

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Settlements in Hydropower Licensing Proceedings
under Part I of the Federal Power Act

Docket No. PL06-5-000

POLICY STATEMENT ON HYDROPOWER LICENSING SETTLEMENTS

(Issued September 21, 2006)

1. Hydroelectric licensing proceedings under Part I of the Federal Power Act (FPA) are multi-faceted and complex. These proceedings involve the balancing of many public interest factors, as well as consideration of the views of all interested groups and individuals. Moreover, since the physical design, environmental impact, and history of every project is different, each licensing proceeding is, to at least some extent, unique.
2. Given this backdrop, the Commission looks with great favor on settlements in licensing cases. When parties are able to reach settlements, it can save time and money, avoid the need for protracted litigation, promote the development of positive relationships among entities who may be working together during the course of a license term, and give the Commission, as it acts on license and exemption applications, a clear sense as to the parties' views on the issues presented in each settled case.
3. At the same time, the Commission cannot automatically accept all settlements, or all provisions of settlements. Section 10(a)(1) of the FPA requires that the Commission determine that any licensed project is

best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related

spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e).^[1]

4. Consequently, in reviewing settlements, the Commission looks not only to the wishes of the settling parties, but also at the greater public interest, and whether settlement proposals meet the comprehensive development/equal consideration standard. Because of the requirements of Part I of the FPA, the Commission's review of hydropower licensing settlements is often different from that accorded to other settlements presented to us, such as those in rate cases. In the latter type of cases, the Commission may accept settlements as a whole, given that it has authority under section 5 of the Natural Gas Act and section 206 of the FPA to examine at any time whether rates, charges, rules, regulations, practices, or contracts are unjust, unreasonable, unduly discriminatory, or preferential. Because section 6 of the FPA precludes revision of hydropower licenses without the licensee's consent, it is necessary that the Commission examine proposed license conditions in detail before approving them. The Commission does include reopener provisions in hydropower licenses, but these are only exercised where environmental conditions have significantly changed. Were the Commission to assert a broad, general authority to reopen any part of a license during its term, equivalent to the authority provided by sections 5 and 206, this would sharply undercut the certainty sought by parties to licensing proceedings. As a separate matter, the Commission's role in overseeing license compliance makes it important that license conditions be clear and enforceable.

5. The Commission must also ensure that its decisions on settlements, like all decisions under the FPA, are supported by substantial evidence.² To support a proposed

¹ See 16 U.S.C. § 803(a)(1) (2000). FPA section 4(e), 16 U.S.C. § 797(e), provides, in pertinent part, that

the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

license condition, then, it is necessary for the parties to develop a factual record that provides substantial evidence to support the proposed condition, and demonstrates how the condition is related to project purposes or to project effects. The settling parties should provide the Commission with record support showing a nexus between the proposal and the impacts of the project, as well as to project purposes, and also explain how the proposal will accomplish its stated purpose.

6. In addition, proposed license conditions must be enforceable. By way of example, the Commission is precluded by law from assessing damages, so any condition that would do so would be unenforceable. To the extent that the Commission does not adopt proposed conditions that it has no jurisdiction to enforce, this does not evidence general opposition to settlements or to the settlement at hand, but rather recognition that the Commission can only exercise that authority given it by Congress. Also, the Commission has jurisdiction over only its licensees, and therefore cannot enforce any condition to the extent that it purports to place responsibility on a non-licensee. In addition, conditions that do not clearly outline the licensee's responsibilities and establish the parameters governing required actions may be difficult or impossible to enforce. However, as discussed below, contracts that the Commission cannot enforce may well be made enforceable by other means, such as binding arbitration, or resort to state or federal court.

7. It should be noted that the fact that the Commission does not, whether as a matter of law or policy, include certain provisions in licenses does not mean that they are precluded from being included in a settlement. Settling parties are free to enter into "off-license" or "side" agreements with respect to matters that will not be included in a license. However, the Commission has no jurisdiction over such agreements and their existence will carry no weight in the Commission's consideration of a license application under the FPA.

8. Based on the foregoing, the logical process for arriving at an acceptable settlement is for the parties to undertake the following steps:

- Use existing information and pre-license studies to determine the environmental effects of the proposed project.

² See FPA section 313(b), 16 U.S.C. § 825l (2000) ("[t]he finding of the Commission as to the facts, *if supported by substantial evidence*, shall be conclusive") (emphasis added).

