EXHIBIT E

KeyCite Yellow Flag - Negative Treatment
Affirmed in Part, Modified in Part by United States Department of the Interior City of Seattle, Washington, F.E.R.C., July 24, 1981

15 FERC P 61144 (F.E.R.C.), 1981 WL 35104
**1 Commission Opinions, Orders and Notices

United States Department of the Interior

Docket No. EL78-36 [1]

City of Seattle, Washington, Project No. 553

Order Conditionally Approving Interim Offer of Settlement
(Issued May 12, 1981)

***61328** Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., and George R. Hall.

Project No. 553 of the City of Seattle, Washington (Seattle), includes three dams and impoundments (Ross, Diablo and Gorge) on the Skagit River in the State of Washington. Article 37 of Seattle's license therefor under the Federal Power Act (FPA) states:

> The Licensee shall in connection with the Gorge development, construct, maintain, and operate such protective devices and comply with such reasonable modifications of the project structure and operation in the interests of fish and wildlife resources as may be hereafter prescribed by the Commission upon the recommendation of the Secretary of the Interior, the Washington Department of Fisheries or the Washington Department of Game.

***61329** On September 21, 1977, the Secretary of the Interior (Interior) recommended certain changes in the operating regime of Project No. 553 that would require releases of water at Gorge Dam (which is the furthest downstream) to maintain minimum flows at Marblemount Bridge (about 15 miles below Gorge Dam) and thereby enhance the habitat of the river for anadromous species. Although Interior's recommendation was submitted in connection with an application for rehearing of the Commission's Opinion No. 808 authorizing Seattle to elevate Ross Dam (which is the furthest upstream), the Commission treated it as a recommendation under Article 37 and, on September 7, 1978, initiated Docket No. EL78-36 to consider Interior's proposal.

Thereafter, several petitions to intervene were filed and granted, and the Commission staff counsel initiated several conferences. Although a hearing was not ordered and a record on the merits of Interior's proposal was not developed, most of the parties participated in settlement negotiations that resulted in substantial agreement on an operating regime and related studies of the fishery, which was embodied in an Offer of Settlement.

On March 2, 1981, Seattle and intervenors Washington State Departments of Fisheries and Game, National Marine Fisheries Service, Sauk-Suiattle Indian Tribe, Upper Skagit Indian Tribe and the Swinomish Tribal Community submitted that Offer of Settlement pursuant to Section 1.18 of the Commission's Rules of Practice and Procedure. On an asserted interim basis, the proposed Settlement Agreement therein establishes conditions of flow regulation, including levels of minimum flow and constraints on maximum flows and flow fluctuations, and requires flow-related fishery studies for approximately two years. The flow regulation conditions and fishery studies are intended to lead to a long-term resolution of the issues through (1) improved consideration of fishery impacts and power planning and management, and (2) the addition of appropriate conditions

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in the license for Project No. 553. At the conclusion of the study period, Seattle is to continue the modified flow regime until a permanent resolution is reached.

**2 On March 16, 1981, intervenor North Cascades Conservation Council (N3C) commented on the proposed settlement, [2] stating that it does not join in the proposal, and that it requests a hearing and a prehearing conference. The Commission staff counsel, Interior and Seattle responded to N3C in support of the proposal. Intervenor United States Department of Agriculture neither commented on the proposal nor responded to N3C's comments. [3]

At the threshold, the Commission observes that the terms "party" and "parties" are used in numerous places in the Offer of Settlement and Settlement Agreement to mean, at different times, (1) parties to this proceeding, (2) parties to the Settlement Agreement, and (3) specifically named parties. It is necessary to give definite meanings to these terms in order to understand the Settlement Agreement and the status of N3C and others thereunder, and to assure that those who are interested in this proceeding are not excluded from participation in the development of data for the record on which this proceeding will be decided or settled. Therefore, it is a condition of approval of the Settlement Agreement that the parties to this proceeding that signed the document entitled "Submission of Offer of Settlement" accept the meanings ascribed below:

1. The terms "party" and "parties" shall mean the parties to this proceeding unless a different meaning is ascribed below.

2. The term "parties" in the second paragraph of the Offer of Settlement shall mean the parties to the Settlement Agreement (the parties to this proceeding that signed the document entitled "Submission of Offer of Settlement").

3. The term "parties" in Article I, Section 3, note 2, shall mean the parties that are specifically named therein.

4. The term "parties to the Agreement" in Article I, Section 6, paragraph 2, line 3, shall be *changed to mean* "the Standing Committee." And the term "parties to this agreement" in Article II, Section 6, line 4, shall be *changed to mean* the "parties to this proceeding."

