

UNITED STATES OF AMERICA 114 FERC ¶61,137  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Portland General Electric Company Project No. 2233-047

ORDER ON REHEARING AND CLARIFICATION

(Issued February 16, 2006)

1. On December 8, 2005, Commission staff issued an order approving an offer of settlement and issuing a new license, pursuant to sections 4(e) and 15 of the Federal Power Act (FPA),<sup>1</sup> to Portland General Electric Company (PGE) to continue operation and maintenance of the 16.68-megawatt Willamette Falls Project No. 2233.<sup>2</sup> The project is located on the Willamette River near the cities of West Linn and Oregon City, Oregon. The December 8 Order included as conditions of the license a number of provisions of a Settlement Agreement among PGE, Indian tribes, federal and state agencies, and local entities.

2. On January 6, 2005, PGE filed a request for rehearing, extension of certain deadlines, and clarification. For the reasons discussed below, the Commission grants in part and denies in part the request for rehearing and clarification.<sup>3</sup>

**A. Fish Technical Committee**

3. The settlement agreement provides that PGE will establish a Fish Technical Committee (FTC) in order to ensure implementation of the agreement's provisions.<sup>4</sup> Article 402 of the license requires PGE to establish the committee, and states that "[t]he

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<sup>1</sup> 16 U.S.C. §§ 797(e) and 808 (2000).

<sup>2</sup> *Portland General Electric Company*, 113 FERC ¶ 62,186.

<sup>3</sup> Commission staff, to whom requests for extensions should be addressed, has granted the requested extensions by order issued January 31, 2006. In addition, staff has issued a February 2, 2006, errata notice correcting the December 8 Order in several respects. The remaining matters raised by PGE are discussed in this order.

<sup>4</sup> *See* Settlement Agreement (filed February 2, 2004) at Exhibit A, Article 1.

National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (FWS), and the Oregon Department of Fish and Wildlife (Oregon DFW) are collectively referred to as the Fish Agencies. In addition to the licensee, the Fish Agencies, to the extent of their interests in participating, comprise the FTC.”<sup>5</sup>

4. PGE explains that, as set forth in section 1(c) of the settlement, the parties contemplated that the FTC include representatives of each settling party that desires to participate, not just the licensee and the Fish Agencies. The company also states that license Article 402(c) refers to consultation with the FTC and approval by “the appropriate (i.e., mandatory conditioning) Fish Agencies,” when in fact the Fish Agencies include entities with varying sources of approval.<sup>6</sup>

5. PGE’s points are well-taken. We will revise license Article 402 to make clear that the FTC may include all parties to the settlement,<sup>7</sup> and to remove the reference to mandatory conditioning authority.<sup>8</sup>

### **B. Trail Plan**

6. In its December 27, 2002 license application, PGE stated that it was proposing no new or modified recreation facilities, but that it intended to work with the City of West Linn to grant an easement on project lands to facilitate the city’s development of a master trail system.<sup>9</sup> The settlement did not deal with recreation issues, and the City of West Linn was not a signatory to the settlement.

7. In its October 2004 Environmental Assessment (EA), Commission staff noted that the trail proposal was one of two recreation enhancements proposed by PGE (the other

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<sup>5</sup> See license Article 402(c).

<sup>6</sup> Request for rehearing at 2-5. Presumably, PGE wishes to make clear the distinction between the mandatory authority of the Departments of the Interior and Commerce to prescribe fishways under FPA section 18, 16 U.S.C. § 811 (2000), and other authority, such as that exercised by the State of Oregon under the Clean Water Act.

<sup>7</sup> We do this by revising license Article 402(a) in a manner consistent with PGE’s request.

<sup>8</sup> We thus grant PGE’s request with respect to license Article 402(c), except that we have not included in that article the third sentence of proposed Article 1(c) from the settlement agreement, which provides that Fish Agencies shall decide which of them is the appropriate approval agency, because we have no jurisdiction over those agencies.