- Based on this record, develop appropriate environmental measures to address those effects.
- Craft settlement provisions based on the record and the proposed measures, taking into account recent Commission precedent.
- Prepare an explanation of the settlement that will enable the Commission to understand the parties' intent and what in the record they believe supports their proposals.³

9. We are aware that settling parties have a strong interest in knowing in advance which provisions of proposed settlements are likely to be acceptable to the Commission. Precedent can serve as a very useful guide in this regard. If parties engaged in settlement discussions wish to obtain additional guidance as to particular concepts or proposed provisions, it may be useful to seek the advice of Commission staff, by requesting that staff either participate in an advisory role in settlement discussions or review proposed settlements before they are filed with the Commission. While Commission staff cannot speak for the Commission itself, staff will be able to give parties the benefit of its experience, as well as advice regarding recent Commission actions. Advice from experienced staff, coupled with careful reading of recent Commission precedent, is the best way to predict the Commission's likely reaction to particular provisions proposed in settlement agreements.

10. At the same time, we recognize the value of more general guidance. Therefore, we have prepared this document, in an attempt to elucidate certain principles regarding settlements. Some of the matters discussed below have been dealt with in Commission orders; others represent application of the principles enunciated in those orders. While we hope that this document will be useful to parties engaged in settlement negotiations, we caution that the Commission will review every case on its facts and make in each instance the public interest determination required by the FPA. Thus, the statements in this document represent guidance, but not a guarantee. It may be that the facts of a particular case dictate a different result from that in a previous proceeding where a similar issue arose, or that policy changes over time.

³ In its regulations, the Commission has set forth details concerning the content of settlements, and the procedures relating to their filing. *See* 18 C.F.R. § 385.602 (2006).

11. Certain general types of issues have arisen with some frequency over the last several years. The following discussion outlines some principles with respect to these issues, in the hope of providing general principles that may assist settling parties. In the last section of this guidance, we list more specific settlement provisions that have been of concern. While individual cases are cited throughout this document, this guidance is not intended to be an encyclopedic reference to all cases involving settlements.

12. The following basic principles, which are discussed in more detail below, apply to the consideration of measures proposed to be included as conditions in project licenses:

- Measures must be based on substantial evidence in the record of the licensing proceeding
- Measures must be consistent with the law and enforceable. In particular, measures must be within the Commission's jurisdiction
- A relationship must be established between a proposed measure and project effects or purposes
- Measures should be as narrow as possible, with specific measures (*e.g.*, installing riprap to prevent erosion) preferred over general measures, such as creation of an aquatic resource fund
- Actions required under measures should occur physically/geographically as close as possible to the project
- Measures must reserve the Commission's compliance authority, as well as its authority to review and modify as necessary proposed resource or activity plans (for example, a provision that a stakeholder committee can determine new measures during the license term should also provide that the proposed measures be filed with the Commission for its review, modification, and approval)

Substantial Evidence

13. As noted above, the FPA provides that the Commission's determinations will be upheld if they are supported by substantial evidence. In consequence, the Commission must have substantial evidence to support its licensing decisions. If parties want the Commission to accept the terms of a settlement, they must provide substantial evidence

to support the measures they ask the Commission to impose. Thus, for example, it would not be sufficient to ask the Commission to set a particular minimum instream flow solely because the parties have compromised on that number. Rather, the parties would need to provide a scientific explanation, supported by facts in the record, of how that level of flows meets the needs of affected resources and how it is consistent with the comprehensive development of the waterway. Similarly, if there is no showing of harm of a fishery, the record will not support a measure requiring the mitigation of harm to fish species. *See Allegheny Energy Supply Company, LLC*, 109 FERC ¶ 61,028 at P 6 (2004); *see also City of Centralia, WA v. FERC*, 213 F.3d 742 (D.C. Cir. 2000).

