

147 FERC ¶ 61,215
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Public Utility District No. 1
of Snohomish County, Washington

Project Nos. P-12690-008
P-12690-007
Docket No. EL14-47-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
AND DENYING STAY

(Issued June 19, 2014)

1. On May 6, 2014, the Public Utility District No. 1 of Snohomish County, Washington (District), licensee of the Admiralty Inlet Pilot Tidal Project No. 12690, filed a petition for a declaratory order. The District requests the Commission to declare that, in this case: (1) the Federal Power Act (FPA) preempts the regulatory authority of Island County, Washington (Island County) and the Washington State Department of Ecology (Ecology) under Washington's Shoreline Management Act (Shoreline Act) over the District's actions to construct, operate, and maintain the Project under its license; and (2) the District is therefore not required to obtain Island County's and Ecology's approval in the form of a Shoreline Conditional Use Permit (Shoreline Permit). Also pending before us are two requests for rehearing, filed by PC Landing Corp. (PC Landing) and the Tulalip Tribes of Washington (Tulalip or Tribes), of the Commission's March 20, 2014 order issuing a pilot project license to the District for the project.¹ With its rehearing request, Tulalip filed a motion for a stay of the license. For the reasons discussed below, we grant the petition for a declaratory order and deny a stay. The requests for rehearing will be addressed in a subsequent order.

¹ *Pub. Util. Dist. No 1 of Snohomish Co., Wash.*, 146 FERC ¶ 61,197 (2014).

Background

2. The 600-kilowatt (kW) Admiralty Inlet Tidal Project will be located on the east side of Admiralty Inlet in Puget Sound, Washington. The licensee plans to install and operate two 300-kW hydrokinetic turbines over a ten-year period to study the potential for developing tidal power in Puget Sound.

3. The District filed a license application for the project on March 1, 2012. In response to the Commission's public notice of the application, a number of parties intervened, including Tulalip and PC Landing. Tulalip objected to the proposed project on the grounds that it would affect the Tribes' access to tribal fishing grounds. PC Landing argued that the project would pose an unacceptable risk to its fiber optic submarine cable system, which provides an international telecommunications link between the United States and Japan.

4. On January 15, 2013, Commission staff issued a draft Environmental Assessment (EA), analyzing the potential environmental impacts of the proposed project and alternatives to it. Various federal and state agencies, Indian tribes, non-governmental organizations, and others, including Tulalip and PC Landing, filed comments on the draft EA. On August 9, 2013, staff issued a final EA for the project. The EA addressed a range of environmental issues and comments, including Tulalip's and PC Landing's concerns, and found that the proposed project with staff's recommended measures would not constitute a major federal action significantly affecting the quality of the human environment.²

5. On December 3, 2013, the National Marine Fisheries Service concluded formal consultation with the Commission under section 7(a)(2) of the Endangered Species Act³ and issued a biological opinion on the project's effects on species listed as threatened or endangered under that act. The biological opinion included reasonable and prudent measures to minimize incidental take of those species.

² Final Environmental Assessment for the Admiralty Inlet Pilot Tidal Project No. 12690-005 (issued Aug. 9, 2013).

³ 16 U.S.C. § 1536(a) (2012).

6. Also on December 3, 2013, Ecology issued a water quality certification for the project under section 401 of the Clean Water Act.⁴ No one filed a timely appeal of the certification.
7. By letter dated January 30, 2014, Ecology informed the Commission that it had waived its Coastal Zone Management Act (CZMA) certification authority over the project.⁵ PC Landing filed a notice of appeal of Ecology's waiver with the Washington State Pollution Control Hearings Board on February 26, 2014.⁶
8. On March 20, 2014, the Commission issued a pilot project license to the District for a 10-year term. The license limits construction to a specified work window to protect listed fish species and other aquatic resources. On April 18, 2014, Tulalip and PC Landing filed timely requests for rehearing, and Tulalip filed a motion for a stay of the license order.
9. On May 6, 2014, the District filed its petition for a declaratory order. The Commission issued notice of the petition on May 8, 2014, and established a deadline of June 5, 2014, for comments, protests, and interventions.
10. On May 20, 2014, the District filed a copy of Ecology's May 12, 2014 decision approving the District's Shoreline Conditional Use Permit (Shoreline Permit) for the Admiralty Inlet project. This decision affirmed Island County's issuance of a Shoreline Permit and incorporated all of the County's conditions. It also stated that activities authorized by the permit are stayed until 21 days from the date of filing (i.e., until June 2, 2014) or, if an appeal is filed, until after the appeal is concluded.⁷
11. On May 27, 2014, the District filed a copy of the Pollution Control Hearings Board's May 21, 2014 decision granting Ecology's motion for summary judgment and the District's motion to dismiss PC Landing's appeal of Ecology's letter informing the

