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BEFORE THE
REGULATORY ENERGY REGULATORY COMMISSION

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PUBLIC FORUM ON: :
A NEW HYDROELECTRIC : Docket No. RM02-16-000
LICENSING PROCESS :

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Commissioners Meeting Room 2C
Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC

Thursday, November 7, 2002

The above-entitled matter came on for meeting,
pursuant to Notice, at 9:15 a.m.

BEFORE:

- CHAIRMAN PAT WOOD, III
- COMMISSIONER NORA MEAD BROWNELL
- COMMISSIONER WILLIAM MASSEY

C O N T E N T S

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I. Opening Remarks and Introduction

Chairman Pat Wood, III, Commissioner Nora
Mead Brownell, Commissioner William Massey,

Lynn Scarlett, Assistant Secretary for
Policy, Management & Budget, U.S. Department
of the Interior

Merlin Bartz, Special Assistant to the Under
Secretary for Natural Resources, U.S.
Department of Agriculture

Sloan Rappoport, Senior Policy Advisor to
the Secretary of Commerce, U.S. Department
of Commerce

II. Overview - Proposal for a New Licensing

Process

Introduction - Tim Welch, Office of Energy
Projects

1 Interagency Hydropower Committee Proposal
2 David Diamond, Office of Policy Analysis,
3 U.S. Department of the Interior

4

5 National Review Group Proposal - Julie Kiel,
6 Director, Hydropower Licensing, Portland
7 General Electric

8

9 III. Need for a New Licensing Process

10

11 Nino Mascolo, Senior Counsel,
12 Southern California Edison

13

14 John Suloway, Director of Licensing,
15 New York Power Authority

16

17 Donald G. Sampson, Executive Director,
18 Columbia River Inter-Tribal Fish

19

Commission

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1 V. Information Development

2 Mark Oakley, Relicensing, Project Manager

3 Duke Power

4

5 Michael Swiger, Attorney, Van Ness Feldman

6

7 William Sarbello, Head, Habitat Protection

8 Section, New York State Department of

9 Environmental Conservation

10

11 Ann McCammon Soltis, Attorney, Great Lakes

12 Indian Fish & Wildlife Commission

13

14 Ken Kimball, Director of Research,

15 Appalachian Mountain Club

16

17 VI. Closing Statement - Chairman Pat Wood

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1 PROCEEDINGS

2 (9:15 A.M.)

3 OPENING REMARKS AND INTRODUCTIONS

4 CHAIRMAN WOOD: This meeting will come to
5 order to consider the matter which has been posted for
6 our discussion at this time and place. Please join me
7 in starting the day with a pledge to our flag.

8 (Whereupon, there was a pause in the
9 proceedings from 9:15 a.m. to 9:17 a.m.)

10 CHAIRMAN WOOD: To start today's work session,
11 I would like to first of all say that as part of FERC's
12 mission we do a lot of things that of late have gotten
13 on the front page of the paper, but I think it is
14 important for us to always remember that the first
15 thing that the U.S. Congress ever told our predecessor
16 agency to do was to take care of licensing of the
17 nation's interstate waters of hydroelectric facilities.

18 Since 1920, the Federal Power Commission and
19 subsequently the FERC has been involved in that effort,
20 and our statutory mandates and directions have changed
21 over the years, but the core mission of making sure
22 that the nation's energy resources are utilized
23 thoughtfully and consistently with our nation's
24 environmental and land use laws has been a big part of
25 what FERC is about.

26 It has been a real pleasure for me as Chair of

1 the Agency to visit our regional offices and see the
2 fine work that the folks outside of Washington are
3 doing on particularly the dam safety issues, which in
4 light of the events of last September are even more
5 important than they were before, but there are a lot of
6 other things that we do with regard to hydroelectricity
7 that are very important to the customers and the
8 industry and our country, and we want to make sure that
9 we continue to do that right.

10 The point of today's conference, and we have a
11 related but a different set of issues to address
12 tomorrow, is to examine the type of issues that this
13 Agency may take through its administrative authority
14 and in concert with our sister agencies in government
15 and at the state level and with the industry, both the
16 licensees and all of the intervener groups --
17 non-governmental organizations, customer groups,
18 et cetera -- to more expeditiously and more
19 thoughtfully administer the licensing and the
20 relicensing process. We have got certainly a lot of
21 history on that, good stories and bad.

22 We want to see if we can capture the victories
23 from what we learn that works well and try to improve
24 that. We have not engaged in a major revamp of our
25 hydroelectricity licensing regulations in the better
26 part of a decade, and I always think it is worthwhile

1 to look at that.

2 I am pleased that members of our sister
3 agencies in government as well as constituent groups
4 across the industry have been thinking about these same
5 issues as well. What we want to focus on today is
6 really a learning opportunity for my colleagues, Bill
7 and Nora, and I -- Commissioner Breathitt could not be
8 here today, she had a preexisting speaking engagement
9 outside of the city, but she is here in spirit as well
10 -- to basically get smarter on these issues and just in
11 this informal format try to understand some of the
12 important concerns that different people across the
13 spectrum have.

14 So with no further comment from me -- my
15 colleagues, do you all have anything to add before I
16 turn it over?

17 COMMISSIONER MASSEY: Well, I agree with your
18 opening comments. There is a lot of expertise in this
19 room on how to make our processes better, and so I
20 think this Agency is very interested in hearing from
21 all of our witnesses on how to do a better job in this
22 area. It is vitally important to our nation. I thank
23 you all for being here. I am here to listen and learn.

24 COMMISSIONER MEAD BROWNELL: I would just like
25 to thank the participants for an extraordinary amount
26 of very hard work that has gone into the proposals that

1 we are going to hear about. I would also like to thank
2 our sister agencies who have made a lot of time and
3 resources available to us as we have tried to identify
4 the areas in which we could improve and get
5 administrative solutions to what is an enormously time
6 consuming and expensive process for the rate payers,
7 with the goal towards delivering both the environmental
8 benefits and the efficiencies that hydropower brings to
9 customers because, as you remind us often,
10 Mr. Chairman, it is all about the customers.

11 CHAIRMAN WOOD: I would like to at this point
12 introduce our members of our sister agencies,
13 Merlin Bartz is from the U.S. Department of Agriculture
14 and Stewart (sic) Rappoport is from the Department of
15 Commerce; and Lynn Scarlett is from the Department of
16 the Interior.

17 We are very pleased to have you all here,
18 because it is a team effort that we engage in from the
19 Federal Government side to oversee this industry and
20 this process. With you all here, it means a lot for us
21 to really delve into as many issues as we can, and we
22 appreciate the time that you all have taken out of your
23 schedules today to come and be with us, so welcome.

24 Would at this point, you all like to say
25 anything? You can jump right in or do whatever you
26 like. Lynn, I will leave it to you.

1 LYNN SCARLETT, ASSISTANT SECRETARY
2 FOR POLICY, MANAGEMENT & BUDGET
3 U.S. DEPARTMENT OF THE INTERIOR

4 SECRETARY SCARLETT: All right. Thank you
5 very much, Mr. Chairman, and members of the Committee.
6 I appreciate the opportunity to be here. I am the
7 assistant secretary of policy, management and budget at
8 the Department of the Interior. On behalf of
9 Secretary Norton, I would like to convey our
10 Department's commitment to improving and streamlining
11 the hydropower licensing process. I do have a full
12 statement and ask that it be actually included in the
13 record, and today, I will just summarize it briefly.

14 As we are all aware, the president's and the
15 administration's National Energy Policy Group
16 recommended to the president that they encourage the
17 Commission and direct federal resource agencies to make
18 the licensing process more clear and efficient while
19 preserving environmental goals.

20 We commend the Commission for its decision to
21 improve this process and look forward to participating.
22 We believe this is actually a historic opportunity to
23 achieve some fundamental changes. As you know,
24 licenses by the Commission may contain conditions set
25 by our bureaus at the Department of the Interior and by
26 other agencies to address the effects of hydropower

1 projects on federal and Indian lands.

2 From Interior's perspective, it is critical
3 that we ensure the appropriate natural resource and
4 Indian trust safeguards, and that they are put in place
5 in any changes that are undertaken. Given the fact
6 that licenses authorize the use of public resources for
7 30 to 50 years, this need is particularly imperative.

8 The responsibilities assigned to resource
9 agencies under the Federal Power Act require us to
10 participate directly in the licensing process to ensure
11 that the resources for which we have responsibilities
12 are protected. Interior's responsibilities go well
13 beyond the Federal Power Act. For example, Interior
14 and Commerce jointly implement the Endangered Species
15 Act, and the organic acts of our resource agencies also
16 include mandates that we must consider as we look at
17 the licensing process.

18 The United States of course also has Indian
19 trust obligations created through a combination of laws
20 and statutes going back many years. The secretary of
21 the Interior has the immediate responsibility to carry
22 out that trust responsibility, but I should underscore
23 that this responsibility actually applies to the
24 government as a whole.

25 I understand that the average time for
26 relicensing from initial consultation to the issuance

1 of a new license is now over seven years. Particularly
2 troubling is that in recent years 91 percent of new
3 licenses were issued after the existing license expired
4 and 61 percent were issued more than one year after
5 expiration. To us this underscores the need for
6 improvements on an urgent basis.

7 Two concurrent and largely complementary
8 efforts, the Interagency Hydropower Committee and the
9 National Review Group processes have provided some,
10 what we think, are well-conceived and thoughtful
11 recommendations for consideration. The IHC effort has
12 highlighted the importance of improved coordination to
13 help reduce duplication, to eliminate conflicts, and
14 ultimately lessen the overall time and cost of
15 licensing while ensuring we believe effective resource
16 protection.

17 Its proposals parallel initial consultation,
18 for example, by the resource agencies and the
19 commission scoping under NEPA, also proposals for the
20 early resolution of study disputes and the coordination
21 of agency actions are especially noteworthy in our
22 minds. The NRG Proposal also addresses prefiling NEPA
23 scoping, early consultation, study dispute resolution,
24 and cooperation between the Commission and resource
25 agencies. We believe that both the IHC and NRG
26 Proposals are largely compatible, and that their

1 integration can be accomplished relatively easily.

2 As a department that deals with many
3 contentious public policy issues, managing every one in
4 five acres of the United States, we find it encouraging
5 that these groups have developed many constructive
6 suggestions and demonstrated a commitment to open and
7 positive dialogue.

8 Further, the Commission's public forums to
9 date indicate that Indian tribes, states, the
10 hydropower industry, non-governmental organizations and
11 the public have ideas worthy of consideration. Our
12 detailed statement also includes specific suggestions
13 concerning resolution of issues such as settlements,
14 studies, NEPA coordination, deadlines and the need to
15 assure cost effectiveness.

16 In addition, I would like to underscore that
17 Interior itself is exploring a streamlined appeals
18 licensing process related to mandatory conditions, and
19 we will need to ensure that any new licensing process
20 treats the results of that effort with the same
21 deference as is currently afforded to conditions set by
22 Interior under Section 4(e) and 18 of the Federal Power
23 Act.

24 A common thread among this set of initiatives
25 is the need for a process that is more efficient and
26 cooperative I think as we all understand, and that

1 respects the mandates of the agencies involved and
2 seeks ends that protect important resources and values
3 while minimizing cost and time to the hydropower
4 entities and to consumers.

5 I would like to just conclude by saying that
6 we very much support the goal to achieve improvements
7 expeditiously, but at the same time while trying to
8 move forward expeditiously should not occur at the
9 expense of achieving truly comprehensive improvements.
10 Reform and improvements will be maximized to the extent
11 that the Commission and the agencies commit to a
12 cooperative relationship in preparing new rules,
13 something that internally within Interior we are
14 committed to among our eight bureaus and particularly
15 those with resource protection and Indian trust
16 protection roles. We also commit to an open and
17 productive dialogue with the public.

18 Accordingly, we urge the Commission to pursue
19 a process that is cooperative, open and inclusive. We
20 believe this forum will produce some substantive and
21 lively discussion. If you have any particular
22 questions for the department through the course of the
23 day, you may direct them to Bill Betenberg, who is with
24 me here today and who has been working on these efforts
25 for many, many months, and indeed I should say years.

26 I thank the Commission for inviting me today,

1 and assure you of our commitment at Interior to working
2 with you and your staff in bringing about the
3 successful conclusion of this effort.

4 Thank you.

5 CHAIRMAN WOOD: Thank you, Lynn, appreciate
6 it.

7 Stewart (sic)?

8 MR. RAPPOPORT: Good morning. My name is
9 Sloan Rappoport.

10 (Laughter.)

11 MR. RAPPOPORT: I am the senior policy advisor
12 to the secretary of Commerce. Mr. Chairman, members of
13 the Commission, thank you very much for inviting me
14 here today to participate in your proceedings. I am
15 pleased that the Department of Commerce and NOAA are
16 eager to work with all stakeholders to assist FERC as
17 it embarks on this rulemaking process. We have
18 appreciated the opportunity to participate in the
19 Interagency Hydropower Committee and look forward to
20 continued participation in this rulemaking effort.

21 Hydropower is a vital component of our
22 nation's energy supply and offers many benefits, as all
23 of us in the room are aware. At the same time, it
24 faces some challenges. NOAA recognizes the importance
25 of hydropower to our nation's energy supply, but also
26 remains aware of our responsibilities under the Federal

1 Power Act and the Endangered Species Act. These laws
2 and others require us to ensure adequate protection of
3 fish and habitat resources.

4 Many FERC license fans were constructed before
5 the enactment of some of our most environmental laws.
6 Many of these dams now coming up for relicensing lack
7 fish passage or other environmental safeguards. It is
8 our job to represent the public interest by ensuring
9 the minimum impact to the natural resources for which
10 we have responsibility while working towards a more
11 efficient better relicensing process as directed in the
12 vice president's national energy policy.

13 I can tell you, Mr. Chairman, that the NEP is
14 extremely important to Secretary Evans. To this end,
15 NOAA has worked with federal agencies, environmental
16 groups, and the hydropower industry to develop
17 procedures and best practices to improve and clarify
18 the licensing process. We fully intend to continue
19 this working relationship with our federal partners and
20 stakeholders.

21 Based on our experience with rulemaking, I
22 must say that the proposed schedule appears to be
23 somewhat ambitious. While NOAA fully supports FERC's
24 goal for the final rule by 2003, we want to ensure
25 that we have a quality product as the end result.
26 Let's make sure we do this right the first time. I

1 know that we are in good hands with you, Mr. Chairman,
2 and the rest of the members of the Commission. I would
3 like to compliment the Commission on initiating this
4 rulemaking and designing such an open and inclusive
5 process.

6 FERC's staff has worked very hard on
7 coordinating this effort and deserves special
8 recognition. In addition, I would like to extend
9 appreciation to the other federal agencies, industry,
10 environmental organizations and stakeholders who have
11 invested much time and energy in developing both the
12 Interagency Hydropower Committee and the National
13 Review Group Proposals. These proposals offer an
14 excellent starting point for this rulemaking.

15 The fact that a strong and positive working
16 relationship has been established between these groups
17 is encouraging and gives me hope for positive outcomes
18 for all those involved. The Department of Commerce and
19 NOAA are eager to continue this positive working
20 relationship and look forward to continued
21 participation in the rulemaking.

22 Thank you.

23 CHAIRMAN WOOD: Thank you, Sloan. We
24 appreciate your participation today.

25 Merlin from the Department of Agriculture.

26 STATEMENT BY MERLIN BARTZ

1 SPECIAL ASSISTANT TO THE UNDER SECRETARY FOR
2 NATURAL RESOURCES, U.S. DEPARTMENT OF AGRICULTURE

3 MR. BARTZ: Good morning. Thank you for the
4 invitation and the opportunity to briefly address you,
5 Commissioner Wood and Commissioner Masee (phonetic) or
6 Massey -- is that correct -- and Commissioner Brownell
7 on behalf of Secretary Veneman and the United States
8 Department of Agriculture.

9 Let me also bring you greetings and regrets
10 from Under Secretary Rey, who is scheduled I believe at
11 Blacksburg Technical College speaking today to a group
12 of college students that was prior scheduled and could
13 not accommodate to the request for today. I am
14 Roland Bartz. I serve as special assistant to Under
15 Secretary Ray, and today I am also serving as the
16 surrogate in participating and attending. I am hoping
17 that as that surrogate I can serve as a conduit between
18 USDA and the FERC Board in regard to any conversation
19 or questions that might arise today.

20 Let me begin by applauding your efforts in
21 initiating an open dialogue concerning the hydropower
22 licensing process and your ongoing efforts in achieving
23 meaningful reform measures. As your notice requesting
24 comments states so well, I had to actually go in and
25 actually plagiarize it a little bit, because I had some
26 time to read it.

1 There is widespread agreement, or we believe
2 that there is widespread agreement, that additional
3 improvements are needed to further the goals of
4 reducing the cost and time of licensing without
5 sacrificing environmental protection and the
6 fulfillment of other statutory responsibilities.

7 USDA as part of this Hydropower Commission
8 looks forward to working with the Commission to develop
9 rules that reflect a collaborative effort and meet the
10 precept of true reform in development of an improved
11 hydropower license process, and we do sincerely
12 appreciate the FERC Commission response for an open
13 process that seeks input from licensees, from states,
14 from tribes, and from other publics that are affected
15 by your deliberations and your ultimate decisions.

16 We particularly appreciate your invitation for
17 us to participate in light of the millions of acres of
18 public lands that we manage on behalf of the American
19 people contained within the same watersheds that many
20 of your active license projects also are in.

21 Removing process gridlock throughout the
22 United States Department of Agriculture is a top
23 priority for the various mission areas within the
24 agency in meeting the principles of the president's
25 management agenda, but our supporting of removing this
26 process gridlock has to go beyond the perimeters of our

1 agency.

2 It would be in many respects disingenuous on
3 one hand to support such measures within our process
4 and advocate for reforms with our consultation partner
5 circles, and yet on the other hand engage in conduct
6 with other federal agencies that thwart their attempts
7 to adopt the same types of reforms.

8 From our perspective, the short of the matter
9 is the FERC licensor process, from our perspective,
10 should not be viewed by other federal agencies as a
11 process of batting a piata around until the candy
12 falls out. It should be viewed as a process that
13 instead assures a clean energy supply -- as you
14 mentioned, Mr. Chairman, a clean energy supply --
15 source for the nation's citizens while at the same time
16 balancing those benefits with the benefits of natural
17 resources conservation and natural resources
18 stewardship.

19 We very much look forward to the collaborative
20 efforts reducing the time and the cost of the licensing
21 process, improving the quality of the decision making
22 and always, always achieving an amicable resolution.

23 Thank you.

24 CHAIRMAN WOOD: Thank you all very much.

25 I would like to also recognize today our staff
26 leadership on this issue, and they represent the tip of

1 the iceberg again of all of the fine folks that we have
2 here who work on hydro issues: the Director of our
3 Office of Energy Projects, Mark Robinson, we also have
4 from the office Ann Miles and Rich Hoffman; and from
5 our General Counsel's Office, John Clements.

6 We can't run an event like this without our --
7 I don't know what to call you, so I will just call you
8 Yoda, pretty wise.

9 MR. MILES: All right, Yoda.

10 CHAIRMAN WOOD: Rick Miles is our mediator
11 supreme and always a person we call upon to help us
12 through collaborative efforts, because you have a great
13 record at doing that. Rick, I am going to just turn it
14 over to you, and let you go from there.

15 MR. MILES: Thank you, Mr. Chairman.

16 At this time, what we will do is start part
17 two of today's session. Tim, are you prepared?

18 MR. WELCH: I am ready.

19 MR. MILES: Okay. Let's go.

20 II. OVERVIEW - PROPOSALS FOR A NEW LICENSING PROCESS

21 INTRODUCTION

22 MR. WELCH: Thanks, Rick.

23 My name is Tim Welch and I am on the FERC
24 staff and I work for the Office of Energy Projects. I
25 am sort of here to give some introductory remarks and
26 sort of kick things off a little bit and sort of answer

1 two questions, first of all, why are we here and then
2 how the heck did we get here.

3 (Whereupon, a PowerPoint presentation was in
4 progress.)

5 MR. WELCH: I would like to start off by
6 saying, and most of you in the room probably already
7 know this, you know, back in 1991 the Commission
8 received over 150 relicense applications. As some of
9 the other speakers mentioned earlier, unfortunately the
10 Commission was unable to license those projects before
11 the expiration date. There are a myriad of reasons for
12 that, and I am not going to get into those right now.

13 Needless to say, there are a lot of people
14 here at the Commission, in the resource agencies and in
15 the industry for that matter and we were all kind of
16 scratching our heads a little bit and saying there has
17 got to be a better way to do this.

18 The first sort of step in that by most
19 agencies is to do some administrative reform efforts.
20 That was sort of our first step to looking at what we
21 call the traditional licensing process. One of the
22 first things we did, we got together with our sister
23 federal agencies that are involved in the process under
24 the Federal Power Act and we formed what we call the
25 Interagency Task Force or "ITF."

26 After about a two year effort, the ITF

1 produced a series of reports that implemented some
2 administrative reform efforts that made it easier for
3 us in more efficiently working together in an area such
4 as NEPA and Endangered Species Act. Those reports are
5 available for us on our Web site.

6 A parallel process was also started by
7 industry folks and some conservation organizations and
8 was funded by the Electric Power Research Institute.
9 They formed what was called the NRG, the "National
10 Review Group," and will say a little bit about that
11 later. They also had another process going about
12 suggesting some administrative reform efforts as well.
13 They also produced a series of reports that were sort
14 of best practices to help guide future applicants sort
15 of through the traditional process.

16 Now, if you remember last December, we were
17 all in this room at the Hydroelectric Licensing Status
18 Workshop where we were looking in depth into a number
19 of these projects that had been before the Commission
20 for more than five years, and were sort of dissecting
21 them and trying to get to the real root cause of why
22 they had been before the Commission for so long.

23 Out of that grew the regional workshops with
24 states where we went out all over the country and met
25 with state agencies about 401 water quality
26 certification and coastal zone management consistency

1 determination, and to meet with them on how could our
2 processes be better integrated. I will talk a little
3 bit about that in a second, and I will go into more
4 detail on that at tomorrow's Hydro Licensing Status
5 Workshop.

6 My final point here is that the resource
7 agencies themselves also went through with an
8 independent effort of administrative reform. Very
9 similar to the Fores Service 4(e) appeals process the
10 Departments of Interior and Commerce came up with a
11 process called the MCRP, the "mandatory condition
12 review process," which subjects their mandatory
13 licensing conditions to a public review process before
14 they finalize them. Those are some of the
15 administrative reform efforts that have sort of gone
16 on.

17 Well, these reform efforts -- excuse me.
18 Before I get to that, I want to say a few things about
19 our regional state workshops. What do we hear from the
20 states? Well, one of the big things we heard was that
21 it would help the states if there were more complete
22 license applications. They could process their 401's
23 much more efficiently if we had more complete license
24 applications that they could work with, and so we sort
25 of got together and we brainstormed a little bit with
26 the states and we heard a number of ways that possibly

1 we could do that.

2 One is early identification of issues through
3 early NEPA scoping before the application is filed;
4 early resolution of disputes over studies, early
5 establishment of a licensing schedule, so everybody is
6 sort of on the same page; and, finally, the notice of
7 intent and the initial consultation package should be
8 all filed together. You will hear a little bit more
9 about some of these points in some of the proposals
10 that you hear a little bit later on, but this is what
11 we heard from the states.

12 As I was just saying, I think the
13 administrative reform efforts they went a long way.
14 They improved especially cooperation and communication
15 between the sister federal agencies as evidenced by the
16 fact that we are sitting here with our sister federal
17 agencies today and that we are also co-sponsoring a
18 series of public forums on this subject throughout the
19 country.

20 Maybe that wasn't enough, and a lot of people
21 have called that into question. We are sort of sitting
22 here today and saying, well, at least we should explore
23 the opportunity of regulatory reform, the next kind of
24 bold step.

25 This fall we have sort of undertaken our new
26 journey called a "regulatory reform," looking into

1 improvements to the current regulations of the
2 traditional process that are needed to reduce the time
3 and cost of licensing while at the same time providing
4 for environmental protection and allowing the agencies,
5 all of the agencies involved, to fulfill their state
6 and federal statutory and Indian trust
7 responsibilities. That is sort of our theme there.

8 Now the last point, and Secretary Scarlett
9 mentioned this earlier, that the national energy policy
10 has trumpeted the fact that the agencies and FERC need
11 to work together for a more efficient hydroelectric
12 licensing process that still maintains environmental
13 goals. We feel that this effort is consistent with
14 that national energy policy.

15 We kicked things off on September 12 with our
16 notice, and we provided opportunities for public
17 comment through our public and tribal forums that we
18 are holding throughout the country. We provided an
19 opportunity for all of you to provide us with some
20 written comments and recommendations on the need for
21 and the structure of a new licensing process.

22 Specifically, that notice includes the
23 Interagency Hydropower Committee Proposal. Now, the
24 IHC is the successor to the ITF, the "son of ITF" as I
25 call it, and you will hear a little bit about that
26 proposal in just a few minutes. The National Review

1 Group that I mentioned earlier also has come up with a
2 process that was also attached to that notice that all
3 of you have read, and you are going to hear a little
4 bit more about that as well.

5 Now, the notice also outlined a series of nine
6 questions that we are posing to you all, the public and
7 the industry. These nine questions sort of focus on
8 once again the need for and the structure of a possible
9 new licensing process. Now, those nine questions
10 formed the basis for the questions that we are posing
11 to our panelists today.

12 Where are we going from here? As I said,
13 September 12 outlined a series of public and tribal
14 forums that we are co-sponsoring with the Department of
15 Interior, the Department of Commerce and the USDA
16 Forest Service. We have already been to both Milwaukee
17 and Atlanta. Next week we will be going to Bedford,
18 New Hampshire, and the week after that we will be out
19 in Sacramento, California and Takoma, Washington.

20 The comments, the written comments, that I
21 mentioned earlier from that notice are due December 6
22 of this year. My colleague from the Office of General
23 Counsel, John Clements, wanted me to mention that the
24 earlier you get those in the better.

25 (Laughter.)

26 MR. WELCH: Because the next bullet there,

1 "December 2002," we are going to have the first of an
2 actual stakeholder drafting session where we are going
3 to be inviting all of you to come here to Washington,
4 D.C., and help us at least conceptualize how the notice
5 of proposed rule might read. John is going to be very
6 busy between December 6 and December 10 is what our
7 date is for that, so the earlier you get that in you
8 will make his life easier.

9 Is that okay, John?

10 MR. CLEMENTS: Rick, it is not strong enough.

11 MR. WELCH: All right, we are going to make it
12 stronger (laughter).

13 Our goal in February 2003 is to, if the
14 circumstances warrant, issue a notice of proposed
15 rulemaking. In March, we will hold another series of
16 technical conferences throughout the country to get
17 public input, and then in April we are going to have
18 another stakeholder drafting session and we will get a
19 lot more specific at that drafting session. Then,
20 finally, our goal is to by July of 2003 present the
21 Commission with, if the circumstances warrant, a draft
22 final rule for their consideration.

23 We think right here we have developed -- we
24 and OEP, "Office of Energy Projects" have developed --
25 a process that will allow us, if the circumstances
26 warrant, to put together a new hydroelectric licensing

1 process that we want to have three attributes. The
2 first attribute is that the process needs to be
3 flexible and easy to understand. Basically, you don't
4 have to hire yourself a lawyer to get through the
5 process. Apologies to all lawyers. I had to get a
6 lawyer joke in.

7 Secondly, a process that makes all of our jobs
8 easier, and by "our jobs" I mean everybody in this room
9 from lawyers to biologists to commissioners. Something
10 that makes our jobs easier allows us to do our job for
11 our particular agencies as efficiently as possible. In
12 other words, working in parallel rather than
13 sequentially so that we are not waiting, one agency or
14 one group is not waiting for another group to finish
15 their job before they can start theirs, so something
16 that makes our jobs easier.

17 Finally, and this is probably the most
18 important point, we want a proposed process that
19 creates a level playing field so that all stakeholders
20 no matter who you are can feel that they can
21 participate effectively in the process.

22 If you keep those three attributes in mind
23 today when you are listening to our panels and when you
24 are making your comments, I think that we all can come
25 up with a process that we can truly say serves the
26 public interest.

1 With your permission, I will introduce my
2 federal colleague from the Department of Interior,
3 David Diamond, who will talk with you about the
4 Interagency Hydropower Committee Proposal.

5 Thanks.

6 INTERAGENCY HYDROPOWER COMMITTEE PROPOSAL

7 MR. DIAMOND: Well, thanks very much.

8 My name is David Diamond. I am with the
9 Office of Policy Analysis at the Department of the
10 Interior, and today I am going to present a proposal
11 for an integrated licensing process developed by the
12 Interagency Hydropower Committee.

13 (Whereupon, a PowerPoint presentation was in
14 progress.)

15 MR. DIAMOND: I am going to start with
16 background on the Interagency Hydropower Committee, the
17 group that generated this proposal; then discuss the
18 objectives that that group identified in developing the
19 proposal; finally, walk through the proposal in some
20 detail; and conclude with some of the benefits that the
21 group hopes might accrue if the proposal was
22 implemented.

23 Interagency Hydropower Committee consisted of
24 staff from the Federal Energy Regulatory Commission and
25 the Departments of Agriculture, Commerce and the
26 Interior, it also included important contributions from

1 the Environmental Protection Agency, the Council on
2 Environmental Quality, and the Advisory Council on
3 Historic Preservation.

4 The IHC was formed in July 2001 and, as Tim
5 mentioned, it was a successor group to the ITF, the
6 "Interagency Task Force," which was an administrative
7 reform effort. The charge in the IHC was to go beyond
8 administrative reform and look at the existing
9 procedures and how they might be improved.

10 The objectives that the group identified in
11 looking at those existing procedures, first if all, a
12 hope to improve coordination in the process. The IHC
13 proposal that is now before you includes specific time
14 frames so that people know when actions are going to
15 occur and particular sequencing of those actions.

16 Eliminate duplication, the IHC proposal
17 includes -- the major feature is combining the
18 pre-filing consultation with the missions scoping under
19 the National Environmental Policy Act. Reducing
20 conflicts in the process, the proposal contemplates
21 early consultation, early identification of issues and
22 resolution of study disputes. The goal of course is
23 expediting the implementation and conclusion of the
24 process, reducing the overall time and cost while
25 ensuring environmental safeguards.

