

SULTAN CITY COUNCIL

AGENDA ITEM COVER SHEET

ITEM NO: C-9
DATE: March 26, 2009
SUBJECT: PUD Confidentiality Agreement
CONTACT PERSON: City Administrator Knight

ISSUE

Issue is to authorize the Mayor to sign the Confidentiality Agreement with Snohomish County Public Utility District #1 (PUD) for the settlement negotiations to re-license the Jackson Hydroelectric Project.

STAFF RECOMMENDATION

Authorize the Mayor to sign the confidentiality agreement with the PUD (Attachment A).

SUMMARY

The City of Sultan is participating in the settlement negotiations with PUD and the other stakeholders. The purpose of the settlement negotiations is to get an agreement on protection, mitigation and enhancement measures (PM&E's) for the re-licensing of the Jackson Hydroelectric Project Culmback Dam.

In order to participate in the negotiations, PUD is requiring all participants to sign the confidentiality agreement. The agreement has been reviewed by the State Attorney General and attorneys from the City of Everett and tribes. The City attorney also reviewed the agreement. The Agreement should have been presented to the City Council at the March 12, 2009 meeting for action.

If the Council does not authorize the Mayor to sign the Agreement, the City of Sultan will not be represented during upcoming settlement discussions in April or receive settlement proposals that could affect the Sultan community.

The City's participation up to this point in the negotiations has been fruitful. Sultan's concerns regarding increased flows and flood impacts are being addressed by the PUD in the PME's.

What the Confidentiality Agreement limits is Sultan's ability to use discussions and materials in a public way to advance the City's agenda. There are other avenues the City could choose to pursue that would not violate the Agreement if the City believes its concerns are not being addressed.

FISCAL IMPACT

There are no direct costs associated with the proposed agreement. Staff time to review the materials and respond is a soft cost.

ALTERNATIVES

1. Authorize the Mayor to sign the Agreement. This alternative will allow the City to continue to participate in the settlement negotiations and represent Sultan's interests.
2. Do not authorize the Mayor to sign the Agreement and direct staff to areas of concern. This action implies the Council has serious questions and concerns that must be addressed by the city attorney and PUD. These may be issues that could be addressed quickly or take more time. The other stakeholders in the re-licensing effort have already approved the Agreement. It is unlikely PUD will negotiate specific changes for Sultan.
3. Do not authorize the Mayor to sign the Agreement. This action implies the City Council does not want to continue as a party to the settlement negotiations.

ATTACHMENT

A – Confidentiality Agreement

COUNCIL ACTION:

DATE:

JACKSON HYDROELECTRIC PROJECT
SETTLEMENT NEGOTIATIONS
CONFIDENTIALITY AGREEMENT

CONFIDENTIALITY AGREEMENT (“Agreement”) made this 25th day of February and covering the period from the date of January 8, 2009 through termination of this agreement, by and among the Tulalip Tribes of Washington (“Tribe”), Public Utility District No. 1 of Snohomish County (“District”), City of Everett (“Everett”), National Marine Fisheries Service (“NMFS”), U.S. Fish and Wildlife Service (“USFWS”), U.S. Forest Service (“USFS”), Washington Department of Ecology (“WDOE”), Washington Department of Fish and Wildlife (“WDFW”), Snohomish County (“County”), American Whitewater, and City of Sultan (“Sultan”) (collectively “Participants”).

WHEREAS,

- A. The District and Everett are currently the Federal Energy Regulatory Commission (“FERC”) co-licensees for the Henry M. Jackson Hydroelectric Project, FERC Project No. 2157 (“Project”), located on the Sultan River in Snohomish County, Washington;
- B. The existing FERC license for this project expires on May 31, 2011;
- C. The District intends to obtain a new FERC license for Project and be the sole licensee under the term of a new license;
- D. As part of the Integrated License Process (“ILP”) for the relicensing of the Project, the Participants will engage in discussions, and seek agreement on Protection, Mitigation and Enhancement measures (PM&Es) to resolve issues presented by the relicensing of the Project, including but not limited to issues pertaining to the mandatory terms and conditions to be submitted under the Federal Power Act, and to WDOE’s issuance of the 401 Certification (these discussions are collectively referred to as “Project License Settlement Negotiations”); and
- E. Many of the Participants are government entities who support the spirit and letter of the applicable federal and state public disclosure laws. Consistent with those laws, this Confidentiality Agreement was narrowly drafted to balance general open government with the limited need to protect truly Confidential Information in the context of legal settlement negotiations.