Procedurally, N3C states that it was invited to attend and participate in only two settlement discussions, which were those initiated by the staff and held on July 20, 1979, and July 24, 1980. While N3C continues that it was never invited to attend, or give its input to, any other discussions leading to the Offer of Settlement, and claims to have deliberately excluded therefrom, the Commission does not assert authority over the attendance of informal discussions among parties to Commission proceedings. Such parties, other than the Commission staff, are at liberty to meet informally with such other parties and non-parties as they may choose to join their discussions. Accordingly, the parties that signed the document entitled "Submission of Offer of Settlement" acted within their *61330 rights to meet informally with one another, to the exclusion of others, including representatives of the staff, for the purpose of negotiating, preparing and submitting the Offer of Settlement and Settlement Agreement. Their failure to receive the input of N3C does not persuade us to reject the Settlement Agreement because it provides a general atmosphere of openness discussed below, and makes the data obtained and reports prepared thereunder equally available to N3C. As a result, we find that N3C has not established that it has been disadvantaged in any way by its asserted exclusion from some of the negotiations.

**3 We note, in this connection, that Article I of the Settlement Agreement, pertaining to flow regulation, provides in Section 6 for a Standing Committee which is to be composed of representatives of the parties to this proceeding, excluding N3C, and that Meetings of the Standing Committee shall be opened to all parties and additional representatives for purposes of open discussion and observation.

. . . The designated contact person(s) [of the parties] will be responsible for coordinating that party's prompt response to questions, quarterly compliance reports, etc.

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Since the meetings of the Standing Committee are to be open to all "parties", as conditioned in this order to mean the parties to this proceeding, including N3C, and since they are to be open "for purposes of open discussion and observation", N3C and its representatives are thereby required to have an opportunity for input into all of the business transacted by the Standing Committee.[4] In this connection, it is a condition of approval of the Settlement Agreement that timely notice of the meetings of the Standing Committee be given to all parties to this proceeding. While attendance of the informal discussions leading to the Settlement Agreement was not within an area of authority asserted by the Commission, the Commission's approval of the Settlement Agreement herein brings the meetings of the Standing Committee thereunder within such an area. And since a principal purpose of the Settlement Agreement is to provide for the development of data for the record on which this proceeding will be decided or settled, it is essential that N3C and other interested non-parties to the Settlement Agreement have an opportunity for input into the development of that data.

On the merits, N3C states that it is concerned with the effects of the proposed settlement on the level of Ross Lake, particularly as the releases of water at Gorge Dam affect Seattle's ability to fill that upstream reservoir, and to maintain it at a constant level for summer recreation purposes and aesthetic values. N3C focuses, in this connection, on Article II, pertaining to the studies, Section 3, pertaining to the areas of study, paragraph F, which describes one of those areas, as follows:

> An analysis of the effects of minimum flows, maximum flows, and reduced ramping rates on power operations, costs, and Ross Lake recreational factors.

N3C contends that such "offhand reference to studies" is insufficient to satisfy the FPA, the National Environmental Policy Act of 1969 (NEPA) and other federal laws because: (1) Details are lacking as to who will perform the studies, and the biologists and data collectors to be provided by some of the parties have no apparent expertise in power operations, economics and recreational factors. (2) Details are also lacking as to the nature of the studies or how they will be performed, particularly as they relate to the ability to fill and maintain Ross Lake under various regimes. (3) The studies should be limited to six months since the analysis provided by paragraph F can be considered theoretically on six months of data. (4) The proposal fails to include all of those who are concerned with the recreational values of the Ross Lake area, such as the National Park Service[5] and affected Canadian agencies. (5) "[I]t is incumbent upon the Commission, before it enters any order in this proceeding, to provide for thorough compliance with the National Environmental Policy Act."

****4** We agree with the Commission staff counsel that all of the details as to who will perform the studies and how they will be performed, need not be spelled out in the Settlement Agreement. Seattle, as the licensee, is responsible for funding and providing personnel with the necessary expertise for the studies, and is capable of doing so. N3C, as a party to this proceeding, is entitled under or outside the Settlement Agreement to provide Seattle with its input in these matters before, during, and after the studies. Indeed, details may be inappropriate since the purpose of the studies is to learn the unknown, and it may become appropriate to modify them midstream as knowledge is acquired. In any event, Seattle states that its interest in Ross Lake coincides with N3C's interest since summer refilling is essential to that impoundment's proper utilization both as a reservoir and for recreation. Furthermore, it will be incumbent upon Seattle to consider carefully any suggestions or recommendations N3C may make, in anticipation of N3C's positions in the final disposition of this proceeding.

