ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 16-1296

DUKE ENERGY CAROLINAS, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

Susanna Y. Chu
Attorney

For Respondent
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Final brief: March 9, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

In addition to the parties listed in Petitioner's brief, the following entities intervened in the agency proceedings on review:

American Whitewater Association
Bowater, Inc.
Catawba Riverkeeper Foundation, Inc.
Lake Wateree Association
National Marine Fisheries Service
North Carolina Wildlife Resources Commission

B. Rulings Under Review

1. Order Issuing New License, *Duke Energy Carolinas, LLC*, 153 FERC ¶ 62,134 (2015) ("License Order"), R. 3263, JA 542-698; and

2. Order on Rehearing and Clarification, *Duke Energy Carolinas, LLC*, 156 FERC ¶ 61,010 (2016) ("Rehearing Order"), R. 3490, JA 786-813.

C. Related Cases

This case has not previously been before this Court or any other court. Respondent is not aware of any related cases.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

March 9, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES

---

* Cases chiefly relied upon are marked with an asterisk.

ADMINISTRATIVE CASES

STATUTES

Federal Power Act

GLOSSARY

Agreement	Revised Comprehensive Licensing Agreement, filed with FERC December 29, 2006, R. 564, JA 83-288
Catawba Project	Catawba-Wateree Hydroelectric Project
Commission or FERC	Respondent Federal Energy Regulatory Commission
Duke	Petitioner Duke Energy Carolinas, LLC
Duke Progress	Duke Energy Progress, Inc.
Environmental Impact Statement	FERC Office of Energy Projects, Final Environmental Impact Statement for Hydropower License, Catawba-Wateree Hydroelectric Project – FERC Project No. 2232 (July 2009)
License Order	Order Issuing New License, *Duke Energy Carolinas, LLC*, 153 FERC ¶ 62,134 (2015), R. 3263, JA 542-698
Niagara License Order	*New York Power Authority*, 118 FERC ¶ 61,206 (2007)
Niagara Rehearing Order	*New York Power Authority*, 120 FERC ¶ 61,266 (2007)
Rehearing Order	Order on Rehearing and Clarification, *Duke Energy Carolinas, LLC*, 156 FERC ¶ 61,010 (2016), R. 3490, JA 786-813

In the United States Court of Appeals for the District of Columbia Circuit

No. 16-1296

DUKE ENERGY CAROLINAS, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

The Federal Power Act authorizes the Federal Energy Regulatory Commission ("FERC" or the "Commission") to issue licenses for hydroelectric projects for terms of up to 50 years. 16 U.S.C. § 799. Upon expiration of such a license, the Commission may relicense a project "for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued." *Id.* § 808(e).

Under this relicensing provision, the Commission generally issues 30-year licenses for projects involving "little or no redevelopment, new construction, new

capacity, or environmental mitigation and enhancement measures," 40-year licenses for projects with a "moderate" amount of such measures, and 50-year licenses for projects involving "extensive" measures. *Duke Energy Carolinas, LLC*, 153 FERC ¶ 62,134, P 276 (2015) ("License Order") (citing *Consumers Power Co.*, 68 FERC ¶ 61,077, at 61,383-84 (1994)), R. 3263, JA 625.

Here, upon expiration of the original 50-year license for a hydroelectric project located along the Catawba and Wateree Rivers in North and South Carolina, Petitioner Duke Energy Carolinas, LLC ("Duke") applied to FERC for a new license. Duke argued to the Commission that the construction and environmental measures it would be implementing under the new license warranted a new 50-year license term. Finding, based on the record, that the license called for a "moderate" level of construction and environmental measures, the Commission issued Duke a 40-year license. License Order, 153 FERC ¶ 62,134, at PP 276-77, JA 625-26, *on reh'g*, 156 FERC ¶ 61,010, at PP 9-26 (2016) ("Rehearing Order"), R. 3490, JA 788-97.

The issue presented is:

Whether the Commission reasonably found that the measures required by the hydroelectric license it issued to Duke were "moderate" under the agency's precedents, warranting a 40-year license term.

STATUTORY PROVISIONS

Pertinent statutes are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The Federal Power Act sets forth "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). The Act authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. 16 U.S.C. § 797(e).

Licenses are issued for terms of up to 50 years, and are "conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe . . . . " *Id.* § 799. Upon expiration of such a license, the Commission may issue a new license to the existing licensee or a new licensee. *Id.* § 808(a). If the Commission relicenses a project under this provision, the new license "shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued." *Id.* § 808(e).

II. PROJECT BACKGROUND

The 819-megawatt Catawba-Wateree Hydroelectric Project ("Catawba Project") occupies an approximately 300-mile long stretch of the Catawba River,

which flows into the Wateree River, east of the Blue Ridge Mountains in North and South Carolina. License Order, 153 FERC ¶ 62,134, PP 3, 11, JA 542, 545.[1]

Under a 50-year license granted in 1958, Duke operated the Catawba Project's generating facilities to meet the needs of its transmission and distribution systems. *Id.* PP 4, 66, JA 543, 557. In advance of the license's expiration in 2008, Duke entered into a Comprehensive Relicensing Agreement ("Agreement") with 70 entities, including state, local, and environmental groups. *Id.* PP 4-5, JA 543-44. The Agreement specified that Duke would implement specified resource protection, environmental enhancement, and recreation measures. *Id.* PP 93-126 (summarizing Agreement provisions), JA 563-75.[2]

Duke filed the Agreement with FERC in 2006 as part of its relicensing application, proposing to operate and maintain the Catawba Project in accordance with the Agreement. License Order, 153 FERC ¶ 62,134, PP 5, 93, JA 543, 563. The Commission notified the public of the application, soliciting public comments, interventions, and protests. *Id.* PP 5-6, JA 543-44. Numerous agencies,

---

[1] "A hydroelectric project generates energy using a turbine, which converts flowing water to mechanical power, and a generator, which converts the mechanical power to electric energy." *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 31 (D.C. Cir. 2015).