Now, THEREFORE, the Participants hereby agree as follows:

- 1. As used herein:

“Information” is defined as communications or data, in any form, including but not limited to oral, written, graphic or electronic form.

“Confidential Information” is defined as information not generally available to the public that a Participant reveals to one or more of the other Participants in the Project License Settlement Negotiations with the reasonable expectation that it will be protected against

unrestricted disclosure in accordance with this Agreement, to the extent permitted by law. All oral communications between or among some or all of the Participants regarding settlement discussions, negotiations, options or proposals within the context of Project License Settlement Negotiations shall be considered to be Confidential Information to the extent permitted by law and otherwise in accordance with this Agreement.

Notwithstanding anything to the contrary contained in the foregoing, written technical analysis and data prepared for or in connection with Project License Settlement Negotiations shall not be considered "Confidential Information", unless so marked by the offering party or otherwise agreed to by the Participants. Written communication or other non-oral information intended to be maintained as Confidential Information under this Agreement must be labeled as "confidential" by the disclosing Participant.

2. Confidential Information shall be kept confidential by each Participant to the extent permitted by applicable law. Confidential Information shall be inadmissible as evidence, argument, admission, or otherwise, in any administrative proceeding (before the FERC, or any other federal or state administrative body), before any state or federal legislative body, in any civil action, or in any alternative dispute resolution process in accordance with and to the extent required by Rule 408 of the Washington State Rules of Evidence, Rule 408 of the Federal Rules of Evidence, or any other similar rule or common law doctrine applicable in administrative or legislative proceedings, federal courts, or the courts of any state.
3. Participants shall use Confidential Information only to facilitate settlement regarding the issuance of a new FERC license for the Project. Individual Participants may distribute Confidential Information internally to their respective agents and employees and to their consultants and legal counsel, provided that each individual recipient of the Confidential Information is notified that the Confidential Information is confidential and is required to preserve the confidentiality of the Confidential Information pursuant to the terms of this Agreement. Except as may be required by law, Participants shall not disclose Confidential Information to non-Participants, unless and until:
 - a. Such information is generally available to the public as a result of filings with regulatory agencies, its presence in the public domain, or otherwise, but not as a result of a breach of this Agreement;
 - b. Such information is already in the possession of the receiving Participant or its employees or agents without restriction and prior to any disclosure or possession hereunder;
 - c. Such information is or has been lawfully disclosed to the receiving Participant or its employees or agents by a third party, not employed by or otherwise affiliated with such receiving Participant, who is free lawfully to disclose the same;
 - d. Such information is independently developed by the receiving Participant without the direct or indirect use of any Confidential Information disclosed hereunder to such receiving Participant; or

- e. The Participants mutually agree to the release of the information and agree that, because of such release, the information is no longer Confidential Information.
4. Notwithstanding the prohibition of the preceding paragraph, a Participant who is a public agency may disclose Confidential Information to a non-Participant that requests disclosure, to the extent such Participant determines that disclosure is required or warranted by the Freedom of Information Act 5 U.S.C. §522, the Washington State Public Records Act Chapter 42.56 RCW, or other applicable law. However, if a non-Participant requests such Confidential Information pursuant to any such law, the Participant receiving the request shall promptly notify the other Participants to this Agreement of such request to provide those Participants with the opportunity to oppose the requested disclosure pursuant to applicable law. The Participant receiving a disclosure request may rely upon the advice of counsel in making the determination as to whether disclosure is required or warranted.
5. No Participant will formally or informally request, pursuant to any state or federal freedom of information or public access law, that a state or federal agency provide it with any Confidential Information.
6. The Participants agree that they shall not formally or informally request, propose, encourage, or otherwise suggest to any non-Participant, its agents or employees, that such non-Participant formally or informally request any Confidential Information under any state or federal freedom of information or public access law.
7. Each Participant reserves its rights to protect, defend, and discharge its interests and duties in any administrative, regulatory, legislative, or judicial proceeding, including but not limited to the FERC relicensing proceeding for the Project; provided Participants shall not disclose Confidential Information in such proceedings. Nothing in this Agreement is intended to restrict a disclosing Participant's use of its own Confidential Information.
8. Each Participant agrees to comply with the Jackson Hydroelectric Project License Settlement Negotiations Working Group Ground Rules (the "Ground Rules"), herein referenced, attached hereto, and made a part of this Agreement.
9. Any notice required under this Agreement shall be made in writing to the individual or individuals nominated by each Participant. Each Participant shall notify the District of the individual or individuals nominated to receive notice. A Participant may unilaterally change or modify the contact information or the nominated individual by providing notice to the other Participants. The District shall maintain and make available to the Participants the official list of the individuals entitled to receive notice pursuant to this Agreement.
10. No contractual relationship, express or implied, shall be deemed to exist between Participants by virtue of this Agreement.