26 The proposal is included in the "Attachment A"

1 to the "Federal Register" notice which was issued by
2 the Commission on 12 September. On page 14 of that
3 attachment, there is a very detailed box-and-arrow
4 diagram of the entire process and how it might run. I
5 am going to not go into that level of detail today and
6 instead hit some of the main features, but a lot of
7 thought went into each of those time steps, each of
8 those action steps. The total, if you added up the
9 time on each of the boxes, is five years.

10 We wanted to make sure that everything that
11 needed to happen could happen and would happen in a
12 shorter time. Again, the average time currently from
13 initial consultation, notice of intent, to the issuing
14 of an order is seven and a half years.

15 The first phase is advance notice through
16 scoping and final study plan, contemplated here in this
17 proposal to take about nine months. The major new
18 features in this proposal are replacing the initial
19 consultation package with a prescoping document and
20 combining the agencies' prefilings consultation with the
21 Commission staff's NEPA scoping.

22 Second is the new feature, a study dispute
23 resolution process; it will take about three months;
24 then the period in which the studies are conducted so
25 that information can be compiled for the draft
26 application, about two and a half years. Finally, the

1 post-filing period, application and hopefully moving
2 quickly through in the processing of that application.

3 In more detail, this early phase is the most
4 important. Most changes to the current process are in
5 this phase, and we are moving work forward. There is
6 an advanced notice of license expiration, basically a
7 heads-up letter saying, "Hey, you are going to be
8 facing license expiration and a relicensing process."
9 That would help get ready for the prescoping document
10 prepared by an applicant, which would replace the
11 current initial consultation package, and would
12 include: project information; a record of consultations
13 that may have occurred; any issues, known issues, and
14 project effects; and an initial list of stakeholders.

15 The Commission would then take that prescoping
16 document with comments and hold a meeting and issue a
17 Scoping Document 1, moving forward towards a study plan
18 so that the information that would be required on an
19 application can be collected.

20 We wouldn't expect to have conflicts over that
21 study plan in that process just identified with the
22 public input and comments and meetings, but in some
23 cases we know that there would be, and we felt that it
24 was critical that we had a mechanism that could
25 identify and resolve those disputes early so that then
26 the process can move forward from there.

1 The process that is contemplated consists of a
2 panel of agency representatives and a neutral third
3 party that would not be connected to the individual
4 proceeding. What would be brought to that panel would
5 be two issues: the necessity of the information for
6 agency or Commission staff and checking to see if the
7 methodology that is proposed would generate the
8 information that would be required.

9 There would be predetermined criteria that the
10 panel would check the request against, and that
11 criteria would include checking to see if there is a
12 nexus between the project operations and effects on
13 resource, clearly stated resource management goals of
14 the jurisdictional agency, whether the methodology that
15 is proposed is accepted scientific methodology, and
16 whether cost and practicality have been adequately
17 considered.

18 The panel would issue a finding to Commission
19 staff who would then move forward in finalizing a study
20 plan in a Scoping Document 2. Again, this is all
21 contemplated to happen in a very constrained time frame
22 so that then the process can move forward.

23 We then left time for the actual conducting of
24 the studies, making sure that the information that has
25 been identified to be required can be produced and put
26 into that draft application which then once it is filed

1 we hope will move very straightforwardly to conclusion
2 and issuance of a license. There are two tracks
3 contemplated in the IHC proposal, one with a draft NEPA
4 document and one without.

5 I will just conclude with some of the benefits
6 that we hope the proposal could generate: one NEPA
7 document for all of the stakeholders' needs; early
8 identification and involvement of stakeholders; early
9 identification and resolution of the disputes; clear
10 time frames and clear sequencing for all participants'
11 actions; similarly, concurrent filing of agency
12 conditions; and we hope adequate information so that we
13 could have more settlements in the future.

14 I look forward to lively and substantive
15 discussion today on these proposals and many others
16 that are out there. Thanks very much.

17 MR. MILES: Julie?

18 NATIONAL REVIEW GROUP PROPOSAL

19 MS. KIEL: I guess since I am not an agency
20 colleague, David is not going to introduce me. Well,
21 that's a rumor.

22 (Laughter.)

23 MS. KIEL: My name is Julie Kiel. I am the
24 director of licensing for Portland General Electric
25 Company Utility in Portland, Oregon. In that role, I
26 am in charge of the licensing of our five, actually now

1 four remaining FERC projects. I last week signed a
2 settlement to agree to remove one of them, so now we
3 are down to four licenses.

4 I am here today speaking on behalf of the
5 National Review Group, and they did want to thank the
6 Commission, Commissioner Wood and his colleagues, for
7 the opportunity to present this today and also to thank
8 the other federal agencies for their time and effort
9 and attention today.

10 I want to hark back just briefly to something
11 Commissioner Wood said at the beginning. This is our
12 chance to make sure we get this right, not only from a
13 regulatory perspective, but in terms of the outcomes of
14 licensing for many years to come.

15 We have heard a lot so far about efficiencies
16 and making the process work better, I think one of the
17 things the NRG believes, NRG members believe, is that
18 we can also make the outcomes better. This is not only
19 about process; this is about better outcomes for all
20 participants in the process, better environmental
21 outcomes, better energy resource outcomes and better
22 public interest outcomes overall.

23 Just very briefly, for those of you who have
24 not heard an NRG spiel before, a little bit about who
25 we are. It was a task force of licensees and public
26 interest groups, again with that core mission to

1 improve relicensing outcomes. We have been working
2 since 2000 on a voluntary basis to try to develop a
3 dialogue, develop an ability to look for common
4 interests, and to work on solutions.

5 As Tim mentioned earlier, we have produced
6 several work products about voluntary things that
7 people can do to guide them through a pretty tortuous
8 process and things that collectively we have found work
9 better. We, too, have made a step into a new future
10 and tried to think beyond the voluntary and go to
11 places where we thought we could effect changes in
12 regulation and policy for agencies.

13 One of the things that I would like to point
14 out about the NRG is it really had a very deeply held
15 and active spirit of dialogue amongst the participants
16 that we are hoping the Commission and its sister
17 agencies will carry over into this rulemaking. There
18 has been a lot of trust developed amongst participants
19 and a lot of good will that we think will help the
20 Commission and agencies craft a rule that will be
21 stable into the future.

22 Real quickly, a long list of participants:
23 Active participation from the non-governmental side or
24 the conservation community and a wide range of industry
25 participants. We are not as monolithic as some might
26 think, and this group really represented a good breadth

1 of the folks who have an interest in all of these
2 projects going forward.

3 NRG advisors, I want to say a role about the
4 role of advisors for the NRG. Everyone was very
5 cautious about the ability of federal agencies to
6 interact openly with a group of sort of self-selected
7 stakeholders, if you will. I sort of analogize it to
8 one of those kids games where you hide something and
9 the person who hid it said, "You're warmer, you're
10 warmer, no you're cold, that's very cold, very cold."
11 It was that sort of guidance, it was, "Yeah, warmer.
12 Oh, boy, cold, very cold."

13 That was very helpful and those folks really I
14 think participated to the extent they could. We did
15 run on a dual track with the Interagency Hydropower
16 Committee. You will see a lot of the concepts that
17 came out of the NRG are surprisingly similar to the
18 ones that you heard David Diamond talk about a few
19 months ago. I think that is a good thing. It is a
20 good indication that collectively we are on the path to
21 getting the best ideas to bubble forward here.

22 What do we think the role of this proposal is
23 now? It is a source for good ideas for discussion
24 going into the rulemaking. We hope it provides a basic
25 framework that people can look at and understand and
26 provide a good way for people to interact in licensings

1 in the future -- agencies, industry and the public --
2 but it is not intended to be a complete licensing
3 proposal.

4 For all of our work, we did not do the sort of
5 detailed work that the IHC did in terms of mapping out
6 the steps and putting the time lines in. You will see
7 some parts as you read the proposal which are sort of
8 hand waving.

9 As one of the crafters of the original idea,
10 it originally ended with something that said, "And then
11 the license is issued and everyone is happy," which is
12 still our goal, but we have a lot of detailed work to
13 do with all of you to make sure that the steps in
14 between get crafted correctly.

15 The NRG really focused on two overlapping
16 problems, which I think again if you harken back to
17 David's presentation, are the core of what we see are
18 the issues. The first one is really an information
19 need. Everybody needs enough information in this
20 process to make it go forward and to make good
21 decisions. We also need to make those decisions about
22 what information is needed carefully.

23 Information gathering is not an inexpensive
24 thing, and so early dispute resolution around a study
25 request that gives applicants and licensees certainty
26 at the end of the process and puts those questions out

1 into the open so that a dialogue can be had about what
2 the right information needs are, what information
3 already exists is very important to a good process.

4 The other thing we focused on was cooperation
5 amongst the regulatory agencies who have to eventually
6 decide these matters. They tend to have overlapping
7 mandates, and hence in some cases overlapping
8 processes, and so this was a real focus of ours to try
9 and streamline that, to try and rationalize it and try
10 and make sense of it within the statutory structure
11 that we have in front of us.

12 The core of that was a coordinated
13 environmental review process. Again, this should sound
14 very familiar from the ITF or IHC proposals. We are
15 into this for improving agency participation in the
16 relicensing process. The NRG proposal is direct in the
17 most hands-on sort of way, and so that this is going to
18 be a place where we will see whether agencies are
19 really going to put their money where their mouth is,
20 to be honest. We are looking for a combined NEPA
21 process for consulting agencies and to reduce redundant
22 and conflicting environmental documents.

23 Even in the most streamline of processes now,
24 you end up producing and reproducing your environmental
25 analysis documents many times. I find it one of the
26 most kafkaesk (phonetic) things I have ever constructed

1 was a draft, a preliminary draft, environmental
2 assessment.

3 Now there are a few too many adjectives there
4 for my taste, and so one of the goals here is to reduce
5 the number of times we have to do that kind of work.
6 Again, study requirements are key here. We would like
7 to reduce the uncertainty that applicants feel about
8 whether or no they have provided sufficient
9 information.

10 You will see in the next slide here keys right
11 into reducing additional information requests at the
12 end. We would like to be able to reach agreement
13 relatively early in the process and have licensees and
14 all other participants understand that this is the
15 information base that has been agreed upon, and it will
16 be sufficient for going forward. The last one you see
17 there is delineating agency responsibility for the
18 drafting. Again, NRG really looked for a cooperative
19 NEPA process.

20 Let's talk briefly about the key elements of
21 the proposal. The first one of those is early
22 consultation. Does that sound familiar? Early, early,
23 early. We understand that this is a long process. It
24 is going to continue to be a long process. Hydro
25 projects are amazingly emotional for what are just
26 energy producers. When you think about it, they are

1 not just energy producers. They affect resources that
2 people care very deeply about, and it takes time to get
3 that right, but in order to get it right you have to
4 start early.

5 We are looking to identify issues early and to
6 share needed information early. From the NRG's
7 perspective, that has to be a two ways street.

8 Everyone has to come to the table with the information
9 they already have so that we can craft those issues.

10 The proposal does require significant early information
11 from the applicant or the licensee.

12 The equivalent of what is now the draft
13 application is proposed to be produced very early in
14 the process here to allow as accurate a scoping process
15 as we can possibly manage very early in the process.

16 More information early in the process we hope will
17 create more certainty.

18 I should also note, it is not here on the
19 slide, but if there is a competitor for the license,
20 those folks would start early, too. That is very
21 important for applicants who would be required here to
22 put their cards on the table early; everyone would put
23 their cards on the table early.

24 The proposal also focuses on more regularized,
25 let's call it, agreements between the federal agencies
26 about how they participate. A key one is an overall or

1 an umbrella MOU between FERC and its sister federal
2 agencies which will help define the cooperating agency
3 relationship that we hope they would be willing to
4 enter into as they go forward.

5 It also contemplates project-specific MOA's
6 between those agencies who are going to participate in
7 the process, the FERC and in many cases the licensee or
8 applicant, to define how the process is going to go,
9 who is going to do what in the process and who is going
10 to craft which pieces of the environmental analysis
11 documents.

12 As a significant piece, sound familiar, again
13 about studies and dispute resolution, I mean, here the
14 NRG and the IHC proposals are quite parallel. They
15 both propose a panel approach to study dispute
16 resolution with some differences in the way it ends up.

17 One of the things that the NRG really focused
18 on again is this issue of certainty around these issues
19 for all participants, but in particular applicants who,
20 to be quite honest, are the ones picking up the
21 economic bill for studies.

22 The idea here is that once those dispute
23 resolution processes have gone forward and a study plan
24 has been agreed upon, if the licensee or applicant
25 undertakes those studies, they get protection at the
26 end of the process from additional information requests

1 or complaints from agencies and others about the record
2 is somehow inadequate for the process to go forward.
3 There is a presumed need for a lack of additional
4 studies at the end, and again that is certainty for
5 licensees.

6 The NEPA document and the license conditions,
7 the NRG is proposing what I think is a very innovative
8 approach here that comes from the experience of many
9 folks in settlements who believe that joint ownership
10 of documents creates a more stable outcome. In this
11 instance, we are proposing as a function of those MOA's
12 or MOU's that agencies actually take joint
13 responsibility for the drafting of the environmental
14 analysis document, and that is be separated from the
15 decision document.

16 Everyone would still be able to reach their
17 own decisions and have those disagreements which are
18 bound to happen; but what that science, what that
19 environmental analysis tells you is that everyone would
20 jointly own that environmental document. It is a very
21 powerful tool. It can be very difficult to accomplish,
22 but it can also be very powerful.

23 One of the things that folks have asked for
24 here as a part of the NRG proposal is that FERC produce
25 draft license articles as a part of its preliminary
26 decision documents. That gives everybody sort of an

1 even playing field about is going to happen and what
2 the FERC is going to do once they get all of this in
3 their decision process.

4 Lastly, a little bit about time lines. We
5 don't have a box diagram with lines between it and
6 dates, but I think a couple of things are key here.
7 Our vision is this can all fit within the existing
8 statutory time lines, and I think that ought to be
9 everyone's goal.

10 We don't want to end up having a process that
11 is longer than the one now. No one wants that as an
12 outcome. It does allow for two study seasons, and you
13 heard that from David Diamond in the IHC proposal as
14 well. Adequate time for actually being in the field
15 particularly for complicated projects is very important
16 to all participants.

17 For those of us in the West and other places
18 who deal with endangered species and anadromous fish,
19 two seasons is the minimum you can expect in terms of
20 the study requirements, and so it is important that the
21 process acknowledge that and leave time for it. But it
22 also, as does the IHC proposal, requires discipline on
23 the part of all parties. If you are going to have
24 joint ownership of a document and move things along,
25 everyone is going to have to stay on schedule, be
26 focused and really commit to making this work.

1 Thank you.

2 MR. MILES: Thank you, Julie.

3 At this time, if I could have the panelists
4 for the first session show up at the front of the
5 table.

6 Thank you Tim, David and Julie for that good
7 overview and presentation. I think it forms a good
8 basis for the next three panel discussions that will
9 take place for the remainder of today.

10 While they are taking their seats, let me
11 introduce myself. My name is Richard Miles, and I will
12 be the moderator for the next three panels. As stated
13 in the notice of this public forum, the goal is to
14 identify the need for a new licensing process. The key
15 issues a new process should address as well as how a
16 new licensing process can better accommodate all
17 interested parties needs.

18 Now the panelists are here today, and all of
19 the panelists are knowledgeable and experienced in
20 hydro issues, but they are here today to discuss issues
21 of proposals associated with establishing a new
22 license.

23 The procedure that we will follow is as
24 follows. The panelists have been asked to keep their
25 presentations to approximately five minutes. Then,
26 following the presentations, for the next 40 to 45

1 minutes what we are hoping we can achieve is a very
2 interactive -- and I hope the panelists are listening
3 to me, we will see (laughter) -- but the goal is to
4 have a very good interactive and engaging conversation,
5 discourse conversation, discussions on the issues each
6 panel is to address.

7 For the last 15 to 20 minutes of each panel's
8 session, an opportunity will be provided to members of
9 the audience to make comments on the agenda topics of
10 the panel presentations and to hear a response or
11 comments from the panelists on the agenda topics and
12 the comments that the audience may raise.

13 I have to note this. The forum today is not
14 intended to address issues in individually docketed
15 hydropower cases before the Commission, and all
16 participants are requested to address the agenda topics
17 and to avoid discussing the merits of any individual
18 proceeding.

19 My task will be to ensure that we keep to the
20 time allocations, to make sure that the participants
21 stay on the agenda topics and to ensure that we have a
22 good, constructive discussion on those topics. With
23 your assistance and cooperation, you make my job a lot
24 easier; okay.

25 Why don't we begin with the first panel. The
26 first panel is here today to discuss the need for a new

1 licensing process. The questions that we have asked
2 the panelists to consider before arriving today are as
3 follows.

4 Is there a need for a new licensing process,
5 and if so, what key issues should a new process
6 address? How might a new process be structured to
7 address the key issues? Should the traditional process
8 licensing or the alternative licensure process be
9 retained? Finally, what provisions should be made for
10 settlement agreements?

11 With that, we will begin with Nino Mascolo.
12 He is a senior counselor for Southern California
13 Edison.

14 III. NEED FOR A NEW LICENSING PROCESS
15 SOUTHERN CALIFORNIA EDISON

16 MR. MASCOLO: Thank you, Rick. As Rick
17 mentioned, my name is Nino Mascolo, I am senior
18 attorney at Southern California Edison Company. I
19 began doing work on hydroelectric licensing issues back
20 in 1986 right after the passage of the Electro
21 Consumers Protection Act of 1986. We kind of came in
22 together.

23 Edison has 11 million customers or 11 million
24 people that we serve electricity to over a 50,000
25 square mile area. We have 20 FERC license
26 hydroelectric projects, seven of those recently

1 received a FERC license over the last ten years. We
2 have nine projects that are currently undergoing a
3 licensing process. A number of them are receiving
4 annual licenses, and we have four projects that are
5 using the alternative licensing process.

6 We have done a lot of different things. We
7 have used some traditional licensing, we have used some
8 hybrids, and we have used the alternative process. We
9 have a fairly good idea of what we like and what we
10 don't like and what some of the issues are.

11 What I am going to do is address the question
12 of settlements and how the Commission might better
13 facilitate settlements in its licensing process, and
14 then I am going to also set out first some key issues,
15 five of them, that the Commission should consider
16 addressing in the licensing process.

17 John Suloway, to my left, is then going to
18 create a construct of how a process might work that
19 accomplishes this -- yeah, and in five minutes no less.
20 The concept is let's take the best of the traditional,
21 let's take the best of the ALP. We are going to use
22 them both because they work well.

23 In addition, let's take the good work that was
24 done by the federal agencies in developing the IHC
25 proposal and let's take the good work that was done
26 with the NRG work, not to leave anything else out many

1 of us, Richard and I on the panel here along with some
2 of the others from the agencies, participated on the
3 Federal Advisory Committee that the Commission put
4 together for the Interagency Task Force for improving
5 hydro licensing. They came up with reports that the
6 Commission also needs to do.

7 John, you have got a lot of work to do.

8 They had some great ideas. My favorite was
9 the ESA report. I just thought it was excellent the
10 way it came out with saying, "Here's how we should
11 integrate some of the ESA issues into the FERC
12 licensing process."

13 John, I would say read that one again. That
14 was my favorite. I thought it just did an excellent
15 job.

16 MR. CLEMENTS: Get your comments in early.

17 (Laughter.)

18 MR. MASCOLO: I will write this down and pass
19 you a note.

20 Let me talk a little bit about some of the
21 five issues. These are five issues that you have heard
22 mentioned by the speakers presenting the IHC and the
23 energy proposals. The Commission has identified many
24 of them already, and the panelists are going to talk
25 about them. The first one I think that everyone
26 focuses on is NEPA and NEPA efficiencies. There are a

1 number of redundancies, as Julie mentioned.

2 There are preliminary draft environmental
3 assessments that then go to draft environmental
4 assessments and then go to final environmental
5 assessments. There has got to be a way to cut out some
6 of that process and make it shorter. Keep it simple,
7 keep it brief, but accomplish what NEPA says we need to
8 accomplish.

9 NEPA is a great statute that says it wants all
10 input from all interested stakeholders. It has public
11 involvement. It makes sure that all agencies that have
12 an interest in this cooperate with the lead agency to
13 prepare the NEPA document, and we can work through that
14 process I think more efficiently when FERC performs its
15 duties in issuing a license.

16 There are two different ways in which you can
17 do that. The traditional process has the NEPA
18 processing take place generally after the application
19 is filed. The IHC, NRG and ALP proposals do the work
20 up front. John is going to get into that in a little
21 bit more depth.

22 In addition, you have seen on both
23 presentations that studies are an issue, they are. It
24 is difficult at times to consolidate all of the
25 different study requests that come in from the various
26 stakeholders and say, "All right, what do we really

1 need to study? How do we consolidate this without
2 doing 15 studies? Can we do two, can we do three
3 instead, and still sufficiently look at all of the
4 resource issues that are there so that each interested
5 stakeholder, each agency and the licensee is certain
6 that the Commission has adequate information on which
7 to base its NEPA analysis?" Your third panel is going
8 to get into more detail on NEPA efficiencies.

9 Coordinating and integrating other processes.

10 There are a lot of agencies and laws that have to be
11 mixed in with hydro licensing: Endangered Species Act
12 is one; the Clean Water Act, Section 401 is another;
13 the Coastal Zone Management Act; the Natural Historic
14 Preservation Act, Section 106, consultation for your
15 archeological and cultural resources; tribes need to be
16 consulted with when their resources are going to be
17 impacted. All of these are separate federal processes
18 and state processes, if you look at states that have a
19 401 program, that have to be integrated into the
20 Commission's licensing process.

21 Right now the regulations don't describe how
22 can we achieve that and what is the best way to make
23 sure that this integration takes place in a timely
24 fashion, so that all of the other federal agencies that
25 have these authorities are involved in the process, but
26 we don't delay the process at the same time. The

1 second panel has the unenviable task of trying to
2 describe this and come up with a solution for it, so I
3 am going to leave that to them. I am just going to
4 outline the issue.

5 Another major issue is mandatory conditions.

6 The Department of Interior talked a little bit earlier
7 about their authority under Section XVIII of the
8 Federal Power Act. We also know that federal land
9 managing agencies who manage reservations have
10 authority under Section 4(e) of the Federal Power Act.

11 One of the issues associated with mandatory
12 conditioning that creates a problem in the Commission's
13 process is the timing. When are these conditions or
14 prescriptions sent to the Commission? How then does
15 the Commission address them?

16 The IHC and NRG try to address this, because
17 when the Commission does a draft EA and if you don't
18 have final or draft at least mandatory conditions and
19 prescriptions submitted, the Commission can't
20 adequately review what those mitigation measures might
21 be, so your NEPA document is not complete. The same
22 thing is true when the final EA or final EIS is issued
23 by the Commission. You need to see what the agencies
24 want to submit in order to fully evaluate what the
25 appropriate mitigation measures are going to be for a
26 project license. Right now, the timing is not quite

1 right.

2 The Commission actually has regulations that
3 require these mandatory conditions and terms to be
4 submitted at a certain time, but frequently that does
5 not happen. The IHC and the NRG propose a methodology
6 for trying to coordinate this better, so that when the
7 final NEPA document is done it addresses all of the
8 mandatory terms and conditions plus what the Commission
9 believes is appropriate for a license, so that there is
10 a final environmental assessment or an EIS that really
11 looks at everything and it is not just partial.

12 It is important that when we develop the
13 process in the future, John's task, that that issue be
14 fully addressed. One of the reasons is that most of
15 the mitigation measures or resource enhancement
16 measures that are proposed by the Commission and
17 various agencies and interested stakeholders all form a
18 whole. They all make a big difference in the economics
19 of the project and what the impacts are going to be in
20 the future. How those are going to be addressed, the
21 Commission needs to fully consider that.

22 Finally, let's talk about settlements. That
23 is a major issue for all of us, and I wanted to talk
24 just briefly about what the Commission might be able to
25 do. Currently, the Commission has regulations that
26 describe how settlements can be addressed. A proposal

1 would be to create a separate set of regulations just
2 dealing with settlements and the hydro licensing issue.
3 Part of the problem is the process itself.

4 Right now, settlements usually are not entered
5 into until after an application has been filed. There
6 isn't sufficient time up front for licensees and all
7 interested stakeholders to enter into settlements.

8 Occasionally, you will have a few specific
9 ones, especially on studies people will agree up front,
10 but most of the time the interested stakeholders and
11 the applicants are worried about getting an application
12 done. Then, once the application is finished, they can
13 try to work through the settlement process. If we can
14 develop a process where settlements can be done ahead
15 of time, it might be more efficient and we might
16 facilitate greater settlements.

17 Thank you.

18 MR. MILES: Okay. Thank you, Nino.

19 Our next speaker is John Suloway, who is the
20 director of licensing for the New York Power Authority.

21 NEW YORK POWER AUTHORITY

22 MR. SULOWAY: Thank you, Rick.

23 Do you all have a copy of the handout that we
24 had out front? It is entitled, "Summary of NHA's
25 Proposed Licensing Process." Before I attempt to do
26 this magic trick that Nino has assigned to me, it would

1 be very helpful. Look at the side that is entitled,
2 "Summary," which is much less complicated than the back
3 side, which is more of the detail, since Nino has given
4 me only five minutes to complete this magic trick.

5 (Whereupon, a PowerPoint presentation in
6 progress.)

7 MR. MILES: Can I make this observation. If
8 we are going to hand out documents during the course of
9 today's session, make sure you give a copy to me, we do
10 have a court reporter here, so we can include those
11 into the record, okay, otherwise the reader of the
12 record won't have what you are going to be talking
13 about to follow it. That is very important. I also
14 turned on my mike, so you can probably hear me.

15 Good morning, Mr. Chairman,
16 Commissioners Massey and Brownell, and distinguished
17 colleagues. My name is John Suloway. My day job is
18 director of licensing for the New York Power Authority.
19 NEPA has eight hydro projects totaling 4,500 megawatts
20 and we have most of that in relicensing right now. I
21 have been doing hydro licensing for over 20 years.

22 Today, I am in front of you as the president
23 of the National Hydropower Association. NHA represents
24 members which own and operate over 60 percent of
25 FERC-license projects, and we have been working with a
26 lot of the people in this room on relicensing reform

1 since 1994.

2 We applaud the Commission and the sister
3 agencies for undertaking this rulemaking. This is the
4 time to make significant improvements, and yet have all
5 of the stakeholders involved. The proposals that are
6 currently in front of the Commission by the IHC and the
7 NRG have many good suggestions, but we also believe
8 that this rulemaking provides an opportunity to look at
9 other issues that have not been addressed in these
10 proposals.

11 I applaud Lynn Scarlett -- and, Bill, I am
12 sure you wrote all of that up real well -- for the
13 ideas of having an appeals process for mandatory
14 conditions. I think it is important that when the FERC
15 moves forward that it makes sure that there is time in
16 your process to allow for them to do that appeal
17 process.

18 We have an opportunity to make the licensing
19 process more efficient, more reasonable and less costly
20 while still preserving the important environmental
21 protection and still preserving the existing
22 authorities of the federal and state resource agencies.
23 I hope my friend in California heard that.

24 We can improve the process, just as
25 Chairman Wood and Julie Kiel said, so it produces
26 better results for America's leading renewable

1 resource, sometimes forgotten, and for those who
2 benefit, the folks that benefit, from this resource.

3 Our proposal is constructed so that every
4 licensing process starts in the same place, working
5 with FERC and all of the stakeholders. Because the
6 current process, as Nino said, the traditional
7 licensing process and the alternative licensing
8 process, are being used and they are being used
9 successfully for some projects, NHA believes that these
10 processes should be retained and serve as the basis for
11 this new process that we are working on.

12 The TLP with NEPA completed after the filing
13 of the final application can be modified to accommodate
14 an abbreviated process for projects that do not require
15 an extended or extensive scrutiny -- my colleagues in
16 the NGO communities agree with us on this -- whereas we
17 can modify the existing ALP process and include some of
18 the great ideas from the IHC and the NRG as well as
19 additional ideas that will come out of this rulemaking
20 to make it a better proposal.

21 I direct your attention to our handout
22 entitled, "A Summary of NHA's Conceptual Plan for a
23 Licensing Process." Through this proposal and
24 subsequent refinements, NHA believes that the issues
25 that Nino Mascolo has brought up and I think will be
26 brought up by the rest of our colleagues, all of those

1 issues can be addressed in this process with
2 refinements.

3 In particular, this proposal is aimed at the
4 issue of flexibility, and that is very important to
5 remember as we go through not only these presentations
6 today, but also the rulemaking. One size does not fit
7 all. If we start with this diagram which is labeled
8 "Figure 1" at the bottom, right hand, as I said before,
9 all applicants begin at the same point.

10 The applicant prepares an initial consultation
11 document, and in cooperation with FERC would host a
12 publicly noticed meeting. This is consistent with what
13 FERC heard at the state workshops. At this meeting,
14 FERC would review how the process works, the roles of
15 the agencies, then the applicant would be interested in
16 finding out what available information is out there
17 from the agencies and other folks, and also what issues
18 they have.

19 Then, the applicant would make a selection of
20 its licensing approach. It would formally submit a
21 plan and a schedule for that plan to the FERC and the
22 stakeholders. We would not expect that FERC would have
23 to approve that plan, if the applicant was proposing to
24 use the traditional licensing process as he does today.

25 However, if he wanted to use Tracks B or C or D, which
26 is basically the second row of our diagram, FERC

1 approval would be required. Now let me describe the
2 different tracks the process could follow.

3 For Tracks A and B, NEPA scoping and analysis
4 would take place after the filing of the final license
5 application as it does now in the traditional process.
6 Whereas, for Tracks C and D, on the right-hand side of
7 the page, the NEPA process would take place prior to
8 the filing of the final license application.