[2] Duke executed and filed with the Commission a slightly revised version of the original Comprehensive Licensing Agreement. The orders on review and this brief refer to the revised Comprehensive Licensing Agreement filed with FERC on December 29, 2006, R. 564, JA 83-288.

environmental organizations, state and local governments, and individuals intervened and submitted comments. *Id*.

In 2008, the Commission notified the public that Duke's application was ready for environmental analysis under the National Environmental Policy Act, and solicited comments and recommendations regarding the issues to be studied. *Id.* PP 7-10, JA 544-45. The environmental analysis process culminated in Commission staff's issuance of a final Environmental Impact Statement that assessed "the environmental and economic effects of (1) continuing to operate the [Catawba Project] as [it is] currently operated (no-action alternative); (2) operating the [Catawba Project] with the environmental measures proposed in the [Agreement]; and (3) operating the [Catawba Project] as proposed in the [Agreement], with additional or modified environmental measures recommended by staff." FERC Office of Energy Projects, Final Envtl. Impact Statement for Hydropower License, Catawba-Wateree Hydroelectric Project – FERC Project No. 2232 (July 2009), at 1 ("Environmental Impact Statement"), R. 1513, JA 299.

The Environmental Impact Statement included a general "economic analysis" of the project based on information provided by Duke in its license application. *Id.* at 385-462, JA 300-77. As explained in the License Order, "[i]n determining whether to issue a new license for an existing hydroelectric project, the Commission considers a number of public interest factors, including the

economic benefits of project power." 153 FERC ¶ 62,134, PP 267-71, JA 623-24. The economic analysis contained in the Environmental Impact Statement "provide[s] a general estimate of the potential power benefits and the costs of a project, and of reasonable alternatives to project power." *Id.* P 267 (explaining that *Mead Corp.*, 72 FERC ¶ 61,027 (1995), sets out the Commission's approach to evaluating the economics of hydropower projects), JA 623.

Based on Commission staff's "independent review and evaluation of the environmental and economic effects of the proposed action, the proposed action with staff-identified measures, and no action," staff recommended that the Catawba Project be relicensed, with license terms to include certain of the measures proposed by Duke, with additional environmental measures identified by staff. Envtl. Impact Statement at 463, JA 378. Staff concluded that "the public benefit of these measures would exceed those of the other alternatives." *Id.*

III. ORDERS ON REVIEW

On November 25, 2015, the Director of FERC's Office of Energy Projects issued a new license for the Catawba Project that incorporated most of Duke's proposed environmental measures, along with "modifications . . . to afford additional protection to resources affected by the project and to facilitate the Commission's administration of the license." License Order, 153 FERC ¶ 62,134, P 135, JA 578.

The License Order stated the Commission's general policy of issuing licenses for 30-year terms where the license conditions involve "little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures," 40-year terms where the license conditions involve "a moderate amount of such activities," and 50-year terms where the license conditions involve "extensive measures." *Id*. P 276 (citing *Consumers Power*, 68 FERC ¶ 61,077, at 61,383-84), JA 625. Finding that the license terms for the Catawba Project required a "moderate" amount of environmental and construction measures under this standard, the Director issued the license for a 40-year term. *Id.* P 277 & ordering paragraph (A), JA 625-26.

Duke filed a request for rehearing of the License Order, arguing that the license should be for a longer 50-year term. Upon consideration, the Commission denied rehearing on the license-term issue, affirming the Director's finding that a 40-year license term is appropriate for the Catawba Project. Rehearing Order, 156 FERC ¶ 61,010, PP 9-26, JA 788-97.

SUMMARY OF ARGUMENT

The orders on review present the Commission's informed judgment that the license it granted to Duke for the Catawba Project involved "moderate," rather than "extensive," construction and environmental requirements, thus warranting a 40-year license term under Commission policy. The Commission's fact-specific

determination—based on its knowledge of the requirements of this particular FERC-issued license by comparison with other FERC-issued licenses—is entitled to respect.

Argument § I. Duke's argument that it is entitled to a 50-year license term rests principally on the incorrect suggestion that license applicants' cost estimates govern the Commission's license term determination under the *Consumers Power* (minimal/moderate/extensive) standard. But no Commission order has ever stated that cost is dispositive. As the Commission explained in the challenged Rehearing Order, the agency uses cost estimates provided by license applicants in its environmental analysis. However, the Commission recognizes that such cost estimates are not necessarily reliable; indeed, in this proceeding, the Commission found Duke's estimates to be questionable.

Argument § II. Based on the facts of this particular FERC-licensed project by comparison with other FERC-licensed projects, the Commission reasonably determined that the measures required under the Catawba Project license are "moderate" rather than "extensive." In so finding, the Commission distinguished the cases cited by Duke and reasonably rejected Duke's contention that Catawba Project requirements are similar to those of a 50-year license issued for the Niagara Falls project, upheld by this Court in *Eastern Niagara Public Power Alliance v. FERC*, 558 F.3d 564 (D.C. Cir. 2009).

Rather, the Commission found that the Catawba Project license requirements were more akin to the 40-year licenses issued for a project in Washington State, and for a project operated by Duke's sister company, Duke Energy Progress ("Duke Progress"), in North Carolina. On brief, Duke refers to the Duke Progress case only in passing, Br. 55, ignoring the Commission's finding regarding the similarities between this case and the Duke Progress case.

