

Lewis County

PUBLIC UTILITY DISTRICT

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October 17, 2016

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE, Mail Code PJ-12.3
Washington, DC 20426

RE: Project No. 2833-104
Cowlitz Falls Project – Washington
Licensee's reply to comments by NPS and individual boaters

Dear Secretary Bose:

On September 16, 2016, Public Utility District No. 1 of Lewis County, Washington ("LCPUD" or "District"), licensee of the Cowlitz Falls Project No. P-2833 (Project), submitted a response to the Commission staff's March 7, 2016 correspondence directing LCPUD to report on its efforts to enhance boating take-out access on the lower Cispus River. Since LCPUD made its September 16 submittal, the National Park Service (NPS) and a number of individual members of the whitewater boating community have submitted unsolicited comments on LCPUD's filing. LCPUD requests permission to submit the following reply to those comments for the purpose of providing further information and clarification.

1. "Uninterrupted Access" – At the outset, LCPUD is compelled to clear up a misconception that permeates the boating community's submittals in this matter. Many of the commenters have misconstrued Article 42 of the original license order as requiring LCPUD to ensure "uninterrupted access" at all times to one or more take-out locations on the lower Cispus River. Article 42 does not, however, require "uninterrupted access." Rather, it requires the licensee to provide a "take-out facility at the head of the reservoir on the Cispus River so that the boating use of that river will not be interrupted by project construction or operation."

Although the Cowlitz Falls Project (Project) inundated approximately 1-1/2 miles of the lower Cispus River, neither the Project's construction nor its operation has been responsible for any interruption of boating take-out access on the Cispus River. Both before and after the Project commenced operations, take-out access on the lower Cispus River has been subject to the control of privately owned timber companies that own large tracts of land on both the north and south shores of the river. The pre-Project take-out site was situated on land, and accessed via roads, owned and controlled by timber companies. Pre-Project take-out access was afforded either by permission of those landowners or by trespass over their property.

Whatever take-out access was available to boaters prior to Project construction was never “uninterrupted.” To the extent it was even legally authorized, it was always subject to the rights of the property owners to restrict access for safety purposes (*e.g.*, excessive risk of fire, rock slide, washout, or flood conditions), logging operations, or any other reason. While access to LCPUD’s Copper Canyon Creek take-out site remains subject to road closures for safety and when harvesting operations require intensive use of those roads, the easement agreement between LCPUD and Port Blakely Tree Farms, L.P. (Port Blakely) has improved pre-Project access by providing a blanket authorization for boaters to utilize Port Blakely’s lands and roads to access the site.¹

Accordingly, LCPUD disagrees with the premise that its FERC license requires it to guarantee boaters uninterrupted access to the river at all times. The premise derives from an erroneous reading of Article 42, is unreasonable, and would be impractical to implement.

2. Open Gate Days – As reflected in its September 16 submittal, LCPUD has proposed to increase significantly the number of “open gate” days on which members of the whitewater community would have vehicular access to the Copper Canyon Creek take-out site over Port Blakely’s 340 spur road, without the need to obtain a vehicular entry permit or liability insurance. LCPUD would provide the additional open gate days by contracting with an individual to man the gate at the intersection of the 300 road and the 340 spur and to supervise the boaters’ vehicular use of the spur. In an August 25, 2016 letter to the boating community (included in Attachment 5c to the September 16 filing), the District proposed two alternatives: (1) opening the gate for two weekends (Friday through Sunday) per month from October through March each year (thirty six days per year), or (2) open the gate for one full week each month, October through March (forty two days per year). In subsequent correspondence with boaters, LCPUD acknowledged that some flexibility must be built into any schedule for open gate days due to the unpredictability of road closures, river stages, weather conditions, and other factors that may restrict usage.

