
**In the United States Court of Appeals
for the Ninth Circuit**

No. 10-70140

**COUNTY OF BUTTE, CALIFORNIA,
*Petitioner,***

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.***

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably denied the complaint of the County of Butte, California (“Butte”) against hydropower licensee California Department of Water Resources (“DWR”), seeking compensation for public safety services provided by Butte at DWR’s FERC-licensed project, when the complaint failed to show that DWR has violated any terms of its license, and when the Commission prefers to address the compensation issue in a separate, ongoing relicensing proceeding.

COUNTERSTATEMENT REGARDING JURISDICTION

This Court has jurisdiction under section 313(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251(b), except for Butte’s allegations, Br. at 49, that FPA section 10(e), 16 U.S.C. § 803(e), confers the authority and duty on the Commission to impose interim license conditions. *See infra* pp. 25-26. Butte did not raise this argument on rehearing to the Commission and is, therefore, precluded from raising it now on appeal. 16 U.S.C. § 8251(b); *see also, e.g., California Trout v. FERC*, 572 F.3d 1003, 1015 n. 9 (9th Cir. 2009).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

In the orders on review, the Commission denied a complaint filed by Butte against DWR for failure to compensate Butte for public safety services Butte provides at and around the Oroville Project, in alleged violation of the recreational and public safety requirements of DWR’s project license and Commission regulations. *County of Butte, California v. California Department of Water*

Resources, 128 FERC ¶ 61,068 (2009) (“Complaint Order”), ER 37, *reh’g denied*, 129 FERC ¶ 61,133 (2009) (“Rehearing Order”), ER 22.¹

The Commission determined that the facts alleged in the complaint did not constitute any past or ongoing violations of the license terms or the agency’s regulations. *See* Complaint Order at P 26, ER 8; Rehearing Order at PP 19-20 and 34, ER 11-12, 14. That Butte, like other governmental bodies, currently is suffering a serious budget problem is not itself a basis, absent a license violation or any demonstrated threat to public safety, to compel DWR to assume the costs of governmental services. The Commission further found that Butte’s complaint was premature, since the issue of compensation for the costs of law enforcement and public safety services has been raised and will be addressed in the separate, ongoing FERC relicensing proceeding. *See* Rehearing Order at P 33, ER 14.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Framework

Part I of the FPA constitutes “a complete scheme of national regulation” to “promote the comprehensive development of the water resources of the Nation.” *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). Federal licenses,

¹ ER refers to the Excerpts of Record filed by petitioner. P refers to the internal paragraph number within a FERC order. Br. refers to the petitioner’s initial Brief.

governed by FPA section 4(e), 16 U.S.C. § 797(e), are required for the construction, operation, and maintenance of FERC-jurisdictional projects. *See American Rivers v. FERC*, 201 F.3d 1186, 1191 (9th Cir. 1999).

Under FPA section 4(e), in deciding whether to issue any license, the Commission must “give equal consideration” to both power and non-power factors; among the latter considerations are “the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” 16 U.S.C. § 797(e). Under FPA section 10(a), the Commission must ensure that any hydropower project it licenses is “best adapted to a comprehensive plan for improving or developing a waterway” for a variety of beneficial uses, including “recreational and other purposes referred to in [FPA] section 4(e).” 16 U.S.C. § 803(a)(1); see also FPA section 10(c), 16 U.S.C. § 803(c) (requiring licensee to maintain FERC-licensed projects in an adequate state of repair); FPA section 6, 16 U.S.C. § 799 (providing that licenses may be altered only upon mutual agreement between the licensee and the Commission); Rehearing Order at PP 31-32, ER 14 (statute does not contemplate routine interim amendments pending relicensing; licensee is obligated to repair damaged project works).

The Commission’s policy statement on recreation development at licensed projects, which appears at 18 C.F.R. § 2.7, expresses the agency’s long-term goal of seeking the “ultimate development” of recreational resources at hydroelectric

projects. Rehearing Order at P 19, ER 11. The policy statement provides in part that the licensee must “comply with federal, state, and local regulations for health, sanitation, and public safety, and cooperate with law enforcement authorities in the development of additional regulations for such purposes.” 18 C.F.R. § 2.7(f)(1).

Rule 206 of the Commission’s regulations provides that a complaint may be filed against a FERC hydroelectric licensee or any person alleged to be “in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.” 18 C.F.R. § 385.206(a) (implementing FPA section 306, 16 U.S.C. § 825e, regarding complaints). Among various requirements, a complaint must “[c]learly identify the action or inaction which is alleged to violate applicable statutory standards and regulatory requirements.” *Id.* § 385.206(b).

B. Events Leading To The Challenged Orders

This case concerns the responsibility for costs associated with public safety and law enforcement services at the Oroville Project, which was originally licensed in 1957. *See California Department of Water Resources*, 17 FPC 262 (1957), ER 139. The 762-megawatt project is located on the Feather River, in Butte County, California, near the City of Oroville. Complaint Order at P 3, ER 5; Rehearing Order at P 2, ER 9. It includes the Oroville Reservoir, the Thermalito Forebay, the Thermalito Afterbay, and the Thermalito Diversion. *Id.* The project occupies

41,540 acres of land, including 1,620 acres of federal lands managed by the U.S. Department of Agriculture's Forest Service and the U.S. Department of the Interior's Bureau of Land Management. *Id.*

On January 26, 2005, DWR filed an application for a new license. Complaint Order at P 4, ER 5; Rehearing Order at P 3, ER 9. On March 24, 2006, DWR filed a comprehensive settlement agreement with the Commission on behalf of itself and 53 settling parties. Butte, which is a party to the relicensing proceeding, is not a party to the settlement agreement. *Id.* The license for the project expired on January 31, 2007. Since February 1, 2007, the project has been operating on an annual license. *See Notice of Authorization for Continued Project Operation*, issued February 1, 2007, in FERC Docket No. P-2100, ER 123. The relicensing proceeding is currently pending before the Commission. Complaint Order at P 4, ER 5; Rehearing Order at P 3, ER 9.

C. The Commission's Proceedings And Orders

1. Butte's Complaint

Butte filed its complaint against DWR on May 22, 2009. ER 88-105. Butte alleged that DWR has violated Articles 7, 14, and 37 of the project license and the recreation and public safety requirements of section 2.7(f)(1) of the Commission's regulations. ER 88. *See* Standard Articles 7, 14, and 37, published at 16 FPC 1121 (1953), and incorporated into the license at 17 FPC at 265, Ordering Par. (B), ER

145; *see also* Complaint Order at nn. 24-26, ER 7 (describing the license Articles). Butte also argued that the Commission should adopt interim conditions pending relicensing of the project, to require DWR to reimburse Butte for costs associated with providing public safety services to the project. Butte requested expedited processing of its complaint, “because the County’s current financial crisis has impaired its ability to continue providing public protection services to the Project.”

Butte stated that to meet the demand for public protection at the project, it provides police and first responder services, valued by Butte at approximately \$5.8 million per year. Complaint at 3, Attachment A, ER 89, 105. *See also* Complaint Order at P 7 and n. 8, ER 5; Rehearing Order at P 4, ER 10. In addition, Butte argued that it loses \$6.9 million per year in property taxes, as a result of DWR’s tax-exempt status as a municipality. Complaint Order at P 7 n. 9, ER 5; Rehearing Order at P 4 n. 7, ER 10. Butte requested that the Commission require DWR to make: (1) annual reimbursements to Butte for \$5.8 million for costs incurred in providing law enforcement and public safety services to the project from the date the license expired on January 31, 2007 through the pendency of the relicensing proceeding; and (2) additional annual payments of \$6.9 million in lieu of taxes to reimburse Butte for the infrastructure needed to provide public services and for the use of county land and natural resources, for a total of \$12.7 million per year. *See*

Complaint at 28, ER 102; Complaint Order at P 10, ER 6; Rehearing Order at P 6, ER 10.

DWR filed an answer to the complaint on June 10, 2009, ER 70-73, and State Water Contractors and the Metropolitan Water District of Southern California filed a joint motion to intervene and comments on June 11, 2009. *See* Rehearing Order at P 9, ER 10. All three parties are intervenors in this appeal in support of the Commission.

2. The Commission's Orders On Review

On July 16, 2009, the Commission issued an order denying Butte's complaint. Complaint Order, ER 5. The Commission determined that Butte failed to substantiate its assertion that, by failing to reimburse the county for the public safety services it performs on project lands, DWR is unable to satisfy the recreation and public safety requirements of its license. *Id.* at P 18, ER 7. For this reason, the Commission denied Butte's complaint, without prejudice to full consideration of all relevant recreation and safety issues in the ongoing relicensing proceeding. *Id.* at P 2, ER 5.