The Commission's reasoned and reasonable determination, based on the particularized facts of this case and the Commission's long experience overseeing the Nation's water resources, should be upheld.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of the Commission's hydroelectric licensing decisions is deferential. *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 25-26 (D.C. Cir. 2015) ("[W]e defer to the agency's expertise . . . so long as its decision is supported by substantial evidence in the record and reached by reasoned decisionmaking . . . . ") (internal quotations and citation omitted); *Eastern Niagara*, 558 F.3d at 567 (applying "deferential arbitrary-and-capricious standard" to licensing decision). *See also Seattle v. FERC*, 883 F.2d 1084, 1087 (D.C. Cir. 1989) ("The Commission's interpretation of the hydroelectric licenses it issues and oversees is entitled to deference.").

"In a licensing decision such as this, where few explicit statutory provisions govern, [the Court's] role is narrowly circumscribed." *Wisconsin v. FERC*, 104 F.3d 462, 467 (D.C. Cir. 1997) (citation omitted). "The court will deny a petition for review so long as [FERC's] decision is supported by substantial evidence in the record and reached by reasoned decisionmaking." *Id.* (citations and internal quotations omitted). Under the Federal Power Act, the Commission's factual findings are conclusive, if supported by substantial evidence. 16 U.S.C. § 825*l*(b); *see also Turlock*, 786 F.3d at 25-26.

The question presented for review in this case—whether the requirements of a hydroelectric license issued by FERC constitute "moderate" or "extensive" measures under the Commission's own precedent—is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise," warranting deference to the agency's "informed discretion." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376-77 (1989). The portions of the order concerning the Commission's interpretation of its own precedents are likewise subject to a deferential standard of review. *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007). *See also FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 784 (2015) (deferentially reviewing FERC order involving "both technical understanding and policy judgment," where Commission "addressed th[e] issue seriously and carefully").

II. FERC SETS LICENSE TERMS BASED ON A FACT-SENSITIVE ASSESSMENT OF THE MEASURES REQUIRED BY THE LICENSE, NOT LICENSE APPLICANTS' ESTIMATED COSTS OF IMPLEMENTATION

Under broad authority granted to it by the Federal Power Act, FERC may relicense hydroelectric projects for terms between 30- and 50-years. 16 U.S.C. § 808(e). The Federal Power Act is silent regarding whether a project license should be issued for a shorter term (i.e., closer to 30 years) or a longer term (i.e., closer to 50 years). *Id.* The Court has recognized that the Commission has broad discretion in fashioning appropriate license terms. *See, e.g., Pacific Gas & Elec. Co.*, 720 F.2d 78, 84 (D.C. Cir. 1983) ("FERC has discretion . . . to restrict license terms to any period not exceeding fifty years, and is also authorized . . . to impose additional license conditions at its discretion.").

It is not disputed that the Commission generally issues 30-year licenses for projects involving "little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures," 40-year licenses for projects with a "moderate" amount of such measures, and 50-year licenses for projects involving "extensive" measures. License Order, 153 FERC ¶ 62,134, P 276 (citing *Consumers Power*, 68 FERC ¶ 61,077, at 61,383-84), JA 625. As originally articulated in the Commission's 1994 *Consumers Power* decision:

> [T]he Commission issues new 30-year licenses for projects which include no substantial new construction or power generating expansion. We issue new licenses for 40 years or more for projects

> which include substantial new construction or capacity increases. . . . [W]e may issue longer-duration licenses for projects which include substantial or costly environmental mitigation and enhancement measures.

68 FERC ¶ 61,077, at 61,383-84.

Neither *Consumers Power*—nor any of FERC's licensing decisions over the past 22 years—states that the term of a license is determined solely by the cost of implementing required license measures, as Duke argues. Rather, the Commission determines whether the "nature and extent" of the required measures qualify as minimal (30-year license term), moderate (40-year term), or extensive (50-year term). *See* Rehearing Order, 156 FERC ¶ 61,010, P 13, JA 789-90. Because "[e]ach [hydroelectric] project is unique and comparing projects can be difficult," the Commission typically engages in a fact-sensitive determination when selecting a 30-, 40-, or 50-year term for a license. *Id.* P 23, JA 796. *See also Duke Energy Progress*, 153 FERC ¶ 61,056, P 42 (2015) (Commission's licensing precedents "demonstrate[] the highly fact-sensitive nature of choosing an appropriate license term based on the record before the Commission").

As the Commission explained here, estimated costs can play a role in this fact-sensitive determination. Such estimates, for example, can "provide some indication of the extent of required measures." Rehearing Order, 156 FERC ¶ 61,010, P 14, JA 790. However, "costs alone are never entirely dispositive . . . . " *Id.* The Commission "may use costs as a check on the propriety of our qualitative

conclusion that measures required under a new license are minimal, moderate, or extensive, but we do not use costs as the conclusive and quantitative test for setting a license term." *Id.* In short, the "selection of license term is largely based on a qualitative, rather than a quantitative analysis." *Id*.

It is entirely appropriate that the estimated costs of license measures do not govern the determination of whether license measures are "minimal," "moderate" or "extensive" for license term purposes. This is because, as the Commission explained, such cost estimates are provided by license applicants, and are used by Commission staff primarily to assess the economic feasibility of a project in the course of performing its environmental assessment. *Id.* ("[T]he economics of a project are analyzed to provide a general estimate of the potential power benefits and cost of a project, in order to assist in the comparison of alternatives (typically, a no-action alternative, the licensee's proposal, and an alternative including mandatory conditions and staff-recommended measures).").