9 As I said before, Track A, which is on the far
10 left-hand side is basically the traditional licensing
11 process. The applicant would be obliged to consult
12 with the stakeholders including the agencies and would
13 be required to seek comments on draft work products,
14 mainly the draft license application. I believe there
15 are some improvements from the IHC proposal and the NRG
16 proposal that could be used in refining the traditional
17 licensing process.

18 Track B is an abbreviated process in which the
19 applicant could choose, approved by FERC of course, to
20 develop an application without required agency and
21 stakeholder consultation. This would be for projects
22 that merit a less rigorous review prior to the filing
23 of the final license application.

24 If we skip over Track C to Track D on the far
25 right-hand side, Track D is essentially the alternative
26 licensing process where the applicant would prepare an

1 applicant-prepared EA or a third party contractor would
2 prepare an EIS. The draft EA or EIS would be prepared
3 in consultation with the agencies and other
4 stakeholders as it is now in our alternative licensing
5 process, and applicants would be encouraged then to
6 work with those folks in meetings to identify issues
7 and the information that is necessary to address those
8 issues.

9 Track C is a refinement of the existing ALP
10 Process and would include elements from the NRG
11 proposal, the IHC proposal and whatever good ideas we
12 can come up with in this rulemaking. The draft EA or
13 EIS that comes out of this process would be prepared by
14 FERC and it would be issued at the same time as the
15 final license application.

16 This alternative could include the MOU among
17 the licensee, the agencies and FERC that would allow
18 for the participation of the agencies as cooperative
19 agencies as was mentioned in the NRG proposal; it
20 doesn't have to, but it could. We are leaving the room
21 in there for, again, as we refine the process as we go
22 down.

23 Now, all of these different tracks are part of
24 one process, so they all have to converge with the
25 filing of the final license application. Based on the
26 complexity and the controversy associated with a

1 particular project, FERC staff would then decide do we
2 do an EIS or do we an EA.

3 Well, if you look at Track C and D, FERC staff
4 and all of the stakeholders have been involved since
5 day one. The decision on whether or not this is going
6 to be an EA or an EIS is basically a no-brainer, so
7 that process should go relatively quickly. For the
8 other tracks, it would be going through a more
9 traditional process.

10 Now, my presentation is focused on the issue
11 of flexibility. This process provides also, though,
12 for improvements in NEPA efficiency, improved
13 efficiency in determining the appropriate studies and
14 study methodologies and enforcement of deadlines, which
15 are the most important issues that are confronting us
16 as far as the industry is concerned.

17 I would be happy to answer any questions that
18 you have concerning this proposal and the ideas that
19 are presented for this panel discussion. When we have
20 a little bit more time, if you have some more
21 questions, we can go into more detail in "Figure 2,"
22 which has a lot more detail in it.

23 Thank you very much.

24 MR. MILES: Thank you, John.

25 Our next panelist will be Rheta Geddings. She
26 is the director of the South Carolina Division of Water

1 Quality.

2 Rheta?

3 SOUTH CAROLINA DIVISION OF WATER QUALITY

4 MR. GEDDINGS: Good morning. As Rick said, my

5 name is Rheta Geddings. I work for the South Carolina

6 Department of Health and Environmental Control, and I

7 am the director of the division of Water Quality. I

8 have been involved with the 401 water quality

9 certification process for approximately 13 years, so I

10 have a good bit of experience with this process. Our

11 agency also implements the Coastal Zone Management

12 Program, although I am not directly involved with that

13 program; we coordinate very closely together.

14 I think a lot of the comments you have heard

15 today I will probably reiterate. I think certainly

16 from a state's perspective the idea of early

17 coordination and a shortened process is something that

18 everyone would benefit from.

19 I think involvement from the 401 water quality

20 certification perspective in particular has been an

21 issue for us because we feel that oftentimes we are

22 working way ahead of the game. By the time that the

23 401 certification has been determined, there may be

24 additional studies that are done or issues that are

25 raised where that decision has already been made and it

26 is very difficult for us to then go back and make any

1 changes to that decision.

2 The answer to the first question, Is there a
3 need for a new licensing process? I think there at
4 least is a need for some modification to the existing
5 process. The two proposals that have been presented so
6 far I think both have very good issues that have been
7 raised and very good points.

8 We will provide more detailed comments as we
9 look at them a little more closely and provide written
10 comments. On the surface, I would say that definitely
11 a combination of these two processes would certainly
12 expedite the process and make things work in a smoother
13 way.

14 As far as problems that we have seen, again
15 reiterating some of the comments that have been made,
16 incomplete applications or lack of studies by the time
17 that a request for a certification has been submitted
18 is an issue. The Clean Water Act requires a year to
19 act on a water quality certification, and if the
20 studies are going to take longer than that, then
21 obviously we are behind the eight ball before we have
22 even started.

23 Early coordination with those studies and
24 determining when an application is complete to start
25 that process is probably one of our bigger issues, to
26 make sure that when we start our process we feel like

1 we can make a decision in the time frame that is
2 allowed.

3 I think coordination with FERC early on in
4 that process, again having their input and the other
5 federal agencies in the state process, is certainly
6 going to again make it a smoother process for all
7 involved for the natural resource issues that come up
8 through the process, which, as you are well aware, the
9 401 certification scope has broadened greatly over the
10 last several years and probably will continue to do so
11 to some degree.

12 I think coordination with all of those and
13 involvement with all of those agencies early on will
14 certainly make that process less cumbersome, less
15 difficult and hopefully result in some settlements and
16 some early discussion about what really does need to be
17 considered and issues that really maybe are not
18 necessarily for a particular project.

19 Once a decision has been made, certainly
20 support of the state requirements. State studies is a
21 big issue for us. Certainly, if a state or a local
22 agency feels that an issue needs to be addressed,
23 support by the federal agencies and FERC to get the
24 licensee to provide that information in a timely
25 manner, again, so that we can consider it during our
26 required time frame. Although this is a very long

1 process, again our process is very limited in time.

2 Really I think those are the biggest issues.

3 I don't want to take more time than is necessary today.

4 I will answer questions. I think, again, just knowing
5 that the water quality standards and the water quality
6 certification process is a federal requirement and that
7 the Coastal Zone Management Program is a federal
8 requirement that does need to be addressed and can be
9 addressed cooperatively and in coordination with all of
10 the other agencies is going to certainly make the
11 process work better and not put us in an antagonistic
12 role as we sometimes are now, and, hopefully, we can
13 avoid some of the lawsuits and things that we have seen
14 recently and keep things moving in a little quicker
15 fashion.

16 MR. MILES: Thank you, Rheta.

17 Our next speaker is Richard Roos-Collins. He
18 is a senior attorney with the Natural Heritage
19 Institute.

20 Richard?

21 NATURAL HERITAGE INSTITUTE

22 MR. ROOS-COLLINS: Thank you, Rick.

23 Mr. Chairman, Commissioners and distinguished
24 colleagues, thank you for this opportunity to appear
25 before you. I am delighted to be here in part because
26 Tim Welch is trying to sunset the involvement of

1 attorneys in licensing proceedings.

2 (Laughter.)

3 (Whereupon, a PowerPoint presentation in
4 progress.)

5 MR. ROOS-COLLINS: I appear as counsel to the
6 Hydropower Reform Coalition. Is there a need for a new
7 licensing process? Yes. In your Section 603 report
8 last year, the Commission found that the existing
9 processes often result in unnecessary cost and delays.
10 Your new practice of denying time extensions, absent
11 very good cause, the Commission has motivated all
12 stakeholders to understand that time is of the essence.

13 Given that administrative reform, a new
14 process should not just be about time management; it
15 should address structural problems that still result in
16 unnecessary complexity in these proceedings. Where we
17 stand, hydropower regulation is complex on an energy
18 unit basis when compared to natural gas or oil
19 pipelines. After all, hydropower uses water, which is
20 one of our most precious natural resources.

21 While, as Mr. Robinson often says, regulation
22 should not be like the Treaty of Versailles, it should
23 produce that quality of decision necessary to manage
24 water for all of the beneficial uses recognized by
25 Federal Power Act, Section 10(a).

26 The Commission should adopt a single process

1 that replaces traditional and alternative processes.
2 It should have common features (indicating), discussed
3 below, and it should allow flexibility given the scale
4 of a project, public controversy and other individual
5 circumstances.

6 What key issues should a new process address,
7 and what are the solutions? First, under existing
8 rules, the license application is developed before the
9 Commission begins environmental review. The sequential
10 track does not improve the quality of the records
11 sufficiently to justify the additional time. As a
12 result, we support the parallel track proposed by the
13 National Review Group.

14 Second, Commission and resource agencies often
15 do not cooperate in the drafting of the environmental
16 document that is a mandatory basis for your respective
17 decisions. Based on the narrow interpretation of the
18 ex parte rule, the Commission offers a catch-22,
19 "Agency, you may cooperate with OEP staff in drafting
20 that document only if you forfeit your right to party
21 status." Most agencies choose not to cooperate,
22 resulting in routine disputes about the quality and
23 completeness of the document.

24 The new process should create a strong
25 presumption in favor of a joint document. A
26 cooperating agency should have the right to become a

1 party provided its prior non-public communications with
2 the Commission do not form the basis of the licensing
3 decision. I know that the Commission is trying this
4 innovation in the ongoing relicensing proceeding for
5 one project.

6 Third, the relationship between the Commission
7 and resource agencies today unfortunately suffers from
8 competition over whose authority trumps. This is
9 worsened by the sequence for submittals of the
10 mandatory conditions under the Clean Water Act,
11 Section 401 and the Federal Power Act, Sections 4(e)
12 and 18.

13 The exiting processes either require the final
14 conditions before the Commission even starts
15 environmental review or allow indefinite extensions for
16 such submittals. Respectfully, this sequence is too
17 strict or too lenient.

18 The new process should provide that mandatory
19 conditions should be submitted in final form with a
20 deliberate window of opportunity only once supported by
21 the record and before the Commission must integrate
22 separate conditions into one decision. More
23 fundamentally, the Commission and these agencies had
24 returned to a cooperative system of checks and balances
25 subject to the Commission's final and exclusive
26 authority to issue or deny a license.

1 Fourth, the Commission does not publish a
2 comprehensive schedule that includes all known and
3 anticipated actions leading to a final decision
4 including those of the licensee, resource agencies and
5 other stakeholders. As one exception, we are very
6 grateful for the administrative reform that you have
7 recently implemented where you publish the anticipated
8 dates for your own environmental review.

9 Under the new process, a comprehensive
10 schedule should be published early and should be
11 updated periodically. It should be based on a process
12 proposal as recommended by NHA. Further, there should
13 be effective interlocutory procedures to resolve
14 disputes before the final licensing decision. Examples
15 include NRG's proposal to elevate a study plan dispute,
16 if necessary, to the Commissioner or cabinet-level or a
17 presumption that a motion for interlocutory remedy will
18 be decided promptly, say, within a month of pleading.

19 Finally, the plan of scientific study required
20 by existing processes typically leaves too much
21 uncertainty about project impacts on the environmental
22 baseline. For example, while it predicts the
23 availability of habitat for a fish resource, it does
24 not test hypothesis about project impacts on the
25 sustainability of that resource.

26 Further, it does not distinguish the

1 proportional impacts of the project versus other
2 facilities and activities in the same basin. A new
3 process should move the state of the applied science
4 forward, so that the same budget or even a lesser
5 budget of time and funding now invested in a study plan
6 produces more understanding about these causal
7 relationships. A license itself should establish
8 accountability for the intended impacts expressed in
9 the form of measurable objectives which are then
10 monitored.

11 I will turn to the final question, What
12 provision should be made for settlement? Stakeholders
13 should be required to make a meaningful attempt at
14 negotiation of the study plan and license articles in
15 every proceedings. Such negotiations should continue
16 as long as there is a reasonable prospect of success,
17 subject of course to the licensees duty to apply timely
18 and its discretion to decide whether a given decision
19 makes business sense. The integrated process should
20 also encourage a comprehensive settlement on all
21 project impacts.

22 In closing, hydropower regulation in my
23 opinion is fairer and more effective than at any time
24 in the history of the Federal Power Act. This
25 rulemaking should build on that progress. It should
26 improve the science necessary to understand project

1 impacts given the reality that multiple facilities and
2 activities, including but not limited to the project
3 before you, affect the environmental baseline.

4 It should establish cooperative working
5 relationships between the Commission and agencies with
6 jurisdiction over the project, and it should motivate
7 the licensee and the stakeholders to reach a
8 comprehensive settlement that once adopted as a license
9 serves their and the public interest.

10 Thank you.

11 MR. MILES: Thank you, Richard.

12 Our final panelist is Don Sampson, and
13 Don Sampson is the executive director for the Columbia
14 River Inter-Tribal Fish Commission.

15 Mr. Sampson?

16 COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

17 MR. SAMPSON: (Speaking in Native American
18 language.) Good morning my relatives. (Speaking in
19 Native American language.)

20 My name is Donald Sampson, and I come from
21 Wallula near the Columbia River, and I am representing
22 the river people here today. I also work as executive
23 director of the Fish Commission which represents the
24 Yakama, Warm Springs, Umatilla and Nez Perce Tribes.
25 In the next year, the Commission will become a party to
26 several major relicensing proceedings involving more

1 than 3,500 megawatts of installed capacity. The
2 Commission is also party to several smaller proceedings
3 such as Naconda Dam.

4 I would first like to offer some comments on
5 some few overarching concerns of the Columbia River
6 Tribes. First, I would like to acknowledge and commend
7 the Commission and thank you for providing
8 tribal-specific forums throughout the region. This is
9 a very good first step in reaching out to tribal
10 governments.

11 I would also recommend a concerted effort to
12 improve FERC's working relationship with tribes across
13 the country. I would like to challenge FERC to build
14 and improve its relations with Indian countries through
15 programmatic outreach and education. These efforts
16 should encompass all aspects of the Agency's mission.
17 The Agency's effort should be both internal and
18 external, so that the Agency and tribal governments are
19 not foreign to one another. I would offer our
20 commission's assistance in this regard.

21 Second, tribal resources and tribal government
22 resources are very limited. The tribes need to
23 maximize the effectiveness of their input. FERC can
24 assist the tribes in the context of relicensing
25 proceedings by, one, assuring that the applicant
26 studies are completed and shared in a timely manner, to

1 provide site-specific project data.

2 Providing the tribes with timely notice of
3 deadlines, showing appropriate flexibility with filing
4 deadlines including appropriate schedule modifications
5 if necessary to address tribal concerns; providing
6 government-to-government consultations between FERC and
7 the affected tribes at the beginning, during and end of
8 licensing; assuring that tribal concerns are not
9 railroaded by lack of resources no matter what process
10 is adopted; involving FERC management in tribal
11 coordination throughout relicensing.

12 Third, when it comes to managing natural
13 resources, we all work in an environment of shared and
14 overlapping jurisdictions. This is particularly the
15 case for natural resources like Pacific salmon. Our
16 success in salmon rebuilding depends on coordinating
17 with Canada, several states and many federal agencies.
18 Likewise, FERC must recognize its part in salmon
19 rebuilding.

20 FERC is more than an umpire calling balls and
21 strikes in relicensing, rather FERC has affirmative
22 duties to Pacific salmon under statutes such as the
23 Pacific Northwest Power Act and needs to work with
24 tribes in other jurisdictions to fulfill these duties.

25 Regarding the two proposals, number one,
26 combining certain common elements of the IHC and NRG

1 with existing traditional rules makes good sense. For
2 example, both proposals call for emerging the initial
3 consultation document and NEPA scoping processes. This
4 should help eliminate unnecessary process and
5 identification of issues.

6 Second, the focus of the IHC proposal on
7 resolution of study design issues is highly
8 appropriate. In the context, the tribes fishery
9 management efforts are held accountable to such study
10 requirements. No lesser standard is appropriate for
11 licensing commitments up to 50 years in length.

12 Third, FERC relicensing proceedings should be
13 transparent, particularly with regard to procedural
14 understandings that are exempt from ex parte
15 communication limitations. We support elements of the
16 IHC and NRG proposals that foster transparency.

17 Fourth existing licensing proceedings should
18 not be modified by new rules unless all parties agree.

19 Fifth, regarding settlement of licensing issues, if
20 tribes have issues that are not settled, FERC must
21 ensure that these issues are reasonably addressed in
22 consultations that tribes are not left out settlement
23 agreements, particularly regarding issues that involve
24 co-management of resources in which the United States
25 has a trust interest.

26 Six, for a variety of reasons, the NRG

1 proposal's approach to MOA's on cooperating agency
2 processes may not work for tribes and the IHC proposal
3 would be preferable.

4 In our experience, MOAs among federal agencies
5 can lead to exclusion of tribes from important
6 decisions. This is our experience in the Columbia
7 Basin. The NRG's proposed limitation on appeal rights
8 for cooperating agencies will work a hardship on tribes
9 who used to be involved in the NEPA process, but do not
10 have the resources to complete dispute resolution
11 procedures.

12 For tribes with limited resources, a process
13 that resolves disputes at the senior policy level
14 presumably in Washington, D.C., may disenfranchise
15 tribal interests. In our experience, disputes are more
16 likely to arise between resource agencies and the
17 applicant. We would encourage FERC to explore a means
18 to ensure that the applicant abides by dispute
19 resolution in a timely fashion.

20 Seventh, we would encourage FERC to
21 incorporate watershed-based impact analysis and
22 planning into the proceedings. In this regard, Clean
23 Water Act 401 certification should include tribal water
24 quality standards where applicable, tribal water rights
25 should be considered, and tribal cultural resources
26 including protection of fish and wildlife resources

1 must be considered.

2 Eighth, 30- to 50-year license terms are too
3 long, given technological breakthroughs; other power
4 sources, for example; and irreversible impacts to
5 natural resources. Terms should be part of the
6 settlements with a reasonable cap that allows for
7 capital investments to be restructured -- to be
8 recaptured.

9 Finally, FERC should streamline and make
10 uniform project decommissioning and removal rules.
11 Again, I want to thank you for this opportunity,
12 Mr. Chairman and members of the Commission and my
13 fellow trustees. Thank you so much. We will provide
14 additional concepts for melding the IHC and NRG
15 proposals in our written comments.

16 Thank you.

17 MR. MILLER: Thank you.

18 Now for the next 30 minutes what I would like
19 to engage is a conversation between the panelists with
20 the possibility of questions from members to the right
21 of me. You have heard a lot of statements that each of
22 you have made.

23 Most of you addressed the issues that we asked
24 you to consider. There are some overlapping interests
25 by the panelists while at the same time there appear to
26 be some departures. There are so many areas I guess

1 that I could start. One is, I guess, the differences
2 between a traditional model as we now have it and the
3 alternative licensing process. In those two models,
4 you have concerns about scheduling, having sufficient
5 flexibility and meshing all of those together.

6 John, you came up I think with a couple of
7 additional models. What I would like to do is here
8 what the panelists have to say about some of the
9 proposals that John had, and then I would like to get
10 to Richard's thoughts about how do you integrate
11 processes or sufficient flexibility in any future model
12 that allows when you reach a barrier that you take a
13 detour and try to overcome that barrier and then get
14 back on track again. I think that is what I was
15 hearing. Who would like to begin?

16 John?

17 MR. SULOWAY: I thought our process was a
18 great idea. What we are trying to do is we recognize
19 that we don't want the regulations to appear to be just
20 an incredible morass that nobody can understand, so
21 what we tried to do in providing flexibility is
22 everybody starts at the same place and everybody winds
23 up basically in the same place, but that after you have
24 started off in the same place and you get some sense
25 about what the issues are going to be and what the
26 information is going to be, to then make some

1 decisions, the licensee or the applicant rather makes a
2 decision, on what approach is going to best meet the
3 needs of their project or the process.

4 The traditional process we look at is, first
5 of all, we have heard from a lot of other licensees
6 that they do not want to see the traditional and the
7 alternative process disappear because they are
8 currently doing a traditional or an ALP, and they don't
9 want to be caught in the transition of this rulemaking.

10 We know from our experience back after ECPA
11 that some projects in fact got caught in the
12 transition, it was not pretty, so that is one of our
13 interests in preserving the process, but also there
14 some licensees and other parties that have participated
15 in these processes and they have worked well. The good
16 parts of those we think should be retained.

17 We have acknowledged that there may be some
18 adjustments that can be made in these proposals, the
19 IHC and the NRG and also further refinements in this
20 rulemaking that might make those two processes better.

21 What I tried to do, and it is kind of difficult, is
22 that the other two processes that I proposed are really
23 just modifications of those two processes, the
24 traditional and the ALP.

25 We think that there are some projects that the
26 impacts are small enough that they don't need to go

1 through all of that three-stage consultation process.
2 Now, that would have to be, first of all, like we said,
3 and I think Richard liked up front, we did have a
4 proposal for what the process would consist of and it
5 would have a schedule and we would need to talk about
6 issues and get input from folks before we made our
7 decision to go that particular way.

8 FERC would have to approve that we would take
9 that abbreviated process where basically the applicant
10 would do its best by itself to fill out a complete
11 application, file it with the Federal Energy Regulatory
12 Commission, and then the FERC would convene its regular
13 scoping process and do the EA and the EIS.

14 The other variation that we proposed, if you
15 will, was a variation on the ALP. We thought that,
16 again, there are a lot of good things that are in the
17 current ALP. We could do a modification of that
18 process that would incorporate a lot of the ideas of
19 the IHC and the NRG and make that process available as
20 well to applicants that want to use that process.

21 Some of the requirements of the NRG and the
22 IHC may be pretty intimidating to a particular
23 applicant. I think the representative from the tribes
24 -- forgive me I don't remember your name -- Don, he was
25 concerned about MOU's and MOA's and there are some
26 applicants that are concerned about having to get an

1 MOA for a particular process.

2 We understand that that might be a concern as
3 well, so we wanted those kind of situations that an
4 applicant and the people involved would be able to
5 stick to the traditional -- or to the ALP process as
6 opposed to taking that variant of the ALP process that
7 includes the NRG or the IHC.

8 MR. MILES: Richard, any thoughts?

9 MR. ROOS-COLLINS: I support the spirit behind
10 this proposal, one track with flexibility depending on
11 individual circumstances. The devil will be in the
12 details. On first reading, this appears overly complex
13 to me. I mean, notwithstanding my teasing Tim about
14 sunseting attorneys, I agree with the spirit of his
15 point, which is simpler is better.

16 Think about the fact that today an application
17 for a new license finds the relevant rules in Parts 4
18 and 16 and has to go back and forth between them.
19 Think about the reality that licensees and stakeholders
20 are often confused which process they are in; and if it
21 is traditional but with some variation, in other words,
22 a hybrid, which rules apply.

23 Whether it is this plan or some other, our
24 plea is for integration and simplicity and utter
25 clarity, so that in any given proceeding the licensee
26 and the stakeholders and the Commission know exactly

1 which process is being followed and what the schedule
2 is.

3 MR. MILES: Don't

4 MR. SAMPSON: I would concur with that. I
5 mean, we have been involved in the Mid-Columbia in an
6 alternative process. I think the problem is the ground
7 rules have not been clearly defined or described for
8 all of the parties to understand time frames and what
9 their responsibilities are. I think it has got to be
10 very clear.

11 Whatever is developed here we need to know
12 what the expectations will be everybody going into it.
13 If we have a single process or something that is very
14 clearly defined and everybody knows going into it what
15 will be expected, that is important, and I think we
16 will work through those. When we have four options
17 that people can select from, again it creates
18 confusion. That is what we have found with the
19 alternative process that we are now involved with in
20 the Mid-Columbia.

21 We are not certain exactly what our role is,
22 whether federal agencies are involved in terms of
23 addressing tribal trust responsibilities, how studies
24 are developed, how any dispute resolution is going to
25 be implemented. I think those procedures need to be
26 clearly established.

1 MR. MILES: It is really not a question of
2 what you call it? You can call it "traditional" or you
3 can call it a "hybrid" or you can call it an
4 "alternative," you can give it a lot of different
5 names. What I am hearing is that there may be some
6 consensus or thoughts on if you are going to have a
7 process, but before you file an application have some
8 structure to it.

9 You should have at the very outset an
10 understanding of what the goals are and try to have all
11 of the parties come to an agreement on what the goals
12 should be for whatever process you are involved in
13 including, Richard, I suspect -- I want to get into the
14 settlement part of it, because I think most of you
15 would agree that it is good if you can address the
16 issues and resolve them before you file an application.

17 I want to touch upon that topic. What is the
18 best way to try to achieve that settlement agreement?
19 It is the last question. What provisions should be
20 made for settlement agreements? But, at the same time,
21 is it simply that you can call it what you want, or are
22 we just looking at making sure we have certain common
23 principles that people can announce or agree upon at
24 the very outset? I mean, is that where we are headed?

25 MR. SULOWAY: Well, if I may, before we get to
26 settlements?

1 MR. MILES: Sure.

2 MR. ROOS-COLLINS: I think that both Richard
3 and Don brought up some really good points. If it
4 isn't clear, I can understand that because it is only a
5 schematic. This process that we are proposing or the
6 concept of it is meant to be clearer. We want the
7 steps all written out nice and clearly. That would be
8 important for a licensee or an applicant, rather, to
9 include as part of their plan.

10 As I said earlier, that plan would include a
11 schedule. That step should have ground rules, I
12 absolutely agree with you. As I mentioned before,
13 there would be a schedule to address time frames. As I
14 mentioned in my prepared remarks, at the initial
15 meeting -- and I agree with you, Richard, it would have
16 to be at subsequent meetings -- that FERC would be
17 involved, at least initially, explaining what the
18 ground rules are and also what the roles of various
19 participants.

20 It is very important, because some
21 participants, for example, in a collaborative process,
22 you know, an applicant will bring everybody together at
23 the table and everybody, you know, in the collaborative
24 spirit believes that they all have equal standing at
25 the table.

26 The applicant of course wants to keep that

1 thought going because it doesn't want a war at the
2 table. However, when you get down to the bottom line,
3 the 401 agencies, the mandatory conditioning agencies
4 and the FERC have a lot more power in this process,
5 just because of the law and the regulations.

6 The person that lives in Upstate New York that
7 participates on one of our processes has a say, their
8 issues get examined, but when the final decisions get
9 made, you know, when the votes are counted, they don't
10 have quite as much input. That is just the way it is.

11 I think it is important that the roles of
12 individuals be explained by the FERC as part of this
13 process. The roles of tribes should be explained, but
14 these are not easy concepts for anyone, whether you are
15 FERC or a magician, to explain to people, particularly
16 in a collaborative process.

17 Just one more, Richard, dispute resolution, it
18 is our intention that if you go to the detail there on
19 "Figure 2," that there would be provisions for dispute
20 resolution as well as part of this process.

21 Thank you.

22 MR. ROOS-COLLINS: Rick, if I may be overly
23 precise, I think the opening comments here have 80
24 percent overlap, and what this rulemaking is about is
25 the last 20 percent. I agree with most of what John
26 has said, but the devil really is in the details. If I

1 could put that more directly, with respect to the
2 rights and the duties of the licensee and the
3 stakeholders, the rule needs to establish a minimum and
4 a maximum, if you will, for cooperation.

5 The red flag went up for me, John, when you
6 described Track B, the abbreviated process, as
7 involving "optional" consultation. As far as I know,
8 each state under the Clean Water Act must consult on
9 each project within this Commission's jurisdiction.

10 There is no optionality there. The Fish and Wildlife
11 Coordination Act and the counterpart state law create
12 the same duties respectively for the Fish and Wildlife
13 Service and the Department of Fish and Game.

14 I don't understand that detail which goes to
15 the minimum level of coordination between the licensee
16 and other stakeholders in a circumstance where there is
17 likely to be little public controversy, but,
18 nonetheless, there are statutory mandates that require
19 consultation.

20 MR. MILES: Nino?

21 MR. MASCOLO: Yes. Let me try to address
22 Richard's concerns. The way that one can look at
23 Track B and understand it I think fairly clearly, and I
24 look towards the resource agencies because you do this
25 on a daily basis, Track B is essentially what do we do
26 today when you go to a federal agency and you seek a

1 permit, whether it is for a ski resort, a transmission
2 line, a pipeline, building of a development on wetlands
3 where you have got to go to the U.S. Army Corps of
4 Engineers? What does NEPA require?

5 It requires that the applicant file an
6 application. FERC has got regulations that set out
7 what a complete application must entail. If you have
8 scoping ahead of time or an up front meeting with an
9 informal consultation package, an initial consultation
10 package. You will get a lot of the issues laid out.
11 You will know who the interested stakeholders are, then
12 your duty is to complete an application and send it to
13 FERC, and then you would proceed through the normal
14 NEPA process, just as you would with any other federal
15 permit.

16 Let's not make it different than anyone else.
17 You would go through the same consultation that anybody
18 else needs to go to for a 401 certificate. If I cross
19 a stream with my transmission line and I am going to do
20 some work on the stream, I need to get a Corps of
21 Engineers permit and I need to get a 401 permit.

22 I have got to go through that process. The
23 public is involved and all of the stakeholders are
24 involved. It is a way to keep it simple, to make it
25 brief, to do what every other federal agency does and
26 not have a very large, complicated process that just

1 really gets blown up for projects that might not
2 otherwise require it.

3 That is how, Richard, we would answer the
4 question of, Do we get other people involved?
5 Absolutely, just as NEPA gets people involved now.
6 NEPA requires public involvement. It is one of the
7 main parts of NEPA. That public involvement would
8 still play into the FERC licensing process.

9 MR. SULOWAY: If I may piggyback, notice how
10 the red flag went up, and Richard and I have been
11 working together for a long time. I hope you
12 understood when I said "optional," and I am just
13 building on what Nino said, I was talking about
14 optional after we had that initial meeting and prior to
15 the filing of the final license application.

16 There would be some initial consultation, and
17 there definitely would have to be consultation with the
18 401 agencies and the other folks after the filing of
19 the final license application, so I hope we lowered
20 that red flag for now.

21 MR. MASCOLO: It allows the licensee to engage
22 in as much consultation, informal, with all of the
23 interested stakeholders as the project would otherwise
24 require without mandating anything in particular, and,
25 hopefully, that will foster settlements.

26 MR. MILES: Rheta, you were reaching for the

1 key. Did you have something to say?