Lawful And Enforceable

14. A settlement provision that extends beyond the Commission's jurisdiction to require or to enforce cannot become a lawful term in a Commission license. It would seem axiomatic that proposed settlement provisions and license conditions must be consistent with law. Yet, in some instances, settlements include provisions that purport to extend the Commission's jurisdiction. It is important for parties to bear in mind that the bounds of the Commission's jurisdiction are established by law and cannot be expanded through an order implementing a settlement. Thus, the Commission has jurisdiction only over its licensees and cannot enforce the provisions of a settlement against other parties, such as federal and state agencies, or private parties. *See, e.g., Avista Corporation*, 93 FERC ¶ 61,116 at 61,329 (2000). Matters that are beyond the Commission's jurisdiction can be resolved by parties in "off-license" agreements that will not be included in a license, *see, e.g., City of Seattle, WA*, 75 FERC ¶ 61,319 at 62,014, n.6 (1996). As another example, because the FPA does not allow the Commission to impose damages, a damages provision may not properly be included in a license. *See, e.g. Consumers Power Company*, 68 FERC ¶ 61,077 at 61,378-80 (1994). In addition, the Commission cannot expand its own jurisdiction. Thus, even if parties agree that a license should include measures that are outside of the Commission's jurisdiction – for example, a requirement that a state agency manage a wildlife refuge – the Commission could not enforce the measures.

Dispute Resolution/Enforceability

15. Parties to settlements often agree as to the form of dispute resolution they will use during the license term. Initially, the Commission declined to include in licenses dispute resolution provisions that purported to bind parties other than the licensee, on the ground that those provisions were unenforceable, given that the Commission had jurisdiction only over its licensees. *See, e.g., Avista Corporation*, 93 FERC ¶ 61,116 (2000). The Commission later modified its policy, to the extent of deciding that it would require

licensees to comply with settlement provisions of this kind, even though it could only enforce them against licensees. See *Erie Boulevard Hydropower, LP*, 100 FERC ¶ 61,321 at 62,502 (2002). Parties who want such provisions in licenses should bear in mind, however, the limited nature of the Commission's enforcement authority in such matters. Thus, for example, the Commission could require a licensee to comply with notice provisions or to attend meetings required by a dispute resolution provision. It could not require a federal or state resource agency or a non-governmental entity to do so.

Relationship To The Project

Comprehensive Development

16. As noted above, pursuant to Part I of the FPA, the Commission is required to license projects that best result in the comprehensive development of a waterway. In order to determine whether proposed settlement provisions or license conditions meet this standard, it is necessary for the Commission to determine to what extent these proposals relate to project effects or project purposes. This is easier to do if the provisions in question call for specific measures (rather than a general expenditure of funds), if the measures call for actions in the project vicinity, and if the settling parties document how the measures are tied to project effects or purposes. Thus, it may be easy to understand and explain how construction of a campground or a boat put-in at a project reservoir is tied to the project purpose of recreation. It is harder to draw that connection if, for example, a settlement measure calls for recreation facilities many miles above or below the project, or for facilities, such as a snowmobile trail, that may not have an obvious connection to the project. Similarly, it is more difficult to explain how paying a dollar amount for future, unspecified enhancements is tied to a project purpose. As the Commission explained in *Virginia Electric Power Company*, 110 FERC ¶ 61,241 at P 11 (2005):

We . . . note with approval the fact that the many measures required by the settlement and the corresponding license articles appear to call for activities related to project impacts and purposes. It is our strong preference that measures required in a license be clearly tied to the project at issue. We are sometimes troubled by settlements which require measures, such as general funds to be used for unspecified measures, that are not tied to either project impacts or purposes. In addition, we prefer measures requiring specific actions (*i.e.*, the licensee shall construct a fish hatchery) to those mandating general actions whose effects are unclear (*i.e.*, the licensee shall contribute \$100,000 to support fisheries enhancements). It is much easier for us to conclude that a project proposal based on specific measures is in the public

interest, as opposed to one made up in large part of measures whose impacts we cannot truly assess. We also note that we have a preference for mitigation or enhancement measures that are located in the vicinity of the project unless this is impractical or unless substantially increased overall project benefits can be realized from adopting off-site measures.

Project Purposes

17. Instances of orders concluding that settlement measures were not sufficiently tied to project purposes or project effects include: *Portland General Electric Company*, 107 FERC ¶ 61,158 at P 21, n.21 (2004) (disposition of non-project lands and of water rights); *PacifiCorp*, 105 FERC ¶ 61,237 at P 113, n.27 (2003) (portions of settlement not relating to project operations or environmental effects not included in license); *Pacific Gas and Electric Company*, 97 FERC ¶ 61,084 at 61,409-10 (2001) (monitoring of water temperature, flows, and meteorological conditions in reservoirs and river reaches within boundaries of upstream project; investigating feasibility of, and possibly making, modifications to upstream project); *Northern States Power Company*, 111 FERC ¶ 62,212 at P 31 (2005) (recreation enhancement measures outside project boundary that did not provide access to project lands or waters, where adequate access already provided at project); *PacifiCorp*, 104 FERC ¶ 62,059 at P 28 (2003) (provisions providing for recreation enhancements outside project boundary, and for sale of non-project lands); *USGen New England*, 99 FERC ¶ 62,025 at 64,060-61 (2002) (partially rejecting proposal for enhancement fund, to extent fund would cover activities outside project boundary, with no nexus to project, or, in case of mitigation for tax revenue impacts, beyond Commission's jurisdiction).