Because cost estimates submitted to the Commission as part of relicense applications are developed by license applicants, and are not dispositive of any issue in a relicensing proceeding, the Commission "do[es] not subject the estimates to the type of rigorous analysis that would be necessary were we to treat them as matters of absolute fact." *Id.* Thus, a "strictly quantitative analysis" based on such estimates would be "problematic." *Id.* P 15, JA 791.

Indeed, the Commission specifically found the cost data submitted by Duke to be unreliable. Rehearing Order, 156 FERC ¶ 61,010, PP 14-17, JA 790-93. The Commission observed that, in response to a staff request for updated cost estimates, Duke provided—without explanation—higher estimates that were "significantly different" from those originally submitted. *Id.* P 15, JA 791-92. For example, Duke updated its cost estimates to include a $40 million gate instead of the $10 million bladder dam required by the License Order, increased its estimate for recreation enhancements from $2,792,113 (in 2008 dollars) to $4,478,559 (in 2015 dollars), and increased its estimate for certain structural modifications from $331,780 (in 2008 dollars) to $1,952,031 (in 2015 dollars). *Id.* "Given that [Duke's] numbers are unexplained (and, in the case of the gate construction, inconsistent with the terms of the license), we cannot use them as a basis for changing the license term." *Id.*

On brief, Duke defends its cost estimates and argues that the Commission should have notified Duke of any concerns during the proceedings. Br. 42-44. There is no applicable statutory or regulatory provision that obligated the Commission to seek clarification from Duke. In any event, as explained above, such cost estimates are principally used in Commission staff's environmental analysis and are not dispositive of the license term issue.

Likewise, the Commission reasonably declined to extend the license term for the Catawba Project in light of costs incurred by Duke prior to license issuance. Rehearing Order, 156 FERC ¶ 61,010, PP 18-19, JA 793-94. Under longstanding policy, the Commission "only consider[s] measures required for the first time in the new license (and not measures authorized or required under the previous license)" when determining an appropriate license term. *Id.* P 19 & n.30 (citing FERC cases), JA 793-94. Thus, the Commission appropriately rejected Duke's contention that certain measures it implemented under amendments to its original license should be considered when setting the term for the new license. *Id.* Similarly, the Commission appropriately rejected Duke's argument that the costs of pursuing relicensing should be considered, based on longstanding precedent. *Id.* P 19 & n.33 (citing FERC cases), JA 793-94.

Duke challenges these determinations as too briefly stated. Br. 53-55. But the Commission's responses were consistent with its long-established precedent. There was no need to say more. *See, e.g.*, *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117, 122 (D.C. Cir. 1989) ("[W]here a particular agency action does not appear to be inconsistent with prior decisions, the agency explanation need not be elaborate.") (citations and internal quotations omitted).

III. BASED ON ITS FACT-SENSITIVE ASSESSMENT IN THIS CASE, THE COMMISSION REASONABLY ISSUED A 40-YEAR LICENSE TERM FOR THE CATAWBA PROJECT

A. The Commission's Determination that the Project Was More Similar to Projects that Received 40-Year License Terms than the 50-Year License Projects Cited by Duke Is Entitled to Respect

As the Commission noted, "[e]ach project is unique and comparing projects can be difficult." Rehearing Order, 156 FERC ¶ 61,010, P 23, JA 796. Based on its review of the facts and circumstances of the Catawba Project license, the Commission permissibly concluded that the Catawba Project license requirements were more similar to the requirements of recently-issued licenses that received 40-year terms—including one issued to a Duke affiliate—than to the 50-year licenses cited by Duke.

As an initial matter, Duke suggests that the Commission should have included certain items when summarizing measures required by the Catawba Project license. Br. 16-17, 26 (asserting that FERC "incompletely" summarized new construction and environmental measures, citing License Order, 153 FERC ¶ 62,134, P 277, JA 625-26). A summary, by definition, is not comprehensive. The conditions for relicensing the Catawba Project appear elsewhere in the orders; the Commission is not required to restate these conditions in the sections addressing license term. *See, e.g.*, License Order, Ordering paragraphs & Appendices, JA 626-98; Rehearing Order, Ordering paragraphs, JA 806-13. *See*

also Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1310-11 (D.C. Cir. 2015) (upholding factual finding based on, among other things, summaries of agreement terms). Moreover, such summaries are typical of the Commission's license decisions. *See, e.g.*, *Duke Energy Progress*, 153 FERC ¶ 61,056, P 41 (briefly summarizing measures); *New York Power Auth.*, 120 FERC ¶ 61,266, P 19 (2007) (briefly summarizing measures).

As summarized by the Commission, the Catawba Project license includes fish and eel passage facilities, construction of a bladder dam, new minimum flow and recreational flow release requirements, water quantity and quality monitoring, and various recreation improvements. Rehearing Order, 156 FERC ¶ 61,010, P 13, JA 789-90. The "nature and extent" of the required measures, the Commission concluded, are "not unusual" for a project of this size, and are "similar to those required in other recent licenses that received 40-year terms." *Id.* P 13 & n.14, JA 789-90.

In particular, the Commission cited the 40-year license it recently issued to Duke's sister company, Duke Energy Progress, for the Yadkin-Pee Dee Hydroelectric Project in North Carolina. *Duke Energy Progress*, 151 FERC ¶ 62,004 (2015), *on reh'g*, 153 FERC ¶ 61,056 (2015).[3] That license involved

[3] Duke Energy Progress and Duke Energy Carolinas are subsidiaries of the Duke Energy Corporation. *See* https://www.duke-energy.com/_/media/pdfs/our-company/fast-facts-2016-print-final.pdf?la=en.