2 MS. GEDDINGS: Well, I really was going to ask
3 a question regarding the 401 process not specifically
4 in Track B, but in all of your tracks. Do you envision
5 earlier coordination? Do you envision that it would be
6 different from the process that is in place now? I
7 guess where would the state involvement start and the
8 tribal involvement start?

9 MR. SULOWAY: Well, involvement of all of the
10 stakeholders would begin right at the very beginning of
11 that first meeting. Also, under this, you know, there
12 are a lot of options, not all of the detail is here.
13 If a licensee decided or an applicant decided that they
14 wanted to consult with the 401 agencies and the tribes
15 and the NGOs even prior to that notice of intent, they
16 should feel free to do that.

17 I mean, part of the flexibility here that we
18 continually kind of preach for is there is a difference
19 in the amount of resources a particular project has.
20 Some of us that are blessed with fairly bountiful
21 projects, and hence a fair amount of resources, have
22 the ability to reach out to you sooner than maybe
23 somebody who has a relatively small project.

24 First of all, to directly answer your
25 question, there is a responsibility to reach out to you
26 in the very beginning right at the notice of intent,

1 filing of the initial consultation document. After
2 that, there has got to be the flexibility within this
3 process for the applicant to work with you and all of
4 the other stakeholders to kind of make this work the
5 best.

6 I think that 95 percent or maybe it is 99
7 percent of the applicants really want to make sure that
8 you are not in a bind on your 401. There is more than
9 one situation in the beautiful state of New York where
10 I reside where the DEC, a great agency that we work
11 with all of the time, is in a situation where we filed
12 an application for a 401 and because our year deadline
13 is running out we have to withdraw the application.

14 You know, we want to make it work, too. I
15 think that is going to be one of the goals of this
16 rulemaking is to add the flexibility, make some
17 adjustments to these processes so we don't run into
18 these kind of situations that really as quite
19 nonsensical.

20 MR. MILES: Before we get into allowing
21 questions from the audience, would your comments differ
22 it was a relicense proceeding versus an original
23 license for a project? How would it differ? Any
24 thoughts on that?

25 Nino, you were shaking your head?

26 MR. MASCOLO: I think a brand new project is

1 going to require a lot more scrutiny. With exiting
2 projects, you have got a baseline that is today and
3 there is not generally significant changes in the scope
4 of the project as it is going forward, whereas with a
5 new project I think the type of environmental analysis
6 is going to be greatly increased because of all of the
7 new impacts that a project would create. I think most
8 of the presentations have really discussed the issuance
9 of a new license for an existing project.

10 MR. MILES: All right.

11 Richard, any thoughts?

12 MR. ROOS-COLLINS: One rule with flexibility
13 that reflects the different circumstances of an
14 original versus a new license. Let me give an example.
15 If a new license is based on a monitoring record that
16 goes back years even decades, then Don's problem, that
17 you can't understand fish population dynamics in the
18 course of two years can be solved.

19 It might be possible in that circumstance for
20 the new licensee to expedite the study process. The
21 rule should have the same minimum requirements, but
22 should allow some flexibility, particularly where the
23 new licensee has taken such initiatives.

24 MR. MILES: Okay. Just before we turn it over
25 to you all, Don, I had sort of a question for you. If
26 you were starting from scratch today and you could

1 design the process for the region of the country you
2 are located in, what would be the key elements of that
3 process before the license application?

4 MR. SAMPSON: Well, again, I point back to my
5 comments, and that is, FERC needs to be involved early
6 on, at the beginning. When we talk about developing
7 the initial consultation documents, the information,
8 the application, I think it needs, it requires that we
9 establish and start our NEPA documentation gathering
10 the information and being clear what is needed.

11 Oftentimes, tribes come into these things
12 describing cultural resources. Most agencies involved
13 do not recognize the importance or the broad array of
14 cultural resources. That is an important issue to the
15 tribes.

16 There are issues that deal with salmon
17 restoration in our case. Those things need to be
18 described up front, and FERC needs to be involved up
19 front at the beginning. The reason that I say that is
20 that they have an obligation to make sure that the
21 applicant is addressing those issues fully. I think
22 that is why we proposed starting that NEPA process up
23 front.

24 Further, we support the idea of -- and I won't
25 go through the entire what I think ought to happen --
26 but further we support NRG's proposal where the

1 cooperating agencies in FERC jointly draft the
2 environmental analysis in terms of putting the
3 information together. That is a very good concept
4 because we are all on the same page, putting the
5 information together. We have already talked up front,
6 "Here is what needs to be incorporated into this
7 analysis," but also we agree with the concept of
8 allowing independent decisions by cooperating agencies
9 because many of them have different statutory
10 obligations.

11 I think those are a couple of procedures that
12 we agree with. Oftentimes, what we do now is on this
13 alternative process, you know, there is no real ground
14 rules. We don't know that FERC is involved until this
15 application is filed. We need them up front to help,
16 as a trustee to the tribe with limited resource help,
17 us up front make sure that these are addressing the
18 impacts to very important things that affect our daily
19 lives.

20 That is why I began with the issue of we are
21 river people. That is where we have come from for
22 thousands of years. We don't address often
23 sufficiently enough the social impacts, the economic
24 impacts to our tribes, the cultural impacts, all of
25 those things seem to be skated to the side unless there
26 are firm ground rules established and that FERC and

1 other federal agencies make sure that our interests are
2 represented.

3 MR. MILES: Mr. Chairman or
4 Commissioner Massey, do you have any questions?

5 CHAIRMAN WOOD: Richard, you had stated 80
6 percent overlap, 20 percent devil in the details.
7 Let's take off your wonderfully collaborative hat for a
8 moment, since this is kind of the kick off into this
9 deal and I am the slow learner in this class. Tell me
10 what, with some level of specificity, is in that 20
11 percent camp so that I can spend my time focusing on
12 getting you all together on that and understanding it
13 myself better. Feel free, I would like the other folks
14 to respond; but since, Richard, you gave me a number to
15 latch onto, I eagerly grab it.

16 MR. ROOS-COLLINS: You know, an attorney
17 should know better than to use a number.

18 (Laughter.)

19 CHAIRMAN WOOD: Particularly to an engineer
20 attorney.

21 MR. ROOS-COLLINS: Okay.

22 CHAIRMAN WOOD: Categories of issues of
23 concern that you think might be at some variance that
24 as we plow through this process and we get the process
25 for the process agreed to that we are going to start
26 seeing on the substantive side.

1 MR. ROOS-COLLINS: Okay. I will answer based
2 partly on the presentations made here and partly based
3 on what is between the lines of the presentation here.
4 First, the cumulative impacts of the project with other
5 facilities and activities that affect the environmental
6 baseline. That issue complicates, necessarily
7 complicates, licensing beginning with the initial
8 consultation, but particularly in the study plan and
9 the NEPA review.

10 CHAIRMAN WOOD: So that would be you have got,
11 say, four dams in a project, you are saying, in
12 addition to that project, the other projects that may
13 not be on deck right now? Is that what you are saying
14 talking about the environmental baseline?

15 MR. ROOS-COLLINS: Yes.

16 CHAIRMAN WOOD: Okay.

17 MR. ROOS-COLLINS: Yes. Specifically, the
18 Hydropower Reform Coalition believes that the licensee
19 has a duty to mitigate its contribution to cumulative
20 impacts. Licensees as a general rule tend to be
21 somewhat less willing to study or mitigate that
22 contribution.

23 Secondly, licensees and the Hydropower Reform
24 Coalition have a different tolerance for uncertainty in
25 the study plan. Again, I am generalizing, and I regret
26 doing this, but you asked me take my collaborative hat

1 off.

2 Licensees tend to believe that the study plans
3 which have been prepared under the existing rules
4 provide an adequate record for your decisions. We tend
5 to believe that the study plans not only fail to
6 address cumulative impacts adequately, but also fail to
7 address what I call "sustainability" in my opening
8 comment. Let me parse what that word means.

9 In a typical study plan going to the impact on
10 a fishery, a licensee will use the in-stream flow
11 incremental methodology or a similar method that
12 evaluates the relationship between flow stage and the
13 availability of habitat that is deemed suitable to that
14 fishery.

15 The assumption is that the availability of
16 habitat is the primary limiting factor on that fishery.
17 That assumption is sometimes right and it is sometimes
18 wrong. The Fish & Wildlife Service in developing IFIM
19 expressly stated that it is not suitable for
20 understanding impact on fishery population, and yet
21 this Commission and licensees tend to use it in that
22 manner.

23 We need to move, in our opinion, the state of
24 the art forward to better understand not just the
25 quantitative availability of habitat for a given
26 biological resource, but its actual condition under

1 alternatives that are under consideration.

2 A third issue that falls in the 20 percent
3 category is who at the end of the day controls the
4 study in the event of a dispute. Frankly, the NRG and
5 the IHC proposals don't fully eliminate what Mark
6 rightly calls a dead end with respect to such disputes.
7 That is because we are assuming that existing statutory
8 authorities remain in place and, therefore, the
9 Commission and, say, the state can rightly claim to
10 share jurisdiction over water quality impact, and,
11 therefore, the study that creates the record for
12 understanding that impact.

13 We really need to create a dispute resolution
14 procedure for study plan disputes that works to the
15 maximum extent feasible, given existing statutory
16 authorities.

17 CHAIRMAN WOOD: Give me an example of one
18 recently that has come up. What kind of issues are in
19 dispute, this cumulative impact issue, your issue one?

20 MR. ROOS-COLLINS: Yes, and also often you see
21 disputes about the habitat population gap that I
22 mentioned. The fourth tough issue that I will put into
23 this 20 percent category goes to the mandate that we
24 propose for settlement negotiation.

25 In other words, we proposed that your rule
26 require in every proceeding, no matter what the

1 flexibility, that the licensee and the stakeholders try
2 to negotiate a study plan and then try to negotiate an
3 interpretation of the study results, and specifically
4 what the mitigation measures should be.

5 I believe that licensees view this as giving
6 the rest of us too much leverage with respect to
7 mitigation measures and schedule, and so if you
8 consider if you including a mandate or even a
9 presumption for settlement in your rule, you need to
10 strike a balance that creates a strong incentive for
11 settlement, but also preserves the licensees legitimate
12 interest in submitting a timely license application.

13 CHAIRMAN WOOD: From this end of the table,
14 are there any items you would stick in the 20 percent?
15 You said it is 20, so don't say it is 10 or 30, just
16 say it is 20. Are there any items that you would stick
17 in the 20 percent that Richard didn't already bring up?

18 (Whereupon, no verbal response.)

19 CHAIRMAN WOOD: We are just kind of
20 identifying the issues here, not really getting too
21 deep into the argumentation.

22 (Whereupon, no verbal response.)

23 CHAIRMAN WOOD: What I am asking are what are
24 the issues? The three proposals that we have heard
25 about today really don't have what I call a "meeting of
26 the minds" from the processes that are already laid out

1 there today.

2 MR. MASCOLO: I can tell you that there are
3 licensees that do not care for either of the study
4 dispute processes that have been proposed by the NRG or
5 the IHC. I am not taking an SEE position at this point
6 in time, but I am also chairperson of the Hydro Issues
7 Group at EEI, and I know that there are some licensees
8 that would rather see FERC just decide license study
9 disputes instead of creating a new process that is
10 going to take more time and have, as the IHC did, a
11 panel of three people and will take three months.

12 We will discuss what needs to be done and then
13 somehow we will reach a decision. If that decision
14 isn't accepted by the majority of the panel, then we
15 will go up to the commissioners themselves and somebody
16 at the resources agency, the secretary of the Interior,
17 let's say, and that those individuals will be forced to
18 come up with a decision as to what is appropriate
19 study.

20 There are licensees that believe, "Wait a
21 minute, let's just cut this out and let's do it simple.
22 Have FERC staff who have the expertise in these areas
23 make a decision, the study is necessary, the study is
24 not necessary. If it is, Licensee, do it; if it is
25 not, you don't need to."

26 If you wanted to have a process where

1 licenses and those advocating the study could put
2 documentation of their position in front of FERC staff,
3 that is fine, but we don't need to take a long time and
4 drag out a study dispute resolution process. That is,
5 for example, one issue that I know some licensees may
6 have with what has been proposed.

7 John, did you have--?

8 MR. SULOWAY: I think Richard highlighted some
9 of the key areas that are going to be in the 20
10 percent. John Clements and I will probably lose more
11 hair than we have already lost because some of those
12 are kind of like holes that you go into and you never
13 come out of.

14 Richard is going into an area with regard to
15 habitat identification as opposed to habitat
16 utilization and population dynamics. The Power
17 Authority of the State of New York spent about 10 years
18 and a gazillion dollars studying perch populations, I
19 think it was white perch, in the Hudson River for a
20 nuclear power plant. We never got anyplace.

21 I think licensees that are experienced in this
22 kind of work recognize and also I think experienced
23 stakeholders know that you have to be careful. There
24 has got to be a balance of how far you go on this kind
25 of stuff.

26 What will happen is if this kind of criteria

1 gets set, Richard, then you are right. Some players
2 who play a little rough and maybe not quite fair will
3 try to use that as leverage against a well-meaning
4 applicant.

5 I want to say right up front there may be some
6 less than well-meaning applicants that may try to use
7 some other part of the process to leverage against you
8 guys. I am very concerned about going too far in
9 cumulative impacts and population analyses because,
10 quite frankly, in some of our alternative processes I
11 think we have come to kind of a nice agreement about
12 how to deal with cumulative impacts. If we try to
13 upset that by going deeper into it, I think we are
14 going to have real problems.

15 As far as something that is in that 80
16 percent, and I think Richard mentioned it a little bit
17 in his remarks, you have heard from the licensees, "It
18 takes too long." I have said publicly, "I can license
19 a 500-megawatt combined cycle plant new greenfield in
20 the middle of New York City in two years." It takes me
21 seven to ten years to relicense an existing hydroplant
22 in Upstate New York.

23 No offense, Richard, but those combined cycle
24 plants use a lot more water than you would be surprised
25 about. That being said, I think Julie Kiel said it
26 best, we know that this is going to be a long process.

1 Even at the end of this rulemaking, we are not going to
2 relicense a project in three years. It is not going to
3 happen. We understand that. What we are trying to
4 achieve here is some economies.

5 That being said, when we looked at some of the
6 time lines for the IHC, and I am just highlighting this
7 particular item, some of them are totally unrealistic.
8 So, we are going to have to work with John Clements and
9 the rest of the folks in the process to make sure that
10 our timelines are tight and they are fair to everybody
11 involved, that the 401 agencies have got enough time to
12 put together their draft 401's, but also, for instance,
13 that the licensee has more than 45 days to go from the
14 draft application to the final application, because, as
15 Julie and I said, it could take us more than 45 days to
16 print the bloody thing much less rewrite it.

17 Time lines are going to be an issue with all
18 of us. We are going to have to rely on input from all
19 of the stakeholders and our experience and FERC sister
20 agency representatives to give this a fair balance.

21 CHAIRMAN WOOD: Let me ask a separate
22 question. Is there any on this panel, any dyspepsia
23 about any single NEPA document among the agencies as
24 was talked about, I guess, primarily in the IHC?

25 MR. MASCOLO: I would like to support one
26 comment that Richard made, and that is, the

1 Commission's practice of putting the agencies in a box,
2 you can be a cooperating agency and work with us on the
3 NEPA process, or you can preserve your right to
4 intervene at a later stage in the Commission's
5 licensing process and a request for rehearing.

6 I think Richard and I are in agreement that it
7 is tough to put the agencies in that box, and if you
8 want them to be a cooperating agency, which I think
9 most licensees do, we want to have one single NEPA
10 document. I don't want the Forest Service coming up
11 with a separate NEPA document for a project to justify
12 their 4(e) conditions. I want it all in one document
13 that the Commission is going to be the lead agency on
14 and that the Commission will issue. If the Commission
15 can modify its ex parte rules, I think that would help.

16 Another 20 percent issue is going to be timing
17 of mandatory traditions and prescriptions and when they
18 are going to be submitted and how they are going to be
19 submitted in enforcing those deadlines. It is a
20 difficult thing for the agencies to work it into the
21 existing FERC process, but it really needs to be done
22 to have a good comprehensive solution at the end of the
23 day.

24 CHAIRMAN WOOD: Yes. It seemed like everybody
25 was on board that, and I assume when you say the
26 "mandatory," you are also talking about the 401's at

1 the state?

2 MR. MASCOLO: Yes.

3 MR. ROOS-COLLINS: Mr. Chairman, I do have
4 heartburn about one form of --

5 CHAIRMAN WOOD: That is the word I was looking
6 for. I don't know why the other one came out.

7 (Laughter.)

8 COMMISSIONER MEAD BROWNELL: "Dyspepsia"
9 worked.

10 CHAIRMAN WOOD: The same track.

11 (Laughter.)

12 CHAIRMAN WOOD: A cumulative impact there.

13 MR. ROOS-COLLINS: Well, you appear to
14 understand "interlocutory" and I understood "dyspepsia"
15 as well. Here is the heartburn. If the joint document
16 is more than analytical, if it is decisional, then the
17 joint drafting which we have advocated would
18 potentially hurt the interest of licensees and
19 conservation groups alike because negotiation over
20 mitigation measures, what is the preferred alternative,
21 would occur behind closed doors.

22 It is essential, respectfully it is essential,
23 that you think of a joint document as necessarily
24 including the requirement that the document be
25 analytical and that the negotiation over terms and
26 conditions, if any, occur in the sunlight.

1 CHAIRMAN WOOD: How does that request bump up
2 against the documents that we individually produce now?
3 Don't they go all the way like the FERC-NEPA document
4 that kind of puts the whole -- is there a way to do
5 that, where at the draft stage you are not putting in
6 the punch line, you are just doing all of the analysis,
7 and then when the Agency walks away and we each make
8 our individual conclusions based off of that common
9 document, that is when we write that last chapter?

10 Is that what the IHC, NRG process envisions,
11 that you have a common body of facts and then you walk
12 away from those facts and you say, "Therefore, those
13 facts combined with my statutory obligations lead me to
14 conclude thus and so," but that happens after the road
15 forks?

16 MR. ROOS-COLLINS: Yes. Now, I understand
17 that NEPA and the CEQ's implementing rules require that
18 a final NEPA document include a preferred alternative.
19 If so, then it would be the Commission's preferred
20 alternative, and the cooperating agencies would have
21 branched off before that chapter is written. They
22 would own the analytical chapters of the joint
23 document.

24 CHAIRMAN WOOD: I think from our workshop last
25 year, Rheta, I think probably you could speak for the
26 state agencies in this regard, I did hear a lot of

1 concern that we can write our own conclusions. It is
2 just very helpful to us if somebody is doing all the
3 legwork of generating the studies and analyzing the
4 facts and doing the statistical this, that or the other
5 in a way that we are all working from. Is that really
6 what the states have indicated, at least in your
7 experience?

8 MS. GEDDINGS: That would be my experience,
9 yes. Yes.

10 CHAIRMAN WOOD: I assume, because I haven't
11 spent a lot of time delving into a NEPA document of
12 late, that the cultural and historical resource issues
13 could similarly be dealt with where they are analyzed
14 and laid out for everyone to understand, that way the
15 tribal groups can look at those and ascertain then what
16 from that they need to bring to the table in the
17 discussions with the licensee?

18 MR. SAMPSON: Yes. I think it is also
19 important, and this gets back to the issue of study
20 design, we make our best decisions when we have the
21 good information. Study design, the results of those
22 studies that are project-specific are very important.

23 We have come to agreement, settlement
24 agreements, where we have jointly agreed what type of
25 studies would proceed, what the data represents and we
26 developed settlement agreements. That is what has

1 happened before in Mid-Columbia, and we have had
2 successful efforts of restoring salmon and operating
3 hydroelectric facilities profitably. When we don't
4 reach those agreements, it results in litigation.

5 Further, it is important to agree upon these
6 study designs and the results so that when we develop
7 the NEPA documents and assess the impact, particularly
8 whether it be cultural resources or fishery impacts,
9 that we all have that same basis of understanding. We
10 think that is very important and so, again, having FERC
11 involved up front, at the beginning, is critical to
12 that.

13 CHAIRMAN WOOD: Let me shift gears one more
14 time. The NHA process, John, Track B, which I know
15 there was some discussions about, is Track B the small
16 scale, don't anticipate much? What kind of items go in
17 Track B?

18 MR. SULOWAY: Track B could be a relatively
19 small project in a relatively small stream where
20 basically all of the resources are known, maybe
21 previous studies had been done ahead of time, maybe
22 further upstream they had already done, or downstream
23 they had done projects, relicensed them, so there was a
24 lot of information on the table already.

25 Maybe the project had been licensed in the
26 modern era as opposed to an older project, maybe it was

1 licensed in the eighties, we have some of those, and so
2 a lot of the information is there and it just needs to
3 be updated. The issues have already been identified,
4 and it is a simple matter of filing that application,
5 again with the understanding that there would be
6 initial consultation with the FERC and all the
7 stakeholders ahead of time.

8 CHAIRMAN WOOD: Finally, for me a global
9 question in looking at Track A, the traditional
10 process. Before we embark on changing something, I
11 guess it would help for me to understand from each of
12 you because I think you represent -- and I appreciate
13 the staff putting together a nice, varied panel --
14 people who have lived with the old world.

15 Other than it takes long, it costs a lot of
16 time, it may not result in an optimal outcome, are
17 those just management issues on our part that we could
18 improve with the traditional process, or is it really
19 just such a vestige of an inefficient system that we
20 really do need to move to something along the Track C
21 method?

22 MR. MASCOLO: I would suggest that some of the
23 parts of the traditional process are unnecessary. We
24 live with them, it works, we are working it today, and
25 it is a way to get through the system. It is not
26 something that if the Commission decided, "No, we are

1 not going to change it, we are just going to leave it
2 the way it is," well, that's fine. We will continue on
3 going through that process, and it is going to end up
4 with decent results.

5 We just think that there are greater
6 efficiencies. I would agree that it is more of a
7 management or an administration of the process that can
8 make it a little less costly and a little bit more
9 efficient.

10 I think the more detailed problems are after
11 the license application is filed and in that process
12 where the Commission undertakes its NEPA analysis some
13 of the changes that you have heard here would require
14 more than just management changes; they would require
15 regulations that restructure how that process is
16 achieved after the license application is filed. Part
17 of it may entail doing things differently up front.

18 MR. SULOWAY: It is largely management issues.

19 MS. GEDDINGS: From a state perspective, I
20 would say it is largely management, but again I think
21 the process as it stands now would need to be modified
22 to make it work for the states more appropriately, to
23 allow us to be involved early on. I don't see that the
24 process as it is now with just management changes would
25 address all of the concerns that we would have.

26 CHAIRMAN WOOD: Rheta, have you all in

1 South Carolina been involved any in the ALP process?
2 Are you familiar enough to speak, if that has addressed
3 any of the--? Let me ask Nino and John the same before
4 I move on. Has the ALP been an improvement over the
5 Track A process, the traditional process, with regard
6 to some of these management issues or the up-front type
7 issues I think that were attempted to be a goal of ALP?
8 I don't know.

9 MR. SULOWAY: The short answer is yes. My
10 experience, though I have been doing this for a long
11 time on relicensing though, is fairly limited. I had a
12 rather unusual project. We actually started an ALP
13 before there were ALP regulations.

14 Quite frankly, we are very happy with the way
15 it has turned out. In that sense, I think we have
16 gained a lot of benefits out of using an ALP, but again
17 that was because of the characteristics, if you will,
18 of the project that I was working with.

19 CHAIRMAN WOOD: Yes, we are going down the
20 line.

21 MS. GEDDINGS: Because of our involvement and
22 when we are involved, I don't know the specifics of
23 ALP, I would say, as far as whether we have had any
24 projects that have gone through that process. We have
25 had several licensees that have -- we are starting to
26 gear up, as in many states, for a lot of relicensing

1 issues -- come to us early in the process to try to
2 work out these agreements ahead of time, long before
3 relicensing was really on the table. That is certainly
4 helping to alleviate a lot of the concerns. I would
5 envision that the ALP process would help, if we were to
6 get to that stage.

7 CHAIRMAN WOOD: Richard and then Don.

8 MR. ROOS-COLLINS: The traditional process
9 does work with proactive management by the Commission,
10 the licensee and the stakeholders. The class of '93
11 really demonstrates that potential. On the other hand,
12 this proceeding is about raising the minimum. The
13 minimum permitted by the traditional process should be
14 unacceptable today.

15 Specifically, it allows the licensee and other
16 stakeholders to go forward to the filing of an
17 application with meet and confer, exchange of paper
18 pleadings. In fact, it really permits the licensee to
19 go forward on the basis of meet and confer with the
20 resource agencies.

21 Respectfully, I think that your innovation
22 with the alternative licensing process demonstrates
23 that we should do better than that as a minimum in each
24 proceeding. We recommend raising the floor; although,
25 we also agree with the comments that John and Nino
26 made, that you should take the best features from the

1 traditional process and integrate it into your new
2 process.

3 MR. SAMPSON: I would concur with Richard in
4 terms of the traditional process. Actually, one of our
5 best results in terms of protecting fish, again in the
6 Mid-Columbia, was when we had a judge oversee the
7 settlement agreement who understood the law and
8 understood what was going on, who actually made sure
9 that we sat down as tribes and resource agencies and
10 applicant in a room to get this thing settled. That
11 worked. Unfortunately, that hasn't been the case for
12 some time.

13 Regarding the alternative, we have been
14 involved in a couple of areas in the Snake and in
15 Mid-Columbia where we spent probably easily two years
16 not knowing who was in charge, who would ultimately
17 make any decisions and the applicant actually walking
18 away saying, "Well, I'm going to go back into this
19 traditional process."

20 I think that has created a lot of frustration
21 in terms of trying to find some settlement and some
22 agreements in terms of that license application. Now
23 all of a sudden we are three years behind and we are
24 probably going to be facing litigation on those types
25 of issues.

26 I think what we propose, what has been

1 proposed by the IHC and the NRG, is we combine those
2 into a process where we all can add to and we are clear
3 what the rules are and what the procedures are and the
4 time frames. I know one of the discussions was the
5 time frames. We lay out those time frames,
6 particularly with dispute resolution, and then we have
7 to meet those.

8 I think that we do need to move forward with
9 this new and improved version, Mr. Chairman and members
10 of the Commission. I think it is very timely now.
11 Again, our tribes are prepared to help in refining that
12 further.

13 Lastly, Mr. Chairman and members of the
14 Commission, again the important message that I want to
15 bring to you today is that it is important that the
16 Commission become aware of the issues that the tribes
17 are dealing with across the country. We are available
18 as resources to you and invite you to come to the
19 Columbia River at anytime so that we can share some of
20 the information with you.

21 Thank you.

22 MR. MASCOLO: Chairman Wood, excuse me. I
23 just wanted to throw in my two cents worth on the ALP
24 process because, although we are currently using it on
25 a few projects, we have made the decision not to use it
26 on a few others because we found that at least for

1 smaller projects it can be very unwieldy and
2 unworkable.

3 It tends to cost quite a bit, especially up
4 front, and for at least some of the smaller projects we
5 have decided not to use it. I think how those projects
6 have moved along, we believe that it is the right
7 decision to have used the traditional process instead
8 of the ALP. It really does depend. If the Commission
9 was seriously considering removing the traditional and
10 just going with an ALP, it is going to cause some
11 difficulty for licensees who have small projects that
12 are marginally economic to begin with.

13 CHAIRMAN WOOD: If you had his B, C and D
14 around, does that solve it? You would just use the B?

15 MR. SAMPSON: Yes.

16 CHAIRMAN WOOD: Colleagues?

17 MR. RAPPOPORT: Thank you, Chairman. I don't
18 have a question, but I did want to thank you again for
19 inviting me to participate today. I appreciate the
20 panel discussion. I thought it was informative for me.

21 I am going to not be able to attend the
22 afternoon session, but I did want to make sure I
23 introduced Catherine Conant from the National Marine
24 Fishery Service who is sitting behind me.
25 Craig O'Connor, the deputy general counsel at NOAA is
26 also behind me. He may be returning in the afternoon;

1 we are not sure. We also have Carrie Griffin from the
2 National Marine Fishery Service. To that extent, we
3 will still be represented here this afternoon.

4 Thanks.

5 CHAIRMAN WOOD: All right. Thanks, Sloan.

6 COMMISSIONER MASSEY: Just a couple of brief
7 things. The point made early by John and then echoed
8 by Richard and I think later by Nino on NEPA and the
9 ex parte provisions it is I think important to
10 understand that FERC is unique in the way it does NEPA
11 now using it as a decision process instead of simply a
12 document that provides information to help inform a
13 decision.

14 So far as I know, every executive department,
15 agency, does it differently. A NEPA document is an
16 analytic document, an informative document, a
17 disclosure document. The decisions are made
18 separately. That is extremely important because if you
19 have separation, then, presumably, you don't have an
20 ex parte problem in participating in the NEPA process.

21 CHAIRMAN WOOD: Our folks here, what has been
22 the history on that?

23 MR. ROBINSON: Well, I am not sure that we are
24 unique in that regard. I think what Bill is referring
25 to is we don't typically do a -- what is the document
26 that is produced after an EIS?

1 COMMISSIONER MASSEY: A record of decision.

2 MR. ROBINSON: A record of decision. That we
3 have always considered to be the Commission's order,
4 was the record of decision. What we do, and I think
5 almost every federal agency does and is required to do
6 by the CEQ regulations, is try to identify the
7 preferred alternative.

8 Now, for a hydro project, that includes things
9 like what should the minimum flow be below that
10 project, so we get very specific on how a project
11 should be operated in a relicensing. That goes to the
12 kinds of decisions and mitigations that you have heard
13 here.

14 People want to make sure there is not an undue
15 influence in developing those alternatives which NEPA
16 requires and the CEQ requires by a certain segment of
17 the parties that are part of our proceeding. That is
18 kind of the tension that we get into with our NEPA
19 documents. Trying to do what the CEQ says, preserve
20 the Commission's ability to make the final decision
21 with their order, and yet involve people in developing
22 those alternatives as well, it is a bit of a high-wire
23 act.

24 MR. BARTZ: Thank you, Mr. Chair.

25 A couple of questions, if I may. As an old
26 legislator, I used to chair committees and deal with

1 executive branch agencies, and I guess I am suffering
2 from withdrawal syndromes here without asking a couple
3 of questions. A question for Mr. Suloway, if I may.