LCPUD received a wide range of requests for specific open gate days in 2017, but to date has been unable to obtain consensus from the boaters on a tentative schedule. The District remains committed to the offer contained in its August 25 letter to boaters and will continue to meet and consult with the whitewater community over the next several months to establish a schedule for open-gate access in 2017, with necessary flexibility built into the schedule to accommodate periodic road closures, flood conditions, and other unpredictable factors that may limit access. Unfortunately, several commenters assert that despite its proposal to increase the number of open gate days from 3-4 per year to 36-42 days per year, LCPUD’s offer falls short of its purported obligation to provide full-time, uninterrupted access. As noted earlier, LCPUD rejects the

¹ It is also noteworthy that the Project’s reservoir, Lake Scanewa, did *not* inundate the most commonly used pre-Project take-out site, as NPS suggests in its October 5, 2016 comments. Instead, access to that site has been restricted by a 200 road bridge collapse that occurred in the mid-1980s, the landowners along the Skinner Road (another access road to the pre-Project take-out site) being unwilling to continue granting access for the whitewater boaters, and the 200 road washout upstream of the take out site.

underlying premise² and believes that its offer in conjunction with Port Blakely to expand the number of open gate days *at least nine-fold* will substantially improve the river's usability for individual boaters without the otherwise necessary permit and insurance.

3. Alternative Take-Out Site – Several commenters reiterate earlier suggestions that LCPUD should be required, in collaboration with stakeholders, to select, develop and maintain an alternative boating access site to use in cases when the 300 Road needs to be closed for logging operations or safety reasons. As noted in our September 16 submittal, LCPUD circulated a list of potential alternative take-out locations to stakeholders on July 14, 2016, and conducted a tour of those sites on August 25, 2016. Representatives of the boating community, NPS, Port Blakely, and LCPUD participated in the tour. During the tour the District affirmed that it will pursue developing an alternative take-out site.

Of the sites considered, the one identified on the attached map as Alternative #3 may be the most promising to the whitewater community, as suggested in NPS's October 5, 2016 comment letter. The location can be accessed via either Port Blakely's 300 Road (on the south side of the river) or its 200 Road (on the north side). There is a small bridge near the site connecting the two roads. Port Blakely has indicated its willingness to negotiate additional easement rights with LCPUD to allow use of the 200 Road for purposes of an alternative take-out location. The District will continue during the next several months to work towards achieving consensus with interested stakeholders on the choice of an alternative take-out and, once consensus is reached, negotiating and executing the necessary access rights with Port Blakely.

4. Suggested Acquisition of Additional Property and Roads – A number of commenters have urged that the Commission require LCPUD to acquire superior property rights from Port Blakely that would ensure uninterrupted access to the Copper Canyon Creek take-out or alternative locations. Some commenters have hinted that LCPUD could use eminent domain to acquire the necessary rights if it were unable to obtain them voluntarily.

As mentioned in LCPUD's August 25 letter to stakeholders, the District has discussed with Port Blakely the possibility of purchasing selective parcels and road segments. During those discussions, it quickly became apparent that the company is unable and unwilling to sell only selective portions of their timberland holdings. In order for a purchase to be considered, it would have to include the entire road system and adjoining lands. Singular ownership of the roads and lands is necessary to avoid conflicting management objectives, fire hazard safety policies, and related liability concerns. If the property were offered for sale (which it has not been), Port Blakely has indicated the purchase price would be in the \$40 million to \$60 million range. Similarly, Port Blakely cannot grant additional easement rights to LCPUD that would eliminate

² Not only is the underlying premise of completely "uninterrupted access" unsupported by Article 42, it would require that the District either (1) hire a full-time gate attendant at the head of the 340 road from dawn to dusk, year-round; or (2) acquire by eminent domain additional easement rights to the 300 and 340 roads that prohibit the property owner, Port Blakely, from restricting access to those roads for safety or commercial reasons. Neither option is reasonable or practical.

or unduly limit the company's ability to manage its road system for safety reasons and harvesting operations.