Recreation

18. Many settlements contain provisions regarding recreation. As with other settlement provisions, it is important that parties base proposed recreation provisions on record evidence supporting the need for the proposed facilities and that they link the measures in question to the project. Thus, if a settlement proposes enhancements to campgrounds in the project area, parties should explain how those facilities are used in connection with the project and demonstrate the need for the facilities. For example, if data show that existing campgrounds are not greatly used, it may be hard to justify expanding them or adding new campgrounds.

19. Given that a project is primarily a water-based facility, it may not be hard to conclude that construction of a boat ramp, a fishing pier, or a hiking trail along the reservoir perimeter could be an appropriate environmental measure that serves a project

purpose, if the need for that facility is established. These facilities would enable the public to better use the project lands and waters. It may be more difficult to justify recreation that is more remote from the project site (as in a campground located 20 miles away from any project works). Similarly, it may be hard to draw a public interest connection between a project and a recreation feature that does not appear to be tied to the nature of the project. For example, a community near a project might consider itself to be in need of a public auditorium. It would be difficult to justify inclusion of such a requirement in a license, unless the parties could demonstrate, not just why the proposed measure is generally worthwhile, but, more specifically, how it is linked to the effects and purposes of the project. *See Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295 at P 32-33 (2003) (noting, with respect to decision not to require retention of certain recreation facilities within project boundary that environmental assessment had found “these facilities are not directly associated with public recreational access to project waters or facilities,” and concluding that facilities not included “have [insufficient] nexus to reservoir-based recreation and [similar facilities] are found elsewhere in the area.”); *Northern States Power Company*, 111 FERC ¶ 62,212 at P 31 (2005) (declining to include proposed recreation measures in license where it is unclear how measures address access to project lands or waters and when adequate recreational access provided by existing facilities).

20. Two other matters that can arise in connection with recreation facilities are inclusion within the project boundary and cost-sharing, both discussed below. If the licensee is expected to undertake measures throughout the license term, such as ongoing maintenance with respect to a recreation facility that the Commission has determined is necessary for project purposes, – and the Commission consequently will have ongoing responsibility to ensure compliance – the licensee may be required to include the facility within the project boundary. As noted, this means that the licensee will have to obtain sufficient rights with respect to the facility to ensure that it can comply with Commission requirements, but it does not mean that the licensee must obtain fee ownership. With respect to cost-sharing, settlements occasionally provide that the licensee will share the costs of maintaining a facility with a state or federal agency (often the entity that owns the facility, such as a campground owned by the U.S. Forest Service). Again as noted below, if the Commission requires that a facility be maintained, it can look only to the licensee to do so. Thus, a license condition must place responsibility for completion of a measure on the licensee. As note above, any cost-sharing agreement may have to be a matter of contract between the licensee and the third party, but will not be something that Commission staff will recommend including in a license. *See Alcoa Power Generating, Inc.*, 110 FERC ¶ 61,056 at P 31 (2005) (finding that, although licensee agreed with U.S. Forest Service and state agencies to share costs of recreation areas and facilities, ultimate responsibility for performance of license obligations must be borne by licensee).

