200409015025 Received FERC OSEC 09/01/2004 01:19:00 PM Docket# P-2114-120

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Progressive Hydro LLC, Complainant, v. Public Utility District No. 2 of Grant County, Washington, Respondent.	Docket No. 2114-___

COMPLAINT OF PROGRESSIVE HYDRO LLC

Pursuant to Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206, Progressive Hydro LLC ("Progressive Hydro") respectfully files this Complaint against Public Utility District No. 2 of Grant County ("Grant PUD"), the current licensee for the Priest Rapids Hydroelectric Project, FERC Project No. 2114 ("Priest Rapids Project"), for Grant PUD's failure to comply with Commission orders.

The full legal name and mailing address of the Complainant is:

Progressive Hydro LLC
c/o Thomas H. Nelson & Associates
825 NE Multnomah, Suite 925
Portland, OR 97232

Progressive Hydro alleges:

1. The Commission in a formal order found that certain clauses in existing power-sales agreements constituted illegal restraints of trade and required that those clauses be

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removed. The first specific order violated was issued on November 21, 2002, in Project No. 2114-106. The order, after finding that the clauses violate Section 10(h)(1) of the Federal Power Act, stated, "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." Order on Complaint, Yakama Nation v. Public Utility Dist. No. 2 of Grant County, 101 FERC ¶ 61,1967 at *32 ("Order on Complaint").

2. Commission orders are immediately effective; under Section 313(c) of the Federal Power Act,[1] one aggrieved by an order must either comply immediately or seek a stay. Grant did neither; rather, it continued to protect itself from competition by leaving the offending provisions in effect and thereby preventing the possibility of competition by its contracting parties during the critically short time remaining for a potential competitor to put together a competing application.[2]

3. Grant PUD kept the illegal clauses in effect knowing full well that there was still a possibility of effective competition for the new license.[3]

4. Following issuance of the Order on Complaint, Grant PUD entered into negotiations with new potential purchaser(s) of power from the Priest Rapids Project. During those negotiations Grant PUD insisted that the clauses declared illegal in the Order on Complaint be incorporated into any new contracts with such new purchaser(s).

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[1] 16 U.S.C. § 825*l*(c).

[2] In order to be considered, all applications for the new Priest Rapids Project license were required to be submitted by November 2003.

[3] In its pleadings to the Commission the Yakama Nation indicated that competition for the new license was still possible.

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5. Grant PUD sought rehearing of the Order on Complaint, which the Commission in Project No. P-2114-111 denied when it issued its Order Denying Rehearing.[4]

6. Once again, instead of complying with the Commission's directive in this new, separate docket or seeking a stay from the court pursuant to Section 313 of the Federal Power Act, Grant PUD kept the illegal, anticompetitive clauses in full force and effect in contracts with its purchasers while it appealed the Commission's ruling.[5]

7. The illegal provisions have yet to be removed from the existing power sales agreements.

8. By keeping the illegal, anticompetitive provisions in place in violation of the Commission's orders Grant PUD prevented competition for the new license for the Priest Rapids Project.

9. Complainant's interest in this matter is as a representative of the public interest concerned that the Commission's licensing activities not be subverted. Grant PUD's violation of the Commission's orders has not yet inflicted measurable direct economic hardship upon Complainant.

10. The issue of Grant PUD's violations of the Order on Complaint and Order Denying Rehearing is not pending before any other tribunal, although both the Yakama Nation and Grant PUD have appealed the Order on Complaint and Order Denying Rehearing to the

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[4] Order Denying Rehearing, Yakama Nation v. Public Utility District No. 2 of Grant County, 103 FERC ¶ 61,073 (April 16, 2003) ("Order Denying Rehearing").

[5] As noted in Paragraph 11, Grant PUD's appeal was consolidated with that of the Yakama Nation and both are currently before the Court of Appeals for the Ninth Circuit.

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Court of Appeals for the Ninth Circuit. Complainant understands that briefs have not yet been submitted in those appeals.

11. The documents and contracts supporting the allegations herein are on file with the Commission in Project Nos. 2114-106 and in Project No. 2114-111.