11. A Participant's failure to abide by this Agreement shall be grounds for other Participants to withdraw from negotiations or to continue negotiations only with other Participants abiding by this Agreement.
12. A Participant's remedies for a violation of this Agreement include, but are not limited to: (i) withdrawal from negotiations; (ii) continued negotiation with complying Participants; or (iii) enforcement of non-admissibility of Confidential Information in accordance with this Agreement and applicable law.
13. Any Participant may withdraw from this Agreement after permanently withdrawing from the Jackson Hydroelectric License Settlement Negotiations Working Group as provided for in the Ground Rules.
14. This Agreement shall remain in effect until the Participants reach settlement or negotiations otherwise terminate. Withdrawal of one or more of the Participants does not terminate this Agreement for the remaining Participants. The confidentiality provisions of this Agreement shall survive termination of this Agreement and remain binding on any Participant withdrawing from negotiations until after the date when FERC's order on relicensing, the Washington State Section 401 Clean Water Act certification for the relicensing, and all other permits and regulatory approvals necessary for the relicensing become final and non-appealable.
15. Nothing in this Agreement shall be construed to waive the sovereign immunity of any Participant.
16. This Agreement may be amended upon consensus and signature of the Participants.
17. This Agreement may be executed in one or more counterparts, all of which shall be considered part of the Agreement, and shall become effective when one or more counterparts have been signed by an authorized representative for each of the Participants and delivered to an authorized representative for the other Participants.
18. Each signatory represents that he or she has authority to execute this Agreement on behalf of the represented Participant.

IN WITNESS THEREOF,

the Participants, through their duly authorized representatives, have caused this Agreement to be executed as of the date set forth in the Agreement.

Public Utility District No. 1 of Snohomish County

Signature

Date

Print Name/Title

Tulalip Tribes of Washington

Signature

Date

Print Name/Title

City of Everett

Signature

Date

Print Name/Title

National Marine Fisheries Service

Signature

Date

Print Name/Title

U.S. Fish and Wildlife Service

Signature

Date

Print Name/Title

U.S. Forest Service

Signature

Date

Print Name/Title

Washington Department of Ecology

Signature

Date

Print Name/Title

Washington Department of Fish and Wildlife

Signature

Date

Print Name/Title

Snohomish County

Signature

Date

Print Name/Title

American Whitewater

Signature

Date

Print Name/Title

City of Sultan

Signature

Date

Print Name/Title

**JACKSON HYDROELECTRIC
PROJECT LICENSE
SETTLEMENT NEGOTIATIONS WORKING GROUP**

GROUND RULES

The purpose of the Jackson Hydroelectric License Settlement Negotiations Working Group (NWG) is to engage in discussions and seek agreement on protection, mitigation and enhancement measures to resolve issues presented by the relicensing of the Project, including, but not limited to issues pertaining to mandatory terms and conditions to be submitted under the Federal Power Act, and to WDOE's issuance of the 401 Certification (these negotiations are collectively referred to as "Settlement Negotiations").