Specific Measures

Cost Caps

21. In some settlements, parties place financial limits on the licensee's obligation to perform certain tasks (for example, "the licensee shall build a campsite at a cost of \$10,000") or limit the licensee's obligation to the payment of funds to a third party (for example, "the licensee shall pay \$10,000 to the state to construct a fishing pier), rather than the performance of a particular measure. As the Commission has made clear, a licensee cannot satisfy the obligation to perform certain tasks by a simple payment to another party, nor can the obligation be limited by a particular dollar figure. The Commission will take an independent look at proposed measures and their costs, to determine if the proposals are reasonable. If a measure is required, however, it will be because the Commission has determined that the measure is required to meet the FPA's comprehensive development standard. In consequence, although the Commission sometimes includes in license articles spending caps that parties have agreed to, it does so to memorialize the intent of the parties, but not to approve the limit. The Commission expects the required measure to be performed by the licensee, even if the cost exceeds the agreed-upon cap. As the Commission stated in *Virginia Electric Power Company*,

[s]ettlements filed with us often include specific dollar limitations (*i.e.*, the licensee shall build a fishing pier, at a cost of up to \$15,000), and we sometimes include those limitations in license articles at the parties' request, in an effort to revise proposed articles as little as possible. It is important for all entities involved in settlements to know, however, that we consider the licensee's obligation to be to complete the measures required by license articles, in the absence of authorization from the Commission to the contrary. Dollar figures agreed to by the parties are not absolute limitations.

110 FERC ¶ 61,241 at P 10 (2005). *See also New York Power Authority*, 105 FERC ¶ 61,102 at P 66 (2003) (reserving Commission's right to amend agreed-upon funding requirements to ensure that project is operated in public interest); *Allete, Inc.*, 107 FERC ¶ 62,036 at P 26 (2004); *City of Sturgis, Michigan*, 105 FERC ¶ 62,132 at P 37 (2003); *Charter Township of Ypsilanti, Michigan*, 105 FERC ¶ 62,019 at P 39 (2003); *PacifiCorp*, 105 FERC ¶ 62,207 at P 27 (2005).

Cost Sharing

22. As noted, the Commission has no jurisdiction over any party to a hydroelectric licensing settlement other than the licensee. Some settlements include agreement that the licensee and some other party will share the costs of performing certain measures, such as an agreement that the licensee and a state and federal agency will jointly manage a recreation area. The Commission cannot enforce such an agreement against a non-licensee. Another problem can arise if the agreement is premised on the receipt of matching funds; that is, the licensee won't be expected to make a payment unless another entity also does so. As discussed in regard to cost caps, if the Commission requires the licensee to undertake a particular measure, it will look to the licensee alone for the performance of that measure. *See, e.g., Virginia Electric Power Company*, 106 FERC ¶ 62,245 at P 44 (2004) (finding that, while settlement provisions require licensee to provide funds to agency for construction and maintenance of facilities, licensee is ultimately responsible for compliance with license conditions); *PacifiCorp*, 105 FERC ¶ 62,207 at P 28 (2005) (noting, with respect to settlement provision requiring licensee to designate environmental coordinator, that, while licensee may hire others to perform required measures, burden of compliance rests with licensee). While licensees and other parties are free to enter into cost-sharing side agreements, including such provisions in a license is problematic because the Commission has no ability to enforce them.

23. Similarly, the parties may agree that a third party will undertake a certain task, and perhaps be paid by the licensee to do so. For example, it might be agreed that the licensee will pay a state agency or a tribe to operate a fish hatchery. If the Commission finds that operation of the fish hatchery is required for the comprehensive development of the affected waterway, it will not include in the license a provision requiring the licensee to pay another entity to operate the hatchery, but rather will require the licensee to operate the hatchery and leave to it how to fulfill that obligation. *See Portland General Electric Company*, 114 FERC ¶ 61,137 at P 11, 15 (2006). This is because the Commission has jurisdiction only over its licensee, and thus cannot ensure that a measure will be carried out unless ultimate responsibility for doing so rests with the licensee.

24. Settlement provisions requiring licensees to pay for the salaries of personnel who work for other entities, such as a state wildlife biologist or a law enforcement officer, also raise several issues. First, as noted, the Commission prefers concrete measures with measurable requirements and impacts such as "construct and operate a fish hatchery" to more indefinite ones such as "pay the salary of a state fisheries biologist." In addition, the Commission has no way of assuring that the hiring of personnel paid for by the licensee will actually accomplish a project purpose or ameliorate a project effect. Again, this is why measures that require specific, direct, on-the-ground actions are preferable to

more general ones. It makes most sense for the license to establish what measures a licensee must perform, and for any settlement between the licensee and third parties regarding the performance of those measures to be addressed in off-license agreements.

Funds

25. As noted above, in order to include a specific environmental measure in a license, the Commission needs to be able to conclude that the measure relates to project impacts or project purposes. This is why the Commission has expressed a preference for specific measures and that, where possible, such measures be implemented within the project boundary or close to the project and the area that it affects. An increasing number of settlements include funds intended to cover the costs of measures to be undertaken during the course of the license term. The principles enunciated above apply to consideration of such funds.

