman Project, as proposed, would not be consistent with the state's federally-approved Coastal Zone Management Program (CZMP). Ecology found that Tacoma's proposed instream flow regime of 100 cfs (with minor pulsing flows in the fall and winter) would be inadequate for salmon and steelhead habitat in the North Fork Skokomish River and that, therefore, the project would not meet water quality standards, a key enforceable policy of the CZMP. However, Ecology also stated:¹⁰

It is Ecology's position that Tacoma Power should release a minimum flow of 240 cfs (or inflow at Cushman Dam No. 2, whichever is less) to the North Fork Skokomish River. During flood events spill may have to be released. It is also Ecology's position that Tacoma Power should be required to participate in an adaptive management process with the goal of increasing flows in the river to more natural levels. This process should include an evaluation whether higher instream flows have a positive effect on reversing channel aggradation in the mainstem Skokomish River. An instream flow adaptive management program would afford the opportunity

⁹Letter from Ecology to Tacoma dated February 9, 2000 (filed with the Commission on February 17, 2000).

¹⁰Id.

to balance the designated uses of the North Fork and mainstem Skokomish River with public health and safety concerns (e.g., flood prevention).

19. Thus, Ecology has already indicated that, although Tacoma's original relicensing proposal would not be consistent with the state's CZMP, Tacoma should be required to implement the conditions of the new license with respect to minimum flows, flood control, and adaptive management. As a result, no purpose would be served by requiring Tacoma to submit a new consistency certification for Ecology's review.¹¹ In short, we regard Ecology's letter as concurrence that the new license terms are consistent with the state's CZMP. Nothing further is required to support our relicensing decision in this case.

20. The Tribe also argues that, in any event, a supplemental consistency review is required, because new species have been listed pursuant to the ESA. Specifically, the Tribe maintains that these new listings constitute "significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource," and that they therefore require a supplemental consistency certification pursuant to the CZMA regulations.¹²

21. Tacoma responds that these listings were issued several years ago and are not new developments. Therefore, Tacoma maintains that the listings do not constitute "significant new circumstances or information" justifying a supplemental consistency review.

22. As noted, we issued our relicensing decision in 1998, and our order on rehearing in 1999. Chinook salmon, chum salmon, and bull trout were subsequently listed as threatened in 1999.¹³ Although these listings were effective after we issued our rehearing

¹¹If we did so require, Tacoma would most likely submit a certification of its original relicensing proposal, which Ecology has already found is inconsistent with the state's CZMP. Although we could require Tacoma to submit a certification based on the new license terms, Tacoma has stated that it would be unable to accept such a license, and Ecology has already indicated that it supports the new license conditions. Therefore, requiring a new consistency certification would simply delay the proceeding without providing any new information.

¹²15 C.F.R. § 930.66(a)(2).

¹³See 64 Fed. Reg. 14308 (March 24, 1999, effective May 24, 1999) (Puget Sound
(continued...))

decision, we had already considered the effects of the Cushman Project on these species, not only in the Commission staff's final environmental impact statement issued in 1996, but also throughout the licensing proceeding. This information was available to Ecology when it issued its decision on Tacoma's consistency certification in 1997. Therefore, although these listings have triggered additional consultation pursuant to the ESA, they are insufficient, without more, to require a supplemental CZMA consistency review. Moreover, as discussed above, Ecology has since issued a new response to Tacoma's consistency certification, finding Tacoma's original proposal inconsistent with the state's CZMP and recommending that Tacoma be required to adhere to the new license conditions. Ecology issued this response more than eight months after the effective date of the chinook and chum salmon listings, and more than two months after the effective date of the bull trout listing. Consequently, a supplemental review would serve no useful purpose and is not required.

B. Water Quality Certification

23. The Tribe argues that Ecology's issuance of water quality certification for the Cushman Project was invalid, and that the Commission must refrain from issuing a new license until a valid certification is obtained. The Tribe maintains that, under the Keating case, the Commission must independently determine whether Ecology's certification complied with Section 401 of the CWA.¹⁴ The Tribe reiterates its complaints, which we considered and rejected in our relicensing and rehearing decisions, concerning the content of the certification (a one-page letter with only one condition), its "interim" nature (requiring a 30 cfs minimum flow only until the Commission issues a relicensing decision), and its procedural history (modified on appeal in response to a settlement agreement between Ecology and Tacoma). The Tribe also argues that Section 401 requires states to establish procedures for public notice of applications for certification, as

¹³(...continued)

chinook salmon); 64 Fed. Reg. 14508 (March 25, 1999, effective May 25, 1999) (Hood Canal summer-run chum salmon); 64 Fed. Reg. 58,910 (Nov. 1, 1999, effective Dec. 1, 1999) (bull trout).