⁴ Washington State Dept. of Ecology, Issuance of Water Quality Certification to Snohomish County PUD No. 1, Project No. 12690-005 (filed Dec. 5, 2013).

⁵ Letter from Erik Stockdale, Ecology, to David Turner, FERC (filed Feb. 10, 2014).

⁶ See PC Landing's Notice of Appeal (filed Feb. 26, 2014).

⁷ See letter from Michael Swiger, counsel for the District, to Kimberly Bose, Commission Secretary (filed May 20, 2014), attaching a copy of Ecology's May 12, 2014 decision.

Commission that Ecology had waived its CZMA consistency certification authority for the Admiralty Inlet project. The Board concluded that it lacked jurisdiction over the appeal.

12. On June 3, 2013, the District filed copies of PC Landing's and the Tribes' petitions for review by Washington's Shorelines Hearings Board of Ecology's May 12, 2014 decision approving the District's Shoreline Permit.⁸ On June 4, 2014, PC Landing and the Tribes filed timely motions to intervene in response to the Commission's notice of the District's petition for a declaratory order.

13. On June 5, 2014, Tulalip and PC Landing filed answers opposing the District's petition. PC Landing also filed a protest. On June 6, 2014, PC Landing filed a letter stating its view that, because the Pollution Control Hearings Board's May 21, 2014 order dismissing PC Landing's appeal of Ecology's CZMA waiver for lack of jurisdiction, the decision did not reach the merits of the appeal and thus did not affect the merits of PC Landing's pending request for rehearing.

14. On June 12, 2012, the District filed a motion for leave to answer and an answer to the Tribes' and PC Landing's responses to the District's petition for a declaratory order. On June 13, 2014, PC Landing filed a motion to lodge documents in support of its request for rehearing of the Commission's March 20, 2014 license order.

15. Under Rule 213(a)(2) of our procedural rules, an answer may not be made to an answer unless otherwise ordered.⁹ The District has not shown a need for an answer in this case. We therefore deny the District's motion. PC Landing's motion to lodge concerns documents in support of its rehearing request. Because we will consider PC Landing's and the Tribes' requests for rehearing in a subsequent order, we defer action on PC Landing's motion.

Discussion

A. District's Petition for a Declaratory Order

16. The District requests that the Commission issue a declaratory order stating that, in this case, the FPA preempts Island County's and Ecology's regulatory authority under Washington's Shoreline Act over the District's actions to construct, operate, and maintain

⁸ See letter from Michael Swiger, counsel for the District, to Kimberly Bose, Commission Secretary (filed June 3, 2014), attaching copies of the petitions for review.

⁹ 18 C.F.R. § 385.213(a)(2) (2013).

the Admiralty Inlet project. The District further requests the Commission to declare that the District is not required to obtain Island County's and Ecology's approval in the form of a Shoreline Permit under Washington's Shoreline Act in order to construct, operate, or maintain the project.