26. For example, where the record shows that a project has an impact on certain aquatic species or could enhance such species, it may be possible to obtain Commission approval of a fund that is designated for the purpose of enhancing and mitigating impacts on those species within the project vicinity, such as a fund to pay for a set of specified fishery habitat enhancements within the project boundary, provided that the licensee retains sufficient control over the fund that the Commission can ensure compliance with the related license article and ensure satisfaction of the underlying project purposes supporting the fund. As the ties between the proposed fund and record evidence and project effects and purposes become more tenuous, as with a fund to undertake unspecified fishery measures within the basin where the project is located, the propriety of the fund may increasingly come into question. Thus, if the record does not show that the project has an adverse effect on fishery resources or does not demonstrate that effective enhancement measures can be undertaken in the project vicinity, it may be more difficult to justify inclusion of a fishery fund in a license. Similarly, a fund that may be used anywhere in a state or in a broad geographic area may be less likely to be recommended than one more closely tied to the project. To the extent that parties feel measures should be undertaken beyond the project vicinity, they should explain in detail why those measures are related to project purposes, why they cannot be carried out at the project site, and why their proposals would satisfy the comprehensive development standard.

Physical Proximity

Project Boundaries

27. In the course of Commission action on settlements, issues often arise with respect to project boundaries. Specifically, parties may be concerned about what facilities need to be within project boundaries, and what the impact of such inclusion will be. Therefore, a brief discussion of this issue may be helpful.

28. Part I of the FPA directs the Commission, when issuing a license for a hydroelectric project, to require the licensee to undertake appropriate measures on behalf of both developmental and non-developmental public interest uses of the waterway, including fish, wildlife, and recreation.⁴ These requirements, as set forth in a license, constitute the "project purposes."

29. The Commission has regulatory authority only over the licensee, and thus can administer and enforce the terms of the license only through the licensee and the licensee's property rights. Standard license Article 5 requires the licensee to acquire and retain all interests in non-federal lands and other property necessary or appropriate to carry out project purposes.⁵ The licensee may obtain these property interests by contract or, if necessary, by means of federal eminent domain pursuant to FPA section 21.⁶

⁴ As discussed earlier, FPA section 10(a)(1) sets forth the standard by which the Commission acts on hydropower license applications, and incorporates by reference those public purposes set forth in FPA section 4(e).

⁵ Standard Article 5 appears in what are called "L-Forms," which are published at 54 FPC 1792-1928 (1975) and are incorporated into project licenses by an ordering paragraph. *See* 18 C.F.R. § 2.9 (2006). Article 5 states in pertinent part:

The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise

(continued...)

30. A licensee's property interests can range from fee simple to perpetual or renewable leases, easements, and rights-of-way. Thus, title to lands within the boundary can be owned by someone other than the licensee, so long as the licensee holds the necessary property interests (*e.g.*, flowage easements) and permits (*e.g.*, a Forest Service special use permit) to carry out licensed project purposes. The license covers only those property interests held by the licensee; each license with a project boundary states (in an ordering paragraph) that "the project consists [inter alia] of (1) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by [a designated exhibit]"

31. If the Commission requires additional control in order to accomplish a project purpose, or amends the license to expand or add a project purpose, it can direct its licensee to obtain any necessary additional property rights, whether inside or outside the existing project boundary, and amend the boundary as appropriate. *See, e.g., Upper Peninsula Power Company*, 104 FERC ¶ 62,135 at P 72 (2003) (finding that, notwithstanding settlement provision that licensee's obligation to develop buffer zone and wildlife and land management plan applied only to license-owned lands within project boundary, obligation in fact extended to all lands within boundary). Conversely, if the Commission determines that less land is needed to meet project purposes, or if it redefines project purposes, it can remove land from the boundary. If the Commission deletes a parcel of land from the project and its boundary, the Commission is placing that land outside of its jurisdiction and regulatory reach. *See, e.g., Pacific Gas & Electric Company*, 102 FERC ¶ 61,309 at P 21; 56-61 (2003) (rejecting portion of land management plan agreement that would have removed from project boundaries lands needed for project purposes). *Compare Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295 at P 29-38 (2003) (approving in part application to amend project boundaries).