<sup>9</sup> See License Application, Exhibit A, at 14-15.

being the development of interpretive and educational opportunities related to the project, fish passage, and Native American significance of the project).<sup>10</sup> Under the heading of recreation needs, the EA noted a study by the Oregon Parks and Recreation Department which concluded that there were high resident participation rates in hiking and walking, and that these activities were expected to experience high growth.<sup>11</sup> The EA also noted evidence that a West Linn path and trail system was the most needed type of open space. Further, the city's goals for complying with a state management plan (the Willamette River Greenway) included trail development.<sup>12</sup> The EA concluded that "[g]ranting an easement to the City of West Linn for the purpose of trail development is an appropriate recreation measure."<sup>13</sup>

8. The licensing order stated that trail development had received stakeholder support and that the EA had recommended that PGE grant the trail easements to the city. However, the order explained that "[s]imply granting the easement to the City would not ensure the construction and maintenance of the trails."<sup>14</sup> The order noted "the conclusion in the EA that the trails are necessary for the project purpose of recreation," and therefore included in the license Article 410, which requires PGE to file for Commission approval a Recreation Trails Implementation Plan, developed in consultation with the City of West Linn, to provide the recreation trails.<sup>15</sup>

9. On rehearing, PGE asserts that the EA did not conclude that the trails were necessary, but only found that granting the easement to the city was appropriate. The company states that it did not propose to develop the trail itself because it was uncertain that safety and security concerns could be addressed, and thus left the matter to the city, which PGE asserts has funds for the project. Finally, PGE states that it devoted its resources to the measures included in the settlement agreement, with no contemplation of implementing a recreational trails program.<sup>16</sup>

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<sup>10</sup> EA at 24-25.

<sup>11</sup> *Id.* at 140-41.

<sup>12</sup> *Id.* at 145. The Commission considered the Willamette River Greenway as a comprehensive plan under FPA section 10(a)(2)(A), 16 U.S.C § 803(a)(2)(A) (2000). *See* EA at 166-67.

<sup>13</sup> EA at 148.

<sup>14</sup> *See* 113 FERC ¶ 62,186 at P 76.

<sup>15</sup> *Id.*

<sup>16</sup> Request for rehearing at 5-7.

10. PGE is correct that the EA did state that granting the easement was “appropriate,” rather than that the trail was necessary. However, the record, as summarized above, shows that there is both a need and a desire for additional hiking/walking resources in the project vicinity. It is our policy to promote “the ultimate development” of the recreational resources of hydropower projects and to require “reasonable expenditures by a licensee for public recreational development.”<sup>17</sup> We therefore affirm the conclusions in the licensing order that the hiking trail is necessary for public recreation and that PGE should develop and implement the trail plan.

11. We cannot accede to PGE’s desire to leave development of the trail to the city.<sup>18</sup> We have authority only over our licensees, and cannot enforce license provisions against other parties.<sup>19</sup> Thus, once we have determined that a measure is required by the public interest, we look to our licensee to perform the measure. That said, there is no reason why PGE’s plan cannot contemplate a leading role for the city in planning the trail. Indeed, if the company and the city wish to reach a private agreement as to how the trail is to be funded (for example, the city agreeing to pay for constructing and maintaining the trail in exchange for an easement), they are free to do so.<sup>20</sup> We, however, must look to PGE to comply with the conditions of its license.

12. The Willamette Falls Project is of significant size (16.680 megawatts). According to Commission staff’s analysis<sup>21</sup> -- which PGE does not dispute -- in the first year of the new license, the project will generate power at a cost of \$2,611,000 less than the likely cost of alternative power. Thus, while we will not know the costs (if any) to PGE of the trail plan until it is approved, it appears unlikely that the plan will substantially affect project economics, and PGE does not so argue. Moreover, other than the trail plan and the interpretive and educational opportunity efforts, PGE is required to undertake no recreation measures. This is a light burden for a project of this size.

13. We do not find that the trail plan requirement is in any way inconsistent with the settlement. The settling parties asked the Commission to adopt the settlement “as part of

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<sup>17</sup> See 18 C.F.R. § 2.7 (2005).

<sup>18</sup> PGC cites to nothing in the record to support its *post hoc* assertion with respect to safety and security concerns.

<sup>19</sup> See, e.g., *Avista Corporation*, 93 FERC ¶ 61,116 at 61,329 (2000).

<sup>20</sup> See, e.g., *City of Seattle, WA*, 75 FERC ¶ 61,319 at 62,014, n.6 (1996).

<sup>21</sup> See 113 FERC ¶ 62,186 at P 100.

the new license,”<sup>22</sup> and nowhere stated that the settlement, which focused exclusively on fishery resources, should comprise the entire license. PGE, which proposed the original trail provision in its license application, never withdrew it.<sup>23</sup> The license contains a number of conditions, including standard license articles dealing with matters such as cultural resources, annual charges, and headwater benefits, which were not referenced in the settlement, but to which PGE does not object. In fact, PGE does not object to the recreation condition dealing with interpretive and educational opportunities.<sup>24</sup> In any event, that the settlement agreement did not include recreation measures is not relevant. We are required by the FPA to examine all public interest considerations and to license the project that is best adapted to the comprehensive development of the waterway in question.<sup>25</sup> The fact that the settling parties did not address recreation does not obviate our need to do so.