The Commission explained that Butte failed to show that the agency's general policy on recreation development at licensed projects requires the remedy sought by Butte or that DWR is out of compliance with the policy. *Id.* at P 19, ER 7. In addition, the Commission found that there is no evidence in the record that

DWR has violated the requirements of Standard Articles 7, 14, and 37 of the license or the Commission's regulations. Specifically, there is no evidence that DWR is failing to allow appropriate public access to project lands and works or failing to take proper action to prevent and suppress fires. *Id.* at P 20, ER 7. In addition, the Commission's most recent dam and environmental inspections found no significant issues with DWR's maintenance and operation of the project. *Id.*

The Commission further explained that its policy is to require licensees to implement necessary license conditions and not to fund personnel at local agencies or to subsidize local services. *Id.* at P 21, ER 7. With respect to Butte's request for interim conditions, the Commission found that the license terms referenced by Butte do not reserve authority for the Commission to impose the subsidization remedy sought by Butte. Therefore, pursuant to FPA section 6, 16 U.S.C. § 799, the Commission could not amend the license without DWR's consent. Complaint Order at P 25, ER 8. In these circumstances, the ongoing relicensing proceeding is the better proceeding in which to address Butte's plea for compensation. *Id.* at P 27, ER 8.

Butte sought rehearing of the Complaint Order, reiterating its arguments that DWR is violating the requirements of the project license and the Commission's regulations and that the license reserves authority to reopen the license and impose interim conditions. See Rehearing Order at P 12, ER 10-11. Moreover, Butte

argued for the first time that FPA sections 4(e) and 10(c), 16 U.S.C. §§ 797(e), 803(c), require the Commission to reopen the license and impose interim conditions. Rehearing Order at P 30, ER 14. In the Rehearing Order, the Commission rejected Butte's arguments and affirmed its denial of Butte's complaint. *Id.* at PP 19-25, ER 11-13.

In particular, the Commission reaffirmed that licensees are not responsible for the provision of law enforcement or safety services on project lands. Rather, local authorities are responsible for these services. *Id.* at P 19, ER 11-12. In addition, the Commission reaffirmed that the Oroville license does not reserve the authority for the Commission to impose interim license requirements, absent DWR's consent, for the provision of payments in lieu of taxes or annual reimbursements for law enforcement or public safety services, nor did Butte demonstrate that the license should be reopened. *Id.* at P 29, ER 13. Finally, the Commission held that Butte's arguments concerning FPA sections 4(e) and 10(c) were waived, since they were not raised earlier. *Id.* at P 30, ER 14. In any event, the Commission found that those arguments are without merit, *id.* at PP 31-32, ER 14, and that all its arguments are best considered in the ongoing relicensing proceeding, *id.* at P 33, ER 14.

SUMMARY OF ARGUMENT

There is nothing “cavalier” or “indifferent,” *e.g.*, Br. at 20, about the Commission’s attitude toward public safety at the hydropower projects it licenses and regulates. In licensing or relicensing a hydropower project, the Commission imposes whatever terms and conditions are necessary to ensure public safety, as well as to advance other power and non-power (including recreational) purposes. Should a licensee abdicate any of its responsibilities, and violate any of the terms of its FERC-issued license, the Commission will act promptly and effectively to direct compliance and to protect the public. Here, the Commission acted attentively and responsibly in addressing Butte’s unsubstantiated complaint that DWR is shirking its responsibilities as a FERC licensee.

In order to address its serious budget problems, Butte seeks compensation for law enforcement and public safety services it provides at the federally-licensed Oroville Project, and has raised the compensation issue in the project’s ongoing relicensing proceeding. Displeased with the pace of that proceeding, Butte filed a complaint against the licensee, DWR, claiming that the Commission must reopen the annual license now and impose interim conditions requiring DWR to compensate Butte over \$12 million yearly for its law enforcement and public safety services.

The Commission appropriately denied Butte's complaint for several reasons. First, the complaint failed to demonstrate that DWR has violated any statute, rule, or order, or has committed any other alleged wrong under the agency's jurisdiction. Nothing in the Federal Power Act, the terms of the project license, or the Commission's regulations requires a licensee to provide public safety services unrelated to project uses or purposes. Nor is there any obligation that licensees compensate local jurisdictions for the costs of such services. Contrary to Butte's claims, local enforcement of local laws on project lands and waters is not related to project uses or purposes, but instead is the responsibility of local authorities. A FERC licensee such as DWR is not obligated to cover the county's expenses where, as here, the State has exempted a licensee from the payment of taxes. These determinations by the Commission are entirely consistent with agency policy and precedent, and should be respected by the Court on review.

In addition, the Commission reasonably determined that Butte did not allege or demonstrate facts sufficient to support reopening the license and imposing interim conditions. Specifically, Butte failed to show that DWR has violated any provision of its license or the Commission's regulations, or that current license conditions are not adequate. Moreover, the general mandates of the FPA and the Commission's implementing regulations do not authorize the agency unilaterally to impose interim conditions on licensees. None of the terms of the Oroville license

reserves authority for the Commission to impose, without DWR's consent, interim requirements for the provision of compensation to Butte for law enforcement and public safety services.

Finally, the Commission appropriately rejected Butte's improper effort to subvert the licensing process by attempting to resolve licensing issues through a complaint. The Commission reasonably found that the compensation issue has been raised in the ongoing relicensing proceeding and is best dealt with there.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, the Court reviews Commission orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *see, e.g., Fall River Rural Elec. Coop. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008); *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). "In determining whether an agency's action is arbitrary or capricious," the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998)). Further, the Commission's policy assessments are owed "great deference." *Transmission Access Policy Study Group v. FERC*, 225

F.3d 667, 702 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 535 U.S. 1 (2002); *see also, e.g., Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (“We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious, or manifestly contrary to statute”).

FERC’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 8251(b); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003). Further, FERC’s interpretations of its own orders are entitled to deference. *Cal. Dep’t of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007). Likewise, FERC’s interpretations of its own regulations warrant deference, unless the interpretation is plainly erroneous. *Id.* at 1035-36; *see also California Trout*, 572 F.3d at 1012-13 (same).

II. THE COMMISSION REASONABLY DENIED BUTTE’S COMPLAINT

A. The Commission Appropriately Found That Butte’s Complaint Failed To Show Any Violation Of Either DWR’s License Or The Commission’s Regulations.

In the challenged orders, the Commission found that Butte failed to show DWR has violated any statute, rule, or order, or committed any other alleged wrong. *See, e.g.,* Rehearing Order at P 34, ER 14. The Commission explained first that, contrary to Butte’s claim, DWR has not violated the agency’s policy on recreational development and public safety under § 2.7(f)(1) of its regulations. That policy provides that a licensee “must comply with federal, state, and local

regulations for health, sanitation, and public safety, and . . . cooperate with law enforcement authorities in the development of additional regulations for such purposes.” 18 C.F.R. § 2.7(f)(1). On appeal, Butte claims that, by implication, in providing for recreational opportunities within a project area, a licensee must also ensure that “essential public services,” such as law enforcement, will be available to recreational users. Br. at 33.

The Commission determined that Butte did not show how this policy requires the remedy sought – reimbursement for costs associated with providing law enforcement and safety services – or how DWR is in violation of the policy. Complaint Order at P 19, ER 7. On rehearing, the Commission expanded its explanation, stating that Butte did not assert that DWR is not cooperating with law enforcement agencies or with federal, state, or local agencies in the provision of recreational facilities. Rehearing Order at P 19, ER 11-12. In addition, the Commission emphasized that the requirements in § 2.7 “d[o] not imply that the licensee is responsible for law enforcement on project lands.” *Id.* The Commission further stated that “nothing in the FPA, California DWR’s license, or our precedent suggests that licensees are responsible for the provision of law enforcement or safety services. Rather, local authorities are responsible for these services.” *Id.*

Butte acknowledges this local responsibility, stating

[T]he County is still under the same obligation to provide vital public safety services within its boundaries. In fact, the Butte County Sheriff has a mandate under the State Constitution to provide law enforcement services for the entire County, including the Project Area. . . . The Licensee has no law enforcement authority itself and must therefore rely on the County to provide ‘front-line’ public safety services at the Project.

Br. at 41-42. Butte’s real complaint seems to lie with the State’s exemption of DWR, as a state agency, from the payment of property taxes, Rehearing Order at P 4, ER 10, and the State’s funding cuts to its counties. Br. at 11.² However, as the Commission held, the fact that the State has not required DWR to pay taxes does not obligate the Commission or DWR to cover Butte’s expenses, nor does the FPA indicate that Congress intended for the Commission to assume the responsibility for overseeing the provision of local safety and law enforcement services. Rehearing Order at P 25, ER 13.

The Commission next addressed Butte’s assertions that DWR, in failing to fund local personnel to carry out law enforcement and first responder measures, has violated certain license terms, Standard Articles 7 and 14.3 Butte repeats those

² The amicus brief filed by the California State Association of Counties (“Association”) at 12-13 explains the State’s role in exacerbating the counties’ budget problems.