"fish passage facilities, higher aquatic and recreation minimum flow releases, and sturgeon monitoring." Rehearing Order, 156 FERC ¶ 61,010, n.14, JA 789. The Commission also cited to the 40-year license issued in *Public Utility District No. 1 of Douglas County, Wash.*, 141 FERC ¶ 62,104 (2012), *on reh'g*, 143 FERC 61,130 (2013), which involved "fish passage facilities, and implementation of numerous aquatic, wildlife, recreation, and cultural resources management and protection plans." Rehearing Order, 156 FERC ¶ 61,010, n.14, JA 789.

Duke's brief contains only a passing reference to the *Duke Progress* case (at page 55), ignoring the Commission's finding regarding the similarities between the two Duke cases. *Duke Progress* also involved a fact-specific determination regarding the extent of required license measures, and the Commission likewise rejected certain cost-based arguments made by Duke Progress in favor of a 50-year license term. 153 FERC ¶ 61,056, PP 38-44.

In particular, Duke Progress compared its annual dollar-per-installed megawatt cost to that incurred by other licensees that received 50-year license terms. *Id.* P 42. The Commission found Duke Progress's cost-based arguments to be "unavailing." *Id.* As the Commission explained there, the orders cited by Duke Progress merely "demonstrate[] the highly fact-sensitive nature of choosing an

appropriate license term based on the record before the Commission." *Id.* The orders on review here are fully consistent with *Duke Progress*.[4]

Duke chooses instead to focus on a 50-year license the Commission granted to the New York Power Authority for the Niagara Falls project. *See New York Power Auth.*, 118 FERC ¶ 61,206 (2007) ("Niagara License Order"), *on reh'g*, 120 FERC ¶ 61,266 (2007) ("Niagara Rehearing Order"), *pet. denied* in *Eastern Niagara*, 558 F.3d 564. *See* Br. 2, 35-36.

As the Rehearing Order notes, the Niagara License Order contained no discussion of costs. Rehearing Order, 156 FERC ¶ 61,010, n.17 (citing Niagara License Order, 118 FERC ¶ 61,206, P 113), JA 790-91. On rehearing, in response to arguments that the 50-year license term was too long, the Commission briefly summarized some of the required measures, concluding: "We find that these measures, which have a total cost of $58,217,645, qualify as extensive." Niagara Rehearing Order, 120 FERC ¶ 61,266, PP 19-20.

Then, in response to a party's contention that "the Commission has evaluated costs in relation to a project's benefits, and has granted license terms *longer than 30 years* where the costs . . . represent a large portion of the total

[4] The Duke Progress license is the subject of an appeal pending in the Fourth Circuit, but no party—including Duke Progress—appealed the 40-year license term, so that issue is not on review. *City of Rockingham, N.C. v. FERC*, 4th Cir. No. 15-2535 (fully briefed; oral argument scheduled for March 23, 2017).

benefit of the project," the Commission stated: "This is true. Where the mitigation measures have not been considered moderate or extensive on their own, we have examined them in the context of the whole project. However, where the costs are high, we have issued *longer term licenses*." *Id.* P 20 (emphasis added). The term "longer term licenses," read in context here, could indicate license terms of either 40- or 50-years.

In a footnote, the Niagara Rehearing Order discusses various 50-year licenses and characterizes them as "requir[ing] extensive measures similar in scope to those required in the Niagara license." *Id.* n.27. This statement supports the qualitative review discussed at greater length in the challenged orders. *See* Rehearing Order, 156 FERC ¶ 61,010, P 14 & n.17, JA 790-91.

On balance, the Commission's Niagara orders reflect the fact-specific arguments made in that case, rather than setting out the considerations that guide the agency's license term determinations. In particular, contrary to Duke's contention, the Niagara orders do not clearly articulate a purely quantitative approach to the Commission's license term determinations, especially with respect to when the Commission will issue a license for a 50-year term versus a 40-year term.

Accordingly, read in context with the underlying orders, the Court's decision in *Eastern Niagara*, and the 2008 Commission brief submitted in that appeal, do

not provide unequivocal support for Duke's position here. *See Eastern Niagara*, 558 F.3d at 567 (finding "no basis to disturb FERC's judgment regarding the length of the license," after noting that FERC "typically issues longer licenses when license conditions impose greater costs on license-holders"). As the Commission explained here, to the extent the Niagara orders can be read to suggest that the license determination there turned on costs, that case is an "outlier that is not consistent with the majority of more recent [Commission] orders." Rehearing Order, 156 FERC ¶ 61,010, P 22, JA 795-96.

The Commission's 1994 *Consumers Power* decision also does not support Duke's position. *See* Br. 45-46. In that decision, the Commission set forth the general standard governing its license term determinations, observing that it issues "new licenses for *40 years or more* for projects which include substantial new construction or capacity increases." 68 FERC ¶ 61,077, at 61,383-84 (emphasis added). Explaining that such "longer duration" licenses—i.e., licenses with 40- or 50-year terms—"ease the economic impact of the new costs" imposed by a license, the Commission issued 40-year licenses for the projects at issue. *Id.* That decision simply does not support a cost-determinative approach to issuing 40- versus 50-year licenses.

Duke's reliance on *Williams Gas Processing v. FERC*, 475 F.3d 319 (D.C. Cir. 2006), Br. 42, is similarly misplaced. That case involved an acknowledged

"fundamental inconsistency" in FERC precedent, and a resultant shift in policy. *Williams Gas*, 475 F.3d at 322. Here, there is no such inconsistency or policy shift. And to the extent the Commission's prior precedents give rise to any ambiguity, the Commission appropriately clarified the issue in its companion Duke case, *Duke Energy Progress*, 153 FERC ¶ 61,056, P 42, and the present orders on review. Rehearing Order, 156 FERC ¶ 61,010, PP 13-15, JA 789-92.