32. Project boundaries are used to designate the geographic extent of the lands, waters, works, and facilities that the license identifies as comprising the licensed project and for which the licensee must hold the rights necessary to carry out project purposes. The

disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. . . .

⁶ 16 U.S.C. § 814 (2000).

establishment of a project boundary makes it easier for the Commission, the licensee, and other interested parties to understand the geographic scope of a project. All facilities, lands, and waters needed to carry out project purposes should be within the project boundary. A project boundary does not change property rights, nor does the conveyance of a property right change a project boundary.

33. To an extent, the Commission has allowed an exception for lands and waters on which a licensee is to carry out one-time measures. For example, if a licensee is required once to place material in a stream in order to create fish habitat, but is not required to undertake other measures in that area during the license term, the Commission may not include that reach within the project boundary. If, however, the licensee is obligated to undertake measures throughout the license term, such as implementing an ongoing habitat restoration plan, the Commission may require that the affected lands be included in the project boundary. *See, e.g., PacifiCorp*, 105 FERC ¶ 61,237 at P 114 (2003) (noting that licensee would have to amend project boundary to include lands previously outside of project boundaries, on which activities required by license).

34. Thus, if settling parties have a desire to include or exclude certain lands, waters, or facilities within project boundaries, they should examine carefully the licensee's obligations and how the lands or facilities in question relate to project purposes. If lands or facilities are to be included within the project boundary, there must be a showing of how they are needed for project purposes; if they are to be excluded there must be a showing of why they are not needed for those purposes, or that the measures affecting project lands or facilities are one-time measures that will not require Commission oversight throughout the life of the license.

Roads

35. One specific instance in which project boundary issues arise is roads. Some settlements require licensees to pay for the upkeep of roads leading to the project or to specific project works, such as recreation areas. Several issues can arise with respect to such measures. First, in order to decide whether a license should include a requirement that road activities be funded, the Commission must determine that the road is necessary for project purposes, as with a road that is needed in order to reach the powerhouse or a road that is the only way to reach a project recreation site. If the road merely passes near the project and is used only incidentally for project purposes, it may not be appropriate to require the licensee to maintain it. The Commission must also be able to determine what part of the road is needed for project purposes. Thus, it will be appropriate to develop license conditions covering only the relevant portion of a long road that at some point provides necessary access to a project, rather than the entire road.

36. Finally, if a road is deemed necessary for project purposes such that the licensee is required to undertake ongoing activities with respect to the road throughout the license term, the Commission may require that the road be included within the project boundary, so that the Commission can exercise its compliance jurisdiction to ensure that the required activities take place. As indicated above, inclusion of a road or a portion of a road within a project does not mean that the licensee must obtain fee title to the road, only that it must obtain sufficient rights, such as an easement, a lease, or a right-of-way, to ensure that it can implement the required measures. There are instances in which road owners, such as towns, counties, or the U.S. Forest Service, have been reluctant to have roads included within project boundaries. Parties should consider this issue carefully when deciding to what extent they want the Commission to impose ongoing obligations on licensees with respect to roads.

Reserve Commission Authority

Commission Approval

37. As the agency charged with the administration of hydropower licenses, the Commission must approve licensees' post-licensing plans. That authority cannot be ceded to other entities. Thus, settlement conditions that provide that the licensee must file specified plans after obtaining the approval of other parties, such as resource agencies, tribes, or non-governmental organizations, are acceptable if they provide that the plans will be filed with the Commission for its approval, and that the Commission will have the right to revise the plans as it deems necessary. Provisions that envision plans (or operational changes outside of the parameters approved in the license) being approved by other entities but not the Commission are not acceptable. In *Virginia Electric Power Company*, the Commission stated that:

. . . we are pleased that the settling parties were able to develop means for carrying out the goals of the settlement in a manner consistent with the Commission's responsibilities under the Federal Power Act. For example, Article 411, which calls for a bypassed reach flow release plan, requires the licensee to develop the plan in consultation with state and federal resource agencies, and then to file the plan for Commission approval, with the explicit understanding that the Commission may require changes in the plan.

110 FERC ¶ 61,241 at P 35.

38. Where, on the other hand, the parties establish a mechanism that purports to give the licensee and other parties the ability to alter license terms or obligations without first obtaining the Commission's approval, the Commission has revised proposed license articles to include its approval authority. *See New York Power Authority*, 105 FERC ¶ 61,102 at P 65 (2003) (modifying proposed license articles to require Commission approval of fishway plans).

