UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Puget Sound Energy, Inc. Project No. 2493-027

ORDER DENYING REHEARING

(Issued June 1, 2005)

1. In an order issued June 29, 2004, the Commission issued to Puget Sound Energy, Inc. (Puget) a new license for the 44.4-megawatt (MW) Snoqualmie Falls Hydroelectric Project No. 2493, located on the Snoqualmie River, in the City of Snoqualmie, King County, Washington.[1] In an order on rehearing, issued March 1, 2005 (March 1 Order), the Commission adjusted upward the minimum flows required by Article 421 of the new license.[2] Puget has requested rehearing of the March 1 Order as it relates to minimum flows.[3]

2. On rehearing, Puget argues that the Commission's adjustment of the minimum flows required by Article 421 constitutes an improper revision of the Clean Water Act certification conditions applicable to the project because: (1) the Commission lacks

[1] 107 FERC ¶ 61,331.

[2] 110 FERC ¶ 61,200. The rehearing order also revised the relicense order to include Puget's contribution to a United States Corps of Engineers project in the calculation of economic benefits for the project, add the Snoqualmie Indian Tribe (Tribe) as a party to be consulted under license article 420, and require the addition to article 405 of a description of how the project will be operated to maintain compliance with article 421.

[3] The Tribe filed a motion under section 713(d)(2) of the Commission's rules of practice and procedure, 18 C.F.R. § 713(d)(2) (2004), to permit the filing of briefs and/or oral argument regarding Puget's rehearing request. The Tribe presents no argument as to why we should depart from the general rule, 18 C.F.R. § 713(d)(1) (2004), that answers to rehearing requests are not permitted. Its motion is denied.

jurisdiction to adjust the certification flows; (2) the Commission's flow adjustment is inconsistent with the certification's flow conditions; (3) the Commission's adjustment was unsupported by substantial evidence; and (4) the Commission's flow adjustment violates the Establishment Clause of the First Amendment to the Constitution. We deny the rehearing request for the reasons discussed below. This order is in the public interest because it resolves this license proceeding.

Background

3. Under the new license, as issued in the Commission's June 29, 2004 Order, and in accordance with the certification issued for the project by the Washington State Department of Ecology (Washington Ecology), the project was required to be operated to ensure that the following minimum flows (as measured at the diversion weir) or "natural" flow, whichever is less, pass over the Snoqualmie Falls: May 16 through May 31 – 200 cfs; June – 450 cfs; July and August – 200 cfs on weekends and July 4th[4] -- 100 cfs daytime weekdays and 25 cfs nighttime weekdays; September through May 15 – 100 cfs daytime and 25 cfs nighttime; and on Labor Day weekend – 200 cfs daytime and nighttime.[5]

4. On rehearing, the Tribe argued that the Commission failed to balance competing interests as required by section 10(a) of the Federal Power Act (FPA) because the Commission's relicense order required flows over the Falls as specified in the project's water quality certification instead of what the Tribe regarded as higher flows recommended by Commission staff in the final Environmental Impact Statement (EIS) issued for the project. It asserted that, given the sacred nature of the site to the Tribe,[6] flows greater than those required in the certification were necessary, and that the Commission should have found that the staff-recommended flows would strike a better balance than the certification flows.

[4] The licensee was also to make the higher weekend releases on holidays during July and August.

[5] 107 FERC at 62,520.

[6] The Tribe noted that mist and spray created by Falls are central to the Tribe's religious practice, and it maintained that curtailment of those flows prevents its ability to practice its religion.

5. In the March 1 Order, the Commission concluded, based on a balancing of competing interests under section 10(a) of the Federal Power Act,[7] that the certification flows did not sufficiently take account of the Tribe's concerns and, on balance, that the license should adopt the certification flows with an adjustment to require flows over the Falls of 1,000 cfs (daytime and nighttime), or inflow, if less, throughout the months of May and June.

Discussion

A. The Commission Has Jurisdiction to Consider Water Quality

6. Citing section 401 of the Clean Water Act (CWA section 401),[8] and *American Rivers, Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99 (2d Cir. 1997), Puget argues that the subject matter of water quality is within the exclusive purview of Washington Ecology; that is, that only Washington Ecology has authority to set water quality conditions or to consider any changes to certification conditions, and therefore that the Commission lacks jurisdiction to consider making any adjustment to the minimum flow conditions as required by Washington Ecology's certification.