***61331** We appreciate that certain aspects of the studies might be considered theoretically on six months of data. But twelve months of data, representing a full season, would likely be better. And the two years of data supported by the fisheries interests is not unreasonable, particularly since a major focus of the studies is on the fisheries of the Skagit River, and it would obviously be beneficial to be able to compare one full season with another. N3C states, in this connection, that there is an "obvious need for a thorough study of the effects of the flow changes on power operations and the recreational viability of the Ross Lake Recreational [A]rea." Certainly, the effects of changed flows on the fishery resources of the Skagit River should be considered no less thoroughly and in conjunction with the effects on Ross Lake.

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Next, we agree with the staff counsel that the proposed settlement is not deficient for not including the International Joint Commission (IJC) and other Canadian interests (1) because they had an opportunity to become parties to this proceeding and did not seek to intervene, and (2) because the meetings of the Standing Committee will be open to interested non-parties to the Settlement Agreement, as will the data developed by the studies. As the staff counsel points out, any changes in the operating regime of Project No. 553 that are approved by the Commission in the final disposition of this proceeding must come within the constraints set forth in the IJC's 1942 order approving Seattle's application for authority to raise the level of the Skagit River at the international boundary.

Lastly, Section 102(2)(C) of NEPA directs the Commission, to the fullest extent possible, to include detailed environmental statements in all "major Federal actions significantly affecting the quality of the human environment." That directive is subject to a rule of reason and does not require environmental statements in all Commission actions. Section 2.80 of the Commission's General Policy and Interpretations and Appendix A thereto implement the foregoing statutory directive. And Section 2.81 provides, in pertinent part, with respect to Commission actions under Part I of the FPA:

**5 (a)(2) Any application for surrender or amendment of a license that proposes a change in the existing state of project works or project operation—

(i) Which would result in a significant change in the normal maximum surface area or normal maximum surface elevation of an existing impoundment, or in a significant environmental impact, must include an environmental report which conforms to the requirements of §2.80 and Appendix A of Part 2 of this chapter. . . .

While Interior's recommendation is not, strictly speaking, an *application* to change the present operation of Project No. 553, it will result in the same final Commission action as would an identical application filed by Seattle. On the other hand, the rule of reason embodied in the Commission's policy is one of a "significant" change or a "significant" environmental impact. Seattle states, in this connection, that it believes "that the terms of the proposed interim downstream flow agreement will not substantially adversely affect the refill capacity of Ross Lake." And N3C does not claim that the present action on the Settlement Agreement or the prospective action on Interior's proposal would result in any significant change to Ross Lake.[6] Instead, N3C concedes, as indicated, that there is an "obvious need for a thorough study of the effects of the flow changes on . . . the recreational viability of the Ross Lake Recreation [A]rea". Indeed, the *raison d'etre* of Interior's proposal is that too little is known about the fishery of the Skagit River.

Under the foregoing circumstances, and in the absence of a record on the merits of this proceeding, we cannot at present determine whether an environmental statement will be required in conjunction with the final action on Interior's proposal. Certainly, such a statement is not required in conjunction with the present interim action on that proposal, which approves a temporary operating regime and studies that are intended to benefit one of the natural resources of the river. There is no claim that the present action will have a significant adverse impact; there is no alternative to conducting the studies under changed flow conditions; and there is nothing irreversible about the present action. Indeed, Article III of the Settlement Agreement provides a safety valve in the event of "unexpected, severe operational impacts . . . including impacts on recreational factors on Ross Lake."

Article IV of the Settlement Agreement[7] is vague and presents several problems.

First, it requires Seattle to continue the flow regulations "unless otherwise agreed by the parties [or] unless resolved [by agreement] under Article III," but does not state what Seattle is to do in the event of an agreement. It is a condition of approval of the Settlement Agreement that any such agreement will be submitted for approval pursuant to Section 1.18 of the Commission's Rules of Practice and Procedure, and the Seattle's obligation to continue the flow regulations will be subject to the action thereon.

**6 *61332 Second, it requires Seattle to continue the flow regulations "unless a specific disputed flow restriction under Article III has remained unresolved for a period of six months after a petition to the Commission." Since Article III serves the

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function of a safety valve in the event of "unexpected, severe operational impacts," Seattle should be given a specific obligation to modify the flow within a practicable short period of time. Therefore, it is a condition of approval of the Settlement Agreement that Seattle will be required to restore the present operating regime with respect to the disputed flow within 60 days after a petition is filed with the Commission, unless otherwise ordered by the Commission. In other words, Seattle's obligation to restore the *status quo* will be automatic in the event of petitions to remedy such impacts, but the Commission will have a prior opportunity to modify Seattle's obligation as the public interest may then require.