³ Butte alleged in its Complaint that DWR also violated Standard Article 37 of its license, which requires licensees to relocate or replace certain existing roads, bridges and communication facilities existing when the license was issued. See Complaint Order at P 20, n.26, ER 7. The Commission agreed with

allegations on appeal. Br. at 32-34. Standard Article 7 requires the licensee to allow public access to project waters and lands for navigation and recreational purposes. However, the licensee may prevent public access in order to protect life, health and property. Complaint Order at P 20 and n.24, ER 7. Standard Article 14 requires the licensee to do everything reasonably within its power to require its employees and contractors to do everything within their power to prevent and suppress fires. *Id.* n.25. The Commission found that Butte did not show that DWR is not allowing appropriate public access to project lands and works or that it is not taking proper action to prevent and suppress fires. *Id.* at P 20, ER 7; Rehearing Order at P 21, ER 12.

In addition, the Commission explained that, in its most recent dam inspection, staff determined that the “overall project is in good condition and is properly maintained.” *Id.* Likewise, in Commission staff’s most recent environmental inspection, “only a few minor action items were identified and these were remedied by . . . DWR.” *Id.* Based on these findings, the Commission appropriately found no evidence of licensing or regulatory violations by DWR. *Id.*

Butte claims that the Commission ignored “uncontroverted evidence” of safety violations by DWR. Br. at 42. That evidence includes a March 19, 2010

DWR that this requirement was satisfied decades ago, *id.*, and Butte did not pursue this allegation in its rehearing request or its appeal.

report from the California Division of Occupational Safety and Health finding DWR responsible for certain occupational safety violations.

But the March 19, 2010 report issued after the agency orders challenged here, and thus could not have been considered by the Commission. *See FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (“ordinarily review of administrative decisions is to be confined to ‘consideration of the decision of the agency . . . and of the evidence on which it was based’”) (citations omitted); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (record on review “includes everything that was before the agency pertaining to the merits of its decision”) (citations omitted). In any event, Butte’s “evidence,” such as photographs of parked cars in restricted areas and newspaper articles concerning hazardous materials, does not establish that DWR has violated any FERC license requirements or regulations. The Commission appropriately relied on its most recent dam safety and environmental inspection reports to determine whether any evidence of such violations existed. At most, the incidents related by Butte show violations of state occupational safety regulations or local laws over which the Commission does not have jurisdiction.

Nor could Butte substantiate that DWR has committed “any other alleged wrong over which the Commission may have jurisdiction,” under 18 C.F.R. § 385.206(a). Rehearing Order at P 22, ER 12. The Commission found

that the general mandates of license articles and its regulations cited by Butte do not require a licensee to provide public safety services or to compensate local jurisdictions for the costs of such services. *Id.* at P 23, ER 12. Therefore, the Commission’s policy is to require licensees to implement necessary conditions and not to fund personnel at local agencies. *Id.*; see also Complaint Order at P 21, ER 7. Consistent with that policy, nothing in DWR’s license requires DWR to subsidize local services, although licensees are free to enter into “off-license” funding agreements. Complaint Order at P 21, ER 7; Rehearing Order at P 24, ER 7. The Commission’s policy does not leave a “dangerous gap” in public protection, as claimed (at 9) by the Association. As the Commission explained, it is the responsibility of local authorities to ensure compliance with local law. Rehearing Order at n.36, ER 13.

The Commission is not a taxing authority. The fact that the State of California has exempted DWR from the obligation to pay taxes “does not obligate the Commission or the licensee to cover the county’s expenses.” Rehearing Order at P 25, ER 13. Moreover, the Commission stated, “[n]othing in the FPA indicates that Congress intended for the Commission to assume the responsibility for overseeing the provision of local safety and law enforcement. The Commission will not usurp this function or establish a tax regime in addition to those provided for by state and federal law.” *Id.* (citing *New York Power Authority*, 120 FERC

¶ 61,266 at P 33 (2007) (Commission denied request to require tax-exempt licensee to make payments in lieu of taxes)).

B. The Commission's Orders Are Consistent With Agency Policy And Precedent.

Contrary to Butte's claims, Br. at 25-26, 37-38, 46-47, the Commission's decision to deny Butte's complaint was entirely consistent with agency policy and precedent. As the Commission explained, it has repeatedly rejected similar proposals to require licensees to pay for local personnel, such as law enforcement officers. Rehearing Order at P 23, ER 12 (citing *Avista Corp.*, 127 FERC ¶ 61,265 at P 193 (2009) (Commission declined to include law enforcement personnel funding in license, finding that such funding "is not the licensee's responsibility"); *Public Util. Dist. No. 2 of Grant County, Wash.*, 123 FERC ¶ 61,049 at P 79 (2008) (Commission rejected recommendations to include in license funding for law enforcement personnel); *Portland General Electric Co.*, 117 FERC ¶ 61,112 at PP 43, 84 (2005) (Commission rejected general funding provisions for local law enforcement that was not specifically tied to compliance with license resource protection plans)). *See also PacifiCorp*, 123 FERC ¶ 62,260 at P 41 (2008) (Commission staff, acting through delegated authority, rejected proposal to include law enforcement personnel funding in license, as law enforcement is the responsibility of county and state agencies); *Yuba County Water Agency*, 54 FERC

¶ 62,082, at pp. 63,140-41 (1991) (finding that Sheriff’s Office, which is responsible for law enforcement at the project, should be permitted to comment on proposed recreation plan).

The Commission’s decision here is also fully consistent with its 1992 *Guidelines for Public Safety at Hydropower Projects* (“*Guidelines*”), ER 136.4

The guidelines provide:

The FERC is primarily concerned with the hazards created by project structures and operations. Hazards created by natural conditions in project waters and at recreational areas that are operated or leased by licensees and exemptees of hydropower projects are equally important. *However, as a practical matter and given the limitations of staff resources, the implementation of safety measures to minimize accidents that are not associated with project structures or operations is usually the responsibility of local entities and law enforcement agencies.*

Guidelines at p. 2, ER 137 (emphasis added). See Rehearing Order at P 18 n.23, ER 11 (citing *Guidelines*).

In 1996, the Commission further addressed public safety at hydropower projects in *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act* (“*Settlement Policy*”), 116 FERC ¶ 61,270 (1996). There, the Commission stated:

Settlement provisions requiring licensees to pay for the salaries of personnel who work for other entities, such as a state wildlife

⁴ Butte only includes the first three pages of the *Guidelines* in the Excerpts of Record. A complete version can be found at <http://www.ferc.gov/industries/hydropower/safety/guidelines/public-safety.pdf>.

biologist or a law enforcement officer, also raise several issues. First, as noted, the Commission prefers concrete measures with measurable requirements and impacts . . . 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. . . .* 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.

Id. at P 24 (emphasis added). *See also* Complaint Order at P 21 n.30 (citing *Settlement Policy*), ER 7; Rehearing Order at P 23 n.34 (same), ER 12.

These policy statements and precedent establish that the Commission has consistently viewed law enforcement and safety services on project lands and waters as the responsibility of local authorities, not licensees, and has consistently rejected proposals to require licensees to fund such services. Contrary to Butte’s assertion that the Commission departed from its precedent under other hydropower licenses, Br. at 37-38, a Commission finding in Butte’s favor, that DWR is responsible for local law enforcement and safety services, would have represented a departure.

To argue otherwise, Butte cites selective portions of Commission precedent or factually distinguishable caselaw. For example, Butte asserts that, under the *Guidelines* quoted above, it is a “standard” FERC requirement that project owners are responsible for providing “any appropriate safety measures” at their projects.

Br. at 37 (citing p. 2 of the *Guidelines*, ER 137). However, Butte ignores the Commission's statement on the same page, quoted *supra* at p. 20, that the implementation of safety measures to minimize accidents that are not associated with project structures or operations is the usual responsibility of local entities and law enforcement agencies, not project owners.

Moreover, Butte disregards the fact that the "appropriate safety measures" described in the *Guidelines* that are the responsibility of project owners directly relate to project structures and operations, such as dams. *Guidelines* at 3, ER 137 ("an applicant or licensee must install, operate, and maintain any signs, lights, sirens, barriers, or other safety devices that may reasonably be necessary or desirable to warn the public of fluctuations in flow from the project or otherwise to protect the public in the use of the project lands and waters"), citing 18 C.F.R. § 12.42 (warning and safety devices). *See also Guidelines* at 4-7 (describing hazardous features and operations at projects that may affect public safety). In contrast, the examples of public safety threats supplied by Butte, Br. at 40, 45 (citing fires on boats, jet ski accidents and attempted suicides), in support of its alleged need for funding, are not related to project structures or operations, aside from the fact that they occurred on project lands and waters.