In any event, this case is readily distinguishable from prior licensing cases cited by Duke. Here, the Commission found that the cost estimates provided by Duke were unreliable, a factual finding not present in *Eastern Niagara*. *See supra* Argument § I. This factual finding is sufficient to distinguish the present case. *See Environmental Action v. FERC*, 996 F.2d 401, 411-12 (D.C. Cir. 1993) ("[W]here the circumstances of . . . prior cases were sufficiently different than those of the case before us[,] . . . the Commission was justified in declining to follow them, and the [C]ourt could accept even a laconic explanation as an ample articulation of its reasoning.") (internal quotations and citations omitted).

Although the Commission reasonably found that the Catawba Project license fell within the "moderate" category under *Consumers Power* based on the circumstances of the case, the Commission went on to distinguish certain cases cited by Duke in which the Commission issued 50-year licenses:

- ***Public Util. Dist. No. 1 of Chelan Cnty.*, 117 FERC ¶ 62,129 (2006) (Lake Chelan project):** The Commission explained that "the extent of the measures required" for this 48-megawatt project "are not analogous to the measures required here with respect to the much larger [Catawba] Project." The Commission also noted that, in setting the length of the license term for the Lake Chelan project, FERC "relied on the general extent of the measures required," rather than a quantitative analysis of costs. Rehearing Order, 156 FERC ¶ 61,010, P 21, JA 794-95;

- ***Public Util. Dist. No. 1 of Pend Oreille Cnty.*, 112 FERC ¶ 61,055 (2005) (Box Canyon project):** The Commission noted the same considerations with respect to this 72-megawatt project. That is, "the extent of the measures required there are not analogous to the measures required here with respect to the much larger [Catawba] Project." And again, the Commission "relied on the general extent of the measures required," rather than a quantitative analysis of costs. Rehearing Order, 156 FERC ¶ 61,010, P 21, JA 794-95;

- ***Portland Gen. Elec. Co.*, 111 FERC ¶ 61,450 (2005)** (**Pelton-Round Butte project):** The Commission explained that the 366-megawatt Pelton-Round Butte Project is "less than half the size" of the Catawba Project, and thus, "measures which in that case were deemed to justify a 50-year license term, would not necessarily support the same result here." The Commission further noted that the agency had explicitly relied on the parties' agreement to a 50-year license term, which is "both inconsistent with our current settlement policy statement and inconsistent with the facts of this case, where the parties did not specifically agree to a 50-year license term." Rehearing Order, 156 FERC ¶ 61,010, P 21, JA 794-95; and

- ***New York Power Auth.*, 105 FERC ¶ 61,102 (2003) (St. Lawrence project):** With respect to this 912-megawatt project, FERC issued a 50-year license term based on its determination regarding "the general extent of the measures required rather than basing its determination on a quantitative analysis of costs," and also settlement parties' agreement to a 50-year license term. Rehearing Order, 156 FERC ¶ 61,010, P 21, JA 794-95.

As this Court has recognized, "FERC may distinguish precedent simply by emphasizing the importance of considerations not previously contemplated." *Environmental Action*, 996 F.2d at 411-12 (finding petitioners' cited cases to be "readily distinguishable"). Here, the Commission distinguished the cases cited by Duke and reasonably found the measures required under the Catawba Project to be "moderate," rather than "extensive," in nature. As in *Eastern Niagara*, 558 F.3d at 567, FERC faced a difficult, fact-intensive question and "answered it in a permissible way given the predictive and inherently speculative nature of the judgment it was required to make." And, as in *Eastern Niagara*, there is no cause for overturning the Commission's "reasoned and reasonable decision." *Id.*

B. FERC Appropriately Determined that Settlement Parties' Position Did Not Tip the Scale in Favor of a 50-Year License

The Commission appropriately rejected Duke's argument that settlement parties' alleged support for a 50-year license term tipped the scale in favor of a longer term.

First, contrary to Duke's contention, Br. 24, 55-56, the Agreement signed by the settling parties did not provide that "all" signatories supported a 50-year license term if the Commission required installation of a bladder dam. The Agreement in fact provided that: if FERC issued a 50-year license (a condition which did not occur), then Duke would implement certain "additional resource enhancements"—

including installation of a bladder dam. Agreement §§ 14.6, 14.6.3.6, JA 237-39. *See* Rehearing Order, 156 FERC ¶ 61,010, n.46, JA 797.

Duke appears to have erroneously flipped the logic of these "if X, then Y" provisions, reading them to mean: if Y (Duke must install a bladder dam), then X (parties support a 50-year license). This is not what the Agreement states. Rather, as the Rehearing Order explained, the signatories to the Agreement "agree[d] to support a New License term that is not less than 40 years nor more than 50 years." 156 FERC ¶ 61,010, P 24 & n.46, JA 976-97 (citing Agreement § 16.3, JA 244). Also, just ten of the 70 signatories filed comments in support of a 50-year license term. Rehearing Order, 156 FERC ¶ 61,010, P 8 & n.4, JA 787.

In any event, even assuming unanimous support for a 50-year license term, the Commission explained that such support would not be dispositive: "[I]n reviewing settlements, the Commission looks not only to the wishes of the settling parties, but also at the greater public interest . . . . We will not extend a license term beyond that dictated by the extent of proposed activities simply because signatories to a settlement have agreed to such a term." Rehearing Order, 156 FERC ¶ 61,010, P 24 & nn.47-48 (citations omitted), JA 796-97.

