



Federal Energy Regulatory Commission
September 21, 2006
Open Commission Meeting
Statement of
Chairman Joseph T. Kelliher

Item No. H-1: Settlements in Hydroelectric Licensing Proceedings (PL06-5-000)

“The need for Commission guidance on hydropower settlements has been apparent for some time. This issue was first raised with me by the Hydropower Reform Coalition about two years ago, when I was a Commissioner.

These groups noticed that the Commission from time to time modified the terms of proposed hydropower licensing settlements. They did not object to the notion that the Commission may have to modify settlement terms. They recognized that our legal duties may require us to modify proposed settlements. What they objected to was what they characterized as uncertainty about the circumstances where we may have to modify settlement terms. They asked for guidance on the kinds of terms that are problematic in hydropower licensing settlements.

I thought this was a perfectly reasonable request. I also think it is good government to provide clarity on our requirements and obligations.

Providing clear hydropower settlement guidance has been a priority for me since I became Chairman, and I am glad we are acting today.

The Commission supports settlements and encourages parties to hydropower licensing proceedings to enter into settlements. Given the nature of the issues in many licensing proceedings, settlement is often the best means of resolving disputes. The policy statement should facilitate future hydropower licensing settlements. That is our purpose.

A hydropower licensing settlement is fundamentally different from a rate settlement. When buyers and sellers agree to a rate the Commission generally leaves a settlement undisturbed. However, a hydropower settlement is very different as we must make certain public interest findings based on balancing a host of developmental, environmental and other considerations involving beneficial public uses of a waterway.

The policy statement recognizes the limits on what can be included in a hydropower settlement. A hydropower settlement is incorporated into a license; it becomes part of the license. There is a limit as to what can legally be incorporated into a FERC hydropower license, since the scope of a FERC license is not unlimited. The Commission’s authority is limited to the licensee, not other parties. So, as a general rule the Commission cannot enforce settlement terms against parties other than the licensee.

The policy statement clearly explains our precedent in this area, and draws broad principles from the case law. These principles provide guidance and will enable parties to reach comprehensive settlements that do not require subsequent Commission modifications.

The policy statement should encourage settlements, by recognizing and identifying

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the limit on what settlement terms can be incorporated into a FERC hydropower license. To the extent parties are willing to agree to terms that would be improper to include in a license, they can enter into side agreements that are enforceable under state law.

In my view, the policy statement does not represent a change in Commission policy or precedent. It recapitulates our precedent and case law, draws broad principles, explains the law, and provides clarity.

Although the policy statement does not represent a change in Commission policy, we seek public comment. I want to credit the leadership of Commissioner Phil Moeller with suggesting this change. It was included at his specific request.

I want to commend the staff in the Office of General Counsel and Office of Energy Projects who worked on this policy statement, under the leadership of John Katz and Ann Miles. It is a clear explanation of our precedent and case law, and of our legal duties under Part I of the Federal Power Act.

I look forward to the public comments.