17. The District states that it has received a Shoreline Permit from Island County and has prevailed on appeal of the permit before the Island County Hearing Examiner.¹⁰ The District adds that it has informed Ecology and Island County that it intends to comply voluntarily with all of the conditions of the Shoreline Permit except condition 23, which imposes a stay on construction and is the reason for the District's petition for a declaratory order. The District argues that the declaratory order is necessary because, under condition 23 and Washington state law, the Shoreline Permit is automatically stayed and the District may not begin constructing the project until 21 days after Ecology's final approval of the permit or, if further appeals are filed, until after the State Shorelines Hearings Board issues its decision and the time for filing judicial appeals has expired.¹¹

18. The District states that this stay would prevent it from implementing the terms of its license, which authorizes immediate construction of the project after the Commission grants the necessary pre-construction approvals. Because Article 410 of the license and the biological opinion require that construction can only occur during a work window of July 16 to October 14, the District argues that it could miss this work window and construction could be delayed by one to two years. This would cause the District to lose valuable time to study the hydrokinetic technology and collect information, frustrating the purpose of the license. The District therefore asks the Commission to find that, in these circumstances, the FPA preempts the state Shoreline Management Act. To allow the District to maintain its construction schedule for the project, the District requests that the Commission act on its petition expeditiously and issue a ruling by July 1, 2014.

19. Tulalip and PC Landing argue that the District's motion is premature because the Commission has not yet ruled on the Tribe's motion for a stay or the pending requests for rehearing, and because the validity of Ecology's waiver of its CZMA authority has not been determined in state proceedings. PC Landing adds that CZMA consistency was not waived, and that the FPA does not preempt Washington's Shoreline Act as applied to political subdivisions of the state. Finally, Tulalip and PC Landing argue that the

¹⁰ District's petition at 2 (filed May 6, 2014), attaching a copy of the Hearing Examiner's decision.

¹¹ *See* Wash. Rev. Code § 90.58.140(5) (2013).

Commission should deny the petition on the merits because there is no conflict with the license and no need for expedited action in this case.

20. Contrary to these arguments, the District's motion is not premature. As discussed later in this order, we deny the Tribe's motion for a stay. In addition, because the filing of a request for rehearing does not operate as a stay of a Commission order unless the Commission rules otherwise, we need not act on the pending rehearing requests before considering the District's petition. Nor need we await a determination of the validity of Ecology's CZMA waiver in state proceedings. The National Oceanic and Atmospheric Administration (NOAA) administers the CZMA. In this case, NOAA determined, as a matter of federal law, that Ecology's agreement with the District to extend the 6-month review period did not comply with federal regulations and that therefore, Ecology waived its CZMA authority.¹²

21. With regard to timing, we need not find that there is an actual conflict with the terms of the license before determining that federal preemption applies in this case. As discussed below, the Supreme Court has held that the FPA's comprehensive scheme of federal hydroelectric licensing and regulation occupies the field, and we have previously found that when a state's CZMA authority has been waived, the FPA preempts the state's shoreline act. While it might be possible for the District to comply with a state-imposed stay under that act, such compliance is not required and could significantly interfere with the District's ability to begin construction as soon as possible after receiving the necessary pre-construction approval from the Commission.¹³ As a general matter, the

¹² Contrary to PC Landing's assertions (in its answer at 12-17), we do not find anything in the communications concerning Ecology's review of the Admiralty Inlet Project that would preclude us from relying on NOAA's and Ecology's determination that the extension of the review period did not comply with federal regulations and that Ecology's CZMA authority was therefore waived.

¹³ Nor do we consider it significant that the District made previous statements suggesting that in-water construction was anticipated to begin in 2015. *See* Tulalip's answer at 7 and PC Landing's answer at 23. The District's January 31, 2014 letter states that, because of long lead times for manufacture and testing of project components, a licensing decision in February 2014 would allow the District to begin preparations for construction in 2015. The District's petition, filed on May 6, 2014, indicates that it intends to proceed immediately with construction and operation of the project after receiving the necessary pre-construction approvals from the Commission. District's petition at 2-3. Uncertainty about a state-imposed automatic stay could impair the District's ability to plan for project construction consistent with its schedule. District's petition at 18.