Similarly, Butte cites (at 47-48) Commission precedent that involves project owners' responsibility for safety measures directly related to project structures

and operations. *See Va. Hydrogeneration and Historical Society*, 112 FERC ¶ 62, 195 (2005) (requiring correction of license violations related to fish passage, adequate fencing, and securing vacant buildings); *Willard Janke v. Pub. Serv. Co. of Colo.*, 103 FERC ¶ 61,072 (2003) (requiring correction of license violations related to integrity of project penstocks); *Flambeau Paper Corp.*, 53 FERC ¶ 61,063 (1990) (dam safety violations). None of these cases establishes that a project owner is responsible for local law enforcement services.

Butte cites (at 38) additional cases that, in fact, support the Commission's decisions. For example, in *Pub. Util. Dist. No. 2*, 123 FERC ¶ 61,049 at P 79 (2008), the Commission rejected recommendations that the project owner fund enforcement personnel to protect wildlife resources from project effects, even where, in contrast to public safety at recreation areas, such protection is the responsibility of licensees. *Id.* That decision does not support Butte's claim that licensees are responsible for public safety enforcement at recreation areas. *See Guidelines* at 6 ("Public safety at recreation areas is under the jurisdiction of State and local agencies, but can be enhanced by the support and cooperation of the licensee").

Likewise, in *Portland General Electric Co.*, 117 FERC ¶ 61,112 at P 84 (2006), the Commission rejected a proposed provision for funding county law enforcement personnel that did not relate to compliance with specific license

requirements. There, the Commission drew a distinction between requirements of the license and compliance with local law. In doing so, the Commission stated

[T]he Commission will look to the licensees to ensure compliance with all license requirements on project lands and waters, regardless of whether the licensees fund [county] personnel to carry out enforcement measures. On the other hand, the enforcement on project lands and waters of laws unrelated to project uses or purposes is not a matter of Commission jurisdiction and is properly left to the licensees to arrange with [the county], through a funding agreement if desired.

Id. See also Rehearing Order at P 24, ER 12 (citing cases).

In sum, Butte's attempt to use selective language from Commission precedent to bolster its theory that DWR is somehow responsible for providing or funding all public safety services, whether or not related to project purposes and uses, on project lands and waters, should be rejected.

C. The Commission Appropriately Denied Butte's Request To Impose Interim License Conditions.

Butte claims that the Commission has both the authority and the duty to reopen DWR's annual license and impose interim conditions requiring DWR to compensate Butte for public safety services, pending completion of the relicensing proceeding. Br. at 49. Butte's claim is incorrect.

Contrary to Butte's assertions, Article 3 of the license does not reserve authority for the Commission to impose a license requirement for the provision of payments in lieu of taxes or annual reimbursements for law enforcement and public safety services. Complaint Order at P 25, ER 8; Rehearing

Order at P 29, ER 13. Instead, Article 3, entitled “License Agreement Emergency Changes,” merely provides, among other things, that “[t]he licensee shall comply with such rules and regulations of general or special applicability as the Commission may from time to time prescribe for the protection of life, health, or property.” *See* Standard Article 3, published at 16 FPC 1121 (1953), and incorporated into the license at 17 FPC 262, 265 (1957), Ordering Par. (B), ER 139.

Butte further asserts (at 49) that FPA section 10(e), 16 U.S.C. § 803(e), provides the Commission with the requisite authority and duty to impose new conditions on a licensee at any time for the protection of life, health, or property. Butte did not raise this argument on rehearing before the agency and is, therefore, precluded from raising it now on appeal.⁵ *See* 16 U.S.C. § 825l(b). (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.”); *see also, e.g. California Trout*, 572 F.3d at 1015 n.9 (declining to address argument not

⁵ On rehearing, Butte argued for the first time that FPA sections 4(e) and 10(c), 16 U.S.C. §§ 797(e), 803(c), require the Commission to reopen DWR’s license and impose interim conditions. Rehearing Order at P 30, ER 14. The Commission rejected those arguments as waived and also determined, in any event, that they lack merit. *Id.* at PP 31-32, ER 14. Butte does not pursue those arguments in this appeal.

presented to the Commission in rehearing application). In any event, FPA section 10(e) does not provide the authority or duty claimed by Butte. Rather, section 10(e) requires a licensee to pay annual charges to the United States to reimburse federal agencies for reasonable and necessary costs incurred by such agencies in the administration of a license.

As the Commission explained, pursuant to FPA section 6, 16 U.S.C. § 799, a license “may be altered . . . only upon mutual agreement between the licensee and the Commission after 30 days public notice.” Thus, if a license does not reserve the Commission’s authority with respect to a matter, then any changes in the license conditions on that matter require the licensee’s consent. Complaint Order at P 22, ER 8; Rehearing Order at P 26, ER 13. Here, since nothing in the license reserves authority for the Commission to impose license requirements for the provision of compensation to Butte for law enforcement and public safety services, the Commission correctly found that it could not amend the license without DWR’s consent, which had not been given. Complaint Order at P 25, ER 8.

To no avail, Butte also asserts that administrative and judicial precedent establish that the Commission has the authority to amend annual licenses that contain reopener clauses to prescribe conditions for the purpose of protecting the public whenever necessary and when circumstances change. Br. at 50-51. However, none of the cases Butte cites supports its argument that the Commission

has the authority and duty to amend DWR's license, which does not contain a reopener clause, for the purpose of imposing compensation requirements for public safety and local law enforcement services.

In *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006), no reopener clause was even involved, contrary to Butte's claim, Br. at 51. There, the Commission issued a new license to an existing licensee that contained environmental protection conditions which were not in the expired license. Tacoma, the licensee, appealed the imposition of the environmental conditions, arguing that they were not "reasonable terms" under FPA section 15, 16 U.S.C. § 808, because they were uneconomic. The court rejected Tacoma's argument, based in part on amendments to the FPA that reflected shifts in national priorities since the original license was issued to focus increasingly on environmental protection. 460 F.3d at 73-74.

Butte also cites *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F. 2d 109, 116-17 (D.C. Cir. 1989), as an example of the Commission's exercise of its reopener authority to prevent harm to fish and wildlife and related habitat areas. Br. at 51. However, unlike *Platte River*, Butte made no showing before the Commission of imminent environmental harm of any kind. Rehearing Order at P 28, ER 13. In addition, the Commission stated that the Court in *Platte River* found that the license in question reserved the Commission's

authority to impose environmental protective conditions, while here Butte pointed to nothing in DWR's license that authorizes the "unilateral imposition of measures to remedy alleged economic harm" to the county. *Id.*

Likewise, in the two administrative decisions cited (at 50-51) by Butte, *Central Nebraska Public Power and Irrigation Dist.*, 50 FERC ¶ 61,180 (1990), which was issued in response to the remand instructions in *Platte River*, and *PacifiCorp*, 126 FERC ¶ 61,236 (2009), *aff'd Hoopa Valley Tribe v. FERC*, No. 09-1134, 2010 U.S. App. LEXIS 26280 (D.C. Cir. Dec. 28, 2010), the licenses in question reserved the Commission's authority to impose environmental protective conditions. Here, in contrast, nothing in DWR's license reserves authority for the Commission, without DWR's consent, to impose conditions for compensation to Butte for law enforcement and public safety services.

Butte asserts that no federal authority limits the Commission's "broad FPA reopener powers to solely address environmental threats to fish, wildlife and habitat." Br. at 51-52. However, Butte fails to identify any section of the FPA that confers "broad reopener powers" on the Commission. As discussed above, contrary to Butte's claim, FPA section 10(e), 16 U.S.C. § 803(e), does not confer such powers. In addition, Butte ignores judicial precedent that affirmed the Commission's prior conclusion that FPA sections 4(e) and 10(a), 16 U.S.C. §§ 797(e), 803(a), do not give the Commission general authority to impose interim

measures. Rehearing Order at P 28, ER 13 (citing *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 32-33 (D.C. Cir 1992) (the general terms of sections 4(e) and 10(a), requiring FERC to consider environmental interests, apply to new licenses, not annual licenses, which must issue under the terms and conditions of the original license)). Butte’s assertion that protection of human life is at least an “equally compelling” interest to protection of the environment, Br. at 52, does not mean that the Commission has broad, extra-statutory powers, particularly in the absence of an express reopener clause, unilaterally to impose interim compensation conditions.

D. The Commission Appropriately Decided To Resolve The Compensation Issue In The Ongoing Relicensing Proceeding.

Finally, the Commission appropriately denied Butte’s complaint as an improper attempt to subvert the licensing process by resolving licensing issues through a complaint. Complaint Order at P 26, ER 8; Rehearing Order at P 33, ER 14. The Commission explained that a complaint, which involves allegations of violations of statute, rule, or order, is not an appropriate vehicle for seeking to reopen a license. Complaint Order at P 25, ER 8. In a reopener proceeding, the petitioner must show that the terms of the license are no longer adequate to deal with current conditions. *Id.* (citing *PacifiCorp*, 126 FERC ¶ 61,236 at P 14 (2009), *aff’d Hoopa Valley Tribe v. FERC*, *supra*). In a complaint proceeding, in contrast, the complainant must show that the licensee is failing to

comply with the existing terms of the license. Since Butte failed to show that DWR has violated any provision of its license, or that current license conditions are inadequate to deal with current conditions, the Commission appropriately concluded that Butte failed to allege or demonstrate facts sufficient to support reopening the license. Complaint Order at P 25, ER 8; Rehearing Order at P 29, n. 47, ER 13-14.