7. We agree that, under CWA section 401, as interpreted by *American Rivers*, the conditions of a state certification are mandatory, and that the Commission does not have authority to reject them. However, it does not follow that the Commission has no jurisdiction to consider the subject of water quality or to adopt license terms related to the subject of water quality.[9] Neither *American Rivers* nor the language of CWA section 401 suggest that the Commission's mandate under section 10(a) of the Federal Power Act (FPA) to balance competing interests, including those that may affect flows, is abrogated,

[7] 16 U.S.C. § 803(a).

[8] 33 U.S.C. § 1341(a)(1).

[9] The Commission has historically considered water quality issues. *See, e.g.*, *Puget Sound Power and Light Co.*, 54 FPC 157, 159-160 (1975) (listing legitimate public interest concerns, including water quality.) *See*, generally, *Udall v. FPC*, 387 U.S. 428, 450 (Commission to consider all public interest uses, including aquatic issues). Indeed, if the Commission had no subject matter jurisdiction, it could not adopt requirements concerning water quality even if the state waived certification or remained silent as to conditions.

except to the extent that the Commission's resulting license conditions may conflict with those of the certification.[10]

B. The Commission's Minimum Flow Adjustment is Consistent with the Certification Condition

8. In this instance, the certification states that the project shall be operated to ensure that at least 200 cfs or natural flow, whichever is less, passes over the Falls during the period from May 16 through May 31, and that at least 450 cfs or natural flow, whichever is less, passes over the Falls during the period from June 1 through June 30.[11] Article 421 essentially adopted the certification's flows.[12] On rehearing, the Commission revised Article 421 of the license to require a minimum flow of at least 1,000 cfs or inflow, if less, throughout May and June. A flow that complies with the Commission's minimum will also meet the requirement of the certification's minimum, which is lower. Thus, the Commission's higher minimum flow does not, on its face, conflict with Washington Ecology's condition.[13]

9. Puget argues that the revised license requirement nevertheless conflicts with the certification's requirement. Seizing upon our statement in the March 1 Order that where the license and the certification differ, "the more stringent provision may govern,"[14] Puget argues that though the May and June flows required by the license are higher, they are not the more stringent flows.

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[10] *See Noah Corporation*, 57 FERC ¶ 61,170 (1991), and *Carex Hydro*, 52 FERC ¶ 61,216, at 61,769 (1990).

[11] *See* 107 FERC at 62,538.

[12] 107 FERC at 62,535. Article 421 added a condition that the licensee release a minimum flow of 200 cfs each day of Labor Day weekend.

[13] Puget cites a number of orders (*Wisconsin Public Service Corp*., 110 FERC ¶ 62,215 (2005); *City of Norway, Michigan*, 110 FERC ¶ 62,011 (2005); and *PCA Hydro, Inc.*, 110 FERC ¶ 62,010(2005)) in which the Commission states, as a general principle, that only a reviewing court can revise or delete certification conditions. As explained in the text, the license revision does not revise or delete the certification condition, but augments it.

[14] 110 FERC at 61,746 n. 24.

10. First, Puget argues that the requirement for increased flows over the Falls conflicts with the certification because such flows could increase total dissolved gas levels in the plunge pool at the base of the Falls, thereby degrading water quality. However, in support, it notes only that it had identified total dissolved gas as a water quality parameter of concern for the plunge pool in its relicense application,[15] and that Washington Ecology's certification requires monitoring of total dissolved gas levels.

11. This argument is without merit. In its relicense application, Puget noted that it had monitored gas levels weekly at numerous locations (Plant 1 and 2 tailraces, the top of the Falls, locations upstream of the project, and at a USGS gage downstream of the project), and found the level of gas saturation to be the same, regardless of where the flow was routed.[16] Washington Ecology's certification required additional monitoring only at the project powerhouses.[17] It did not require monitoring in the plunge pool or at other locations below the Falls. Furthermore, while Washington Ecology's certification requires minimum flows over the Falls, it contains no constraints on the maximum flow over the Falls.

12. Next, Puget argues that the requirement of a 1,000-cfs minimum flow over the Falls is likely, during dry years, to prevent compliance with the requirement that a minimum flow of 30 cfs pass through Plant 1's tailrace, resulting in a conflict between two beneficial uses – aesthetic values and aquatic resources – protected by the certification. The 1,000-cfs minimum flow over the Falls, and the 30-cfs minimum flow through the Plant 1 tailrace are required by Articles 421 and 407, respectively, not by the certification. Therefore, no conflict with the conditions set forth in the certification is presented.[18]

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[15] Puget references its application, Volume II, at E2-26.

[16] *See* license application, Volume II, at E2-27.

[17] The condition states a requirement for sampling for three consecutive months at each powerhouse, and if the standards are met, then annually thereafter. 107 FERC at 62,539.