Commission encourages licensees to comply with state and local requirements to the extent that they do not conflict with the Commission's requirements or frustrate the purposes of the FPA. We recognize, however, that under the Supremacy Clause of the Constitution, federal law preempts state and local laws when Congress occupies the field by enacting comprehensive legislation that leaves no room for supplemental state or local regulation. The Supreme Court has held that the FPA establishes a comprehensive federal scheme for regulating hydroelectric power projects on navigable waters and thus preempts state law by occupying the field.¹⁴

22. An exception to this can occur when later-enacted federal statutes provide for a state role in specific areas, such as the water quality certification requirement for federal projects under section 401 of the Clean Water Act,¹⁵ or state shoreline permits and consistency certifications issued pursuant to federally-approved state programs under the CZMA. Nevertheless, it is clear in these circumstances that these state requirements depend on federal law for their validity.

23. Under section 307(c)(3)(A) of the CZMA,¹⁶ the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the license applicant's certification of consistency with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within six months of its receipt of the applicant's certification.

24. We have previously held that, absent a waiver of Ecology's CZMA authority, the FPA does not preempt a licensee's compliance with Washington's Shoreline Act and such compliance is required for Ecology to issue a consistency certification.¹⁷ We have

¹⁴ *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181-82 (1946); *California v. FERC*, 495 U.S. 490, 496 (1990) (FPA preempts inconsistent state flow requirements).

¹⁵ *See, e.g., Pub. Util. Dist. No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700 (1994) (states can require flows as water quality certification conditions under section 401(d) of the Clean Water Act).

¹⁶ 16 U.S.C. §1456(3)(A) (2012).

¹⁷ *See Mountain Rhythm Resources*, 88 FERC ¶ 61,260 (1999) (finding no federal preemption where CZMA authority was not waived), *aff'd*, *Mountain Rhythm Resources v. FERC*, 302 F.3d 958 (9th Cir. 2002). In that case, the Commerce Department's regulations implementing the CZMA provided (as they do now) that the six-month waiver period does not begin until the state has also received whatever data and information is required in the state's federally-approved coastal zone management

also held that when a state's CZMA authority has been waived, the FPA preempts compliance with the state's shoreline management act and a shoreline permit is not required.¹⁸

25. In this case, Ecology received the District's application seeking concurrence with the District's consistency certification on March 26, 2012, thus starting the six-month review period. On September 21, 2012, Ecology and the District filed a joint letter advising the Commission that they had agreed to extend the CZMA review period. On January 30, 2014, Ecology informed the Commission that the National Oceanic and Atmospheric Administration, which administers the CZMA, had informed Ecology that the agreement with the District to extend the CZMA review period did not comply with federal regulations. Ecology stated that, as a result, the six-month review period expired in September of 2012 and Ecology had waived its CZMA authority for the project.

program. Ecology required a county-issued shoreline development permit as part of an application for consistency certification. The Commission found that it had no authority to interpret the Commerce Department's regulations or to review the validity of Washington's program. A state's 6-month review period begins when the state agency has received the applicant's consistency certification and all necessary data and information. *See* 15 C.F.R. § 930.60(a) (2013). Under the Commerce Department's current regulations, necessary data may include completed state or local permit applications, but may not include the issued state or local permits. *Id.* § 930.58(a)(2).

¹⁸ *See Weyerhaeuser Co.*, 55 FERC ¶ 61,079 at 61,248 (1991) (permit not required under Washington state's Shoreline Act where county had failed to notify Commission of its objection within six months, thus waiving CZMA authority); *see also South Fork Resources, Inc.*, 36 FERC ¶ 61,331 at 61,786 (clarifying that license did not require licensee to obtain a shoreline development permit under Washington's Shoreline Act), *on reh'g*, 37 FERC ¶ 61,293 (1986), *on reh'g*, 39 FERC ¶ 61,025 (1987) (affirming that Commission licensees are not required to secure state permits that deal with matters which are within Commission's exclusive purview). We note that *Weyerhaeuser* concerned an earlier version of the CZMA, which provided for consistency review by King County rather than Ecology and included language regarding the start of the six-month review period that differs from the current statute and implementing regulations. However, these differences do not affect our conclusion that if a state's consistency certification is waived, the FPA preempts state and local permits that might otherwise be required under the state's shoreline management act.