Ultimately, the Commission exercises its expertise and informed judgment in selecting license terms for the hydroelectric licenses it issues. Under the applicable deferential standard of review, "[e]ven if another decisionmaker might

have reached a contrary result," the Commission's reasoned and reasonable decision, based on the particularized facts of this case, should be upheld. *Marsh*, 490 U.S. at 385. *See also Electric Power Supply Ass'n*, 136 S. Ct. at 784 (recognizing that courts play a "limited role" in reviewing FERC decisions in areas implicating the Commission's technical expertise).

CONCLUSION

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

Respectfully submitted,

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426
(202) 502-8464
Susanna.Chu@ferc.gov

March 9, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,711 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel.: (202) 502-8464
Fax: (202) 273-0901
E-mail: Susanna.Chu@ferc.gov

March 9, 2017

ADDENDUM
Statutes

TABLE OF CONTENTS

PAGE

ing minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Pars. (22), (23). Pub. L. 109–58, §1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

''(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

''(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.''

Pars. (26) to (29). Pub. L. 109–58, §1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, §726(b), inserted ''(including any municipality)'' after ''State agency''.

Pars. (23) to (25). Pub. L. 102–486, §726(a), added pars. (23) to (25).

1991—Par. (17)(E). Pub. L. 102–46 struck out '', and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)'' after ''geothermal resources'' in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, §3(a), inserted ''a facility which is an eligible solar, wind, waste, or geothermal facility, or''.

Par. (17)(E). Pub. L. 101–575, §3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, §201, amended definitions of ''reservations'' and ''corporations'', and inserted definitions of ''person'', ''licensee'', ''commission'', ''commissioner'', ''State commission'' and ''security''.

FERC REGULATIONS

Pub. L. 101–575, §4, Nov. 15, 1990, 104 Stat. 2834, provided that: ''Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amend-ed by this Act)—

''(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

''(2) shall not be subject to the size limitation contained in section 292.601(b) of such part.''

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, §731, Oct. 24, 1992, 106 Stat. 2921, provided that: ''Nothing in this title [enacting sec-tions 824*l*, 824m, and 825*o*–1 of this title and former sec-tions 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protec-tion or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

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

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

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

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

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

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

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to

furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

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

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

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

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:[1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

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

(g) Investigation of occupancy for developing power; orders

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

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

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

find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, pt. I, § 4, 41 Stat. 1065; June 23, 1930, ch. 572, § 2, 46 Stat. 798; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 202, 212, 49 Stat. 839, 847; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; Pub. L. 97–375, title II, § 212, Dec. 21, 1982, 96 Stat. 1826; Pub. L. 99–495, § 3(a), Oct. 16, 1986, 100 Stat. 1243; Pub. L. 109–58, title II, § 241(a), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

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

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

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

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

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

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

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

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

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

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

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

CHANGE OF NAME

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

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–495, § 18, Oct. 16, 1986, 100 Stat. 1259, provided that: ''Except as otherwise provided in this Act, the amendments made by this Act [enacting section 823b of this title and amending this section and sections 800, 802, 803, 807, 808, 817, 823a, 824a–3, and 824j of this title] shall take effect with respect to each license, permit, or exemption issued under the Federal Power Act after the enactment of this Act [Oct. 16, 1986]. The amendments made by sections 6 and 12 of this Act [enacting section 823b of this title and amending section 817 of this title] shall apply to licenses, permits, and exemptions without regard to when issued.''

SAVINGS PROVISION

Pub. L. 99–495, § 17(a), Oct. 16, 1986, 100 Stat. 1259, provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act—

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

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

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

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

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

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

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

TERMINATION OF REPORTING REQUIREMENTS

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

PROMOTING HYDROPOWER DEVELOPMENT AT NONPOWERED DAMS AND CLOSED LOOP PUMPED STORAGE PROJECTS

Pub. L. 113–23, § 6, Aug. 9, 2013, 127 Stat. 495, provided that:

''(a) IN GENERAL.—To improve the regulatory process and reduce delays and costs for hydropower development at nonpowered dams and closed loop pumped stor-

age projects, the Federal Energy Regulatory Commission (referred to in this section as the 'Commission') shall investigate the feasibility of the issuance of a license for hydropower development at nonpowered dams and closed loop pumped storage projects in a 2-year period (referred to in this section as a '2-year process'). Such a 2-year process shall include any prefiling licensing process of the Commission.

''(b) WORKSHOPS AND PILOTS.—The Commission shall—

''(1) not later than 60 days after the date of enactment of this Act [Aug. 9, 2013], hold an initial workshop to solicit public comment and recommendations on how to implement a 2-year process;

''(2) develop criteria for identifying projects featuring hydropower development at nonpowered dams and closed loop pumped storage projects that may be appropriate for licensing within a 2-year process;

''(3) not later than 180 days after the date of enactment of this Act, develop and implement pilot projects to test a 2-year process, if practicable; and

''(4) not later than 3 years after the date of implementation of the final pilot project testing a 2-year process, hold a final workshop to solicit public comment on the effectiveness of each tested 2-year process.

''(c) MEMORANDUM OF UNDERSTANDING.—The Commission shall, to the extent practicable, enter into a memorandum of understanding with any applicable Federal or State agency to implement a pilot project described in subsection (b).

''(d) REPORTS.—

''(1) PILOT PROJECTS NOT IMPLEMENTED.—If the Commission determines that no pilot project described in subsection (b) is practicable because no 2-year process is practicable, not later than 240 days after the date of enactment of this Act [Aug. 9, 2013], the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that—

''(A) describes the public comments received as part of the initial workshop held under subsection (b)(1); and

''(B) identifies the process, legal, environmental, economic, and other issues that justify the determination of the Commission that no 2-year process is practicable, with recommendations on how Congress may address or remedy the identified issues.