Adaptive Management

39. Settlement provisions often contemplate that adjustments to measures required during the license term will be based on information gleaned from ongoing monitoring or other post-license studies. This is sometimes called adaptive management. Settling parties may agree, for example, that a committee will meet and decide on an annual level of spring flows for fishery purposes. To the extent that the proposed flows are within parameters considered in the licensing proceeding and determined to be appropriate, this does not pose a problem. A license might provide that a licensee be required to release increased flows of between 100 and 200 cfs for a period, to be determined on an annual basis, between March 15 and June 15. It would be appropriate for the committee to decide each year what flows within these parameters should be released, with notification to the Commission. However, it would not be appropriate to give the committee authority to require flows beyond the limits set forth in the license, because the Commission would not have had a prior opportunity to determine whether those flows were in the public interest. In order for this to occur, the licensee would have to file an amendment application with the Commission, seeking authority to alter the terms of the license. For the same reason, it would not be appropriate to propose that the license not contain flow parameters at all, and simply leave flow decisions up to an adaptive management group. As the Commission explained in *Virginia Electric Power Company*:

We receive many settlements in which parties agree to adaptive management measures, calling for future studies and possible changes in project operations based on experience. For the Commission to exercise its oversight authority, it is necessary that license conditions embodying these measures provide for Commission review and, where required, modification of proposed actions that go beyond the limits imposed by the license.

110 FERC ¶ 61,241 at P 23. *See also PacificCorp*, 103 FERC ¶ 62,183 at P 35 (2003) (“The Agreement provides for possible modifications to project structures and operations during the license term. For example, the proposed articles contain provisions to alter whitewater flow releases in the event that monitoring attributes to these releases

deleterious impacts to biological resources. While such adaptive management provisions are not uncommon in licenses issued in recent years, the proposed articles would put project modifications under the direction of [a committee]. It is however the Commission's role and responsibility to give prior approval, through appropriate license amendments, for all material amendments to the project and the license").

Other Issues

40. In addition to the matters discussed above, there have been a number of other instances over the last few years in which proposed provisions that do not fit precisely into the more general categories discussed above were not included in licenses. These provisions are briefly summarized below, in order to provide additional guidance:

(1) Provisions that would require amending the license for another project. Section 6 of the FPA precludes the Commission from altering a license without the licensee's consent. *See Pacific Gas & Electric Company*, 97 FERC ¶ 61,084 (2001); *Arizona Public Service Company*, 109 FERC ¶ 62,241 (2004); *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 62,021 (2004).

(2) Financial restrictions with respect to future surrender of a project. *See Northern States Power Company*, 111 FERC ¶ 62,212 at P 33 (2005) (Commission has previously declined to impose generic project retirement plans and licensee is anticipated to have sufficient financial resources to satisfy any conditions on surrender); *Northern States Power Company*, 111 FERC ¶ 62,123 at P 34 (2005) (same).

(3) A provision purporting to restrict parties' statutory right to seek rehearing. *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 62,021 at P 23 (2004).

(4) A proposed license condition stating that the Commission would not object to "reasonable" fees charged by licensees and operators of recreational facilities within the project boundaries. *See FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 62,021 at P 24 (2004) (Commission generally does not review reasonableness of such fees).

(5) Provision tying future actions to the date that the licensee accepts the license, contrary to general Commission practice of using the more certain date of license issuance. *See Virginia Electric Power Company*, 106 FERC ¶ 62,245 at P 46 (2004).

(6) Settlement provision requiring that requesting party pay licensee for whitewater releases above those set forth in settlement not accepted, because licensee

must bear cost of any releases required by Commission. *See Alcoa Power Generating, Inc.*, 110 FERC ¶ 61,056 at P 23, n.14 (2005).

Comment Procedures

41. We invite interested persons to submit written comments on the Commission's policy with regard to settlements in hydropower licensing proceedings. Comments are due 45 days from the date of publication of the policy statement in the *Federal Register*. Comments must refer to Docket No. PL06-5-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. Comments may be filed either in electronic or paper format.

42. Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and requests commenters to submit comments in a text-searchable format rather than a scanned image format. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, N.E., Washington, D.C. 20426.

43. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described below. Commenters on this policy statement are not required to serve copies of their comments on other commenters.

44. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.