[18] There could be a conflict between the requirements of the two license articles during the extreme low flow periods associated with a drought (an uncommon, but possible, occurrence). Accordingly, we will clarify that when, in May and June, there is insufficient water to pass both 1000 cfs over the Falls and 30 cfs through the tailrace, the requirement to pass the 30 cfs minimum flow takes precedence.

(continued)

13. Finally, the license requires that, at the end of April, Puget begin ramping the flows over the Falls up from April's required 200-cfs minimum flow to May's required 1,000-cfs minimum flow (rather than the certification's 450-cfs minimum for May). Puget argues that this required increase in flows over the Falls will result in ramping over a greater range of flows than does the certification's condition, and thus for a longer period of time, creating a greater potential for adverse effects on aquatic species downstream. However, it is not the duration of ramping, but the ramping rate which affects aquatic species, and neither the license nor the certification restricts the duration over which ramping can occur. In this instance, it was determined that a ramping rate of 2 inches per hour in the nighttime with no ramping during the daytime, will adequately protect aquatic species from the effects of ramping during April.[19] This requirement is set forth in the certification[20] and is a requirement of the license.

C. The Commission Appropriately Balanced the Public Interest on Rehearing

14. Puget argues that the record is devoid of any evidence to support a conclusion that the required 1,000 cfs will supply spray and mist sufficient to provide the Tribe with a satisfactory religious and spiritual experience, and that the selection of a 1,000-cfs flow requirement to accomplish such purpose is speculative. Alternatively, Puget argues that, in requiring the 1,000-cfs flow, the Commission has improperly relied on new assertions of the Falls' historic centrality to the Tribe's spiritual practices, set forth for the first time in the Tribe's rehearing request.

15. Throughout the proceeding, the Tribe has consistently maintained that natural flows over the Falls are needed to provide it with a satisfactory religious and spiritual experience, and this need was referenced in the relicense order.[21] The Tribe's need, along

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It should be noted that if inflow minus 30 cfs is ever less than the 450 cfs mandated by the certification, a conflict would exist between the certification and article 407's mandated 30 cfs minimum flow for the tailrace. In that circumstance, the certification's requirement would take precedence.

[19] Similarly, at the end of June, Puget will be allowed to ramp flows down to a July minimum of 200 cfs on weekends and holidays, and 100 cfs on weekdays/25 cfs on weeknights. The certification's one inch per hour day and night ramping rate at the end of June will apply and will protect aquatic resources.

[20] *See* Appendix A to the relicense order, 107 FERC at 62,538.

[21] *See* 107 FERC at 62,518 and n.33.

with other competing interests, was weighed as required by section 10(a) of the FPA. Although, in the relicense order, we accepted Washington Ecology's certification flows as an appropriate balancing of those competing interests, the 1,000 cfs was also considered in the proceeding, as a part of Flow Option C, which was discussed and recommended in the Final EIS.[22] Therefore, there was certainly a basis in the record upon which to conclude, as we did on rehearing, that the 1,000-cfs flow would better balance those interests.

16. Puget also argues that the license application stated and the Final EIS agreed that there is no constant relationship between flow volume and the Falls' sound and spray; rather, that sound and spray levels may vary with atmospheric conditions, including wind speed and direction, temperature, and humidity. It maintains that since there is no assessment on the record of what level of flows will produce the greatest volume of mist, there is no basis to support 1,000 cfs as a level of waterflow that will create a specific volume of mist,[23] and that 200 cfs or 450 cfs over the Falls could generate as much mist as 1,000 cfs over the Falls on any given day, depending on the weather.

17. We disagree. While the dispersal of the mist may be dependent upon climatic conditions (wind speed and direction, temperature, humidity), the amount of mist generated is a function of the quantity of flow over the Falls.[24] A 1,000-cfs flow produces a greater quantity of mist than a 450-cfs flow, and May and June are the months in which the natural level of flows produces the greatest amount of mist; that is, the greatest number of water particles. Thus, while it is conceivable that, on a windy day, the mist produced by a 200-cfs flow could be dispersed upwards so as to resemble, in volume, a mist cloud derived from a 1,000-cfs flow on a calm day, the 200-cfs mist cloud

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[22] *See* Final EIS at 6-46. Specifically, the Final EIS stated that Flow Option C (with the 1000 cfs daytime flow requirement for May and June) would meet the widest variety of important objectives among the different flow options considered. It added that while Flow Option C would not provide the full natural flows the Tribe requested, it could still enhance the Falls' cultural value.

[23] Specifically, Puget notes that there are no still photos in the Final EIS depicting 1,000 cfs over the Falls, and that the videotape on the record shows only a visual of flows around 1,200 cfs.