26. Because Ecology waived its consistency certification under the CZMA, a Shoreline Permit under Washington's Shoreline Act is no longer required as a matter of federal law. Therefore, we grant the District's petition and declare that the FPA preempts any supplementary or inconsistent state or local requirements under Washington's Shoreline Act. The District need not comply with the state-imposed stay provision of condition 23 of its Shoreline Permit. To hold otherwise would be inconsistent with the FPA, because it would allow the state permit to stay a Commission hydroelectric license.¹⁹

27. PC Landing maintains that, because the District is a political subdivision of the state rather than a private entity, the FPA does not preempt Washington's Shoreline Act as applied to the District, citing the Supreme Court's decision in *Nixon v. Missouri Municipal League*.²⁰ We disagree. The Court's decision in that case turned on a lack of clear Congressional intent to preempt a state's authority to decide whether to authorize state and local governmental entities to provide telecommunication services. In contrast, in this case there is no question regarding the District's authority under state law to seek a license for its project and to operate and maintain it in accordance with a federal license. The only question is what law governs the District's license, and the answer is that the FPA applies and preempts the field of hydroelectric regulation. Washington law cannot, therefore, authorize the District to engage in the business of generating hydroelectric power without also ceding the state's authority over the District's activities under its federally-issued license.²¹

¹⁹ Under section 313 of the FPA, 16 U.S.C. § 8251 (2012), and the Commission's regulations in Rule 713, 18 C.F.R. § 385.713(e) (2013), the filing of a request for rehearing does not operate as a stay of the Commission's order, unless the Commission specifically orders otherwise. As a result, only the Commission (or a federal court of appeals, on judicial review) may grant a stay of a hydroelectric license.

²⁰ 541 U.S. 125 (2004). In that case, the Supreme Court held that a provision of the Telecommunications Act authorizing preemption of state and local laws prohibiting the ability of "any entity" to provide telecommunications services did not preempt a state statute barring its political subdivisions from providing those services. The Court reasoned that the term "any entity" was not defined and could mean different things in different settings, and there was no clear expression of Congressional intent to preempt a state's decision regarding whether to authorize state and local governmental entities to provide telecommunications services. *Id.* at 132.

²¹ The FPA by its terms specifically applies to states and municipalities; section 3(7) of the FPA defines "municipality" as a city, county, irrigation district, drainage district, or other political subdivision or agencies of a state competent under state law to

(continued...)

28. Our authority under the FPA is limited to our licensees; we have no regulatory authority over Ecology or Island County in this case. Therefore, our declaration simply provides our interpretation of the FPA as it relates to other federal, state, and local laws. In addition, because the District intends to comply voluntarily with all conditions of the Shoreline Permit except the stay of construction, we need not examine those conditions in detail to determine whether they are consistent with the license. We note that in the event of any actual conflict, however, the federal license would govern.

B. Tulalip's Motion for a Stay

29. Tulalip requests an immediate stay of the Commission's March 20, 2014 order issuing a pilot license for the Admiralty Inlet project. The Tribes argue that a stay is necessary to prevent irreparable harm that will result to Tulalip and its members if the order remains in effect. They maintain that construction and operation of the project "will restrict and/or eliminate access to a usual and accustomed fishing area, which is used by Tulalip members for subsistence, ceremonial, and commercial uses nearly year-round."²² They assert that, absent express Congressional approval, the Commission has no authority to deprive them of access to treaty-reserved fishing grounds, and that the "deprivation of access to usual and accustomed fishing areas constitutes irreparable harm."²³ They add that the project will also harm the transit of fish on which the Tribes depend, issuing a stay will not substantially harm other parties, and the public interest supports a stay to permit adequate time for rehearing and judicial review, as well as careful consideration of environmental impacts.