4 I would like to go back and revisit one of
5 your rationales in regard to the four: the A, B, C, D
6 tracks. I think if I recall correctly, you talked
7 about the fact that if you went to one track or some
8 sort of new track, you would have folks in the process
9 right now that would have to move over to that track
10 and it would create some problems in regard to they had
11 already started the licensure process?

12 I believe that was the rationale you used; and
13 if not, correct me because the thing that I wanted to
14 make a point on is from a perspective of refinement.
15 At least in my experience in state government, you
16 could certainly run a two-track system until all
17 licenses or licensures in the door were through that
18 process, and then move directly over into the new
19 process.

20 MR. SULOWAY: At first, I didn't understand
21 your question, but now I do. Yes, one of our concerns
22 is that the traditional licensing process, Track A and
23 the ALP, Track B, be retained because we are concerned.
24 We have licensees now that are in those processes, and
25 we wouldn't want them caught in the transition period
26 of having to maybe move backward or make adjustments

1 that they were not comfortable with, with the new
2 process.

3 I agree with you it is possible that you could
4 actually run a couple of different tracks at once. You
5 could say that, you know, for all of the licensing
6 proceedings that started at a certain date relative to
7 this rulemaking, that they would continue doing it
8 exactly the way they were.

9 MR. BARTZ: Or jump into the new track, if
10 they so desired?

11 MR. SULOWAY: If they so desired, and I would
12 hope that it would be the applicant's decision to do
13 that.

14 MR. BARTZ: Okay. That is all I --

15 MR. SULOWAY: That would alleviate part of the
16 concern. But as Nino expressed, there are some folks
17 that really are uncomfortable with using something
18 different than the traditional licensing process. They
19 feel that the resources that are required to do an ALP
20 or a variation on the ALP such as the NRG or the IHC
21 just would be more than what their resources could
22 bear.

23 MR. BARTZ: The second question, if I may, and
24 I wish to have an answer from both yourself and
25 Mr. Roos-Collins. Mr. Roos-Collins brought up the
26 issue, if I recall correctly, of the mandate that there

1 be a settlement, a mandatory settlement I think might
2 have been the word or a presumption of settlement or
3 something in regard to these issues.

4 I think you stated something to the extent
5 that perhaps the reason that some people would oppose
6 this issue or this particular provision would be the
7 issue of a heavy-handed federal government. Is that a
8 correct interpretation of how talked about the 20
9 percent, Richard, maybe?

10 MR. ROOS-COLLINS: I suggested there should be
11 a presumption in favor of settlement and a mandate that
12 the licensee and stakeholders price out on that
13 negotiation. In other words, they try, and if they are
14 successful, they go forward to settlement; and if they
15 don't, they explain that to the Commission.

16 MR. BARTZ: I think one of the reasons that
17 you said that this may be an issue of disagreement is
18 that some may view it as the overindulgent, overbearing
19 federal government in the process?

20 MR. ROOS-COLLINS: Yes, and also giving too
21 much leverage to other stakeholders. That is the fear.

22 MR. BARTZ: Okay. Couldn't that be
23 accommodated or tempered in some respect with some sort
24 of rebuttable presumption or proof of where those
25 government agencies would have to go in order to come
26 up with that settlement? Or, what we used to do in the

1 state of Iowa when we had these types of issues we
2 would say, "If not settled by a certain date, it is
3 deemed settled," and definitely raise the stake from
4 the perspective of evening the playing field in regard
5 to the federal government agency. I think I got a
6 smile out of that one.

7 (Laughter.)

8 COMMISSIONER MEAD BROWNELL: Yes.

9 MR. SULOWAY: Could I ask a question back?

10 MR. BARTZ: Certainly.

11 MR. ROOS-COLLINS: Deemed settled in what
12 form? Whose last offer would be deemed the settlement?

13 MR. BARTZ: In the case of, like, permitting,
14 in the case of permitting with the Department of
15 Natural Resources. I mean, the permit was deemed
16 issued period, if certain accommodations couldn't be
17 made before that certain time frame. Now, maybe that
18 is novel in the federal government, but I am new enough
19 yet that I guess it is a question I had to ask. I will
20 leave it there.

21 MR. ROOS-COLLINS: I think that goes too far.

22 (Laughter.)

23 MR. BARTZ: Okay. Thank you, Mr. Chair.

24 MR. ROOS-COLLINS: But if I may, if I may?

25 You have heard --

26 MR. SULOWAY: Can I respond to that one?

1 MR. SULOWAY: But I haven't finished my
2 answer.

3 MR. SULOWAY: Oh, okay, sorry.

4 MR. ROOS-COLLINS: With respect to settlement,
5 with respect to alternative licensing processes, a
6 specific form of settlement negotiation, with respect
7 to cumulative impacts and population dynamics you have
8 heard a fear, a risk that things will drag on, costs
9 will be too much.

10 My response is right, let's design a rule that
11 manages that risk. When the process plan is submitted,
12 the Commission looks at it, and if it proposes ten
13 years, the Commission says, "Come back again." If it
14 proposes seven years, you say, "Come back again."

15 Whatever innovations may occur, either in
16 settlement negotiation or in the substantive analysis
17 that is done, those innovations occur on the clock. As
18 long as that clock is in the process proposal, which
19 the Commission accepts, I think we have managed the
20 risk.

21 MR. SAMPSON: Mr. Chairman, I just wanted to
22 respond to Mr. Bartz's comment. You know, one of the
23 things that our tribes looked to federal agencies as
24 well as FERC for is that when we are beginning to scope
25 or identify studies that are necessary to address the
26 impacts that may occur to tribal trust resources.

1 When we do the impact analysis in NEPA
2 documents, those are very critical analyses that we ask
3 federal agencies to assess what are the impacts to
4 tribal trust resources.

5 If I am in a fiduciary responsibility to the
6 tribe to make sure that their resources are protected
7 for the long-term beyond perhaps even 50 years, you
8 need to be able to understand how those affected
9 tribes, you need to be able to understand what that
10 fiduciary standard might be. I think that is a very
11 important aspect of your analysis.

12 Oftentimes, if we said, "Hey, at this time if
13 things are settled, that is the way it is," well, the
14 easiest game to play is just draw this thing out
15 forever, and then whoever is on top wins. In this
16 case, there is a particular standard that we are asking
17 as tribal governments and as federal agencies who hold
18 a trust responsibility to us to follow up on.

19 I think that is why, again, the study design
20 is important, early involvement by FERC and other
21 federal agencies is important and the NEPA analysis is
22 important. Now, how those decisions are made, we will
23 then go to each agency and say, "How are you going to
24 meet your individual obligation as a trustee to our
25 tribe with the resources that you are authorized to
26 oversee?" I just wanted to explain that from our

1 perspective.

2 Thank you.

3 MR. SULOWAY: Okay. Now I will answer the

4 question. Richard, I love settlement negotiations.

5 You know that. We do it with you. However, to mandate

6 that every project has to try settlement negotiations

7 would be a huge mistake, because in settlement

8 negotiations one of the things that everybody agrees on

9 is we want to be careful about costs and we want to be

10 careful about time.

11 The average settlement negotiation, formal

12 settlement negotiation, is 18 months, okay, and the

13 amount of resources that are required to do that are

14 tremendous because it is my time. I am negotiating

15 directly with Richard. It is two guys behind me that

16 are providing me the information to make sure I don't

17 screw up. There are 50 guys behind them that are doing

18 the studies to provide them the information that they

19 can break down that I can use.

20 For a small project, that is a megawatt. To

21 mandate that they must do settlement negotiations is

22 just too much of a requirement from a time-and-cost

23 point of view. I just don't think it is workable.

24 That being said, I strongly believe in the use

25 of settlement negotiations in a lot of projects. I

26 just don't think the one-size-fits-all is a good idea.

1 Richard, some folks would use it as leverage. They
2 would say, you know, "If you don't give me this study,
3 then I am not going to continue this settlement
4 negotiation with you." I know that would be in the
5 absolute minority of cases, but there would be some
6 cases of that. Again, I will say all licensees are not
7 perfect; we use leverage on our side, too.

8 COMMISSIONER MEAD BROWNELL: I am not going to
9 get in the way of lunch. I have learned that that is a
10 way to lose your popularity real fast. I am just going
11 to make two comments. Actually, Merlin, in
12 Pennsylvania, when I was on the Commission, we said in
13 our electric restructuring cases, "Settle it or we will
14 do it for you." The fear of having five commissioners
15 decide the future made everybody settle. It worked
16 pretty well.

17 Having said that, I appreciate that
18 settlements are very difficult and time consuming, but
19 at the Commission I think we have expressed a very
20 strong preference for settlement and a willingness to
21 offer whatever resources; we send Rick out and our
22 staff out to get that done.

23 One comment I would like to make and I really
24 hear a lot of consensus actually as well as a lot of
25 good ideas. If, indeed, we are to keep the traditional
26 approach, I think I heard everybody on the panel say it

1 really doesn't work and it needs some work. I would
2 hope that in everybody's comments they are going to put
3 some effort into saying, "Okay, here is what you can do
4 to make it better."

5 I think we all agree that you talk about
6 resources and opportunities for delay and
7 inefficiencies, just not acceptable in this Commission
8 and in this world. I would just encourage people to
9 focus on that. Thank you, I think we are making great
10 progress.

11 CHAIRMAN WOOD: I just want to panel, and say
12 you all kicked it off to a good start. You raised the
13 bar for the afternoon crowd. Everybody get well
14 nourished at lunch.

15 MR. MILES: Come back at one o'clock?

16 CHAIRMAN WOOD: One o'clock sounds good.

17 (Whereupon, at 12:00 p.m., a luncheon recess
18 was taken, to reconvene at 1:00 p.m., this same place.)

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1 AFTERNOON SESSION

2 (1:10 P.M.)

3 MR. MILES: Let me make two quick
4 observations. I am sorry we didn't give the audience
5 an opportunity to provide some comment before noon. We
6 are going to do so after lunch. Also, the other
7 adjustment we are going to make is to squeeze the time
8 a little bit, because there are some members of the
9 audience and on the panel that have flights around
10 5:00, 5:15, so they have asked if we could stick to the
11 schedule of 3:45 with the Chairman making closing
12 remarks, so we are going to try to do that, too. That
13 is going to depend on the cooperation of the panelists.

14 Well, let's go ahead and begin the second
15 panel. As with the first panel, we have individuals
16 that are very knowledgeable in the field. I suspect we
17 are going to have a very engaging conversation. This
18 panel is titled, "Integrating Processes." The
19 questions that we have asked them to address are: How
20 can a new licensing process improve the timing of
21 recommendations and mandatory conditions? How might a
22 new licensing process better accommodate state
23 certification processes? How can a new licensing
24 process accommodate the interests of Indian Tribes?

25 With that, I am going to start off with
26 Andrew Fahlund, who is the director of Dam Programs for

1 American Rivers.

2 Andrew?

3 IV. INTEGRATING PROCESSES

4 AMERICAN RIVERS

5 MR. FAHLUND: Thanks a lot, Rick.

6 Thank you for inviting me to speak to you
7 today. I am Andrew Fahlund with the American Rivers.
8 It is funny to introduce myself because I think I know
9 everybody at the table, except for Mr. Bartz, so I
10 guess I will address my introduction to you.

11 (Laughter.)

12 MR. FAHLUND: I am with American Rivers here
13 in Washington, D.C. We are a national conservation
14 organization with membership around the country. I am
15 also the chair of the Hydropower Reform Coalition. We
16 have about 110 organizations that represent
17 conservation, recreation interests throughout the
18 country involved in about 75 percent of the license
19 proceedings before FERC today.

20 I am pleased to have the opportunity to talk
21 to you about these process reforms that are being
22 discussed here at the Commission. I and American
23 Rivers have been involved in discussions like these for
24 many years now. We have very strong interest in the
25 outcome of this proceeding, and I think that this is a
26 culmination of many years of effort. I am very hopeful

1 that we are approaching, if not a finish line, at least
2 a weigh station where we can take a breath and see
3 where we are at.

4 We have three basic interests in this
5 rulemaking, and those really have been already stated
6 by others today. The first really is improving
7 environmental decisions and decision making to provide
8 greater certainty over the term of a 30- to 50-year
9 license.

10 As Julie I think said first today, the idea
11 here is not necessarily better process, but really
12 better outcomes. Hopefully, those outcomes will stem
13 from a better process. Second is really something that
14 Richard touched on, and that is, enhancing public
15 participation in both quantity, quality and
16 accessibility.

17 What we are interested in is trying to improve
18 upon the minimum that is currently afforded in the
19 relicensing process. The traditional process under its
20 most strict definitions is fairly limited when it comes
21 to levels of public participation as well as certain
22 kinds of environmental analysis.

23 The third basic interest that we have is
24 reducing complexity and improving transparency, and
25 this I think was stated by Tim Welch pretty effectively
26 earlier. Well, I want to take the opportunity to say

1 thank you to NHA for putting forth a proposal today.

2 I think that it is obviously a great deal of
3 work to put that together, and I think it is something
4 that is useful in terms of the next step from at least
5 the NRG process. Obviously, the IHC already had their
6 list of boxes.

7 I guess I do want to emphasize I think that we
8 need to do some more work on it. I am committed to
9 putting forth the effort to try to make improvements on
10 their boxes. Even though it appears to start to mesh
11 things together, I still see a few too many boxes wide,
12 if you will.

13 With that, the question before us for this
14 panel is, How can a new licensing process improve the
15 timing of recommendations and mandatory conditions?
16 While I believe there are a number of ways that a new
17 licensing process can improve timing, the question in
18 some ways assumes that the timing of those
19 recommendations and conditions is the root cause of
20 delays at the exclusion of others. I want to suggest
21 that might not be the case.

22 Instead, I would rather focus on the role of
23 each party and its contribution to delay an
24 inefficiency. It is just as important for improving
25 the timing of agencies as it is improving the timing of
26 licensees, FERC-interested stakeholders and really

1 everyone involved.

2 While it is also important to improve timing
3 and efficiency, those shouldn't be the sole goal of
4 this rulemaking. I don't believe that they are. I
5 don't believe anybody is suggesting that they are, but
6 that has certainly been the bulk of the conversation
7 here to this point.

8 As we have stated time and again, the
9 interests most natively affected by delays in
10 relicensing I would argue are environmental. When a
11 license expires, it receives annual licenses and those
12 projects maintain status quo terms and conditions.

13 However, while we are eager to avoid
14 unnecessary delays and I believe that most of the
15 industry is as well, I think what is important is to
16 make sure that we are not rushing through processes
17 simply to get to the end, forsaking what is in fact a
18 very deliberate and careful examination of a project, a
19 resource and an energy source.

20 I mean, all of those factors, whether you are
21 talking about the environmental or whether you are
22 talking about environmental considerations, we are
23 better off getting it right for a 30- to 50-year period
24 that is at stake, rather than rushing through just to
25 say, "Well, we got it done." I think that the more we
26 rush things, the more likely we are going to stumble

1 and to back in and wind up in court.

2 I think that the key is complete and timely
3 information, and that has been said over and over again
4 today. I think that what is really important to
5 underscore is the complete and timely information that
6 is necessary for each decisionmaker coupled with
7 cooperation between those decisionmakers.

8 A new process could certainly improve the
9 timing of mandatory conditions and FERC actions, if it
10 results in all of the necessary studies being
11 requested, initiated and completed in a timely manner.

12 Criticisms abound on both sides.

13 Some license applicants fail to undertake
14 studies sometimes deliberately to delay a final
15 decision or to avoid developing information that might
16 be used "against them," or simply because they disagree
17 with the need for such study, and some of those
18 disagreements may be very valid.

19 Likewise, some agencies or other parties do
20 not request necessary studies in a timely manner or
21 fail to link their requests to goals and objectives or
22 project nexus. In each case, the result is that these
23 disagreements ripple through the licensing proceeding
24 and affect each decision point thereafter.

25 Finally, FERC has in the past taken a position
26 that applicants need only provide information that is

1 necessary for FERC's own decisions, and not necessarily
2 the needs of other agencies. I believe that is
3 changing to a large degree, but we believe that an
4 integrated process, outlined in the NRG and IHC
5 documents, will ensure that studies that are shown to
6 be necessary and requested in a timely manner are
7 completed early in the process and prevent unnecessary
8 delays and additional information requests.

9 I am going to skip over going over critical
10 elements of the IHC and NRG proposals. I had thought
11 that I might provide you with that laundry list, but I
12 think I will leave that to my written comments.

13 Suffice it to say that I think that
14 integration is possible through elements of the NRG and
15 IHC processes, and that things like MOU's, scheduling,
16 I think things like early FERC involvement, development
17 of NEPA scoping in the initial stages will go a long
18 way toward improving the process.

19 When I look at amending the hydrolicensing
20 process and trying to improve it, the way I look at it
21 is we are focusing on that 20 percent. We are looking
22 at the bad actors on both sides of the equation. There
23 aren't actually two, there are many sides of this
24 equation.

25 We are looking at sort of: How do we fix the
26 "bad apples" and make it easier for the folks who

1 really want to work together and be solution-oriented,
2 be problem solvers, how do we get them working forward
3 together?

4 The two other questions I am going to largely
5 defer to my other panelists, but I want to at least
6 mention a couple of things with respect to the Clean
7 Water Act. Given the scope and relevance of delegated
8 state authority under the Clean Water Act, this is a
9 really vitally important question.

10 Over the past several years, it has been a
11 source of a great deal of controversy, and in my mind
12 somewhat unnecessary. This past spring, the Commission
13 undertook an unprecedented effort to reach out to the
14 states and begin to work through ways to improve the
15 coordination between hydropower licensing and state
16 water quality certification.

17 I would say that the best place to seek wisdom
18 in terms of ways to improve upon the licensing process
19 to better coordinate that with certification processes
20 is to look at the transcripts of those proceedings.
21 There is a wealth of information in terms of what the
22 states had to offer in terms of comments.

23 It is uncanny that you will see as you walk
24 through those transcripts very similar recommendations
25 throughout, each time in a different region of the
26 country, and I don't believe they were coordinating

1 with one another in this effort anyway. They were
2 saying largely the same things, and so I really urge
3 Commission staff and the commissioners to look in that
4 direction.

5 Finally, how can a new licensing process
6 accommodate the interest of tribes? The interest of
7 Indian Tribes are broad and far reaching, and American
8 Rivers and the Hydropower Reform Coalition won't
9 pretend to understand them all or even speak for tribes
10 on how our process can best meet them. For the most
11 part, we defer to the tribes on this question.

12 We hope that the elements of the NRG proposal
13 and IHC proposal do work for their benefit. I believe
14 that they can and should, at least that was the intent
15 in their design. I do hope that we can pay special
16 attention to the interest of Indian Nations. They are
17 somewhat unique in this process, and I think that we
18 owe it to them to make a concerted effort to improve
19 things for their benefit.

20 In conclusion, we all have our own wish list
21 and our own unique pet peeves with the current
22 licensing process. Given the potential for contention
23 and controversy around this topic and the limited time
24 available to get the job done, we urge the Commission
25 to stay focused on the fundamental question of how to
26 improve the analytical process in FERC proceedings to

1 better understand and mitigate the ongoing impacts of
2 hydropower projects.

3 Multiple jurisdictions involved in relicensing
4 while inelegant is a reflection of the
5 multijurisdictional nature of rivers themselves. The
6 key to our success here will be to embrace that fact
7 and learn to cooperate in an effort to reach informed
8 decisions that, in fact, meet the public interest.

9 MR. MILES: Thank you, Andrew.

10 Our next speaker will be Joe Hovenkotter,
11 attorney, Confederated Salish-Kootenai Tribes.

12 CONFEDERATED SALISH-KOOTENAI TRIBES

13 MR. HOVENKOTTER: Thank you. Thank you,
14 Mr. Chairman, and thank you, Commissioners. My name is
15 Joe Hovenkotter and I am a staff attorney for the
16 Confederated Salish and Kootenai tribes of the Flathead
17 Nation.

18 Unlike Andrew, I don't know anyone at the
19 table this morning, so I will direct my comments to the
20 entire group, but I bring that up because I think its
21 notable. As far as I understand with my client, this
22 is the first time that they have been invited to speak
23 directly to the Commission and have been involved in
24 hydropower licensing proceedings since the 1930s.

25 They are quite appreciative of the fact that
26 you invited them today, and they believe that this is

1 indicative of a change in operations in the FERC that
2 provides the tribes more of a government-to-government
3 recognition, and they are appreciative of that. I
4 express the gratitude of the Chairman of the Tribal
5 Council, Fred Matt, and also the Tribal Council of the
6 Confederated Salish-Kootenai Tribes to you for that
7 fact.

8 If I were home on the Flathead today, I would
9 be expected to start, particularly if I were talking to
10 elders I would be expected to start, to tell a little
11 bit about myself, particularly who my grandparents were
12 and parents so that you could have some context from
13 where I speak.

14 Rather than regal you with my immigrant story,
15 what I will do simply is try to point out that I am
16 neither Indian nor a tribal member, and so it might be
17 important to recognize as you go forward today that I
18 am speaking as the representative of the tribes, but I
19 am not tribal myself.

20 In addition to that, it may be important to
21 note that I might be a good witness for you in one
22 respect in that, although I am not expert in hydropower
23 issues, I am a government bureaucrat for tribes and
24 work every day on trying to help them identify how to
25 best apply their resources to deal with decision-making
26 questions that are presented to them.

1 In hydropower licensing processes, I would be
2 probably very representative of the type of person that
3 would be asked to represent tribes and try to keep up
4 with the larger governments on the outside, and so I
5 think I very well understand the burdens that licensing
6 presents to tribes and will try address that to you
7 today.

8 Tribes have many interests and
9 responsibilities regarding hydropower projects. Tribal
10 people who practice their traditional ways believe that
11 they have a cultural and spiritual obligation to their
12 ancestors and descendants, to utilize and protect their
13 traditional places on rivers in order to assure that
14 the tribe will survive, and to assure that the tribe's
15 usual and accustomed places for practicing their
16 traditional lifeways will be preserved.

17 Tribal governments are domestic sovereign
18 nations that either retain or have been delegated
19 significant governmental power relevant to hydropower
20 licensing including trusteeship for treaty reserve,
21 fish and wildlife resources throughout tribal
22 territory.

23 Landownership of the beds and banks of
24 riverine and lacustrine project reservoirs in Indian
25 country and the regulatory authority for establishing
26 and enforcing water quality standards for interstate

1 waters in Indian country. Tribal governmental also are
2 or have chartered business entities that have the right
3 to become licensees for hydropower projects.

4 In summary, tribes are multidimensional with
5 regard to their relationship with the Commission. In
6 addition to the unique traditional interests of tribal
7 members as citizens, tribes also are sovereign
8 governments which retain significant licensee,
9 landowner, natural resource trustee, and environmental
10 regulatory authorities.

11 In proceeding to revise FERC hydro licensing
12 regulations, I recommend that you apply the American
13 Indian policy that your parent agency, the Department
14 of Interior, has already established. It has seven
15 guiding principles, and they are listed in order as
16 such.

17 First, to commit to a government-to-government
18 relationship between the agency and the tribes.

19 Second, to recognize the U.S. trust responsibility to
20 tribes. Third, to consult with tribes regarding tribal
21 rights and concerns prior to taking action or issuing
22 decisions.

23 Fourth, to consult with tribes regarding
24 impacts of proposed agency actions on cultural
25 resources and spiritual/religious concerns so as to
26 avoid unnecessary interference with religious practice.

1 Fifth, to identify and seek to remove impediments to
2 working directly and effectively with tribal
3 governments on agency programs.

4 Sixth, to work with other federal and state
5 agencies to clarify the roles, responsibilities and
6 relationships as they relate to tribal matters.

7 Seventh and finally, to incorporate and
8 institutionalize this policy into the agency's
9 long-term planning and management.

10 I believe these seven principles are quite
11 relevant to FERC rulemaking, and they provide a
12 fundamental policy which would assure that you honor
13 the agreements that the U.S. entered into with tribes
14 by treaties, and it would also concomitantly uphold the
15 U.S. Constitution which states that treaties are the
16 supreme law of the land.

17 Specifically with regard to revising
18 hydropower licensing procedures, much of what I would
19 have to say would probably echo Mr. Sampson today, so I
20 will try not to be too redundant of that part of the
21 presentation, but I would offer the following comments.

22 First, I concur with the common elements of
23 the IHC and NRG proposals that provides for FERC
24 involvement early, but rather than embellish that,
25 Mr. Sampson did a good job of addressing that this
26 morning so I will just leave it at that.

1 Second, I strongly concur with the common
2 theme of the IHC and NRG proposals to integrate the
3 licensing process with other natural resource, cultural
4 resource and environmental review and permit
5 procedures, particularly with NEPA. Such an integrated
6 process is more compatible with the tribal cultural
7 view of the world, and is more compatible with the
8 unitary nature of river systems.

9 I particularly identify NEPA because there is
10 a prevalent federal presence in Indian country and NEPA
11 happens every day. Tribes understand the NEPA process
12 much better than they understand the FERC process. It
13 is one that they are comfortable with and one that they
14 understand milestones in and they understand production
15 requirements for.

16 In working to integrate, the more that the
17 FERC can integrate its process, NEPA process, the
18 better understood and more comfortable representatives
19 in Indian country will be. An integrated process would
20 also more effectively and consistently incorporate
21 tribal concerns by having tribal input shared early and
22 commonly amongst all of the government agencies
23 involved.

24 An integrated process should also lessen the
25 burden on tribal governments whose resources are
26 already thinly spread in attempting to accomplish all

1 of their governmental activities without having to
2 repeatedly address potential hydro impacts to multiple
3 agencies in a burdensome process.

4 Furthermore, such an integrated process would
5 also minimize the potential for conflict between
6 authorities acting pursuant to the Federal Power Act,
7 the Clean Water Act, the Endangered Species Act and the
8 various treaties that tribes have.

9 I also concur with the common theme of the IHC
10 and NRG proposals to provide for study dispute
11 resolution process regarding the scope and methods for
12 licensing studies; however, if such a dispute
13 resolution process is developed it needs to provide for
14 direct tribal representation.

15 I concur with the concept that the NRG
16 proposal forwards that requires for federal agencies to
17 develop a memorandum of agreement between themselves,
18 or between the FERC and the various agencies, regarding
19 the licensing process.

20 Such guidance would provide tribes with
21 predictability and structure for review and decision
22 making that it is now lacking, particularly between the
23 FERC and the Department of Interior. However, I would
24 note that if such MOA's were to be developed, they
25 should be done in a full and open MOA negotiation that
26 would assure tribal concerns are appropriately

1 addressed.

2 I am intrigued by the specific MOU concept
3 proposed by the NRG for MOU's for specific projects,
4 but I am concerned by that proposal because it creates
5 additional process and the potential for tribes to be
6 left out. I strongly encourage the Commission to
7 consider establishing an Office of Indian Affairs
8 within the FERC.

9 Tribes traditionally are lost on approaching
10 the FERC not knowing who to approach or how to get
11 guidance on how to participate in FERC decision making.
12 I think an Office of Indian Affairs that particularly
13 worked directly and closely with the Department of the
14 Interior Bureau of Indian Affairs would be a great help
15 in directing tribes on how to participate in a timely
16 manner.

17 Finally, I encourage the Commission to
18 consider expanding the integrated concept to enlarge
19 its scope over time, to gradually reorganize and
20 reschedule the relicensing provision or the relicensing
21 processes so that it would happen on a watershed basis,
22 so as to better provide for tribes to focus their
23 limited resources and provide for integration on a much
24 broader scale.

25 Again, I thank you for the opportunity to come
26 and speak today on behalf of tribes. I will provide

1 written comments to you after hearing what the other
2 tribes to have to say in your public forum to be held
3 in Tacoma on November 21.

4 Thank you, Joe.

5 Our next speaker or panelist is John Prescott.
6 He is a vice president with the Idaho Power Company.

7 IDAHO POWER COMPANY

8 MR. PRESCOTT: Thanks, Rick.

9 Mr. Chairman, Commissioners, good afternoon.

10 My name is John Prescott. I am currently employed as
11 the vice president of the power supply at Idaho Power
12 Company. Idaho Power serves about 400,000 customers in
13 Idaho and Oregon and owns and operates 17 hydroelectric
14 plants, totaling some 1,700 megawatts of electric
15 capacity.

16 Our Hell's Canyon Project consists of three
17 dams and about 1,200 megawatts and was originally
18 licensed in 1955. That one particular project supplies
19 approximately two-thirds of the electricity used by our
20 customers in a median-water year. That particular
21 project is a boundary project in that it straddles both
22 the states of Idaho and Oregon.

23 We are actively engaged in relicensing the
24 Hell's Canyon Project, since the current license
25 expires in 2005. We have been working on this
26 relicensing project for over six years, and so far we

1 have spent over \$30 million on studies for this one
2 particular project. We have issued our draft
3 application for the project in September of this year.

4 We are using the traditional relicensing
5 process for Hell's Canyon with the additional
6 collaborative effort that we committed to many, many
7 years ago by a CEO of Idaho Power Company. It has been
8 called a "hybrid process," so it is traditional with a
9 collaborative effort for settlement to the extent
10 possible up front. We are also in the process of
11 relicensing several other projects that we own and they
12 are in various stages of the process.

13 I applaud the Commission for its interest in
14 making improvements in the relicensing process.
15 Specifically, I have been asked to address the
16 integration of mandatory conditions, state
17 certifications and Native American interests. With a
18 backdrop of the stated goals of reducing time and cost
19 while continuing to protect the environment and fulfill
20 state, federal and tribal responsibilities, I will
21 address each topic.

22 First, how to better integrate mandatory
23 conditions, some suggested areas for improvement. I
24 have two areas here. You are going to hear a theme,
25 and you have heard it most of the morning. The first
26 point I have is early identification of potential

1 mandatory conditions by the agencies. This would allow
2 for very focused and meaningful studies and will
3 ultimately lead to sound science used in decision
4 making.

5 The second point would be for FERC evaluation
6 of mandatory conditions, and that evaluation would
7 include checking for reasonableness, qualitative
8 science, impacts to operations, impacts to safety and
9 also to check for conflicts with other conditions in
10 the license.