This does not mean that Butte is without a vehicle to pursue its claim to compensation. Butte has raised in the ongoing relicensing proceeding the issue of whether DWR should compensate it for the costs of law enforcement and public safety services, and the matter will be dealt with there. Complaint Order at P 26, ER 8; Rehearing Order at P 33, ER 14. The Commission's decision to resolve the issue in the ongoing relicensing proceeding, rather than in a separate complaint proceeding, was well within its discretion, particularly given Butte's failure to demonstrate facts sufficient to support either its complaint or the imposition of interim conditions. *See Mobil Oil Exploration and Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 230-31 (1991) (affirming the Commission's "broad discretion" to defer consideration of a particular issue to a later proceeding); *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 49 (1968) (finding that the Commission did not abuse its discretion in concluding that a particular issue "can be better dealt with" in another proceeding).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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February 8, 2011

STATEMENT OF RELATED CASES

Respondent is not aware of any related cases pending before this or any other Court.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and Circuit Rule R.32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 7,302 words, not including the tables of contents and authorities, the certificates of counsel, and the addendum.

/s/ Kathrine Henry
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Attorney for Federal Energy
Regulatory Commission

February 8, 2011

ADDENDUM

STATUTES AND REGULATIONS

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HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec. 801.	Congressional review.
802.	Congressional disapproval procedure.
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§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND
TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104-88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104-88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104-88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licenses in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:¹ The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.² *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United

¹ So in original. The colon probably should be a period.

² So in original. The period probably should be a colon.

States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, 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 damage 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.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, pt. I, § 4, 41 Stat. 1065; June 23, 1930, ch. 572, § 2, 46 Stat. 798; renumbered

pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 202, 212, 49 Stat. 839, 847; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; Pub. L. 97-375, title II, § 212, Dec. 21, 1982, 96 Stat. 1826; Pub. L. 99-495, § 3(a), Oct. 16, 1986, 100 Stat. 1243; Pub. L. 109-58, title II, § 241(a), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

2005—Subsec. (e). Pub. L. 109-58, which directed amendment of subsec. (e) by inserting after “adequate protection and utilization of such reservation.” at end of first proviso “The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.”, was executed by making the insertion after “adequate protection and utilization of such reservation.” at end of first proviso, to reflect the probable intent of Congress.

1986—Subsec. (e). Pub. L. 99-495 inserted provisions that in deciding whether to issue any license under this subchapter, the Commission, in addition to power and development purposes, is required to give equal consideration to purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of environmental quality.

1982—Subsec. (d). Pub. L. 97-375 struck out provision that the report contain the names and show the compensation of the persons employed by the Commission.

1935—Subsec. (a). Act Aug. 26, 1935, § 202, struck out last paragraph of subsec. (a) which related to statements of cost of construction, etc., and free access to projects, maps, etc., and is now covered by subsec. (b).

Subsecs. (b), (c). Act Aug. 26, 1935, § 202, added subsec. (b) and redesignated former subsecs. (b) and (c) as (c) and (d), respectively.

Subsec. (d). Act Aug. 26, 1935, § 202, redesignated subsec. (c) as (d) and substituted “3d day of January” for “first Monday in December” in second sentence. Former subsec. (d) redesignated (e).

Subsec. (e). Act Aug. 26, 1935, § 202, redesignated subsec. (d) as (e) and substituted “streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States” for “navigable waters of the United States” and “subsection (f)” for “subsection (e)”. Former subsec. (e) redesignated (f).

Subsec. (f). Act Aug. 26, 1935, § 202, redesignated subsec. (e) as (f) and substituted “once each week for four weeks” for “for eight weeks”. Former section (f), which related to the power of the Commission to prescribe regulations for the establishment of a system of accounts and the maintenance thereof, was struck out by act Aug. 26, 1935.

Subsec. (g). Act Aug. 26, 1935, § 202, added subsec. (g). Former subsec. (g), which related to the power of the Commission to hold hearings and take testimony by deposition, was struck out.

Subsec. (h). Act Aug. 26, 1935, § 202, struck out subsec. (h) which related to the power of the Commission to perform any and all acts necessary and proper for the purpose of carrying out the provisions of this chapter.

1930—Subsec. (d). Act June 23, 1930, inserted sentence respecting contents of report.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Sec-

retary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

EFFECTIVE DATE OF 1986 AMENDMENT

Section 18 of Pub. L. 99-495 provided that: "Except as otherwise provided in this Act, the amendments made by this Act [enacting section 823b of this title and amending this section and sections 800, 802, 803, 807, 808, 817, 823a, 824a-3, and 824j of this title] shall take effect with respect to each license, permit, or exemption issued under the Federal Power Act after the enactment of this Act [Oct. 16, 1986]. The amendments made by sections 6 and 12 of this Act [enacting section 823b of this title and amending section 817 of this title] shall apply to licenses, permits, and exemptions without regard to when issued."

SAVINGS PROVISION

Section 17(a) of Pub. L. 99-495 provided that: "Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act—

"(1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any ground water resource;

"(2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States;

"(3) alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water-related right;

"(4) affect, expand, or create rights to use transmission facilities owned by the Federal Government;

"(5) alter, amend, repeal, interpret, modify, or be in conflict with, the Treaty rights or other rights of any Indian tribe;

"(6) permit the filing of any competing application in any relicensing proceeding where the time for filing a competing application expired before the enactment of this Act [Oct. 16, 1986]; or

"(7) modify, supersede, or affect the Pacific Northwest Electric Power Planning and Conservation Act [16 U.S.C. 839 et seq.]"

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (d) of this section relating to submitting a classified annual report to Congress showing permits and licenses issued under this subchapter, see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 91 of House Document No. 103-7.

IMPROVEMENT AT EXISTING FEDERAL FACILITIES

Pub. L. 102-486, title XXIV, §2404, Oct. 24, 1992, 106 Stat. 3097, as amended by Pub. L. 103-437, §6(d)(37), Nov. 2, 1994, 108 Stat. 4585; Pub. L. 104-66, title I, §1052(h), Dec. 21, 1995, 109 Stat. 718, directed Secretary of the Interior and Secretary of the Army, in consultation with Secretary of Energy, to perform reconnaissance level studies, for each of the Nation's principal river basins, of cost effective opportunities to increase hydropower production at existing federally-owned or operated water regulation, storage, and conveyance facilities, with such studies to be completed within 2 years after Oct. 24, 1992, and transmitted to Congress, further provided that in cases where such studies had been prepared by any agency of the United States and published within ten years prior to Oct. 24, 1992, Secretary of the

Interior, or Secretary of the Army, could choose to rely on information developed by prior studies rather than conduct new studies, and further provided for appropriations for fiscal years 1993 to 1995.

WATER CONSERVATION AND ENERGY PRODUCTION

Pub. L. 102-486, title XXIV, §2405, Oct. 24, 1992, 106 Stat. 3098, provided that:

"(a) STUDIES.—The Secretary of the Interior, acting pursuant to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388) [see Short Title note under section 371 of Title 43, Public Lands], and Acts supplementary thereto and amendatory thereof, is authorized and directed to conduct feasibility investigations of opportunities to increase the amount of hydroelectric energy available for marketing by the Secretary from Federal hydroelectric power generation facilities resulting from a reduction in the consumptive use of such power for Federal reclamation project purposes or as a result of an increase in the amount of water available for such generation because of water conservation efforts on Federal reclamation projects or a combination thereof. The Secretary of the Interior is further authorized and directed to conduct feasibility investigations of opportunities to mitigate damages to or enhance fish and wildlife as a result of increasing the amount of water available for such purposes because of water conservation efforts on Federal reclamation projects. Such feasibility investigations shall include, but not be limited to—

"(1) an analysis of the technical, environmental, and economic feasibility of reducing the amount of water diverted upstream of such Federal hydroelectric power generation facilities by Federal reclamation projects;

"(2) an estimate of the reduction, if any, of project power consumed as a result of the decreased amount of diversion;

"(3) an estimate of the increase in the amount of electrical energy and related revenues which would result from the marketing of such power by the Secretary;

"(4) an estimate of the fish and wildlife benefits which would result from the decreased or modified diversions;

"(5) a finding by the Secretary of the Interior that the activities proposed in the feasibility study can be carried out in accordance with applicable Federal and State law, interstate compacts and the contractual obligations of the Secretary; and

"(6) a finding by the affected Federal Power Marketing Administrator that the hydroelectric component of the proposed water conservation feature is cost-effective and that the affected Administrator is able to market the hydro-electric power expected to be generated.