30. On May 5, 2014, the District filed an answer in opposition to the Tribes' stay motion. The District argues that the Tribes have not demonstrated that they will suffer irreparable harm absent a stay, particularly in light of the Commission's findings in the license order that the project would not affect known fishing areas, will occupy only a small portion of Admiralty Inlet, and requires no navigational restrictions. The District

carry on the business of developing, transmitting, utilizing, or distributing power. *See* sections 3(6) and (7) of the FPA, 16 U.S.C. §§ 796 (6) and (7) (2012). The Supreme Court's decision in *First Iowa* (note 12, *supra*) concerned a cooperative association organized under the laws of Iowa with power to generate, distribute, and sell electric energy; in other words, like the District, a "municipality" within the meaning of section 3(7) of the FPA.

²² Tulalip Tribes' request for rehearing and motion for stay at 28 (filed April 18, 2014).

²³ *Id.*

maintains that there is no basis for the Tribes' concerns about possible harm to fish and marine mammal species, and adds that a stay would substantially harm the District by disrupting its construction schedule given the limited work windows allowed in the license for in-water construction. Finally, the District argues that a stay would be contrary to the public interest in determining the value and feasibility of the hydrokinetic technology at issue.

31. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act, that is, the stay will be granted if the Commission finds that "justice so requires."²⁴ Under this standard, the Commission considers a number of factors, such as whether the movant will suffer irreparable injury in the absence of a stay, whether the issuance of a stay would substantially harm other parties, and where the public interest lies.²⁵

32. In order to meet the requirement of irreparable injury for a stay, the injury must be both certain and great, actual and not theoretical.²⁶ Economic loss alone does not constitute irreparable harm.²⁷ In this case, the Tribes do not claim any economic loss, but rather maintain that the potential of fishing gear or anchor lines getting caught in the project's turbines would effectively close this area for fishing. They also express concern that the monitoring plans for the project are not capable of monitoring behavioral changes in fish or observing harm of fish.²⁸

33. We examined these concerns in the license order and found that the project will not adversely affect the Tribes' treaty rights.²⁹ The project will be short-term, will occupy an extremely small portion of Admiralty Inlet, and does not create a need for any travel or navigational restrictions on project waters. Moreover, the license contains no prohibitions on the right to fish in and around project waters, and includes appropriate

²⁴ 5 U.S.C. § 705 (2012).

²⁵ *Aquenergy Systems, Inc.*, 39 FERC at 62,211 (citing *Columbia Gulf Transmission Co.*, 37 FERC ¶ 61,003 (1986)).

²⁶ *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at P 26 (2001) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

²⁷ *Id.*

²⁸ Tribes' answer at 3.

²⁹ *Pub. Util. Dist. No. 1 of Snohomish Co. Wash.*, 146 FERC ¶ 61,197 at P 94.

conditions to protect tribal fisheries.³⁰ Finally, although we have found that the license will adequately monitor and protect fish, we note that the turbines are removable and the Commission has the authority to require the licensee to stop project operations if it is observed that the project results in inappropriate harm to fish.³¹ We recognize that the Tribes have sought rehearing of our findings, and we will address their arguments in a subsequent order. However, in light of the lack of navigational or fishing restrictions on project waters and the fact that the turbines can be removed if necessary, we find no basis to support the Tribes' claim of irreparable harm. In addition, a stay would harm the District by reducing the value of its limited-term license, and would delay the testing of these experimental turbines, which we have found to be in the public interest. We therefore find that justice does not require a stay, and we deny the Tribes' motion.

The Commission orders:

(A) The petition for a declaratory order filed in this proceeding by the Public Utility District No. 1 of Snohomish County, Washington, on May 6, 2014, is granted.

(B) The motion for a stay pending rehearing and judicial review of the Commission's March 20, 2014 order issuing a pilot license for the Admiralty Inlet Project, filed in this proceeding by the Tulalip Tribes of Washington on April 18, 2014, is denied.

(C) The motion for leave to file an answer and an answer to responses to the petition for a declaratory order, filed by the District on June 12, 2014, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ *Id.* P 96.

³¹ *Id.* P 100.

Document Content(s)

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