11 The second topic is how to integrate state
12 certifications and suggested areas of improvements.
13 There are three of them I have here. The first one,
14 again, is early identification of the issues to allow
15 for focus studies. The second is that it should be
16 done as a parallel process rather than sequential; in
17 other words, it shouldn't happen at the end. The third
18 suggested area for improvement would be that conditions
19 should certainly focus on project impacts and be based
20 on sound science and quality studies.

21 The final topic is the integration of Native
22 American issues. Suggested areas of improvement, I
23 have three areas here and most of them have been
24 covered by Joe and Don earlier this morning, and the
25 first one is early identification of the issues that
26 the tribes have. That will certainly provide for focus

1 studies and more productive consultation.

2 The second area for improvement deals with the
3 government-to-government consultation, that FERC should
4 step in and facilitate. The third point is that the
5 applicant, the agencies and the tribes need to adhere
6 to established time lines and milestones. I also
7 believe that in many cases tribes need additional
8 financial support to participate in the process. Many
9 of them are impoverished and don't have the skill sets
10 required.

11 You see a common theme here, and that is,
12 early identification of issues, which will lead to more
13 focused and effective studies, which will lead to
14 better decisions and those decisions will be based on
15 sound science and those quality studies.

16 Since each project presents unique challenges,
17 a choice of the most effective relicensing process must
18 be available to the applicant. A related areas that
19 requires attention is the appeals process for mandatory
20 conditions at the agencies.

21 An appeal process must be established that is
22 consistent, fair and based on facts. I was very
23 encouraged this morning when I heard Ms. Scarlett talk
24 about the efforts at Interior, and I know there are
25 other efforts in other agencies as well. I was very
26 encouraged by that.

1 The IHC and NRG proposals suggest solutions to
2 some of these issues, and I certainly applaud those
3 efforts. However, maybe a word of caution here.
4 Without careful consideration and rigorous process
5 evaluation, we may actually end up increasing the time
6 and cost to license or relicense a project without any
7 associated incremental benefit to the resource.

8 I would urge the Commission to focus not just
9 on speed to an end product, but rather a quality end
10 product. Also, please don't overlook the millions of
11 rate payers who will ultimately provide the financial
12 support for your decisions.

13 Thanks.

14 MR. MILES: Thank you, John.

15 Toby Freeman, he is the manager for hydro
16 licensing at PacifiCorp.

17 PACIFICORP

18 MR. FREEMAN: Good afternoon. As Rick says, I
19 am Toby Freeman. I work for PacifiCorp out in
20 Portland, Oregon. For the past 13 years, I have been
21 licensing hydroelectric projects.

22 For those of you not familiar with PacifiCorp,
23 we are one of the largest utilities in the West,
24 serving over 1.5 million customers in six Western
25 states. About 10 percent of PacifiCorp's generation
26 portfolio is hydro, that is about 1,100 megawatts of

1 installed capacity. PacifiCorp is the licensee of 20
2 FERC-licensed hydroelectric projects located in
3 Washington, Oregon, Idaho, California, Montana, and
4 Utah. Nearly all of these projects are in some stage
5 of relicensing.

6 I thought I would focus directly on the
7 questions you asked, just to make things a little
8 simpler. I think we have heard a lot of discussion
9 from the prior panel about the value of an integrated
10 process and its ability to improve the development and
11 timing of mandatory conditions.

12 In summary, however, because so many of the
13 requirements and associated costs ultimately embedded
14 in the new operating license are the result of
15 mandatory conditions, it is of critical importance to
16 the licensee that consideration of these conditions be
17 identified early in the process, and the process
18 designed to integrate the needs of mandatory
19 conditioning agencies with the study and analysis being
20 conducted for the license application.

21 This should be done during initial project
22 scoping. In addition, early identification of these
23 resource considerations can be addressed openly in the
24 same forum with all of the other relicensing
25 stakeholders, so resource tradeoffs are clearly
26 understood.

1 I also want to take the opportunity to echo
2 what John said about applauding the agencies for
3 working on their appeals process, and that is certainly
4 something that we support as well.

5 How might a new licensing process better
6 accommodate the state 401 certification process and/or
7 CZMA consistency determination? The state 401
8 certification agencies typically have the broadest
9 authority in the relicensing process. For example, in
10 our Louis River relicensing process in Washington
11 State, PacifiCorp is engaged in an ALP, an "alternative
12 licensing process."

13 We have completed the study and analysis phase
14 and have recently initiated settlement negotiations.
15 However, because of the way that 401's are typically
16 processed, the Washington State Department of Ecology
17 has indicated, that while they are willing to remain
18 engaged in an advisory capacity, the 401 process will
19 be conducted separately and later. Therefore, even if
20 we reach settlement with all of the other participants
21 in the process we still face the risk of an
22 inconsistent 401 certification.

23 It begs the question, What incentive do any of
24 the parties have to sign the settlement agreement? In
25 our Claymouth relicensing process staffed with the
26 California State Water Resources Control Board, they

1 have indicated already that if the data points in that
2 direction they will mandate dam removal as a condition
3 of their 401 certification. They have also sent us a
4 letter, however, expressing interest in a coordinated
5 environmental analysis.

6 One solution might be for FERC and the state
7 agencies to try working from the same playbook. FERC
8 and the 401 agency should develop agreements that will
9 allow them to jointly participate in transparent
10 scoping, issues identification, information
11 development, study design, environmental analysis, and
12 development of resource management measures. They need
13 to do this in a manner that respects their independent
14 decision-making authority, however.

15 They also need to agree on objective criteria
16 that will be used to guide decisions and resolve
17 disputes. These processes need to be integrated, if we
18 want to have any hope of reducing the time it takes to
19 relicense hydroelectric projects.

20 Again, I wish Don had gotten this question
21 directly earlier. How best can a new licensing process
22 accommodate the authorities, roles and concerns of
23 Indian tribes? One of the common situations that we as
24 licensees face is the inevitable meeting with tribal
25 counselor staff where we are asked, "Why are we talking
26 to you and where is the federal government?"

1 We only engage in government-to-government
2 consultation. A step that might help would be for
3 FERC, BIA and mandatory conditioning agency staff to
4 meet with affected tribes early on to explain the
5 relicensing process and engage in a preliminary
6 discussion of tribal issues.

7 If a tribe is uncomfortable or unwilling to
8 consult with the licensee directly, FERC staff should
9 step in to assume responsibility for consultation to
10 assure that tribal issues and interests are adequately
11 considered in the process.

12 In the spirit of integration, Section 106 of
13 the National Historic Preservation Act needs to be
14 addressed early and throughout the relicensing process.
15 Clear direction to licensees and stakeholders will
16 assure better consultation and analysis.

17 MR. MILES: Thank you, Toby.

18 Our next speaker is Polly Zehm. Polly is the
19 regional director at the Washington Department of
20 Ecology.

21 WASHINGTON DEPARTMENT OF ECOLOGY

22 MS. ZEHM: Thanks. I will get to Tony's (sic)
23 point here in just a minute after I introduce myself
24 and make a couple of opening statements.

25 I do work for Washington's environmental
26 protection agency called the Department of Ecology. We

1 have 401 authority and CZMA authority. We do a little
2 NEPA process we call "CEPA." Our sister agency,
3 Department of Fish & Wildlife, does management for fish
4 and wildlife habitat often in a co-management role with
5 tribes.

6 I will just say up front I am not going to try
7 to answer the tribal question. I don't think it is
8 appropriate for a state to do that, but tribes are
9 incredibly important partners to us in the
10 environmental protection role we play.

11 We have a government-to-government
12 relationship with them. I would just say a process
13 that doesn't work for tribes in our state is not really
14 going to work very well for our state. That is just
15 how I will cover that part of the question.

16 I want to also say that the hydropower states
17 have been working together for a decade or more now to
18 try to help improve the relicensing process. This is
19 incredibly important to us. We all have a lot of
20 hydropower projects that are a very important part of
21 the energy resource of our states, I would say,
22 especially for Washington. I think we have the most
23 kilowatts in hydro of all states.

24 We are committed to continuing to work with
25 FERC on this process, and ask that we need to be
26 considered as integral partners in this. We have 401

1 and other authorities that need to be integrated, need
2 to be respected and appreciate that FERC is coming out
3 this winter to meet with us here in just a couple of
4 weeks. We need to continue to be a high priority part
5 of the process.

6 I am going to get to Tony's (sic) point
7 because it gets to resources. It is a problem at a
8 project -- Toby, sorry -- like Louis River where
9 PacifiCorp and other parties need us at the settlement
10 negotiating table but we don't have the resources, the
11 staff resources, to participate in relicensing of that
12 project that way.

13 Part of what I am here to answer the question
14 on how can this process work, we need FERC to help us
15 get resources to the states to the other key parties to
16 participate in an up-front collaborative process. You
17 can't collaborate without collaborators. We need to
18 get the right people to those tables early in the game.
19 We want to do that. It is heartbreaking not to be able
20 to participate in Louis River the way we would like to
21 or the way PacifiCorp and other parties would like us
22 to.

23 We do have an example, soon to be two examples
24 in the state where utilities are stepping up to provide
25 the state resources through staffing to participate
26 actually for both of the state agencies, which is a

1 great integration step in and of itself. Where other
2 utilities aren't stepping up to do that, you can help
3 us because you have the authority already to do that,
4 so a big plug from me on that front.

5 I want to talk about integrated schedules.
6 Obviously the state supports having an integrated
7 schedule, start working on schedule and intensive
8 project management and process management up front.
9 Last week, a couple of Ann's staff were out in
10 Washington working at the early stages of one of our
11 projects.

12 We did a lot of kind of process mapping,
13 figured out where the key decision points and process
14 points are, a long and tedious day, but very
15 worthwhile. Part of my message there to make this work
16 we need to get your staff out to where the projects are
17 and have them intimately involved in more steps than
18 they have been involved in, in the past.

19 Study requirements and coordination, there are
20 a lot of things for utilities to spend their monies on.
21 Washington State wants utilities to be spending their
22 money on the environmental restoration and mitigation
23 and not all of it on studies, so we want that money
24 invested on focus studies that help define where the
25 restoration and mitigation efforts are really going to
26 pay off and really hit the primary issues.

1 I agree with really everything I have heard
2 today so far about regulatory agencies and other
3 parties with key interests and needs. We need to
4 identify those and get all of the cards on the table up
5 front -- it is going to be a big, ugly stack of cards
6 -- and then start the winnowing and focusing process.

7 We need to do that as efficiently as possible
8 and get the work, the scientific work, defined so that
9 it can get underway. It can take a long time, but
10 invest that money wisely. That is an important
11 investment to every party who has an interest in
12 relicensing.

13 Along with the resources to do the work, my
14 second most important point today in how can improving
15 the licensing process help make things work better, we
16 have a fundamental conflict between how you are doing
17 NEPA for these projects and how the state does CEPA for
18 these projects and how we use your NEPA work product
19 for us. This is mandated in state statute. We use the
20 environmental review process, the NEPA document and our
21 own CEPA documents, we use that to inform our
22 permitting processes and decisions.

23 My view of how NEPA is used, you know, I am
24 not a student of every project, but my view is that you
25 want to use the state permitting and other permitting
26 decisions to inform your NEPA process. We are kind of

1 in a conundrum there, and that is not a problem we are
2 going to solve today.

3 For my state and I believe many other states,
4 that is a fundamental problem. We need to work hard
5 together with FERC staff at the regional workshops and
6 probably in some other forums to get to the bottom of
7 that, because, from my perspective, we are going to not
8 be as successful as we need to be in this streamlining
9 process if we can't get some traction in solving that
10 problem.

11 I am not completely sure because this has been
12 largely federal agency discussions up to this point
13 about bringing all of the federal agencies certainly
14 together to participate in the NEPA process. I am not
15 sure what the desire is or isn't to bring states into
16 that process, but we have some similar concerns
17 certainly to the federal agencies if we are asked into
18 that process.

19 I think there is a mechanism to do it that
20 exists today. We need to not be restricted from being
21 able to be interveners later on. It is just too high
22 of a price to pay in the event that a process breaks
23 down and doesn't work.

24 Also, I want to mention a theme from this
25 morning about ex parte communication rules.
26 Collaboration, which is what we are all in the room

1 here talking about today, there is a need for a lot of
2 communication and a lot of commitment to problem
3 solving throughout the process, sometimes especially at
4 the end of the process.

5 If we can't communicate freely amongst the
6 parties about what is going on and what scheduled
7 drivers are influencing different parties, it is very
8 difficult to stay in the problem-solving mode. I think
9 we need to try to do what we can to remove obstacles
10 that exist to the ability to communicate freely amongst
11 parties throughout the process. I think those are my
12 main points. I am not sure how I am doing on time.

13 MR. MILES: Passed.

14 (Laughter.)

15 MS. ZEHM: Thanks.

16 MR. MILES: Okay. Well, thank you very much.

17 To get the ball rolling, Mr. Chairman, do you want
18 to--?

19 DISCUSSION

20 CHAIRMAN WOOD: Well, I wanted to clarify a
21 couple of things, because there was a question I asked
22 the woman from South Carolina on the first panel. If
23 the NEPA document were done back earlier in the
24 process, I think what I just heard you say was that
25 forms a kernel of some of the other things you need to
26 do to support what you want to do on the 401 decision.

1 If that were changed along the ways we were
2 discussing where it became more of an analytical
3 document to which each of us and you then attach our
4 decision based on a common set of facts and were
5 available to you earlier in the process, as it would be
6 available to all of us, is that a procedural--?

7 MS. ZEHM: As I understand this morning and
8 drew a little picture of what was described, that is a
9 help. Again, I think there is still a problem in terms
10 of we don' have to have NEPA and CEPA done for every
11 project, but we do have to have them done for projects
12 in our coastal counties, which are a whole bunch of
13 projects.

14 For those projects, we cannot issue our
15 consistency determination under Coastal Zone Management
16 or 401 certification until the final NEPA document is
17 done. The more work that is done on an analytical
18 document that describes the projects, the impacts,
19 maybe impacts even of mitigation, that certainly helps
20 move us along. It helps us to get preliminary
21 indications out to the utility and to your staff about
22 what our conditions are going to look like, which I
23 know you desperately need that information, but I think
24 we still have a tangle ultimately.

25 CHAIRMAN WOOD: Because you need a final?

26 MS. ZEHM: Because we need a final before we

1 can get our final out. I keep hitting the wall on this
2 one. It seems like we are in a contest that none of us
3 want to be in on what is the last shoe that drops.

4 CHAIRMAN WOOD: Really, under your law final
5 is the process as analyzed and as mitigated by all of
6 our conditions on that project?

7 MS. ZEHM: The final? I think the final is
8 the final, and for you the final includes the record
9 decision. If you, for example, need our final decision
10 on what the in-stream flow condition is going to be in
11 order to issue your record of decision, again, I think
12 we have got to sit down and probably get a couple of
13 our attorneys in the room and figure out if there is a
14 way through that or not, given your legal requirements
15 and our legal requirements.

16 CHAIRMAN WOOD: What you had said, the kernel
17 earlier, was yes that is at the end. But, the guts of
18 what you have got to do would or would not be based on
19 the original analysis of the project prior to
20 mitigation?

21 MS. ZEHM: The guts of what we do is based on
22 the analysis of the project. Now, for 401
23 certification in particular as we do them in our state,
24 we apply that authority very broadly; they can be very
25 encompassing. Mitigation is sometimes something that
26 becomes something that is covered in a core 401

1 condition.

2 Again, I think scheduling, a commitment to
3 scheduling and really focusing in on what the key
4 decision points and key processes are amongst us and
5 maybe especially amongst the states and FERC toward the
6 end of the process, is really going to help show us how
7 big of a scheduling problem do we have here and keep
8 the utility engaged in that.

9 CHAIRMAN WOOD: Back to the Louis River
10 issues, I missed it. Could you just crystalize it for
11 me again? you ended your discussion of that with you
12 wish you could be but you can't, and I can't remember
13 why you can't.

14 MS. ZEHM: We wish we could invest enough
15 staff resources in the Louis River process, to be at
16 the table.

17 CHAIRMAN WOOD: I get the resources.

18 MS. ZEHM: We asked the utilities if they
19 could help us with staffing. They didn't respond in
20 the affirmative, so the hard decision we had to make
21 was that we could not be at the settlement table. We
22 had to focus our limited amount of staff on actually
23 doing the 401 in a separate and parallel process. It
24 is not good government. I don't feel good about it.
25 It is simply a reality, and we are having to look at
26 every project that way.

1 CHAIRMAN WOOD: Okay. Thank you.

2 MR. MILES: In reviewing my notes about the
3 comment the panel has made, it seems to me that there
4 is one common theme. Andrew, you indicated that one of
5 the keys is complete and timely information and study
6 identification, identification of issues. Joe, you
7 mentioned early FERC involvement in identifying
8 processes early with NEPA.

9 John, you talked about, again, early
10 identification and meaningful mandatory commissions.
11 Toby, you again said early identification of issues.
12 Polly, you talked very early on in your presentation
13 about having an integrated schedule. It sounds like to
14 me one important observation, at least the one I am
15 coming up with, is the first meeting may be the most
16 important, but the first meeting has got to involve
17 everybody. Any thoughts on that? I mean, if you are
18 going to do all of these things, you have got to do it
19 from the very beginning and do it collaboratively; I
20 don't know. Any comments?

21 John?

22 MR. PRESCOTT: That is very true. It also
23 depends on the complexity of the project and the issues
24 involved with the project. The stakeholders that are
25 involved, the earlier they can meet to get the issues
26 on the table, the better off everybody will be and the

1 better the quality of the end product will be as well.

2 MR. MILES: It is just not the issue, it is
3 everything, scheduling and who is going to show the
4 leadership.

5 Andrew?

6 MR. FAHLUND: I am not sure if this is an
7 answer to the question. I guess I look at this as
8 beyond simply just the first meeting. I mean,
9 absolutely, the first meeting is crucial and getting
10 everybody at the table and having something to work
11 with at the beginning, the NRG and IHC proposals both
12 contemplate a fairly robust initial consultation
13 document, an initial information package, if you will,
14 that contains a lot of the information that is actually
15 often what we spend time looking for in the current
16 consultation process.

17 Trying to assemble as much of that up front as
18 possible is actually an objective that I think we
19 should all strive for is making those documents more
20 meaningful than they currently are. Some are very
21 good, some are not as good.

22 I think that what is important to me is having
23 FERC involvement early on in that process in order to
24 formalize it, I guess, a little bit more than it
25 currently is. I think that it is too easy for people
26 to kind of get together and meet and talk past each

1 other for too long, and not really have the discipline
2 to hone in on what it is that we are actually trying to
3 get done and solve problems. I think that there is
4 some benefit to having FERC staff for that.

5 MR. MILES: Toby?

6 MR. FREEMAN: Yes, I would echo what Andrew is
7 saying. I think that as a veteran of several
8 collaborative proceedings we definitely find it to be a
9 real challenge to have stakeholders clearly articulate
10 resource goals and objectives. I think having a common
11 understanding within the group of what it is we are
12 actually there to accomplish as well as what we are not
13 there to address would be helpful as well.

14 I think helping stakeholders better understand
15 the difference between interests and specific actions
16 also is important in collaborative proceedings and
17 something that sounds easy, but, frankly, when you are
18 at the table with 40 folks, it can be pretty difficult
19 to come by.

20 I think that what I have seen is folks often
21 feel that they are, perhaps, disadvantaging themselves
22 by clearly articulating what their resource objective
23 is, or another way of saying that is a given interest.
24 In other words, if a stakeholder is coming to the table
25 saying what they want to see is dam removal, typically
26 that is an action that has really got more to do with a

1 different interest that they hope to achieve, for
2 example, fish passage, anadromous fish restoration,
3 et cetera, et cetera. I think folks often feel that
4 perhaps they disempower themselves in the proceeding if
5 they are articulate things in terms of interest as
6 opposed to the specific actions. In other words, I
7 might find a cheaper solution which might not be in
8 other folk's interest.

9 COMMISSIONER MEAD BROWNELL: Toby, would it be
10 helpful -- we have heard Polly, we heard the tribes
11 mention resources, experience -- if early on in the
12 process we had staff, Rick and his team, kind of do a
13 little mini kind of, "Here's how to effectively
14 participate demonstration"? Because some people, I
15 mean, for some they just really don't have the
16 experience and resources.

17 MR. FREEMAN: I agree, and I think what you
18 see a lot of licensees doing in collaborative
19 proceedings is trying to create a more level playing
20 field, for example, by offering stakeholders training
21 in interest-based negotiation processes. That was
22 something we did in the Callett's (phonetic) proceeding
23 when I was at Tacoma City Light.

24 Yes, I think one of the things that we have
25 heard today is there is that as well as other
26 opportunities for FERC to come in early on in the

1 process, ideally at the front end, and help frame the
2 process and educate the participants as to what you are
3 there to accomplish, how to most effectively engage,
4 and how to assure that that process is really working.

5 The process needs to work in such a manner
6 that it addresses folk's interests, at least in terms
7 of those that are appropriate for that particular
8 venue. You often find this is the venue that is
9 available for folks and they are going to bring their
10 issues to the table, although at times they may have
11 absolutely nothing to do with the hydroelectric project
12 and the relicensing proceeding.

13 COMMISSIONER MEAD BROWNELL: Andrew I -- oh,
14 I'm sorry. You wanted to comment, and then I have a
15 question for you.

16 MR. FAHLUND: I guess I also wanted to point
17 out that I think there is some benefit even to some
18 less experienced licensees in this regard having FERC
19 staff there early on in the process. Many don't really
20 have an appreciation for what it is that they are
21 expected to do. They can read the regulations, but it
22 doesn't necessarily come through. I think having a
23 little bit more guidance there would be helpful. I
24 think having them undertake scoping and really begin
25 the NEPA process, that is the first step, would be even
26 better.

1 COMMISSIONER MEAD BROWNELL: It sounds like an
2 already busy and overtaxed staff is going to be busier
3 as a result of this. Andrew, I have a question. You
4 referred us to transcripts of comments to get the
5 states' views of implementation of the Clean Water Act.
6 Give us a hint. Why don't you give us, like, the top
7 three? You said there was inconsistency there, so it
8 would be helpful.

9 MR. FAHLUND: Well, I went over my time and I
10 had them listed out, but I figured I had better skip
11 over them or else I was going to get Rick on my case.

12 COMMISSIONER MEAD BROWNELL: You just bought
13 you some time from Rick.

14 MR. FAHLUND: I think, let's see, on my list I
15 have right here, I think first and foremost is to
16 really understand state standards for numeric and
17 narrative criteria for designated uses and
18 antidegradation as they relate to hydropower projects.

19 I mean, the Clean Water Act is fairly broad in
20 its mandates and the mandates supplied to hydropower
21 facilities and similarly to other kinds of regulated
22 interests. Having a better understanding here at the
23 Commission of sort of what all of those are and what
24 they mean, I think would be, at least from what the
25 states were saying would be, very helpful.

26 Ensuring complete studies and application

1 development early in the licensing process, and we have
2 heard that said time and time again, facilitating
3 cooperation between FERC and state agencies in the
4 development of an environmental review document,
5 obviously there are statutes and this was said in a
6 number of these meetings, that there are statutes and
7 regulations at the state level that kind of collide a
8 bit with FERC regulations and even the Federal Power
9 Act itself. So, there are some challenges to be met
10 there, but I think that we can find a way around that.

11 Coordination and the timing of the
12 certification application with environmental review,
13 that may be one of the biggest of all. Currently,
14 different states do it differently, and it kind of
15 depends on when the licensee files the application; but
16 a state has, according to the Clean Water Act, only a
17 year to act on a certification application once it is
18 filed. Often, those are filed well before the NEPA
19 documents are completed or even studies are done. That
20 really creates a challenge for the states. They have
21 to deny without prejudice, and I don't think that they
22 like to do that.

23 I guess the other thing that came up in
24 several instances was facilitating and coordinating
25 public comment requirements of water quality
26 certifications with the public comment requirements of

1 the Federal Power Act. You know, there are
2 requirements among a lot of states that you have to
3 obtain public comments and there are certain time
4 periods, and so forth. Trying to line those up as best
5 we can with what are required in NEPA or the Federal
6 Power Act, I think would be very useful. Those are
7 some of the things that I read in their comments.

8 MR. MILES: If there aren't any other
9 questions from my right, I will see if anybody in the
10 audience has any comments that they would like to make.
11 Now, we have two microphones.

12 John, let's start over there on the right, and
13 then we will flip back and forth.

14 MR. MILES: Could you identify yourself and
15 who you represent because we do have a reporter here.

16 MR. CAMPBELL: Matthew Campbell, I am a deputy
17 attorney general in the State of California Attorney
18 General's Office, and I represent the State of
19 California Resources Agency here today working in
20 conjunction with the State of California Environmental
21 Protection Agency, the State Water Resources Control
22 Board, and the Department of Fish & Game.

23 Thank you for the opportunity to provide
24 comments. I know we are short on time so I am going to
25 go very quickly in a sound byte fashion to cover
26 comments both on this panel, the preceding panel and

1 looking forward to the third panel so we can be done
2 with it.

3 The comments are going to move from the
4 general to the specific, and they are mostly in the
5 nature of themes, thoughts or ideas because we greatly
6 appreciate the Commission's willingness to allow us all
7 here today to think out loud and to toss around some
8 ideas and to see if we can move forward with a
9 successful rulemaking.

10 The State of California is very interested and
11 supportive in a successful rulemaking. Mr. Chairman
12 and Commissioners with your permission and
13 representatives of the Department of Commerce, Interior
14 and Agriculture, panelists and audience, I am just
15 going to wing through them very quickly.

16 MR. MILES: It won't take too long? Because
17 we do have other people in the audience.

18 MR. CAMPBELL: Okay. The first theme is we
19 appreciate the cooperative approach to proposed
20 rulemaking. Second, states, tribes, FERC, other
21 federal agencies, applicants and stakeholders should
22 all work on partnership through the licensing process.

23 Next, states are not just parties to a FERC
24 proceeding and rulemaking; the states are regulatory
25 partners who implement delegated federal authorities
26 under the Clean Water Act and Coastal Zone Management

1 Act.

2 Many of the states' themes that I am going to
3 run through really quickly here, and then you won't
4 hear from me again, are reflected in the IHC and NRG
5 proposals, but the states do not support some of the
6 elements, implications and details of both proposals,
7 and the proposals do not address some important state
8 concerns and issues.

9 Relicensing is the practice of bringing old
10 energy facilities into conformance with modern
11 environmental law and standards. Relicensing at 30- to
12 50-year intervals is a complex process that requires a
13 lot of data, analysis and discussion. While the
14 current process is administratively inefficient, we
15 need to distinguish between scientific complexity and
16 administrative efficiency.

17 On that note, one thing that has been
18 emphasized here today is shortening the time. We think
19 we need to look at it not just on paper, shortening the
20 time on paper, but the practical result of what we are
21 trying to get done here.

22 We would rather look at it in terms of can we
23 get this done on the ground as a practical matter
24 before the existing 30- to 50-year license expires. I
25 think there will be some other commenters that will
26 touch about the long history of state involvement and

1 trying to reform the relicensing process.

2 MR. MILES: Okay. Is that it?

3 MR. CAMPBELL: I have got a few more.

4 MR. MILES: Okay. Not too much longer,
5 please.

6 MR. CAMPBELL: Okay. I do appreciate your
7 allowing us a little bit of time because we didn't get
8 any time after the first panel.

9 MR. MILES: I understand, but let's move
10 along.

11 MR. CAMPBELL: Okay. To some more specific,
12 those are some general, to the more specific, what we
13 think this rulemaking process should do is address the
14 problems of incomplete applications; insufficient,
15 inadequate or no studies, tardy studies; lack of
16 schedules; and lack of FERC enforcement that cause
17 delay.

18 Problems with lack of information in the
19 initial stage of the process accumulate for the
20 duration of the relicensing. FERC could better utilize
21 its existing regulatory authorities to determine if
22 applications are deficient and to assess penalties for
23 lack of compliance with FERC regulations and
24 procedures.

25 A common theme has been earlier FERC
26 involvement, and I will just touch on that very

1 briefly. I know there was some interest in integration
2 of the state 401 process, and I have got just three
3 quick bullets on that.

4 Earlier FERC involvement, one, FERC should
5 utilize existing regulatory authority to determine
6 whether applications are deficient and/or to impose
7 penalties for failure to comply with FERC regulations
8 and orders.

9 FERC should impose sanctions on applicants who
10 fail to comply with regulations, schedules or who fail
11 to produce timely or adequate studies. Distinguish
12 between studies requested by state resources agency
13 through the 10(j) process and studies requested by
14 states and tribes through their exercise of Clean Water
15 Act authority under Section 401.

16 That is an interesting distinction because the
17 dispute resolution notion that has been discussed in
18 some of these proposals could likely apply to the
19 former situation where studies are requested by state
20 agencies through the 10(j) process.

21 We would feel that a dispute resolution
22 process, especially a mandatory dispute resolution
23 process, would be inapplicable to states and tribes
24 exercise of 401 certification authority. Early
25 identification and participation of appropriate
26 stakeholders; FERC published schedule and maintaining

1 more rigid time frames; and, lastly, in terms of better
2 coordination with state processes, getting a little bit
3 more specific here, start the clock for 401
4 certification after the state deems the application
5 complete.

6 This would be very helpful in that I haven't
7 heard anybody here today or in any of the written
8 proposals that have been circulated today support the
9 current regulatory process which frustrates states'
10 ability to conduct 401 certification, because states
11 are required to conduct a certification prior to the
12 completion of the studies. It just doesn't make sense.

13 Second, require application for 401
14 certification after FERC issues the REA. Third, states
15 may impose preliminary conditions in response to
16 issuance of the REA, if there is a clear reservation of
17 authority to alter conditions based upon final NEPA
18 document. Third (sic), greater deference to state
19 study requests, again, as distinguished from state
20 study requirements under Section 401. Finally,
21 incorporate state issues into the NEPA analysis.

22 I appreciate you indulging me in a little
23 extra time.

24 MR. MILES: Thank you.

25 COMMISSIONER MEAD BROWNELL: I just want to
26 ask a question, because I think you raised many

1 important points, and we are particularly interested in
2 the State of California's view. Particularly because
3 you rely so heavily on hydro imports, I would assume
4 that whatever we can look forward to having California
5 recommend would include some recognition that time is
6 important to California.