[24] Puget itself has acknowledged this, stating (*see* license application, Volume II, at E8-27), "the amount of mist generated is therefore a function of the flow over the Falls, such that a flow of 200 cfs should generate twice as much mist (as measured by the number of water particles) as does a flow of 100 cfs."

would be comprised of fewer water particles and therefore would be less dense than the 1,000-cfs mist cloud. As stated in the Final EIS, at a flow of 1,000 cfs, five waterfall plumes are active, and the waterfall flow causes heavy spray to rise from the canyon.[25] The Final EIS considered the 1,000-cfs flow along with seven other flow thresholds levels[26] and, as previously noted, recommended this flow on the grounds that it meets the widest variety of important objectives among the different flow options considered.[27]

D. Adoption of the Minimum Flow Adjustment Does Not Constitute an Establishment of Religion

18. Puget argues that the Commission's section 10(a) finding that the requirement of a 1000-cfs flow over the Falls is in the public interest was based solely on the Falls' religious significance to the Tribe. Based on the reasoning in *Lemon v. Kurtzman*,[28] *Lynch v. Donnelly*,[29] and *Lee v. Weisman*,[30] it maintains that the required increase in flows violates the Establishment Clause of the First Amendment of the Constitution

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[25] *See* Final EIS at 3-53 and 3-54.

[26] *Id*.

[27] *See* n. 20, *supra*.

[28] 403 U.S. 602 (1971). Puget references the Court's statement of three tests that statutes must meet in order not to violate the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) its principle or primary effect must be one that neither advances nor inhibits religion; and (3) the statue must not foster an excessive government entanglement with religion. 403 U.S. at 612.

[29] 465 U.S. 668 (1984). Puget cites *Lynch v. Donelly* for the view that the government impermissibly endorses religion if its conduct has either the purpose or effect of conveying a message that religion or a particular religious belief is favored or preferred. However, in that case, related to a city's display of a crèche during the Christmas season, the Court specifically stated, "the Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." 465 U.S. at 672-673.

[30] 505 U.S. 577 (1992). Puget cites *Lee v. Weisman* for the view that a law violates the Establishment Clause test where it forces people to support a given religion. That case involved the performance of a formal religious exercise at secondary schools' promotional and graduation ceremonies.

because there was no secular reason for requiring increased flows, and because requiring Puget to provide flows in order to provide mist for the Tribe is equivalent to requiring Puget to subsidize the Tribe's religious practices. This is incorrect. Nothing in the Constitution precludes our considering the cultural and religious concerns of people affected by our licensing decisions. Here, we have not established a religion or required anyone to subscribe to a set of beliefs. Rather, we have made a reasonable accommodation of the Tribe's needs as part of our general public interest balancing. Moreover, as reflected in the discussion in the Final EIS,[31] the 1,000-cfs flow was not arrived at only to accommodate the Tribe's concerns, but also because of the additional value it would provide for aesthetics and recreation, and cultural resources.

The Commission orders:

(A) Article 421 of the license is revised to read as follows:

> Article 421. Minimum Flows over Snoqualmie Falls. In addition to the minimum aesthetic flows required by Appendix A, Condition II.A, the licensee shall:
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> (1) during Labor Day Weekend of each license year, release a minimum flow over the Falls of 200 cubic feet per second (cfs) or inflow, if less, commencing one hour before sunrise on the Saturday of Labor Day Weekend and extending to one hour after sunset on Labor Day; and
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> (2) during May and June of each license year, release a minimum flow over the Falls during both daytime and nighttime of 1,000 cfs, or inflow minus 30 cfs, if less.

(B) The March 31, 2005 request for rehearing filed by Puget Sound Energy, Inc., is denied in all other respects.

[31] *See* Final EIS, at 6-44 through 6-46.

(C) The April 29, 2005 motion, filed by the Snoqualmie Indian Tribe, to permit the filing of briefs and/or oral argument related to Puget Sound Energy, Inc.'s March 31, 2005 rehearing request is denied.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Puget Sound Energy, Inc. Project No. 2493-027

(June 1, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

On June 29, 2004, the Commission issued Puget Sound Energy, Inc. (Puget) a new license for the Snoqualmie Falls Hydroelectric Project. In a March 1, 2005 order on rehearing of the June 29, 2004 order, the Commission increased the flows required by the new license. Puget has now challenged the Commission's decision to increase the flows; the instant order denies Puget's challenge. I dissent in part from this order for the reasons set forth in my partial dissent of the March 1, 2005 order on rehearing.

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Joseph T. Kelliher

Secretary