''(2) PILOT PROJECTS IMPLEMENTED.—If the Commission develops and implements pilot projects involving a 2-year process, not later than 60 days after the date of completion of the final workshop held under subsection (b)(4), the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a report that—

''(A) describes the outcomes of the pilot projects;

''(B) describes the public comments from the final workshop on the effectiveness of each tested 2-year process; and

''(C)(i) outlines how the Commission will adopt policies under existing law (including regulations) that result in a 2-year process for appropriate projects;

''(ii) outlines how the Commission will issue new regulations to adopt a 2-year process for appropriate projects; or

''(iii) identifies the process, legal, environmental, economic, and other issues that justify a determination of the Commission that no 2-year process is practicable, with recommendations on how Congress may address or remedy the identified issues.''

IMPROVEMENT AT EXISTING FEDERAL FACILITIES

Pub. L. 102–486, title XXIV, §2404, Oct. 24, 1992, 106 Stat. 3097, as amended by Pub. L. 103–437, §6(d)(37), Nov. 2, 1994, 108 Stat. 4585; Pub. L. 104–66, title I, §1052(h), Dec. 21, 1995, 109 Stat. 718, directed Secretary of the Interior and Secretary of the Army, in consultation with Secretary of Energy, to perform reconnaissance level studies, for each of the Nation's principal river basins, of cost effective opportunities to increase hydropower production at existing federally-owned or operated water regulation, storage, and conveyance facilities, with such studies to be completed within 2 years after Oct. 24, 1992, and transmitted to Congress, further provided that in cases where such studies had been prepared by any agency of the United States and published within ten years prior to Oct. 24, 1992, Secretary of the Interior, or Secretary of the Army, could choose to rely on information developed by prior studies rather than conduct new studies, and further provided for appropriations for fiscal years 1993 to 1995.

WATER CONSERVATION AND ENERGY PRODUCTION

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

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

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

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

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

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

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

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

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

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

PROJECTS ON FRESH WATERS IN STATE OF HAWAII

Pub. L. 102–486, title XXIV, §2408, Oct. 24, 1992, 106 Stat. 3100, directed Federal Energy Regulatory Commission, in consultation with State of Hawaii, to carry

out study of hydroelectric licensing in State of Hawaii for purposes of considering whether such licensing should be transferred to State, and directed Commission to complete study and submit report containing results of study to Congress within 18 months after Oct. 24, 1992.

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

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

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

CODIFICATION

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

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

Section212 of act Aug. 26, 1935, ch. 687, title II, 49 Stat. 847, provided that nothing in this chapter, as amended should be construed to repeal or amend the provisions of the act approved Mar. 3, 1921 (41 Stat. 1353) [16 U.S.C. 797a] or the provisions of any other Act relating to national parks and national monuments.

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

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

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

REFERENCES IN TEXT

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

CODIFICATION

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

CHANGE OF NAME

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

§ 797c. Dams in National Park System units

After October 24, 1992, the Federal Energy Regulatory Commission may not issue an original license under Part I of the Federal Power Act [16 U.S.C. 791a et seq.] (nor an exemption from such Part) for any new hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal lands within any such unit. Nothing in this section shall be construed as repealing any existing provision of law (or affecting any treaty) explicitly authorizing a hydroelectric power project.

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

REFERENCES IN TEXT

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

CODIFICATION

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

§ 797d. Third party contracting by FERC

(a) Environmental impact statements

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

(b) Environmental assessments

Where an environmental assessment is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit an applicant, or a contractor, consultant or other person selected by the applicant, to prepare such environmental assessment. The Commission shall institute procedures, including pre-application consultations, to advise potential applicants of studies or other information foreseeably required by the Commission. The Commission may allow the filing of such applicant-prepared envi-

ronmental assessments as part of the application. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(c) Effective date

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

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

REFERENCES IN TEXT

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

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

CODIFICATION

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

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

(a) Purpose

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.

(b) Extension of period

The Commission may extend the period of a preliminary permit once for not more than 2 additional years beyond the 3 years permitted by subsection (a) if the Commission finds that the permittee has carried out activities under such permit in good faith and with reasonable diligence.

(c) Permit conditions

Each such permit shall set forth the conditions under which priority shall be maintained.

(d) Non-transferability and cancellation of permits

Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

(June 10, 1920, ch. 285, pt. I, §5, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§203, 212, 49 Stat. 841, 847; Pub. L. 113–23, §5, Aug. 9, 2013, 127 Stat. 495.)

AMENDMENTS

2013—Pub. L. 113–23 designated existing first, second, and third sentences as subsecs. (a), (c), and (d), respec-tively, and added subsec. (b).

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

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

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

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

AMENDMENTS

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

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

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

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

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 2302 of Title 10, Armed Forces.

§ 800. Issuance of preliminary permits or licenses

(a) Preference

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

AMENDMENTS

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 808. New licenses and renewals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation

of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after October 16, 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) License term on relicensing

Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines

to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.

(f) Nonpower use licenses; recordkeeping

In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

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

AMENDMENTS

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

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

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

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

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

TERMINATION OF WAR AND EMERGENCIES

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

§ 810. Disposition of charges arising from licenses

(a) Receipts from charges

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

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first sec-tion of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Docu-ments.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United

States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on March 9, 2017, I served the foregoing brief on all parties to this proceeding through the Court's CM/ECF system.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8464
Fax: (202) 273-0901
Email: susanna.chu@ferc.gov