¹⁴Keating v. FERC, 927 F.2d 616, reh'g denied, 927 F.2d 616 (D.C. Cir. 1991).

well as procedures for public hearings in appropriate cases.¹⁵ Because, in this case, there is no evidence that the state issued public notice of Tacoma's certification application or held a hearing in connection with it, the Tribe argues that we must declare it invalid and require Tacoma to obtain a new certification.

24. Tacoma responds that the Commission has already rejected many of the Tribe's procedural objections to the certification, and has held that federal agencies have no authority to review state certifications under Section 401. Tacoma therefore argues that we should reject the Tribe's requests.

25. The Keating case concerned a state's attempted revocation of water quality certification pursuant to Section 401(a)(3) of the CWA. That section creates a presumption that a state certification issued for purposes of a federal permit to construct a facility will be valid for purposes of a second federal license related to the operation of that facility. The court held that the validity of the state's purported revocation of its prior certification was a matter of federal law for the Commission to decide in the first instance. In doing so, the court distinguished revocations from initial certification decisions. With respect to the latter, the court stated: "Nor do we doubt the propriety of a federal agency's refusal to review the validity of a state's decision to grant or deny a request for certification in the first instance, before any federal license or permit has yet been issued."¹⁶ The court observed that initial certification decisions presumably turn on questions of substantive state environmental law, adding that "a number of courts have held that disputes over such matters, at least so long as they precede the issuance of any

¹⁵Section 401 provides, in pertinent part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions of . . . this title. . . . Such State . . . shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. . . .

33 U.S.C. § 1341(a).

¹⁶927 F.2d at p. 623.

federal license or permit, are properly left to the states themselves.”¹⁷ Thus, the Keating decision is limited in scope, and does not apply to initial certification decisions.

26. The Tribe argues that the Commission must decide whether Ecology’s certification procedurally complied with Section 401. We disagree. The courts have made it clear that the Commission lacks the authority to alter or reject a state’s certification conditions, or to review their validity.¹⁸ Issues concerning a state’s procedural compliance with Section 401 should be brought to the state’s attention through its appeals process and reviewed in the state’s courts.

27. The Tribe argues that Section 401 requires public notice of all certification requests, and that we must require Tacoma to request a new certification because there is no evidence that the state provided the requisite notice. Section 401 provides that states “shall establish procedures for public notice in the case of all applications for certification.” However, we do not regard this as authorizing us to determine whether or how a state may have provided such notice, or to reject a certification on grounds of inadequate notice. These are matters of state law that are not within the Commission’s jurisdiction or expertise. In addition, because Section 401 does not specify what sort of notice procedures should be required, there is no federal law for us to apply. Consequently, the situation is unlike that in Keating, which involved the application of procedures and substantive standards for revocation that were clearly set forth in Section 401(a)(3). We therefore deny the Tribe’s motion to declare the certification invalid and require that Tacoma file a new certification request.

The Commission orders:

(A) The motion to partially lift the stay to establish interim conditions, filed by the Skokomish Indian Tribe in this proceeding on March 3, 2003, is held in abeyance until further order of this Commission.

(B) The Chief Administrative Law Judge is directed to appoint a presiding administrative law judge to conduct, on an expedited basis, whatever proceedings, hearings, and settlement discussions that may be appropriate to develop a factual record and assist the parties in evaluating possible interim solutions to benefit threatened fish species pending completion of the remanded relicensing proceeding for the Cushman

¹⁷Id.

¹⁸See American Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997); Department of the Interior v. FERC, 952 F.2d 538 (D.C. Cir. 1992).

Project Nos. 460-021 and 027

- 12 -

Hydroelectric Project and any subsequent judicial review. The presiding judge shall convene a conference in the proceeding to be held within fifteen days of the date of this order. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure. The presiding judge shall file a report within ninety days after the date of this order. The Commission's Office of Administrative Litigation and Office of Energy Projects shall provide technical support to the ALJ and the parties in this proceeding.

(C) The petition for a declaratory order and motion for summary disposition regarding the City of Tacoma's water quality certification under Section 401 of the Clean Water Act and consistency certification under the Coastal Zone Management Act, filed by the Skokomish Indian Tribe in this proceeding on April 25, 2003, are denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.