Accordingly, acquisition of property rights from Port Blakely (or other neighboring timber companies) other than by voluntary grant of easement does not appear feasible. Fortunately, Port Blakely has continued to cooperate with LCPUD on improving take-out access, and has signaled its willingness to accommodate the District and the whitewater community with respect to the substantial expansion of open-gate days and development of an alternative take-out location.

5. Requests that LCPUD Provide Umbrella Insurance for Boaters – The Port Blakely-LCPUD easement agreement limits vehicular access to the gated 340 spur road (which connects the Copper Canyon Creek take-out site to the company's 300 road) to boaters and outfitters who obtain a vehicular entry permit from Port Blakely. (LCPUD administers the permit program for Port Blakely.) One of the prerequisites to obtaining a permit is to provide proof of insurance with at least \$1 million in liability coverage. Although boaters without permits or insurance are allowed to park outside the spur road gate and may access the take-out facility on foot, the insurance requirement has been a point of contention with the boating groups for much of the past decade. Port Blakely has modified the insurance requirement since the initial easement was negotiated to make it less onerous on individual boaters (*e.g.*, by removing a requirement that the policy owner name Port Blakely as an additional insured under the policy). However, Port Blakely has steadfastly maintained that it cannot eliminate the insurance requirement altogether given the risk to its timber property from fires and other hazards related to public vehicular access.

Several commenters continue to suggest that LCPUD obtain an "umbrella" insurance policy that will cover the negligent acts of all boaters who use the 340 road. For legal as well as policy reasons, LCPUD has consistently taken the position that it cannot expend public funds to insure a particular segment of the public – namely, those without liability insurance – against their own negligence.³ On a number of previous occasions, the Commission has declined to find the insurance requirement unreasonable under the totality of circumstances,⁴ and there is no basis for the Commission to alter that stance now.

Conclusion

LCPUD is committed to continue working with members of the whitewater community and Port Blakely Tree Farms to improve boater take-out access on the lower Cispus River. The District

³ In May 2005, LCPUD's general legal counsel issued an opinion letter concluding that proposals for the District to provide insurance coverage to members of the public who are not otherwise insured would violate Article VIII, Section 7 of the Washington State Constitution.

⁴ *See, e.g.*, Order Modifying and Approving Plan for Whitewater Boating Take-Out Site, 115 FERC ¶ 62,305 (2006); Order on Rehearing, 117 FERC ¶ 61,188, at P 18 (2006); Letter from Steven G. Naugle, Acting Chief, Land Resources Branch, DHAC, to David Muller, Manager, LCPUD, dated August 13, 2007, at p. 7; *see also* letter from Lorraine W. Yates, Environmental Protection Specialist, DHAC, to David J. Muller, Manager, LCPUD, dated Nov. 16, 2010; letter from Robert J. Fletcher, Chief, Land Resources Branch, DHAC, to David J. Muller, Manager, LCPUD, dated Apr. 28, 2011.

already has instituted enhancements such as new signage and improvements to LCPUD's recreation web page. Significant progress also has been made on initiatives to increase significantly the number of open-gate vehicular access days to the Copper Canyon take-out and identification and development of an alternate take-out site when the 300 road is closed for reasons other than fire hazard. LCPUD needs the coordinated cooperation of the boating community to complete those initiatives, and intends to schedule additional discussions with stakeholders over the next several months to determine a schedule of 2017 open-gate days and to select an alternate take-out location.

It is unfortunate that some members of the boating community refuse to participate constructively in these discussions, preferring instead to engage in a letter-writing campaign resurrecting issues that have long since been decided by FERC, and insisting that nothing short of guaranteed, uninterrupted access to the lower Cispus will do. The District hopes very much that all affected recreationists can come together to reach a consensus on addressing the remaining legitimate issues discussed above.

Please contact me if you require further information on LCPUD's ongoing efforts to enhance whitewater recreation on the lower Cispus River.

Sincerely,



Robert D. Geddes
Manager

cc: Distribution list (attached)

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