"(b) CONSULTATION.—In preparing feasibility studies pursuant to this section, the Secretary of the Interior shall consult with, and seek the recommendations of, affected State, local and Indian tribal interests, and shall provide for appropriate public comment.

"(c) AUTHORIZATION.—There is hereby authorized to be appropriated to the Secretary of the Interior such sums as may be necessary to carry out this section."

PROJECTS ON FRESH WATERS IN STATE OF HAWAII

Pub. L. 102-486, title XXIV, §2408, Oct. 24, 1992, 106 Stat. 3100, directed Federal Energy Regulatory Commission, in consultation with State of Hawaii, to carry out study of hydroelectric licensing in State of Hawaii for purposes of considering whether such licensing should be transferred to State, and directed Commission to complete study and submit report containing results of study to Congress within 18 months after Oct. 24, 1992.

§ 797a. Congressional authorization for permits, licenses, leases, or authorizations for dams, conduits, reservoirs, etc., within national parks or monuments

On and after March 3, 1921, no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as constituted, March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

(Mar. 3, 1921, ch. 129, 41 Stat. 1353.)

CODIFICATION

Provisions repealing so much of this chapter “as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission” have been omitted.

Section was not enacted as part of the Federal Power Act which generally comprises this chapter.

Section 212 of act Aug. 26, 1935, ch. 687, title II, 49 Stat. 847, provided that nothing in this chapter, as amended should be construed to repeal or amend the provisions of the act approved Mar. 3, 1921 (41 Stat. 1353) [16 U.S.C. 797a] or the provisions of any other Act relating to national parks and national monuments.

§ 797b. Duty to keep Congress fully and currently informed

The Federal Energy Regulatory Commission shall keep the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate fully and currently informed regarding actions of the Commission with respect to the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.].

(Pub. L. 99-495, §16, Oct. 16, 1986, 100 Stat. 1259.)

REFERENCES IN TEXT

The Federal Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Federal Power Act is classified generally to this subchapter (§791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Electric Consumers Protection Act of 1986, and not as part of the Federal Power Act which generally comprises this chapter.

CHANGE OF NAME

Committee on Energy and Commerce of House of Representatives treated as referring to Committee on Commerce of House of Representatives by section 1(a) of Pub. L. 104-14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Commerce of House of Representatives changed to Committee on Energy and Commerce of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred to Committee on Financial Services of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

§ 797c. Dams in National Park System units

After October 24, 1992, the Federal Energy Regulatory Commission may not issue an original license under Part I of the Federal Power Act [16

U.S.C. 791a et seq.] (nor an exemption from such Part) for any new hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal lands within any such unit. Nothing in this section shall be construed as repealing any existing provision of law (or affecting any treaty) explicitly authorizing a hydroelectric power project.

(Pub. L. 102-486, title XXIV, §2402, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

The Federal Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Act is classified generally to this subchapter (§791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Federal Power Act which generally comprises this chapter.

§ 797d. Third party contracting by FERC

(a) Environmental impact statements

Where the Federal Energy Regulatory Commission is required to prepare a draft or final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit, at the election of the applicant, a contractor, consultant or other person funded by the applicant and chosen by the Commission from among a list of such individuals or companies determined by the Commission to be qualified to do such work, to prepare such statement for the Commission. The contractor shall execute a disclosure statement prepared by the Commission specifying that it has no financial or other interest in the outcome of the project. The Commission shall establish the scope of work and procedures to assure that the contractor, consultant or other person has no financial or other potential conflict of interest in the outcome of the proceeding. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(b) Environmental assessments

Where an environmental assessment is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit an applicant, or a contractor, consultant or other person selected by the applicant, to prepare such environmental assessment. The Commission shall institute procedures, including pre-application consultations, to advise potential applicants of studies or other information foreseeably required by the Commission. The Commission may allow the filing of such applicant-prepared environmental assessments as part of the application. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(c) Effective date

This section shall take effect with respect to license applications filed after October 24, 1992.

(Pub. L. 102-486, title XXIV, §2403, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (a) and (b), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Federal Power Act, referred to in subsecs. (a) and (b), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Act is classified generally to this subchapter (§791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Federal Power Act which generally comprises this chapter.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

(June 10, 1920, ch. 285, pt. I, §5, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§203, 212, 49 Stat. 841, 847.)

AMENDMENTS

1935—Act Aug. 26, 1935, §203, amended section generally, striking out “and a license issued” at end of second sentence and inserting “or for other good cause shown after notice and opportunity for hearing” in last sentence.

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

(June 10, 1920, ch. 285, pt. I, §6, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§204, 212, 49 Stat. 841, 847; Pub. L. 104-106, div. D, title XLIII, §4321(i)(6), Feb. 10, 1996, 110 Stat. 676; Pub. L. 104-316, title I, §108(a), Oct. 19, 1996, 110 Stat. 3832; Pub. L. 105-192, §2, July 14, 1998, 112 Stat. 625.)

AMENDMENTS

1998—Pub. L. 105-192 inserted at end “Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.”

1996—Pub. L. 104-316 struck out at end “Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.”

Pub. L. 104-106 struck out at end “Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.”

1935—Act Aug. 26, 1935, §204, amended section generally, substituting “thirty days” for “ninety days” in third sentence and inserting last sentence.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of Title 41, Public Contracts.

§ 800. Issuance of preliminary permits or licenses**(a) Preference**

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the

United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

(June 10, 1920, ch. 285, pt. I, § 7, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 205, 212, 49 Stat. 842, 847; Pub. L. 90-451, § 1, Aug. 3, 1968, 82 Stat. 616; Pub. L. 99-495, § 2, Oct. 16, 1986, 100 Stat. 1243.)

CODIFICATION

Additional provisions in the section as enacted by act June 10, 1920, directing the commission to investigate the cost and economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, and also in connection with such project to submit plans and estimates of cost necessary to secure an increased water supply for the District of Columbia, have been omitted as temporary and executed.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99-495 inserted “original” after “hereunder or” and substituted “issued,” for “issued and in issuing licenses to new licensees under section 808 of this title”.

1968—Subsec. (c). Pub. L. 90-451 added subsec. (c).

1935—Act Aug. 26, 1935, § 205, amended section generally, striking out “navigation and” before “water resources” wherever appearing, and designating paragraphs as subsecs. (a) and (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

§ 801. Transfer of license; obligations of transferee

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

(June 10, 1920, ch. 285, pt. I, § 8, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the

commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3)¹ Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

(June 10, 1920, ch. 285, pt. I, § 9, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Pub. L. 99-495, § 14, Oct. 16, 1986, 100 Stat. 1257.)

CODIFICATION

Former subsec. (c), included in the provisions designated as subsec. (a) by Pub. L. 99-495, has been editorially redesignated as par. (3) of subsec. (a) as the probable intent of Congress.

AMENDMENTS

1986—Pub. L. 99-495 designated existing provisions as subsec. (a), redesignated former subsecs. (a) and (b) as paras. (1) and (2) of subsec. (a), and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) **Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions**

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be 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 water-power 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

¹ See Codification note below.

section 797(e) of this title¹ if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and

maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, sub-

¹ So in original. Probably should be followed by “; and”.

ject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to—

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which—

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statu-

tory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

(June 10, 1920, ch. 285, pt. I, § 10, 41 Stat. 1068; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 206, 212, 49 Stat. 842, 847; Pub. L. 87-647, Sept. 7, 1962, 76 Stat. 447; Pub. L. 90-451, § 4, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99-495, § 3(b), (c), 9(a), 13, Oct. 16, 1986, 100 Stat. 1243, 1244, 1252, 1257; Pub. L. 99-546, title IV, § 401, Oct. 27, 1986, 100 Stat. 3056; Pub. L. 102-486, title XVII, § 1701(a), Oct. 24, 1992, 106 Stat. 3008.)

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (j)(1), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

1992—Subsec. (e)(1). Pub. L. 102-486, in introductory provisions, substituted “administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter;” for “administration of this subchapter;” and inserted “*Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended:” after “as conditions may require:”.

1986—Subsec. (a). Pub. L. 99-495, § 3(b), designated existing provisions as par. (1), inserted “for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat),” after “water-power development”, inserted “irrigation, flood control, water supply, and” after “including”, which words were inserted after “public uses, including” as the probable intent of Congress, substituted “and other purposes referred to in section 797(e) of this title” for “purposes; and”, and added pars. (2) and (3).

Subsec. (e). Pub. L. 99-546 inserted proviso that no charge be assessed for use of Government dam or structure by licensee if, before Jan. 1, 1985, licensee and Secretary entered into contract which met requirements of date of license, powerplant construction, ownership, and revenue, etc.

Pub. L. 99-495, § 9(a), designated existing provisions as par. (1) and added pars. (2) to (4).