7 While it is, I think, of interest to
8 incorporate state interest, I would think it would be
9 in your interest to have a process that works more
10 efficiently than any of the processes do today?

11 MR. CAMPBELL: Yes, but without losing track
12 of the important environmental benefits that will be
13 gained through relicensing as well. California has
14 over 40 projects scheduled for relicensing over about
15 the next 10 years, affecting most of the major
16 waterways in the state. I think we are going to have
17 an opportunity in Sacramento in a couple of weeks to
18 elaborate on these issues, and I think our program
19 people would be happy to answer that question.

20 COMMISSIONER MEAD BROWNELL: Thank you.

21 MR. CAMPBELL: Thank you.

22 MR. MUELLER: Thank you. My name is
23 David Mueller (phonetic). I am manager of hydro
24 licensing at Pacific Gas & Electric Company, the
25 California utility. I am very glad to have this
26 opportunity to make a few very brief comments.

1 Pacific Gas & Electric Company knows
2 licensing. We have 26 licenses, representing almost
3 4,000 megawatts of power. We have successfully
4 relicensed 15 projects. We have nine projects in
5 relicensing right now. In the next 20 years, we will
6 have another 12 projects coming into relicensing.

7 We have used TLP, ALP, and a number of
8 different hybrid processes. We have seen what works,
9 and we have seen what doesn't work. We worked with
10 collaboratives, we have worked with neighboring
11 licensees, we have faced competition on licenses seven
12 times, and we have kind of seen how it plays out.

13 I am not going to go over any themes or any
14 issues here, because I think if you take all of the
15 themes and all of the issues and all of the problems
16 that everybody has identified here, and there is a lot
17 of repetition, we all know what they are.

18 The question is, Is there a structure that can
19 deal with all of these problems and come up with at
20 truly efficient and effective licensing process? There
21 are a couple of proposals on the table, the NRG and the
22 IHC proposals. What PG&E did is we said, "Rather than
23 focusing on the problem, let's do a blue sky effort
24 ourselves."

25 We took all of our experience and we sat down
26 with a blank piece of paper and tried to determine for

1 ourselves is there a single licensing process that can
2 address these issues, work for large projects, small
3 projects, complex, simple, new licenses, original
4 licenses.

5 We went through that process and wrote it down
6 on paper. After we were done, we went back and
7 compared it to the TLP, the ALP, the IHC, the NRG. Lo
8 and behold, we decided there is a process and it looks
9 very similar to the IHC process.

10 My message really is here today we think there
11 is a process out there. The IHC seems to be on the
12 right track. There are some specific improvements that
13 are needed, and I am going to mention just two. One is
14 it is totally silent on all of the non-federal
15 processes, and all those states processes which we have
16 all been talking about need to be integrated into the
17 IHC proposal.

18 Then, secondly, there are some timing issues
19 in there. I am going to just mention two specific
20 timing issues. It proposes, as does the NRG proposal,
21 that various participants make study proposals early in
22 the proceeding. There is a serious logic disconnect if
23 study proposals are required before issues are
24 established and information needs are established and
25 discussed.

26 It just doesn't make sense to propose studies

1 before you know what information is needed. The same
2 thing with timing of proposed conditions. It just
3 doesn't make sense that anyone starts proposing
4 conditions before the license application is on the
5 table so people can see what the proposal is.

6 I look forward to working with FERC staff and
7 others to deal with those two big issues, they don't
8 see like show stoppers at all to me, and to work with a
9 number of issues that need to be addressed there.

10 Thank you.

11 MR. MILES: Okay. Thank you, David.

12 Why don't we pause here? Oh, there is a
13 question over here (indicating). We will get a
14 microphone to you.

15 MS. SCHIMODA: I will be super brief. My name
16 is Risa Schimoda, and I am the executive director of
17 American Whitewater and a member of the Hydropower
18 Reform Coalition. I just wanted to mention something
19 that I have been thinking about as people have talked
20 about the incentive for a new proposal.

21 Andrew has represented us in terms of his
22 position as an NRG member having heard the other
23 proposals, but an incentive to me for everyone to
24 embrace one or two or how ever many other tracks we end
25 up with is not just the amount of time that we spend
26 during the procedure, but time that we save from not

1 having to spend more time on the back end from either
2 rehearings or interventions and so forth.

3 Whether we go from seven years or seven and a
4 half to five, I think we can solve problems at the back
5 end by making a commitment to the front end, front
6 loading the effort on the front end, and to some degree
7 it will be sort of a marketing effort on all of our
8 parts to make sure people know what to do when we
9 start.

10 Just as a conservation and recreation
11 organization that we are, if we are not really
12 comfortable with the settlement agreement, we feel like
13 the procedure will go on for 30 to 50 years because we
14 have to feel super vigilant about what the settlement
15 agreement turns out to be, so another type of incentive
16 for making the process shorter.

17 Thank you very much.

18 MR. MILES: Thank you.

19 One more brief comment over here (indicating),
20 and then we are going to start with the next panel.

21 MR. SIMMS: Real brief. Frank Simms, American
22 Electric Power. One, I think definitely a process of
23 collaboration is good. I think we ought to keep the
24 traditional process options, which are good, too. The
25 one thing I caught this morning, and I was wondering if
26 somebody could answer this for me, is in this form of

1 collaboration I noticed on the IHC process that for the
2 study dispute resolution process there was a panel of
3 three which is the requesting agency representative,
4 commission representative, and a neutral third party.

5 I am just wondering, Where is the licensee?

6 MR. MILES: Then, why don't we take a -- don't
7 leave. All we are going to do is excuse these
8 panelists and have the next ones come on board.

9 MR. FAHLUND: Do you want an answer to that
10 question?

11 MR. MILES: Do you want to give a quick
12 answer, Andrew?

13 MR. SIMMS: Apparently not.

14 MR. MILES: David has a handout that
15 summarizes what he was just saying. It is in the back
16 of the room. For those of you who have to catch a
17 plane, we are going to end at 3:45 with the Chairman's
18 remarks; okay.

19 (Whereupon, there was a pause in the
20 proceedings.)

21 MR. MILES: Okay. Let's begin the third and
22 last panel. The third panel, the topic is "Information
23 Development." We asked the panelists to address two
24 issues: How can licensed study requests be
25 accomplished in a timely and cost effective manner?
26 What process should be initiated to resolve study

1 disputes?

2 With that, I am going to start with
3 Ken Kimball, director of research for the Appalachian
4 Mountain Club.

5 Ken?

6 V. INFORMATION DEVELOPMENT
7 APPALACHIAN MOUNTAIN CLUB

8 MR. KIMBALL: Thank you, Rick. First, I
9 appreciate the opportunity to be here. I work with the
10 Appalachian Mountain Club, which has about 96,000
11 members. It is a Northeast group and we have been
12 engaged in hydro relicensing since the 1980s, so we are
13 very familiar with the process. We have actually been
14 engaged in about seven different -- excuse me, eight
15 different successful settlement agreements as well.

16 I think it is important before trying to offer
17 solutions to look briefly at some of the root causes at
18 a global level on how study requests get lengthy,
19 costly, and may lead to dispute. I will try to make
20 this very brief.

21 First, many of the recent and ongoing licenses
22 start with a lot of disjunct and incomplete data. When
23 first licensed, there was no Clean Water Act,
24 Endangered Species Act, NEPA process. These are
25 data-generating processes. I think it is important to
26 keep this in mind because the problem we are trying to

1 address here today may resolve some of itself in the
2 near future.

3 A class 1993 licensings actually will come up
4 for relicensing in 2023, which is not very far away.
5 When they do come up for relicensing, they will have a
6 much richer database to start from than we currently
7 have. I think we should not lose perspective of that
8 as we look at changing the rules here.

9 Second, there are different time scales that
10 we are trying to address here. There are biological
11 time scales and there is business and political time
12 scales. The business and political time scales, the
13 business time scales as we well know sometimes work on
14 quarterly returns, the political time scales such as
15 the relicensing process here works on a three- to
16 five-year type of time scale.

17 When we have biological questions we are
18 trying to achieve with some of the studies that are put
19 out there, in many cases those particular studies
20 require decades before we can really get the true
21 answers. It is important to keep this in mind, because
22 applicants want definitive answers before they are
23 going to have to move forward and implement expensive
24 mitigation.

25 For a lot of the studies we are trying to
26 accomplish here in a one- or two-year time frame, it is

1 impossible for them to come up with definitive answers
2 before you make some of these decisions. There is no
3 simple answer to that challenge, but I think we have to
4 keep that in perspective as we move forward.

5 Third, studies can bog down and get costly
6 because they are not carried out in an unbiased,
7 science environment rather in a business and political
8 one. More specifically, the applicant is responsible
9 for creating the databases and the studies chosen.
10 They have the responsibility of doing both of those,
11 but they also are biased as they carry these particular
12 studies out and determine which ones and how they want
13 to go about doing it. The simple reason is a study
14 that shows a negative impact of their project also
15 makes them very liable relative to the types of
16 mitigation that they might be required to put forward.

17 We do have a process where we have the
18 applicant essentially trying to monitor itself, granted
19 the agencies, et cetera, are involved in that
20 particular process, but it would be expected that the
21 other side, that is, the agencies, the NGOs, et cetera,
22 are going to be somewhat skeptical of that type of
23 process as it exists out there right now.

24 Now, how do we accomplish timely and
25 cost-effective studies? I am going to try to just list
26 out a couple of things to consider. First, clearly

1 define what is required in the initial consultation
2 document or the prescoping document, depending on which
3 type of method is finally selected here.

4 What do I mean by "be specific"? First of
5 all, have a checklist of the existing conditions of
6 which data are necessary in that ICD that is going to
7 come out; that is, take a look at Section (e) in the
8 NEPA process in the categories. When you have
9 categories like wetland resources, be very specific of
10 what is expected such as an inventory of the
11 hydrologically connected wetlands with a reservoir.

12 Second of all, require that the comprehensive
13 management plans that are listed not only be listed and
14 titled, but have the ICD list out the specific sections
15 within those comprehensive management plans that are
16 relevant to those projects. This is a first step in
17 truly trying to identify at least what the existing
18 management objectives are for some of the agencies and
19 other entities involved.

20 Third, list out the potential impacts, both
21 positive and negative. You don't have to determine
22 whether they are actually occurring, but at least list
23 out the potential impacts.

24 Fourth, have the applicant then propose the
25 impact studies that it proposes to proceed ahead with.
26 I would emphasize that FERC should be a stringent

1 traffic cop at this particular step. You want the
2 initial consultation document to really try to resolve
3 many of the baseline background data questions that are
4 out there, so that you can focus the remaining couple
5 of years and studies that you have in on studies that
6 are related to impacts themselves and the kinds of
7 studies that will determine in a much more effective
8 way the types of protection mitigation enhancement
9 measures that may or may not be needed in the process.
10 Truly, try to truncate it out between the ICD
11 addressing the background and leaving the remaining
12 years so that you can address the impact type of
13 studies that are necessary out there.

14 Second of all, many study requests bog down in
15 a debate over the choice of study methods. The method
16 chosen may affect the study costs, the time to conduct
17 it, and also the results. Different methods have
18 different bias, we know that.

19 At a minimum, I encourage the Commission to
20 develop a list of acceptable peer review study methods
21 out there so that we at least can narrow down the range
22 of argument that is going to happen over how do we go
23 about doing some of these studies.

24 Third is construct the licensing time line and
25 the scoping document process to permit two field
26 seasons worth of work. Build that time line so that it

1 understands you have that period where you do the study
2 design and consultation process.

3 You have a block of time so that when you go
4 out to hire the consultant that you can get a
5 consultant. That is, if you are looking at a
6 biological question that needs to be studied in the
7 summer, you should have the study consultation process
8 done by December, so there is a reasonable amount of
9 time left so that you can go out and find and hire a
10 consultant to then proceed ahead starting at that time.
11 You don't want to be finishing the study consultation
12 process in June and say, "Now we've got to start the
13 study," because you have created an impossible
14 situation, you know, to throw you off the time line
15 immediately.

16 Fourth is when the applicant does a study or
17 directly hires a consultant who reports to them, there
18 is this bias and mistrust that obviously is going to
19 play out. I think there are two possible pathways that
20 you can try to resolve this. Number one is continue
21 the current process that you have, but then you will
22 need to develop some sort of third party independent
23 process to resolve disputes that come up, because they
24 inherently will come up.

25 The second is to have the entity that is doing
26 the study report directly to the stakeholder group, not

1 to the applicant. I think if you can get to that step,
2 you can remove a lot of the mistrust that comes up and
3 the delay that happens as you fight out who is going to
4 do what and how the studies are going to be
5 interpreted, and so forth.

6 I would note that I have been involved in
7 several settlement agreements where this has been done
8 on a voluntary basis, and it has actually I think
9 reduced a lot of the conflict on the studies and sped
10 up the process dramatically.

11 Fourth, I want to just take a shot at the
12 cumulative impact analysis question. This one really
13 is asking you to think outside of the box in a big way.
14 Right now, licenses come up for renewal with what I
15 would label as geographic randomness. That is, you may
16 have headwater storage projects that come up on Day X,
17 and then the downstream projects that may actually be
18 dependent on that that come up two or three or five or
19 six years later.

20 For a company, they may actually have a couple
21 of projects on river coming up this year, then at the
22 same time a couple of projects on another river, and
23 then three years later back on river one they have got
24 a couple of projects coming up again. This is a
25 perfect formula for inefficiency.

26 It means that the agencies, it means the NGOs,

1 it means the Commission staff have to all try to get up
2 to speed on five or six or seven different rivers
3 concurrently. It also means that when we are taking a
4 look at dams we are doing the headwater storage
5 projects one year and then we are doing some of the
6 projects downstream that may be dependent on them in
7 another year.

8 If there is a way that we can bring the
9 licensings in on watersheds in the same year, then
10 staff would have to focus their time just on one
11 watershed at a time as opposed to a multiple set of
12 projects spread out all over the place. Hopefully,
13 these suggestions will be of some help.

14 Thank you.

15 MR. MILES: Thank you, Ken.

16 Our next speaker is Ann McCammon Soltis,
17 attorney for the Great Lakes Indian Fish & Wildlife
18 Commission.

19 Ann?

20 GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION

21 MS. McCAMMON SOLTIS: Thanks. As Rick said,
22 my name is Anne McCammon Soltis. I am an attorney for
23 the Great Lakes Indian Fish & Wildlife Commission,
24 which covers the northern third of Wisconsin and lands
25 in Eastern Minnesota and the Western Upper Peninsula of
26 Michigan. There are 87 FERC-licensed sites in these

1 territories. Regulation and management of these sites
2 impact natural resources harvested by tribes including
3 fish and wild rice.

4 FERC like all federal agencies has a trust
5 responsibility to protect tribal trust resources
6 whether on or off the reservation, to protect the
7 tribe's ability to continue to exercise their lifeway
8 and their relationship with the land and water. This
9 trust obligation includes ensuring that tribes have the
10 opportunity to effectively participate and provide
11 meaningful input into the licensing process.

12 Although we agree that the process can be
13 reformed, we are concerned that shortened review times
14 will result in diminished participation, in part
15 because our member tribes do not in general have
16 dedicated staff to work on FERC relicensing issues.

17 If shortened review times are to be
18 implemented, it becomes increasingly important for FERC
19 to take affirmative actions to reach out to tribes to
20 consult with them on a government-to-government basis
21 and to help provide the infrastructure necessary for
22 full tribal participation. We think this could include
23 tribal liaisons in each of the regional FERC offices,
24 and I would agree with what Joe Hovenkotter said
25 earlier on that subject.

26 Because there are so many FERC sites in the

1 ceded territory that we deal with. GLIFWC is actually
2 undertaking a project right now through a grant from
3 the Administration for Native Americans to gather
4 information about natural resources near FERC-licensed
5 projects and evaluate evidence for tribal participation
6 in the relicensing process. This will help us
7 prioritize which projects are of the greatest interest
8 to our member tribes, since we probably aren't going to
9 be able to participate in all 87 relicensings.

10 We will certainly benefit from a clear and
11 transparent relicensing process in that regard.

12 Whatever the specifics of the new relicensing process
13 are it needs to recognize the unique position of tribes
14 in terms of their relationship with the federal
15 government and it must provide flexibility to
16 accommodate other government-to-government
17 relationships and structures that may be in place.

18 One example that I would cite is that in
19 Wisconsin some of the federal court orders that we
20 implement include consultations between the state and
21 the tribes when state actions or management would
22 impact wild rice. To the extent that there are FERC
23 sites that have wild rice, those relationships and
24 those structures need to be accommodated somehow in
25 this timing process.

26 Tribal input, as many others have said, should

1 be sought early on in the process, and consultation
2 with tribes should be mandatory and not just
3 encouraged. During study development, sufficient time
4 must be provided so that federal natural resource
5 agencies can meet with tribes to develop and agree upon
6 the studies that will be needed in order to support
7 license conditions.

8 Tribes are in a little bit of a unique
9 position, because they need to work with the
10 departments to kind of work out what those studies
11 should be and what the license conditions are going to
12 be, and that takes a little bit of time. It may take
13 more than the 60 days provided for review of the
14 prescoping document, and that consultation really needs
15 to begin as early as possible.

16 Clear methods and quality assurance need to be
17 set out early on in order to reduce the potential for
18 disputes later. In terms of the study request
19 criteria, I just have a few kind of specific comments
20 in reading over those.

21 In terms of the demonstration of a nexus
22 between project operations and effect on the resource,
23 I would hope that would be interpreted in a way that
24 would be flexible. What I would fear is getting into a
25 "chicken and an egg" situation where the study has to
26 be performed in order to show the nexus, but there is

1 opposition to the study because that nexus hasn't been
2 shown yet. I would hope that would be flexible.

3 In addition, in regard to one of the study
4 criteria, it refers to the mandate of agencies and the
5 languages with jurisdiction over the resource to be
6 studied, I would have a concern that you may get bogged
7 down in unnecessary disputes about who does or doesn't
8 have jurisdiction over a particular resource in
9 question, and so it may be best just to look at the
10 expertise of the agency to determine whether they are
11 qualified to make such a recommendation.

12 Finally, although cost and practicality should
13 be taken into account, they should not be a basis for
14 denying a study request that is necessary to assess
15 potential impacts on trust resources.

16 Tribes exercise considerable natural resource
17 management over resources both on reservation and off
18 reservation through intertribal agencies like GLIFWC.
19 In addition, tribes are assuming treatment of state for
20 the purposes of setting water quality standards with
21 the potential to impact 401 certifications. Those are
22 just a couple of other things that I think need to be
23 taken into account as we go through this process.

24 Thank you.

25 MR. MILES: Thank you, Ann.

26 Our next speaker is Bill Sarbello. Bill is

1 with the New York State Department of Environmental
2 Conservation, and he is the head of their Habitat
3 Protection Section.

4 Bill?

5 HABITAT PROTECTION SECTION

6 NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

7 MR. SARBELLO: Thank you, Rick.

8 My section oversees a variety of energy
9 projects and we attempt to minimize the Fish & Wildlife
10 impacts of the various generation transmission
11 projects. New York has over 200 FERC-licensed and
12 exempt projects which supply about 17 percent of our
13 power needs.

14 I have also, by way of background, we have had
15 a large class of '93 relicensing that is almost
16 complete now, and I have been involved in 13
17 settlements, which comprise about 50 projects for 50
18 developments overall.

19 Thank you very much for this opportunity to
20 address. I will try and represent the states, but will
21 probably have more of a New York slant to some of my
22 experience.

23 First off, to make the process go better, I
24 request that FERC recognize the statutory
25 responsibilities that states have in the process.
26 Others have said this before, that we are really

1 involved agencies and that we need to have an adequate
2 record before us in order to support and defend our
3 decisions potentially in administrative and legal
4 judicial proceedings. The information requests that we
5 make and some of the studies that we request are
6 particularly critical.

7 We ask that FERC view the states as regulatory
8 partners in implementing the delegated authority of the
9 Clean Water Act and Coastal Zone Management Act. More
10 specifically, in the IHC proposal we request that
11 everywhere where it says "federal resource agency" or
12 "Indian tribe" you add "or state." I think they will
13 go a long way towards solving a lot of -- well, greatly
14 improving the IHC proposal.

15 The second as a state is that we ask that you
16 recognize our restoration role. States are charged
17 with restoring minimum acceptable levels of water
18 quality and habitats. Often, our study needs require
19 assessing not only the current levels of impact of a
20 project, but also projecting what the river would look
21 like under different alternative operating conditions
22 or with additional features involved. We ask that FERC
23 also recognize that states often require a different
24 baseline in the nature of their studies because of our
25 different role.

26 I would also like to strongly echo what others

1 have said before. We strongly support the front
2 loading of the process to assure early FERC involvement
3 in securing the needed information. What is needed is
4 to be sure that the applicant does follow up and
5 provide the information.

6 The IHC proposal really liked the idea of the
7 Scoping Document 1 and Scoping Document 2 process as a
8 way of providing improved certainty for ferreting out
9 problems early and resolving study issues early with
10 the weight of a FERC order behind it.

11 I think it is a significant improvement over
12 the traditional license process in that respect,
13 because often in the traditional process you find out
14 too late, it might be late in Stage II, that something
15 hasn't been done or it is not what you expected.

16 A couple of other suggestions, as others have
17 said, is we suggest that FERC should relicense all of
18 the projects in the basin or at least the majority
19 sub-basin or watershed or whatever you want to call it,
20 at one time.

21 I think this will achieve greater efficiency
22 over the piecemeal renewals and foster cooperative
23 studies, and it is also a little bit more equitable.
24 If you don't do that, often the first person in the
25 door is doing the cumulative impact studies for
26 everybody else in the basin.

1 We have had some excellent success with that.
2 Our Rackett River relicensing and Sacandaga-Hudson,
3 Rackett River was 14 of 17 projects. We really
4 couldn't have accomplished that without having a
5 willing and supportive applicant who advanced some of
6 their relicensing, the same with the Hudson-Sacandaga.

7 The fourth point is that FERC should serve as
8 a source of information and expertise. One suggestion
9 is that there have been a lot of studies done. It
10 would be really very handy to have them available
11 through FERIS. Right now, you cannot go on FERIS and
12 access turbine mortality studies or entrainment
13 abundant studies. These have all been done. People
14 spend a lot of good money on it. The thing that would
15 be really helpful if people could see them, so that we
16 didn't reinvent the wheel every time.

17 You might want to consider providing FERC
18 assistance and providing flow storage and generation
19 modeling assistance. That was instrumental in
20 achieving some of our settlements because we could
21 project what different alternatives would have in terms
22 of impact.

23 Last is to also have FERC staff biologist
24 expertise available. There are the ones doing some of
25 these studies all the time, and they have more
26 perspective than perhaps one of our staff biologists

1 who might be doing wetlands one day, stream protection
2 another day, and, "Oh, today I'm doing hydropower."

3 Question two: Which processes should be
4 initiated to resolve study disputes? I think that the
5 current standards in the traditional license process
6 are good. The only problem is it is kind of an
7 optional process. The IHC, I think it does bring the
8 dispute resolution process into the correct stage. It
9 moves it up early and you resolve issues early, which
10 is a very positive feature. There are some details of
11 that, which we won't get into now, where we think it
12 could probably be tweaked and improved a little bit.

13 Someone else said this as well, that it would
14 be good in looking at state requests that, again, you
15 may want to discriminate between what we need for
16 401(c)'s versus what will be considered like other
17 10(j) types of requests. For the other ones, we really
18 need to have that burden so that we can establish a
19 record and defend it in court, if we need to.

20 Finally, on the NRG dispute process, I know it
21 wasn't laid out to be a final process, but right now we
22 just have a batch of questions on exactly how it would
23 work. It seems as though it is more advisory,
24 non-binding mediation. We are not sure if that would
25 work compared to what is laid out in the IHC.

26 One last point on the NRG process. I think a

1 lot of states have expressed that they do like the idea
2 of cooperative agreements and like the process in a lot
3 of ways. One thing that is difficult is in order to
4 become a cooperator you have to give up your party
5 status and that is a difficulty that I think has to be
6 addressed.

7 In conclusion, I would like to say that the
8 states are supportive of the efforts to improve the
9 process. We have only had a few weeks to read and
10 discuss the IHC and NRG alternatives. We are still
11 striving to understand the implications.

12 We really haven't had a lot of time to discuss
13 them amongst ourselves, so some of our reactions are
14 preliminary, but we are encouraged by everybody, the
15 FERC, federal agencies, NGOs, states, tribes and other
16 stakeholders working together in partnership both on
17 the potential licensing process and on the potential
18 rulemaking. We states stand ready to assist and
19 cooperate in the process.

20 Thank you very much.

21 MR. MILES: Thank you, Bill.

22 Our next speaker is Michael Swiger. He is an
23 attorney with the law firm of Van Ness Feldman.

24 Michael?

25 VAN NESS FELDMAN

26 MR. SWIGER: Thanks, Rick.

1 I am pleased to be here today as the
2 Commission and other interested agencies and other
3 stakeholders think about how to design and improve
4 licensing process. I think we started out today at the
5 30,000-foot level when we were talking about studies
6 and study disputes and we are now down to the ground
7 level, the nitty-gritty, where a lot of these things
8 are hashed out.

9 In working on projects from 2 megawatts to
10 2,000 megawatts, and study disputes have been at the
11 heart of many of those relicensings and have resulted
12 and an inability to resolve those study disputes often
13 has been a substantial barrier to timely relicensing.
14 So, I think you have correctly identified it as an
15 important problem.

16 I am a lawyer, I am not a biologist, so I am
17 going to leave question one to the biologists and
18 address primarily the second question posed for our
19 panel, which is, "What process should be initiated to
20 resolve study disputes?"

21 My answer to that would be that the IHC
22 proposal, with some modifications that I will talk
23 about -- I agree with you, Bill -- would be
24 appropriate, would be a very good improvement in
25 resolving study disputes.

26 The other thing is that this study dispute

1 resolution process ought to be available to
2 relicensings that are ongoing now and not just to
3 relicensings that are initiated after the rule becomes
4 effective, because I think it will be a very useful
5 tool.

6 The Commission's September 18 public notice,
7 question five broke this study dispute question down
8 into two parts. The first question was, "Do the
9 existing regulations provide an adequate process for
10 resolving study disputes?" I think the answer to that
11 is yes and no. The process sometimes works, but it
12 needs improvement. It could be significantly improved
13 by refining the criteria for needed studies and by
14 earlier Commission resolution of study disputes.

15 The goals of a study dispute resolution
16 process should be fairness to the applicant and to the
17 other parties; efficiency in moving the licensing
18 forward in a timely manner in a way that avoids wasting
19 of resources on disputed studies; effectiveness in
20 producing timely, relevant and cost-effective data on
21 which FERC and the applicant and the other parties can
22 make informed decisions.

23 I think there are two important elements to a
24 fair, efficient and effective study dispute process.
25 One is a fair and efficient process for resolving
26 disputes, and the second is reasonable and effective

1 criteria for deciding when a study must be done.

2 The criteria in the Commission's current
3 regulations as elaborated by various letter orders that
4 FERC has issued in individual proceedings I think are
5 generally adequate, and they are very helpful in
6 defining needed studies, but they could use some
7 refinement.

8 Moreover, the process in the Commission's
9 current regulations does little to promote timely
10 resolution of study disputes. Study requests can be
11 submitted anytime up to filing of the application with
12 no apparent consequences. Study requests can even be
13 submitted after filing of the application only on a
14 showing of good cause why they shouldn't have been
15 submitted earlier. Then, mandatory conditioning
16 agencies often withhold their final conditions based on
17 disagreements about whether sufficient studies have
18 been done.

19 The second part of that question five in the
20 Commission's notice was, "Do the elements of the IHC
21 and/or NRG proposals adequately address this issue?" I
22 think, yes, the IHC proposal does. First, it provides
23 a mechanism for early Commission resolution of study
24 disputes in which the applicant and all interested
25 parties are going to have input.

26 Second, it expands and clarifies and refines

1 the criteria for when a study must be done beyond the
2 reasonable and necessary standard in the current
3 regulations. The NRG proposal also has an early
4 dispute resolution procedure, but I think that is
5 flawed in two important ways. One is it does not
6 clearly define the criteria for when a study is needed
7 and appropriate; and, two, it leaves the ultimate
8 responsibility for deciding the study question up in
9 the air.

10 One apparent omission in the IHC proposal I
11 think has already been noted by Bill and others, and
12 that is, that it only deals with disputes between the
13 applicant and federal agencies and tribes. The NRG
14 proposal, however, allows any cooperating agency, and
15 presumably that means state or federal agency, to
16 trigger dispute resolution. So, the IHC study dispute
17 resolution mechanism should be expanded to include
18 state resource agencies including certificating
19 agencies under the Clean Water Act, Section 401, and
20 the Coastal Zone Management.

21 The criteria, and here I am going to take my
22 "collaborative hat" off for a moment and respond among
23 other things to the point about the baseline, I think
24 one of the criteria that ought to be added to the IHC
25 proposal is for relicense projects, not original
26 projects, whether the request identifies current or

1 ongoing project impacts, that is, studies intended to
2 establish a pre-project or without project baseline
3 will be rejected.

4 Now, that is not to say that applicants can't
5 do those voluntarily, and there may be reasons why they
6 might want to do that voluntarily or collaboratively,
7 but I don't think it should be required. I think the
8 bottom line is here is the Commission had a baseline
9 policy in effect for some time, it has been upheld by
10 the courts of appeal, and the baseline policy says that
11 we are looking at the current environment that includes
12 the project in place as the benchmark against which we
13 measure impacts and, therefore, mitigation
14 requirements.

15 I think there has been a lot of creative
16 thinking and effort going on among resource agencies
17 and other folks since those court decisions have come
18 down into how to sort of wiggle around that baseline
19 policy.

20 I have heard people say that the Clean Water
21 Act requires a different baseline and the Endangered
22 Species Act requires a different baseline, but I have
23 never really seen any reasoned analysis that would
24 support either of those conclusions. I think the
25 baseline policy needs to be enforced at the study level
26 as well as initial license conditions.