### **C. The Fish Ladder**

14. The licensing order described a fish ladder, located at the project dam, as “owned by PGE and Oregon Department of Fish and Wildlife.”<sup>26</sup> PGE states that the fish ladder is entirely owned by Oregon DFW, and that, pursuant to the settlement, Oregon DFW will operate the facility, while PGE has assumed various maintenance responsibilities. The company asks the Commission to clarify this matter.<sup>27</sup>

15. There is nothing in the record that contradicts PGE’s statement that the fish ladder is wholly owned by Oregon DFW. Moreover, there is nothing inappropriate with a third party, such as Oregon DFW, operating a part of a project. It is important to note, however, that the fish ladder is a project work and is listed as such in Ordering Paragraph (B) of the license, a matter regarding which PGE did not seek rehearing. As discussed above, the Commission has regulatory authority only over its licensees, and thus can administer and enforce the terms of the license only through the licensee and the

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<sup>22</sup> February 2, 2004 settlement at 1.

<sup>23</sup> Although the recreation provisions proposed by PGE were discussed in Commission staff’s January 23, 2004 draft EA, the company did not discuss the subject in its comments on the draft EA, which were submitted after the settlement was filed.

<sup>24</sup> See 113 FERC ¶ 62,186 at P 77 (referencing license Article 409).

<sup>25</sup> See FPA section 10(a)(1), 16 U.S.C. § 803(a)(1) (2000).

<sup>26</sup> 113 FERC ¶ 62,186 at P 11.

<sup>27</sup> Request for rehearing at 11.

licensee's property rights. A licensee's property interests can range from fee simple to perpetual or renewable leases, easements, and rights-of-way, and title to project works can be held by someone other than the licensee, so long as the licensee holds the necessary rights to carry out project purposes. Standard license Article 5 (which is part of the Project No. 2233 license) requires the licensee to acquire and retain all interests in non-federal land and other property necessary or appropriate to carry out project purposes. It is PGE's responsibility to do so with respect to the fish ladder.<sup>28</sup>

The Commission orders:

(A) Portland General Electric Company's request for rehearing, filed January 6, 2006, is granted to the extent set forth in this order and is otherwise denied.

(B) The December 8, 2005, Order in these proceedings is clarified to the extent set forth herein.

(C) Article 402(a) of the license for Project No. 2233 is revised to read:

The licensee shall establish a Fish Technical Committee (FTC) as provided by Proposed Article 1 in the Settlement Agreement filed on February 2, 2004, in order to ensure that the requirements of the Relicensing Implementation Plan in the Settlement Agreement, except as modified by this license, are incorporated into the licensee's implementation of the terms and conditions of this license. The FTC is composed of the licensee, the Fish Agencies (as defined below), and the remaining signatories to the settlement, to the extent they elect to participate. The licensee's development and implementation of study plans, reports, facility designs, and operating and implementation plans submitted to the FTC shall comply with the requirements of the Relicensing

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<sup>28</sup> As a separate matter, PGE requests that we delete footnote 7 of the December 8 Order, which states, based on information placed in the record by PGE, that about 85 percent of all fish pass by the project during a period when one of the powerhouses is shut down in the spring. PGE now asserts that the percentage may be different for some species. Request for rehearing at 12. Generally, we do not on rehearing make editorial revisions, unless they have some legal effect, alter license requirements, or relate to substantial evidence on which we relied. The footnote in question is a narrative description of past project operations and did not serve as the basis for any substantive conclusion or license requirement. Moreover, PGE, while questioning the data referenced in the footnote, does not explain the extent to which the data was incorrect (or whether any error was significant), nor does it provide substitute data. Therefore, the footnote will not be deleted.

Implementation Plan, to the extent such provisions are required by this license.

(D) Article 402(c) of the license for Project No. 2233 is revised to read:

The National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the Oregon Department of Fish and Wildlife are members of the FTC and are collectively referred to as the Fish Agencies. Where consultation with the FTC and approval by the appropriate Fish Agencies is required by this license, the licensee shall also submit the final study plan, report, facility design, or operating or implementation plan to the appropriate Fish Agencies for approval prior to filing with the Commission. The licensee's implementation of measures pursuant to this license shall be reported to the FTC as provided in the Relicensing Implementation Plan.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.