Subsec. (h). Pub. L. 99-495, § 13, designated existing provisions as par. (1) and added par. (2).

Subsec. (j). Pub. L. 99-495, § 3(c), added subsec. (j).

1968—Subsec. (d). Pub. L. 90-451 provided for maintenance of amortization reserves on and after effective date of new licenses.

1962—Subsecs. (b), (e), (i). Pub. L. 87-647 substituted “two thousand horsepower” for “one hundred horsepower”.

1935—Subsec. (a). Act Aug. 26, 1935, § 206, substituted “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 water-power development, and for other beneficial uses, including recreational purposes” for “scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses,” and “such plan” for “such scheme”.

Subsec. (b). Act Aug. 26, 1935, § 206, inserted “installed” before “capacity”.

Subsec. (d). Act Aug. 26, 1935, § 206, substituted “net investment” for “actual, legitimate investment”.

Subsec. (e). Act Aug. 26, 1935, § 206, amended subsec. (e) generally.

Subsec. (f). Act Aug. 26, 1935, § 206, inserted last sentence to first par., and inserted last par.

Subsec. (i). Act Aug. 26, 1935, § 206, inserted “installed” before “capacity”, and “annual charges for use of” before “lands” in proviso.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

SAVINGS PROVISION

Section 9(b) of Pub. L. 99-495 provided that: “Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect any annual charge to be paid pursuant to section 10(e) of the Federal Power Act [16 U.S.C. 803(e)] to Indian tribes for the use of their lands within Indian reservations.”

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(4) of this section relating to reporting recommendations to Congress every 5 years, see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 91 of House Document No. 103-7.

§ 804. Project works affecting navigable waters; requirements insertable in license

If the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, insofar as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may

be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

(June 10, 1920, ch. 285, pt. I, § 11, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted “Title 10, Armed Forces” which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

§ 805. Participation by Government in costs of locks, etc.

Whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures cannot, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in subsection (a) of section 804 of this title, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures.

(June 10, 1920, ch. 285, pt. I, § 12, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 806. Time limit for construction of project works; extension of time; termination or revocation of licenses for delay

The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not

longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title.

(June 10, 1920, ch. 285, pt. I, §13, 41 Stat. 1071; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847.)

REFERENCES IN TEXT

Proceedings in equity, referred to in text, were abolished by the adoption of rule 2 of the Federal Rules of Civil Procedure, set out in the Appendix to Title 28, Judiciary and Judicial Procedure, which provided that "there shall be one form of action to be known as 'civil action'".

§ 807. Right of Government to take over project works

(a) Compensation; condemnation by Federal or State Government

Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the

value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

(b) Relicensing proceedings; Federal agency recommendations of take over by Government; stay of orders for new licenses; termination of stay; notice to Congress

In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its¹ does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

(June 10, 1920, ch. 285, pt. I, §14, 41 Stat. 1071; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§207, 212, 49 Stat. 844, 847; Pub. L. 90-451, §2, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99-495, §4(b)(2), Oct. 16, 1986, 100 Stat. 1248.)

AMENDMENTS

1986—Subsec. (b). Pub. L. 99-495 struck out first sentence which read as follows: "No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title."

1968—Pub. L. 90-451 designated existing provisions as subsec. (a) and added subsec. (b).

1935—Act Aug. 26, 1935, §207, amended section generally.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

§ 808. New licenses and renewals

(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered

(1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or

¹ So in original. Probably should be "it".

projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 803 of this title, consider (and explain such consideration in writing) each of the following:

(A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this subchapter.

(B) The plans of the applicant to manage, operate, and maintain the project safely.

(C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.

(D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity gen-

erated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 803 of this title, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

(B) The actions taken by the existing licensee related to the project which affect the public.

(b) Notification of intention regarding renewal; public availability of documents; notice to public and Federal agencies; identification of Federal or Indian lands included; additional information required

(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.

(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after October 16, 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

(4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this subchapter for such lands, and to provide such additional information as the Commission

deems appropriate to carry out the Commission's responsibilities under this section.

(c) Time of filing application; consultation and participation in studies with fish and wildlife agencies; notice to applicants; adjustment of time periods

(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) of this section and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

(2) The time periods specified in this subsection and in subsection (b) of this section shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

(d) Adequacy of transmission facilities; provision of services to successor by existing licensee; tariff; final order; modification, extension or termination of order

(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.

(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this chapter has been executed, the Commission shall order the existing licensee to file (pursuant to section 824d of this title) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and rea-

sonable rates in accordance with section 824d of this title and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this subchapter, except that in issuing such order the Commission—

(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;

(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;

(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;

(D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and

(E) shall not order any entity other than the existing licensee to provide transmission or other services.

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.

(e) License term on relicensing

Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.

(f) Nonpower use licenses; recordkeeping

In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this

title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

(June 10, 1920, ch. 285, pt. I, § 15, 41 Stat. 1072; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Pub. L. 90-451, § 3, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99-495, §§ 4(a), (b)(1), 5, Oct. 16, 1986, 100 Stat. 1245, 1248.)

AMENDMENTS

1986—Subsec. (a). Pub. L. 99-495, § 4(a), (b)(1), designated existing provisions as par. (1), substituted “existing” for “original” wherever appearing, and added pars. (2) and (3).

Subsecs. (b) to (f). Pub. L. 99-495, § 4(a), 5, added subsecs. (b) to (e) and redesignated former subsec. (b) as (f).

1968—Pub. L. 90-451 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

§ 809. Temporary use by Government of project works for national safety; compensation for use

When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license under this chapter, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

(June 10, 1920, ch. 285, pt. I, § 16, 41 Stat. 1072; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

TERMINATION OF WAR AND EMERGENCIES

Joint Res. July 25, 1947, ch. 327, § 3, 61 Stat. 451, provided that in the interpretation of this section, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

§ 810. Disposition of charges arising from licenses

(a) Receipts from charges

All proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder, except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this subchapter, shall be paid into the Treasury of the United States, subject to the following distribution: 12½ per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to “Miscellaneous receipts”; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands and national forests shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests and public lands from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of the Army in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States. The proceeds of charges made by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter shall be paid into the Treasury of the United States and credited to miscellaneous receipts.

(b) Delinquent payments

In case of delinquency on the part of any licensee in the payment of annual charges a penalty of 5 per centum of the total amount so delinquent may be added to the total charges which shall apply for the first month or part of month so delinquent with an additional penalty of 3 per centum for each subsequent month until the total of the charges and penalties are paid or until the license is canceled and the charges and penalties satisfied in accordance with law.

(June 10, 1920, ch. 285, pt. I, § 17, 41 Stat. 1072; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 208, 212, 49 Stat. 845, 847; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

REFERENCES IN TEXT

The Act of Congress known as the Reclamation Act, approved June 17, 1902, referred to in subsec. (a), probably means act June 17, 1902, ch. 1093, 32 Stat. 388, which is classified generally to chapter 12 (§ 371 et seq.)

AMENDMENTS

1999—Subsec. (b). Pub. L. 106-102 inserted subsec. heading, designated existing provisions as par. (1), inserted heading, and substituted “After 6” for “After six”, and added par. (2).

1978—Subsec. (c). Pub. L. 95-617 added subsec. (c).

EFFECTIVE DATE OF 1978 AMENDMENT

Section 211(b) of Pub. L. 95-617 provided that: “No person shall be required to file a statement under section 305(c)(1) of the Federal Power Act [subsec. (c)(1) of this section] before April 30 of the second calendar year which begins after the date of the enactment of this Act [Nov. 9, 1978] and no public utility shall be required to publish a list under section 305(c)(2) of such Act [subsec. (c)(2) of this section] before January 31 of such second calendar year.”

§ 825e. Complaints

Any person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee, transmitting utility, or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee, transmitting utility, or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

(June 10, 1920, ch. 285, pt. III, §306, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 856; amended Pub. L. 109-58, title XII, §1284(a), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “, transmitting utility,” after “licensee” wherever appearing.

§ 825f. Investigations by Commission**(a) Scope**

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. The Commission may permit any person, electric utility, transmitting utility, or other entity to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and cir-

cumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) Attendance of witnesses and production of documents

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Resort to courts of United States for failure to obey subpoena; punishment

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

(d) Testimony by deposition

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor in-

Stat. 417 [31 U.S.C. 686, 686b)]” on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceed-

ings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), “section 1254 of title 28” substituted for “sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)” on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “to which such person,” and substituted “brought by any entity unless such entity” for “brought by any person unless such person”.

1958—Subsec. (a). Pub. L. 85-791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted “transmitted by the clerk of the court to” for “served upon”, substituted “file with the court” for “certify and file with the court a transcript of”, and inserted “as provided in section 2112 of title 28”, and in third sentence, substituted “jurisdiction, which upon the filing of the record with it shall be exclusive” for “exclusive jurisdiction”.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted “court of appeals” for “circuit court of appeals”.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

§2.7

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(e) During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.