Consensus. The NWG will attempt to make decisions by consensus. Consensus is defined as all NWG members either accepting the recommendation or decision or deciding that they can live with it. Silence is considered acceptance. A NWG member disagreeing with a proposed resolution shall offer an alternative resolution. If the NWG is unable to achieve consensus on an issue, the alternative proposed by the objecting member shall be noted. At the request of the objecting member, or at another appropriate time before the conclusion of negotiations, the members shall return to a disputed issue for the purpose of considering new alternative or information in an effort to achieve consensus. There may be circumstances in which a contingent approval is given that is contingent on another issue being decided in a particular matter. If the group cannot reach consensus on any issue, members will be free to choose their future course of conduct regarding that contested question, including seeking Federal Energy Regulatory Commission resolution of the dispute in the formal relicensing process.

Good Faith. All NWG members agree to act in good faith in all aspects of the collaborative effort. A member's specific offers made in open and frank problem solving conversations will not be used against that member or any other member in future litigation or public relations. Personal attacks and prejudiced statements are not acceptable.

Good faith requires that individuals not represent their personal or organization's views as views of the NWG unless the two are in fact the same.

Decision Making. The NWG will seek to make decisions at each meeting by consensus. However, if a decision is reached on any final component of the Settlement Agreement, those absent from the meeting will be asked to provide timely written comments (by email or fax) after the District or facilitator has provided timely information about the final component(s) to any absent NWG members and prior to the decision becoming final for purposes of this process

It is understood that NWG members are representing interests of their agency, organization, and/or constituents. As such, ultimate decision-making authority may reside with an individual not at the table. NWG members agree to regularly brief the decision-makers within their respective organizations to enhance the likelihood of acceptance of decisions developed through the NWG process, as well as the likelihood of successfully implementing a settlement agreement.

Confidentiality. The NWG and the facilitator agree to comply with the Confidentiality Agreement, herein referenced and made a part of these Ground Rules.

Press. Unless otherwise agreed to by the NWG, members shall comply with the Confidentiality Agreement and not initiate contact with the media to discuss or disclose any information regarding the negotiations. If media initiate contact, a member may state its interest in the negotiations, but shall not disclose Confidential Information, as defined in the Confidentiality Agreement, or the status or prospects for success of negotiations, or characterize other members' interests or positions, unless disclosure is required or warranted by law. The members shall cooperate and coordinate in the development and issuance of individual or joint media releases regarding the negotiations, and on appropriate outreach to non-members.

Action Items. The District or facilitator will prepare action item lists and a decision matrix to assist the NWG in documenting its progress and activities. The District will ensure that items included on the lists are tracked and that NWG members are informed of progress.

Caucuses/Breaks. Meetings may be suspended at any time at the request of any member to allow consultation among group members. Requests should be respectful of all members' time. If the use of caucuses becomes disruptive, the NWG will revisit the process.

Right to Withdraw. Any member may temporarily or permanently withdraw from the NWG at any time after providing written notice thirty days in advance of withdrawal to all NWG members and discussing the reasons for withdrawal with the facilitator and NWG members. Any entity that withdraws from the NWG shall remain bound by the good faith, confidentiality, and press provisions of these Ground Rules. The remaining NWG members will determine how to proceed in light of the withdrawal.

Commitments of Members. All NWG members shall make their best effort to:

- Attend meetings as authorized by their principals and follow through on promises and commitments;
- Bring concerns from their interest group or organization up for discussion at the earliest point in the process;
- Share all relevant information that will assist the group in achieving its goals;

- Participate in a free, open, and mutually respectful exchange of ideas, views, and information prior to attempting to achieve consensus;
- Resolve issues being addressed by the NWG within the NWG structure;
- Articulate to the best of their ability interests that underlie issues and concerns in an effort to find common ground among the parties;
- Communicate the expectation to subgroups and those providing scientific and technical input that these ground rules are fully applicable to them;
- Characterize individual, caucus, or subgroup viewpoints as fully and accurately as possible;
- Keep its organization's decision-makers informed of potential decisions and actions, in order to expedite approval of the final product;
- Support the eventual product if they have concurred in it; and
- Not publicly state other parties' views, opinions, or comments.