1 The second thing I think that the IHC would
2 need to add is no modifications to the applicant's
3 approved study plan should be required except in
4 unusual circumstances or extraordinary circumstances.

5 In fact, the NRG proposal, Section 7.3, identifies a
6 number of those circumstances.

7 Once you have the study plan and it is
8 approved, under the IHC proposal there is sort of
9 additional opportunities as things go forward for
10 people to incrementally add on to that plan and modify
11 that plan, but the NRG proposal establishes a firmer
12 deadline for finalizing that study plan.

13 I think we heard some concern in the audience
14 about lack of applicant's involvement in study dispute
15 resolution I think that could be expanded to include
16 lack of other stakeholder involvement as well in study
17 dispute resolution.

18 One possible way of dealing with that would be
19 for the panel consisting of the Commission, the agency
20 and the neutral to hold a technical conference or
21 technical conferences in which all interested parties
22 could participate. That would result in greater
23 transparency in the dispute process.

24 That is all I have.

25 MR. MILES: Thank you, Michael.

26 Our next and last panelist today is

1 Mark Oakley. He is the relicensing project manager for
2 Duke Power.

3 Mark?

4 DUKE POWER

5 MR. OAKLEY: Thank you, Rick.

6 Good afternoon. Being the last panelist, I
7 suspect this needs to be good.

8 (Laughter.)

9 MR. OAKLEY: Or, at least short. I will
10 settle for one. I am Mark Oakley. I am relicensing
11 project manager at Duke Power. Duke operates 30
12 hydroelectric facilities in North and South Carolina.
13 They are regulated by 14 Commission licenses. These
14 stations total approximately 2,800 megawatts, and we
15 are relicensing about 80 percent of those facilities
16 between now and 2008, so we have got a significant
17 interest in revisions to regulations and procedures for
18 relicensing.

19 Among the projects we are relicensing is our
20 Catawba Watery Hydroelectric Project 2232, 11
21 reservoirs, 13 powerhouses occupying parts of 14
22 counties in two states, North and South Carolina, all
23 in one license.

24 This project is going to test any current or
25 future relicensing process, and not only do we have a
26 strong interest in the Commission's upcoming

1 rulemaking, but we have been actively involved in
2 relicensing reform initiatives since 1997. In addition
3 to today's forum, we will file detailed comments with
4 the Commission. I am going to talk just briefly about
5 information development and study dispute resolution.

6 Regarding the process changes, if any, that
7 are needed to ensure development of information and
8 studies, Duke advocated establishing standards for
9 study requests in February 2001 when we sent comments
10 to the Commission as it prepared its Section 603
11 report. These standards we believe can effectively
12 focus and clarify relicensing issues as well as the
13 requested studies.

14 The IHC proposal we believe takes a great step
15 in the right direction. Establishing the study request
16 criteria enables them to be used as screening tools by
17 applicants and stakeholders early in the process. It
18 can reduce the future need for dispute resolution.

19 As such, these criteria effectively become an
20 extension of the FERC staff, provides some education
21 for folks who enter the relicensing process as
22 different levels of acquaintance, very much supports an
23 earlier discussion today, talking about the value of
24 groundrules.

25 Regarding whether or not the NRG proposals
26 adequately address the issue, the NRG proposal

1 currently does not include standards, which we do think
2 is important. The IHC criteria need to incorporate
3 past decisions and precedents that people have labored
4 hard and long over, and includes standards that require
5 substantial evidence of a project-related problem
6 before study is required, do not require the license
7 applicants to perform the studies to provide that
8 substantial evidence. That obligation resides with
9 agencies.

10 In addition to requiring that there be a nexus
11 between project operations and resource impact, extend
12 that and require a nexus between the resource impact
13 and the requested study, and do not require study
14 related to pre-project conditions.

15 The Commission should also consider adopting
16 Item 5.1(a) of the NRG proposal which recommends that
17 agencies should identify their resource goals and
18 objectives along with the issues and information needs
19 to meet their regulatory obligations and completed
20 administrative record.

21 However, this item should be expanded such
22 that the resource goals and objectives are applicable
23 to the project undergoing relicensing. Each agency
24 should translate their statutory mission into a goals
25 and objectives statement consistent with their
26 jurisdictional authority and specific to the project.

1 This is a necessity when you are attempting to
2 evaluate whether or not a requested study relates to a
3 relevant resource management goal. Another enhancement
4 would be standardized study plan formats. All studies
5 would have a concisely defined purpose, project-related
6 justification, and a predefined use for the ultimate
7 study results.

8 Regarding whether existing Commission
9 regulations provide an adequate process, the existing
10 Commission regulations for resolving disputes would be
11 markedly improved by adding the refined IHC criteria
12 for evaluating disputed study requests.

13 The elements of the IHC and/or NRG proposals
14 adequately address the issue. Neither the NRG nor the
15 IHC proposal adequately address dispute resolution
16 because neither appropriately involves the license
17 applicant. Any revised dispute resolution process
18 should ensure that the license applicant as well as
19 other stakeholders are provided due process and
20 equitable representation.

21 One item that does appear problematic is the
22 IHC provision in which the Commission makes a final
23 decision on the disputed study that is binding on the
24 applicant without the applicant being present.

25 Equitable and efficient dispute resolution would
26 reserve to the Commission the assessment of disputed

1 study requests based on the study request criteria.

2 The assessment should either be based on
3 written information submitted by the disputing parties
4 and the applicant and made part of the record, or
5 decided after a technical conference or meeting of some
6 form before the Commission which allows the disputing
7 parties to present their cases in person.

8 An additional observation briefly is that the
9 IHC and NRG proposals employ some degree of dispute
10 resolution by committee. It tends to be a little
11 timely and it also diffuses and dilutes the
12 Commission's authority to make final decisions.

13 In closing the IHC study requests criteria and
14 dispute process, with the modifications that I have
15 mentioned, should be available regardless of the
16 relicensing process being used by the applicant and
17 regardless of the entity whose study request is in
18 dispute.

19 Thank you very much.

20 DISCUSSION

21 MR. MILES: Thank you, Mark.

22 Ken, if I were to ask you a question, if this
23 panel was to talk about information development, and
24 the way the question was framed, "How can license study
25 request," if you were to change that to "How can
26 mandatory conditioning study request" or "State water

1 quality certificate request," the guidelines you
2 presented earlier that would help shape what a study
3 request ought to look like, will they also apply in
4 those situations?

5 MR. KIMBALL: I think so. I mean, the point I
6 was trying to make is a lot of times we end up with
7 applications coming in that just has the baseline
8 information, and then we just have the two remaining
9 years to try to go through all of these studies
10 including the ones that are necessary for mandatory
11 conditioning, et cetera.

12 The formulation of many of the study requests
13 are really dependent upon knowing what the baseline
14 condition is. My recommendation was let's get the
15 baseline condition question out of the way in the ICD
16 so that we have sufficient time to go through the
17 mandatory conditioning study requests and the other
18 study requests that may come on relative to the
19 impacts, because mandatory conditioning really are
20 going to pertain to what the protection mitigation
21 enhancement recommendations are or are not going to be.
22 I am not sure I fully answered your question.

23 MR. MILES: I think I understand that. Any
24 thoughts on that by anybody else on the panel, I mean,
25 as to any type of guidelines you could give to the
26 parties as to make it easier for study requests to be

1 formulated and disputes to be avoided? I guess what I
2 want to go to, the last question goes, "What process
3 should be initiated to resolve a study dispute?" What
4 can you do to prevent study disputes is another way of
5 looking at it. Any thoughts?

6 Mark?

7 MR. OAKLEY: I guess I would reiterate one of
8 my comments in that having the criteria established up
9 front, known to the applicants at the beginning as they
10 start making study requests, certainly gives them the
11 various traps that they know that need to be --
12 questions that need to be answered, to know in advance
13 if they have asked for a legitimate study.

14 Again, I think one of Mike Swiger's point is
15 certainly in order. I think we are talking about the
16 criteria by which to require a study doesn't
17 necessarily mean that an applicant can't necessarily
18 volunteer to do the study.

19 Yes, Ann?

20 MS. McCAMMON SOLTIS: I was just going to add
21 that having kind of a standard format with methodology
22 and those kinds of things laid out very clearly is
23 going to speed things along because then you don't have
24 to keep going back, "Well, what do you mean by this"
25 and "How are we going to do that," those sorts of
26 things. Some kind of a standard format may help that

1 issue.

2 MR. MILES: Well, that is the format that I
3 was thinking of is that if you put in regulations or
4 you put in a process to make the licensing process more
5 efficient but also to make it integral to the mandatory
6 conditioning processes and water quality certificate
7 processes, can you come up with guidelines or should
8 you come up with guidelines or formats that would
9 integrate all of those things in a way that each of the
10 different agencies and licensees can make use of?

11 Yes?

12 MR. KIMBALL: Rick, I think, and this is sort
13 of the fourth bullet I had on we should make sure that
14 the ICD, or whatever its morph is going to be, should
15 contain as a list of the potential impacts, both
16 negative and positive, of the project. That is the
17 framework from which your study request should be
18 coming from, and you want to get that up front.

19 Frankly, after having gone through years and
20 years of licensing, it is not that difficult to build
21 out a list of the potential types of positive and
22 negative impacts that a project would have. That list
23 should carry over from project, to project, to project.
24 You can run down through that list and say, "Yes, this
25 one is applicable or no it isn't." Having that
26 framework would be the framework from which your study

1 request should be coming from.

2 MR. MILES: Mike and Mark, the two of you
3 talked about dispute resolution, models for it. If
4 during the course of the negotiations between the
5 parties as to what type of study ought to be pursued
6 and you reach a barrier -- and I think, Mike, you were
7 talking about this -- could you bring in somebody that
8 is a neutral to provide an early neutral evaluation?
9 Is that what you had in mind? Maybe it could be
10 somebody from staff or from some other source that
11 could be viewed as a neutral to come in and give an
12 unbiased, non-binding opinion?

13 MR. SWIGER: Well, it sort of ties in with
14 your question about prevention, I think various people
15 today have mentioned earlier FERC staff involvement in
16 these processes. This is an area where earlier FERC
17 staff involvement could be very useful because many,
18 many study disputes come down to a question of, What is
19 the scope of the project? How do you define the
20 project and its impacts?

21 Sometimes you will see study disputes that
22 really have to do with very remote or indirect impacts
23 of the project, and there are other areas where there
24 clearly are gray areas. To have someone from the
25 Commission staff to help give some guidance on that is
26 how FERC sees the scope of the project, I think would

1 eliminate a lot of confusion early on. In terms of
2 later when you have a study dispute, I think the IHC
3 proposal, that is where I am at, it sets up as having
4 the agency and FERC and a neutral come and add some
5 objectivity to that.

6 MR. MILES: That would be a panel presentation
7 after you reach a dispute -- I mean, before you get to
8 the barrier where you need a group to come in and
9 really make a decision for you?

10 MR. SWIGER: Yes.

11 MR. MILES: I am saying during the course of
12 your negotiations, when you sit down and say, "Well, we
13 have identified the issues, now what type of study
14 should be developed?"

15 MR. SWIGER: I think FERC staff can help there
16 and many of these, particularly ALP-type proceedings,
17 have mediators and facilitators that often will also
18 help fill that role.

19 MR. MILES: All right. Do you think the NGOs
20 and the tribal community will accept somebody from FERC
21 before a license is filed to come in and give that sort
22 of early neutral evaluation?

23 MR. KIMBALL: Well, I have found the
24 recommendation rather interesting, because the
25 recommendation was for FERC staff to come in and to
26 mediate. But if I understand what the gentleman also

1 added, and it is a caveat that makes me nervous, is he
2 wants the applicant in the room when that final sort of
3 independent analysis is made. I think if you are going
4 to have dispute resolution to occur and you are going
5 to have an entity making the final decision, the
6 applicant can't be in the room then.

7 MR. MILES: Well, I understand that, but I am
8 separating the two. I guess what I am trying to do is
9 during a negotiation phase as opposed to the advocacy
10 phase, because the two to me are separate and distinct.
11 I am talking about before you get to the panel
12 presentation and the parties are sitting down in a
13 session like today.

14 I mean, most of you have been in settings
15 where you have multiparties and you are around a large
16 table and you are talking about what type of study
17 ought to be performed. Today, if you could not reach
18 an agreement on what the study ought to look like,
19 would it be possible to say, "Well, wait a minute, Tim
20 over here we can bring him in tomorrow and Tim can give
21 you an unbiased, neutral opinion"? Would that be
22 worthwhile?

23 Bill?

24 MR. SARBELLO: Yes. I think it would be very
25 worthwhile just from bringing experience, but also if
26 you don't do it up front, you will be doing it at the

1 additional information request stage at the back end of
2 the process. Because if the need isn't satisfied, it
3 is still going to be not satisfied and then, again I
4 will speak as a state, what are the options?

5 In the absence of information, you could
6 either issue a requirement that might be viewed as
7 overly protective in order to be sure that you could
8 defend it without having the information you need, or
9 you might have to use your separate statutory authority
10 to say this application is incomplete and we require
11 the following additional information and backload the
12 process. Or, as someone else mentioned before, if the
13 time clock is running out, you may have to deny without
14 prejudice for lack of information. Rather than do
15 that, if you can front load the FERC involvement, I
16 think it could work really well.

17 MR. MILES: If you don't address it early, you
18 have to address it later. One way or the other, they
19 have got to address it.

20 MR. SARBELLO: Yes.

21 MR. MILES: Anybody on this (indicating) of
22 the table have any questions?

23 Bill?

24 MR. BETENBERG: I just had one brief comment,
25 and that was there seems to be a lot of comments on
26 addressing things on a basin-by-basin. I heard it

1 several times here and several times earlier. The
2 Assistant Secretary as part of the longer statement has
3 a proposal in it for doing that.

4 Basically, for those basins that are where
5 projects would expire within a seven-year span you just
6 simply told the early ones and let them run a little
7 bit longer so that you catch them within that seven
8 years. That captures about two-thirds of all of the
9 multiproject basins, if you will. Couple that then
10 with FERC setting the term of the remaining licenses to
11 get them all bunched up so that the next time around
12 you have them all being analyzed as a basin.

13 CHAIRMAN WOOD: I have heard the same message
14 all day. Is there anybody here that has some concern
15 with that proposal from the assistant secretary?

16 MR. SWIGER: I think it is current Commission
17 policy, Part II of the regulations, to try to
18 coordinate expiration dates of licenses in their river
19 basin. I think that is a good idea.

20 CHAIRMAN WOOD: What about coordinating the
21 license reissuance today, not just fixing it for --

22 MR. SWIGER: I think it makes a lot of sense.
23 It does make a difference whether the Commission is
24 doing the environmental review or people are doing
25 applicant-prepared EA's. If you have got three
26 projects in the basin and they are each doing an

1 applicant-prepared EA, then to gain those efficiencies
2 would require that those three entities collaborate and
3 figure out a way to share studies and costs. It can be
4 a positive thing, but it is a little more complicated
5 than if the Commission is doing one basin-wide EIS.

6 CHAIRMAN WOOD: We have done exactly this in
7 the past. The push back that we get doesn't come from
8 licensees typically, but typically will come from the
9 agencies. The projects that you are tolling, means
10 environmental improvements that might accrue through
11 the relicensing process, are deferred. There is an
12 aspect there that --

13 MR. OAKLEY: Right, you have waited seven
14 years, what's a few more.

15 (Laughter.)

16 CHAIRMAN WOOD: Well, I will say for this
17 industry it's got me a little worried folks.

18 MR. BETENBERG: We thought carefully about
19 that and concluded that the benefit of the multiproject
20 evaluation outweighed the delay, but it was a concern,
21 and that was part of our reason for the seven years.

22 MR. MILES: Okay. If there are no other
23 questions and comments by the panel, then why don't we
24 open it up to the audience? Is there anybody in the
25 audience that would like to add any comments or ask the
26 panelists any questions?

1 Yes, sir? Hold on we have got a mike.

2 MR. BARTHOLOMEW: My name is Henry Bartholomew
3 from the Edison Electric Institute. I just want to
4 thank the Commission for having the session today and
5 giving all of the stakeholders a chance to offer some
6 thoughts on the various topics you have had. I think
7 it has been a good discussion.

8 I would like to convey that and will certainly
9 convey that in our written comments as well. I think
10 our hope is that the Commission will retain a broad
11 array of basically tracks or options for license
12 applicants to follow that best fit each of their
13 individual projects, and it is not only an issue of
14 size, it is an issue of the range of topics that have
15 to be addressed at different projects.

16 It is a matter of the relationships between
17 the applicants, FERC staff, the other state and federal
18 resource agencies, and the NGOs that may be interested
19 in a particular project. All of those sorts of factors
20 are going to go into deciding whether the traditional
21 license process that you have today works best for a
22 given project or on sort of the other end of the
23 collaborative spectrum, the alternative license
24 process, or something in between.

25 I like to describe it as preserving
26 flexibility, certainly keeping those types of options

1 and some additional ones that you have seen described
2 in the NHA process. I hope that the options can
3 include even more robust availability of options for
4 applicants to do some of the NEPA work in the pre-filing
5 stage without necessarily having to go all the way
6 toward the ALP collaborative process to get their CEQs
7 regulations, recognize that applicants can do draft
8 EA's.

9 We would like to see the concept of applicants
10 helping to prepare a draft EIS, if an EIS is where you
11 need to be in the array of options available. That can
12 be some of the additional tools that are available in
13 the pre-filing stage for sure, and again the other
14 post-filing NEPA type options laid out as the
15 "traditional" and the "Track B" that you have seen in
16 the NHA proposal. I encourage the Commission. I know
17 that you are interested in looking for ways to
18 streamline and simplify the process, and so forth.

19 A clear signal I get back from our members is
20 that they need an array of options, one size does not
21 fit all. Even the Commission in its own regulations
22 today recognizes that because it reviews whether an ALP
23 approach fits. I understand that in some cases it
24 said, even though an applicant was interested in it,
25 "No, it doesn't make sense in this setting. There is
26 just not the right array of factors." So, flexibility

1 of that sort, and the more you can allow the applicants
2 to help make those decisions, since they are the ones
3 that have to live with the process and the end results,
4 I think the better that would be.

5 Thanks.

6 CHAIRMAN WOOD: Do you envision that or is it
7 your understanding that the IHC and/or the NRG process
8 would or would not permit an applicant to do some of
9 the initial preparatory work on an EAR or EIS?

10 MR. BARTHOLOMEW: I don't know the answer to
11 that yes. I haven't parsed them enough to sort of
12 think through that issue, but we will look at that.

13 CHAIRMAN WOOD: Will the folks that were
14 involved in creating, writing those documents know the
15 answer to that?

16 MR. MILES: Has everybody heard the question?

17 MS. CONANT: The question was, Whether or not
18 the IHC or the NRG proposal allowed an applicant to
19 help do some of the preparation of the NEPA document,
20 as the gentleman had made reference to, not just the
21 ALP? I was a part of the IHC proposal, and the idea
22 was that the documents, the prescoping document and the
23 draft and final license application, would actually
24 mirror the sections of the NEPA document that the
25 Commission would be ultimately using.

26 In some sense, the applicant would be helping

1 to draft some of the parts of the NEPA document that
2 would be applicable at that appropriate stage, but then
3 FERC would ultimately take and add the additional
4 information that they need, additional sections, for
5 their final draft and final NEPA document. So, yes,
6 that would be part of that.

7 MR. MILES: Any other comments, questions?

8 Good.

9 MR. AIR: I am Fred Air (phonetic) with
10 Fred Air Associates from Portland, Maine. I do a
11 little relicensing and consulting. My question is
12 about NEPA. Today, we have been exploring processes
13 and we have been looking at models. It seems to me
14 that what I have heard is that we have a NEPA process
15 that begins in some when the relicensing begins, and in
16 others like the traditional we have a NEPA process that
17 does not begin until the end of relicensing. One of
18 the watchwords I have heard today is "efficiency." Is
19 there anybody from this panel or other panels who could
20 give me what the efficiency advantages are to the late
21 NEPA start?

22 (Whereupon, no verbal response.)

23 MR. MILES: Did you follow that? You know
24 what we are looking for. I am not going to anoint
25 somebody, it is too late in the day for that. It is a
26 good question. I suspect that if we are not prepared

1 to answer that today, it might be something that
2 members ought to consider including in their comments
3 when they file their comments. It might be the best
4 time to address that.

5 Any other comments, questions by anybody? If
6 not, we are going to wrap up.

7 Yes, David?

8 MR. MUELLER: David Mueller, Pacific Gas &
9 Electric Company. On this issue of study requests, I
10 just want to touch on an issue that I mentioned
11 earlier, and that is, to be careful about pushing the
12 timing of study requests in advance of the opportunity
13 to identify issues and information needs, two reasons
14 for that. One is simply a logic disconnect to request
15 studies before you know what you need; and, secondly,
16 as soon as those study requests come out, they start
17 creating some positions. If we are trying to get the
18 participants in a licensing proceeding to work
19 together, inviting positions to be established
20 certainly is problematic there.

21 The second thing as far as the study disputes,
22 I think both the NRG and IHC proposals contained some
23 very good dispute resolution concepts. Again, we need
24 to be careful to not make a dispute resolution
25 procedure an alternative to the participants trying to
26 sort out there disputes among themselves.

1 We don't want it to be so strong and so rigid
2 that it is a default where the participants push the
3 dispute resolution process away from the folks that are
4 most familiar with the proceeding, the issues, the
5 projects and into the hands of some sort of dispute
6 resolution panel that may have the least familiarity
7 with the issues at hand.

8 It is important to have some sort of dispute
9 resolution mechanism as a back stop, particularly one
10 that uses some sort of rational criteria for evaluating
11 disputes, but to not make it an alternative to the
12 parties to the proceeding trying to work together.

13 MR. MILES: Well, thank you. Thank you very
14 much.

15 I think at this time we will wrap up. I think
16 Bill and some other people have to leave. Well, Bill,
17 did you have to leave?

18 MR. BETENBERG: Yes and Merlin.

19 MR. MILES: Okay. Well, if you have to leave,
20 we want to thank you very much; okay.

21 CHAIRMAN WOOD: Great. Bill, why don't you
22 pipe in.

23 MR. SARBELLO: I just had one point of
24 clarification, because Mike Swiger and I might have
25 talked past each other a little bit. In terms of the
26 baseline issue again, I recognize FERC has its

1 baseline; but again if you want to accommodate the
2 state processes, recognize that we are looking for, we
3 are going to be asking for in some cases that define
4 not a pre-project condition, but essentially a
5 condition, say, with a dam in place and the project not
6 operating.

7 For example, let's say you have a three-mile
8 long bypass reach that is essentially dry most of the
9 time year. It may not meet water quality standards.
10 As a matter of fact, it probably is listed as precluded
11 because it is not supporting fish propagation and
12 survival.

13 We need the information for how much water
14 will it take to meet the minimum standards in that
15 bypassed reach. We are not asking to restore to
16 pristine levels, but it needs to meet the minimal
17 levels of water quality standards. If we don't have
18 that information, we will be operating in a vacuum and
19 have to do something else.

20 As a matter of fact, I will go even further.
21 It is very easy to do a standard-setting approach and
22 set a high level that we know will be protective. If
23 you want to try and optimize the project, it really
24 does take work and studies to do that. The closer you
25 want to get to optimization, unfortunately the longer
26 it takes and the more people have to work together, but

1 you can do it. We have done some tremendous things in
2 New York state where we have restored miles and miles
3 and river.

4 I mentioned the Rackett, that is 90 miles of
5 river that is now restored, and at the same time having
6 full power generation, preserving pulsed operation. It
7 can be done, but it takes a real application of
8 information to do that.

9 Thank you.

10 MR. MILES: Are there any other comments?

11 (Whereupon, no verbal response.)

12 MR. MILES: Mr. Chairman?

13 CHAIRMAN WOOD: Just in closing, I want to
14 thank this final panel. You all have lived up to the
15 charge of being as helpful as the first and second
16 panels, and I appreciate our colleagues from our sister
17 agencies here and from the states and the Indian tribes
18 as well, and a nice job on the staff's part getting a
19 nice set of balanced panels here for us.

20 I really feel like I learned a lot. We are
21 going to be involved in this process probably quite a
22 bit more than our dear predecessors on FERC have been,
23 because you and I are both committed to it in our
24 nomination last year, and I am sure our future
25 colleagues will be asked to do the same as regards
26 hydro issues. I heard a lot of consensus on many

1 issues. I think the 80 percent sounds like a decent
2 number. I think we are going to get that number lower
3 than 20, folks, just watch.

4 (Laughter.)

5 CHAIRMAN WOOD: I think it makes a lot of
6 sense and certainly seemed like a lot of buy in that a
7 more integrated environmental review process has got to
8 happen. It is a way to help maximize our collective
9 limited resources as well as those of the states who
10 ultimately have to pass verdict on the number of
11 required statutory findings, and so I do think that is
12 very achievable and I look forward to getting into the
13 nitty-gritty and figuring out exactly how we can do
14 that.

15 A simpler more transparent process, most
16 people go "duh," but, quite frankly, this is kind of an
17 inside-the-beltway crowd. We sometimes think we have
18 it all figured out, but there are constituencies
19 outside of the "in crowd" that need to understand what
20 we do better, including me. I think we can get there
21 with a process, that while allowing for some diversity
22 of procedural process, can throughout the process be
23 more transparent and better explained.

24 I understand we do have more of a "missionary"
25 role to play in explaining our processes to the outside
26 world, not just to the tribes, which had some very I

1 think eloquent testimony on that issue today, but I
2 have not only heard it from them, in my meetings with
3 folks, but from a lot of other folks.

4 Early identification of issues, again that
5 seems like a no-brainer, but I think what it requires,
6 however, is a commitment on the part of not just the
7 licensee and maybe some of the major stakeholders, but
8 everybody to not lie behind the log but tip their early
9 and say, "Here is what we are about and here is what
10 our interests are in this process." It is critical to
11 making either a settlement function or a limited
12 back-and-forth function work well.

13 I heard I think it was on the first panel --
14 and, Nora, you might you have made note of it, too --
15 but dollars should be used for mitigation of
16 environmental issues and not for keeping all of us
17 driving nice cars and having money to pay the
18 dry-cleaning bill for our suits and dresses.

19 I mean, the process and the litigation aspect
20 of this are necessary, but I think we have got to
21 remember that it is not just our clients, et cetera,
22 who are paying the bill and the licensees can complain
23 but ultimately behind the licensee, most of whom are
24 regulated local utilities, are customers who are paying
25 bills.

26 Whether those are agricultural customers who

1 are growing the fruit for all of America out there in
2 California, residential, commercial mills,
3 industrials, or cities that are paying the bills up in
4 New England or in South Carolina, there are real people
5 who are paying these bills. It is a hidden tax, and we
6 need to be as mindful of the impact of that on
7 customers as the Congress down the street is when they
8 discuss income tax changes and other corporate tax
9 changes for the broader economy.

10 I recognize and I heard in spades that there
11 are diverse agendas here. That is okay, that is the
12 way America works. There are diverse resource
13 potentials that people have. Some people have deeper
14 pockets than others.

15 I certainly heard on the first, the second and
16 the third panel that not all projects are the same. I
17 do note with some, I guess, conceptual agreement that
18 some multiple track processes to the extent that we
19 have got just so many people up here that can handle
20 this as well, but multiple track processes that may be
21 customized towards the specific types of projects are
22 good things to have and to have available, but that we
23 ultimately are going to let the great competition
24 between processes work to have one rise to the top.

25 I do note with pleasure the stats of how the
26 ALP has been used to handle more of the large, major,

1 potentially contestable projects as people have gotten
2 more comfortable with it and seen it work well.

3 I do think that as we talk about a new process
4 that learns the best lessons, I have full expectation
5 that it will not be used by everybody at the front end.
6 But as early successes are gained with that that result
7 in better outcome for less time and dollars, which is
8 our goal, that that will again become the migrating
9 process.

10 I am not of a mind-set at least as one of the
11 five here that have to vote on something from our
12 agency that we are going to go to a single process and
13 cut everybody else off of the other three. I do want
14 to spend a lot of time making sure that the single
15 process that we are trying to groom here works well for
16 the balance of this decade and all the projects to
17 come.

18 Please do not feel threatened by the fact that
19 we are talking about a new process when, in fact, there
20 are some that are doing, if not a great job, at least a
21 pedestrian job to date.

22 I do appreciate particularly hearing from the
23 tribes, their issues and concerns. I do note that both
24 of the proposals that we heard about, the IHC and the
25 NRG, had a lot of input from our federal brothers and
26 sisters and from the non-governmental organizations as

1 well as the licensees. As former state commissioners,
2 I think our ears are particularly attuned when we hear
3 the difficulties or the concerns of the legal issues
4 that states have in this process, and so I want to just
5 say a personal welcome and a personal plea for states
6 to take a little bit of time to respond to our requests
7 for comments, again due to Mr. Clements, on or before
8 December 6.

9 We want to find a way to address those issues
10 because, as we will talk about tomorrow in our study of
11 the old pending licenses here that have been pending
12 for way too long, there are some state issues that are
13 concerned there that are just kind of a consequence of
14 the way things are.

15 If there are procedural changes that we can
16 make to that or even legal changes, I think the energy
17 bill looks like it is going to be open for a little
18 while so if we have got some suggestions that ought to
19 be made to the statute that don't upset everybody just
20 way too much, then we can recommend those down the
21 street because it still is timely.

22 Finally, I just want to say this type of
23 process that we have begun to embark upon is one that I
24 am very familiar with from my experiences as a state
25 regulator. It is messy, it is very non-linear, it is
26 very difficult for anybody to game. For that reason,

1 it is exactly why folks like Nora and me and Bill and
2 Linda like it, because it really does result in people
3 talking about what they need, not just what they want
4 from a regulatory process.

5 I look forward to working on that with you
6 all, getting smarter on your issues our issues, and
7 look forward to the fine work that our staff has set up
8 as far as the process. Again, Mr. Clements is our next
9 recipient of our ball over the home plate , so serve
10 him a strike folks, so he can slap it over the fence.

11 The meeting is adjourned.

12 (Whereupon, at 3:40 p.m., the meeting was
13 adjourned.)

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