(f) Changes under escalator clauses may be suspended as changes in existing filed schedules.

(g) Suspension of a rate schedule, within the ambit of the Commission's statutory authority is a matter within the discretion of the Commission.

(Natural Gas Act, 15 U.S.C. 717–717w (1976 & Supp. IV 1980); Federal Power Act, 16 U.S.C. 791a–828c (1976 & Supp. IV 1980); Dept. of Energy Organization Act, 42 U.S.C. 7101–7352 (Supp. IV 1980); E.O. 12009, 3 CFR part 142 (1978); 5 U.S.C. 553 (1976))

[Order 141, 12 FR 8471, Dec. 19, 1947. Redesignated by Order 147, 13 FR 8259, Dec. 23, 1948, and amended by Order 303, 48 FR 24361, June 1, 1983; Order 575, 60 FR 4852, Jan. 25, 1995]

§2.7 Recreational development at licensed projects.

The Commission will evaluate the recreational resources of all projects under Federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities. The Commission expects the licensee to assume the following responsibilities:

(a) To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.

(b) To develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters and to include therein consideration of the needs of persons with disabilities in the design and construction of such project facilities and access.

(c) To encourage and cooperate with appropriate local, State, and Federal agencies and other interested entities in the determination of public recreation needs and to cooperate in the preparation of plans to meet these needs, including those for sport fishing and hunting.

(d) To encourage governmental agencies and private interests, such as operators of user-fee facilities, to assist in carrying out plans for recreation, including operation and adequate maintenance of recreational areas and facilities.

(e) To cooperate with local, State, and Federal Government agencies in planning, providing, operating, and maintaining facilities for recreational use of public lands administered by those agencies adjacent to the project area.

(f)(1) To comply with Federal, State and local regulations for health, sanitation, and public safety, and to cooperate with law enforcement authorities in the development of additional necessary regulations for such purposes.

(2) To provide either by itself or through arrangement with others for facilities to process adequately sewage, litter, and other wastes from recreation facilities including wastes from watercraft, at recreation facilities maintained and operated by the licensee or its concessionaires.

(g) To ensure public access and recreational use of project lands and waters without regard to race, color, sex, religious creed or national origin.

(h) To inform the public of the opportunities for recreation at licensed projects, as well as of rules governing the accessibility and use of recreational facilities.

[Order 313, 30 FR 16198, Dec. 29, 1965, as amended by Order 375–B, 35 FR 6315, Apr. 18, 1970; Order 508, 39 FR 16338, May 8, 1974; Order 2002, 68 FR 51115, Aug. 25, 2003]

until the Regional Engineer has approved the program.

(b) If the construction, repair, or modification work is performed by a construction contractor, quality control inspection must be performed by the licensee, the design engineer, or an independent firm, other than the construction contractor, directly accountable to the licensee. This paragraph is not intended to prohibit additional quality control inspections by the construction contractor, or a firm accountable to the construction contractor, for the construction contractor's purposes.

(c) If the construction, repair, or modification of project works is performed by the applicant's or licensee's own personnel, the applicant or licensee must provide for separation of authority within its organization to make certain that the personnel responsible for quality control inspection are, to the satisfaction of the Regional Engineer or other authorized Commission representative, independent from the personnel who are responsible for the construction, repair or modification.

§ 12.41 Monitoring instruments.

(a) In designing a project, a licensee must make adequate provision for installing and maintaining appropriate monitoring instrumentation whenever any physical condition that might affect the stability of a project structure has been discovered or is anticipated. The instrumentation must be satisfactory to the Regional Engineer and may include, for example, instruments to monitor movement of joints, foundation or embankment deformation, seismic effects, hydrostatic pore pressures, structural cracking, or internal stresses on the structure.

(b) If an applicant or licensee discovers any condition affecting the safety of the project or project works during the course of construction or operation, the applicant or licensee must install and maintain any monitoring devices and instruments that may be required by the Regional Engineer or other authorized Commission representative to monitor that condition.

§ 12.42 Warning and safety devices.

To the satisfaction of, and within a time specified by, the Regional Engineer, an applicant or licensee must install, operate, and maintain any signs, lights, sirens, barriers, or other safety devices that may reasonably be necessary or desirable to warn the public of fluctuations in flow from the project or otherwise to protect the public in the use of project lands and waters.

§ 12.43 Power and communication lines and gas pipelines.

(a) A licensee must take all reasonable precautions, and comply with all reasonable specifications that may be provided by the Regional Engineer, to ensure that any power or communication line or gas pipeline that is located over, under, or in project waters does not obstruct navigation for recreational or commercial purposes or otherwise endanger public safety.

(b) Clearances between any power or communication line constructed after March 1, 1981 and any vessels using project waters must be at least sufficient to conform to any applicable requirements of the National Electrical Safety Code in effect at the time the power or communication line is constructed.

(c) The Regional Engineer may require a licensee or applicant to provide signs at or near power or communication lines to advise the public of the clearances for any power or communication lines located over, under, or in project waters.

§ 12.44 Testing spillway gates.

(a) *General requirement.* An applicant or licensee must make adequate provision, to the satisfaction of the Regional Engineer or other authorized Commission representative, to ensure that all spillway gates are operable at all times, particularly during adverse weather conditions.

(b) *Annual test.* (1) At least once each year, each spillway gate at a project must be operated to spill water, either during regular project operation or on a test basis.

(2) If an applicant or licensee does not operate each spillway gate on a

each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

(d) *Form of notice.* If a pleading or tariff or rate filing must include a form of notice suitable for publication in the FEDERAL REGISTER, the company shall submit the draft notice in accordance with the form of notice specifications prescribed by the Secretary and posted under the Filing Procedures link at <http://www.ferc.gov> and available in the Commission's Public Reference Room.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 647, 69 FR 32439, June 10, 2004; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006; Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

§ 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

§ 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) *Contents.* A complaint must:

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

(10) Include a form of notice of the complaint suitable for publication in the FEDERAL REGISTER in accordance with the specifications in §385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

(11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) *Service.* Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with §385.2010(f)(3), facsimile, express delivery, or messenger.

(d) *Notice.* Public notice of the complaint will be issued by the Commission.

(e) *Privileged treatment.* (1) If a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit, with its complaint, a request for privileged treatment of documents and information under section 388.112 of this chapter and a proposed form of protective agreement. In the event the complainant requests privileged treatment under section 388.112 of this chapter, it must file the original and three copies of its complaint with the information for which privileged treatment is sought and 11 copies of the pleading without the information for which privileged treatment is sought. The original and three copies must be clearly identified as containing information for which privileged treatment is sought.

(2) A complainant must provide a copy of its complaint without the privileged information and its proposed form of protective agreement to each entity that is to be served pursuant to section 385.206(c).

(3) The respondent and any interested person who has filed a motion to intervene in the complaint proceeding may make a written request to the complainant for a copy of the complete complaint. The request must include an executed copy of the protective agreement and, for persons other than the respondent, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

(4) A complainant must provide a copy of the complete complaint to the requesting person within 5 days after

receipt of the written request that is accompanied by an executed copy of the protective agreement.

(f) *Answers, interventions and comments.* Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) *Complaint resolution paths.* One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§ 385.604–385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with § 385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) *Fast Track processing.* (1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

(2) A complainant may request Fast Track processing of a complaint by including such a request in its complaint, captioning the complaint in bold type face “COMPLAINT REQUESTING FAST TRACK PROCESSING,” and explaining why expedition is necessary as required by section 385.206(b)(11).

(3) Based on an assessment of the need for expedition, the period for filing answers, interventions and comments to a complaint requesting Fast Track processing may be shortened by the Commission from the time provided in section 385.206(f).

(4) After the answer is filed, the Commission will issue promptly an order specifying the procedure and any schedule to be followed.

(i) *Simplified procedure for small controversies.* A simplified procedure for complaints involving small controversies is found in section 385.218 of this subpart.

(j) *Satisfaction.* (1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file:

(i) A statement setting forth when and how the complaint was satisfied; and

(ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 602, 64 FR 17097, Apr. 8, 1999; Order 602-A, 64 FR 43608, Aug. 11, 1999; Order 647, 69 FR 32440, June 10, 2004]

§ 385.207 Petitions (Rule 207).

(a) *General rule.* A person must file a petition when seeking:

(1) Relief under subpart I, J, or K of this part;

(2) A declaratory order or rule to terminate a controversy or remove uncertainty;

(3) Action on appeal from a staff action, other than a decision or ruling of a presiding officer, under Rule 1902;

(4) A rule of general applicability; or

(5) Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.

(b) *Declarations of intent under the Federal Power Act.* For purposes of this part, a declaration of intent under section 23(b) of the Federal Power Act is treated as a petition for a declaratory order.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 8th day of February 2011, served the following upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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