And third, there is no provision for the restoration of the present operating regime of Project No. 553 in the absence of a petition to convene a hearing for further studies or final disposition of this proceeding. As a result, the present action could be construed, not as an interim action, but as a final agency action that (A) is not based on a record on the merits of Interior's proposal, and, arguably, (B) lacks an environmental statement. Therefore, it is a condition of approval of the Settlement Agreement that Seattle will be required to restore the present operating regime within three years from the date of this order, unless otherwise ordered by the Commission. Again, Seattle's obligation to restore the *status quo* will be automatic after the studies are completed. But Seattle will also be obligated to continue the changed operating regime for about a year after the studies are completed, to enable the Commission either to act finally on Interior's proposal, or to issue such further interim order thereon as the public interest may then require.

The Commission finds:

The Offer of Settlement submitted herein on March 2, 1981, is in the public interest as conditioned herein, and should be approved and made effective as hereinbelow ordered.

The Commission orders:

(A) The Offer of Settlement submitted herein on March 2, 1981, including the Settlement Agreement therein, is hereby approved subject to acceptance of the conditions set forth in the body of this order as hereinbelow provided.

(B) Within 30 days after the date of this order, each of the signatories to the document entitled "Submission of Offer of Settlement" may submit to the Director, Division of Licensed Projects, an unconditional acceptance of the conditions of approval of the Settlement Agreement that are set out in the body of this order. If all such signatories submit timely acceptances, the Settlement Agreement is hereby made effective as of the date of this order. But, if any such signatory fails to submit a timely acceptance, the Settlement Agreement is hereby disapproved without prejudice as being vague, and a hearing and prehearing conference on the Secretary of the Interior's recommendation will be ordered.

****7** (C) The Commission's approval of this settlement shall not constitute approval of or precedent regarding any principle or issue in this proceeding.

Federal Energy Regulatory Commission

Footnotes

1 The Commission's notice of September 7, 1978, initiating this docket, and all subsequent notices and pleadings, styled this docket incorrectly as "City of Seattle, Washington," and certain pleadings on and after March 26, 1981, designated it incorrectly as "Docket No. EL79-36." Henceforth, the format of this order should be followed.

2 The filing is styled "Comments of American Intervenors to Offer of Settlement of February 27, 1981" and purports to have been made on behalf of N3C "and other American conservation organizations who have intervened in this

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proceeding to protect their interest in the protection and enhancement of the North Cascades National Park, Ross Lake National Recreation Area, and adjacent lands." The term "American Intervenors" was used to distinguish N3C and others from certain Canadian parties to the proceeding in Project No. 553 pertaining to the elevation of Ross Dam. N3C is the only conservation organization to have intervened in the instant proceeding pertaining to Interior's proposed operating regime and, therefore, the comments are being treated as having been filed solely on behalf of N3C.

N3C stated in its petition to intervene that it is a non-profit corporation founded in 1957 to protect and preserve the scenic, scientific, recreational, educational, wildlife and wilderness values of the North Cascades mountain area. N3C claims that it and its members "were the leading citizens behind the establishment of the North Cascades National Park and the Ross Lake National Recreation Area."

3 N3C submitted for filing an answer to the staff's counsel's response, which submission was not considered on the merits because it is not authorized by Section 1.18 of the Commission's Rules of Practice and Procedure.

4 Although N3C is not entitled under the Settlement Agreement to a representative on the Standing Committee, it has not asked for one.

5 N3C is wrong as to Interior's National Park Service, since a representative of that Service is to be on the Standing Committee.

6 The changes resulting from implementation of the Settlement Agreement may be quite insignificant in relation to the changes in the normal maximum surface area and elevation of Ross Lake that will result from the elevation of Ross Dam. Such changes were addressed in a detailed environmental statement.

7 *Article IV—Further Proceedings*

At the conclusion of the approximate two-year study period contemplated by Article II of this Agreement, any party may petition the Commission to convene a hearing in this proceeding, either for the purpose of conducting further studies or for the purpose of achieving a permanent resolution of issues. Until a permanent resolution is achieved, the City shall nevertheless continue to provide the flow regulations set forth in Article I unless otherwise agreed by the parties, unless resolved under Article III, or unless a specific disputed flow restriction under Article III has remained unresolved for a period of six months after a petition to the Commission.

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