12. Informal dispute resolution procedures were not used because of the serious nature of the violation and Grant PUD's inability to provide relief from the harm already caused to competition and to the public interest.

13. Because the harm complained of is to competition and to the public interest and not necessarily specific to Complainant, Complainant does not believe that alternative dispute resolution under the Commission's supervision could successfully resolve the complaint.

WHEREFORE, Progressive Hydro respectfully requests:

1. That the Commission issue an order declaring that Grant PUD has violated the Order on Complaint and Order Denying Rehearing by failing to remove the provisions those orders found to be illegal from existing power-purchase agreements and by insisting that such provisions be inserted into contracts being negotiated after the date of the Order on Complaint;

2. That the Commission find that there is no longer the potential for competition with Grant PUD for the new Priest Rapids Project because the deadline for filing competing applications expired on October 31, 2003;

3. That the Commission find that Grant PUD's conduct contravened the policies expressed in the antitrust laws and was not otherwise justified by the public interest;

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4. That the Commission find that the expiration of time for filing competing applications for the new license has made it is impossible to prevent or adequately minimize the contravention;

5. That the Commission find that, under Section 10(h)(2) of the Federal Power Act, it is required to refuse to issue any license to Grant PUD for the Priest Rapids Project;

6. That the Commission find that, because the Commission is prohibited from issuing a new license for the Priest Rapids Project to Grant PUD and because the time for filing of applications for the new license has expired, that Priest Rapids Project is an "orphaned" project, and

7. That the Commission issue a notice that it will entertain applications for the new license for the Priest Rapids Project from interested persons excluding Grant PUD.

DATED this 1st day of September 2004.

Respectfully submitted,

Thomas H. Nelson
Of Attorneys for Progressive Hydro LLC

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing NOTICE OF COMPLAINT and COMPLAINT OF PROGRESSIVE HYDRO LLC, by regular mail, postage prepaid, upon each person designated on the official service list compiled by the Secretary in this proceeding.

DATED this 1st day of September, 2004, at Portland, Oregon.

Thomas H. Nelson
Of Attorneys for Progressive Hydro LLC

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NOTICE OF COMPLAINT

(September __, 2004)

Take notice that on September 1, 2004, Progressive Hydro LLC, as a representative of the public interest and pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 C.F.R. § 385.206 (2004), filed a Complaint against Public Utility District No. 2 of Grant County, Washington ("Grant PUD"), licensee of the Priest Rapids Hydroelectric Project, FERC Project No. 2114.

Progressive Hydro alleges that Grant PUD violated the Commission's November 21, 2002, order directing Grant PUD "to remove Section 8 from the Surplus Sales Contract and Section 7, clauses (d), (f), and (g) from the Reasonable Portion Contract." Progressive Hydro further alleges that after November 21, 2002, in power-sales negotiations with new potential purchaser or purchasers, Grant PUD insisted that the illegal clauses specified above be inserted in new power purchase contracts. Progressive Hydro also alleges that Grant PUD violated a separate requirement that it remove the offending provisions when the Commission issued its Order Denying Rehearing on April 16, 2003. As a result of Grant PUD's violation of the Commission's order, Progressive Hydro claims that Grant PUD successfully prevented competition for the new license for the Priest Rapids Hydroelectric Project, for the deadline for filing competing applications for the new license was October 31, 2003.

Progressive Hydro requests that the Commission invoke Section 10(h)(2) of the Federal Power Act, 16 U.S.C. § 803(h)(2), and find that Grant PUD's conduct has made it impossible to prevent or adequately minimize the contravention of the policies expressed in the antitrust laws and that therefore the Commission is required to refuse to issue any license to Grant PUD. As a consequence of this situation, Progressive Hydro

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requests that the Commission declare that the Priest Rapids Project is an "orphaned" project and that the Commission solicit applications for a new license from all entities interested in so doing except Grant PUD.

Any person desiring to be heard or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. The answer to the complaint and all comments, interventions, or protests must be filed on or before the comment date. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at http://www.ferc.gov using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at (866)208-3676, or for TTY, contact (202)502-8659. The answer to the complaint, comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 C.F.R. 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "eFiling" link. The Commission strongly encourages electronic filings.

Comment Date:

Secretary

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