

161 FERC ¶ 61,078
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

(Docket No. PL17-3-000)

Policy Statement on Establishing License Terms for Hydroelectric Projects

(Issued October 19, 2017)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy Statement.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is giving notice of a new policy on establishing license terms for hydroelectric projects. In this Policy Statement, the Commission adopts a 40-year default license term for original and new licenses for hydropower projects located at non-federal dams. The Policy Statement also sets forth when the Commission will consider issuing those projects a license with a term for less or more than 40 years.

EFFECTIVE DATE: This policy statement will become effective [date of publication in the *Federal Register*].

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SUPPLEMENTARY INFORMATION:

original licenses. FPA section 15(e)² provides that any “new license”³ shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years.

3. It is current Commission policy to set a 50-year term for licenses issued for projects located at federal dams.⁴ For projects located at non-federal dams, the Commission sets a 30-year term where there is little or no authorized redevelopment, new construction, or environmental mitigation and enhancement; a 40-year term for a license involving a moderate amount of these activities; and a 50-year term where there is an extensive amount of such activity.⁵ The Commission previously established this policy to ease the economic impact of new costs, promote balanced and comprehensive development of renewable power generating resources, and encourage licensees to be good environmental stewards.⁶

² 16 U.S.C. 808(e) (2012).

³ “New license” is the term used in the FPA to refer to a license issued to replace a project’s expiring license.

⁴ *City of Danville, Virginia*, 58 FERC ¶ 61,318, at 62,020 (1992) (citing *Little Falls Hydroelectric Associates*, 27 FERC ¶ 61,376 (1984)).

⁵ *Id.* (addressing original licenses); *Consumers Power Co.*, 68 FERC ¶ 61,077, at 61,384 (1994) (addressing new licenses). Projects that entail construction of a new dam have generally received 50-year licenses. *City of Danville, Virginia*, 58 FERC ¶ 61,318 at 62,020 (citing *Little Falls Hydroelectric Associates*, 27 FERC ¶ 61,376).

⁶ *Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,384.

4. Determining whether the measures required under a license are minimal, moderate, or extensive is highly case-specific and largely based on a qualitative analysis of the record before the Commission. In establishing the appropriate license term, staff initially examines the nature and extent of the required measures in the context of the project at issue,⁷ and then uses the cost of measures as a check on a qualitative conclusion that the measures required under the license are minimal, moderate, or extensive. The Commission's current policy takes a forward-looking approach, such that any measures adopted under a prior license term are not considered.⁸ It has also been the Commission's policy to coordinate, to the extent feasible, license terms for projects in the same river basin to maximize consideration of cumulative impacts when the projects are due to be relicensed.⁹

5. The length of an original license has not been contested on rehearing for some time; however, licensees and other parties have recently contested the length of a new license in several relicensing proceedings. The arguments raised in these cases include

⁷ For example, one type of fishway may be more expensive than another, and a fishway type that might be considered extensive for a small project could be seen as minimal for a larger one.

⁸ See, e.g., *Duke Energy Carolinas, LLC*, 156 FERC ¶ 61,010, at P 19 (2016) (*Duke Energy*) (stating Commission's long-standing policy is to only consider measures required in the new license) (citing *Alabama Power Co.*, 155 FERC ¶ 61,080, at P 72 (2016); *Georgia Power Co.*, 111 FERC ¶ 61,183, at P 12 (2005); *Ford Motor Co.*, 110 FERC ¶ 61,236, at PP 6-8 (2005)).

⁹ 18 CFR 2.23 (2017); see also *Public Utility of District No. 1 of Chelan County, Washington*, 127 FERC ¶ 61,152, at P 18 (2009) (*Chelan PUD*).

that the Commission, when establishing the license term, should have considered, or given more weight to: previously-authorized capacity-related investments or environmental enhancements made by the licensee before issuance of the new license;¹⁰ total cost of the relicensing process;¹¹ losses in generation value related to environmental measures;¹² the license terms of projects that the license applicant states are similarly situated to its project;¹³ and the license term provided for in settlement agreements.¹⁴ In each circumstance, the Commission declined to extend the length of the license.

B. Notice of Inquiry on Establishing License Terms for Hydroelectric Projects

6. On November 17, 2016, the Commission issued a notice of inquiry (NOI) to seek comments on whether, and if so how, the Commission should revise its current license term policy. The NOI invited comments on five potential license term policy options: (1) retain the current policy; (2) modify the current policy to consider voluntary

¹⁰ See, e.g., *Duke Energy*, 156 FERC ¶ 61,010 at P 12; *Alabama Power Co.*, 155 FERC ¶ 61,080 at P 71; *Public Utility District No. 1 of Douglas County, Washington*, 143 FERC ¶ 61,130, at PP 12-13 (2013) (*Douglas PUD*); *Chelan PUD*, 127 FERC ¶ 61,152 at PP 12-13; *Georgia Power Co.*, 111 FERC ¶ 61,183 at P 10; *Ford Motor Co.*, 110 FERC ¶ 61,236 at P 6.

¹¹ See, e.g., *Duke Energy*, 156 FERC ¶ 61,010 at P 12.

¹² See, e.g., *id.*

¹³ See, e.g., *id.* P 20; *Alabama Power Co.*, 155 FERC ¶ 61,080 at P 71; *Duke Energy Progress, Inc.*, 153 FERC ¶ 61,056, at P 39 (2015); *Douglas PUD*, 143 FERC ¶ 61,130 at P 15.

¹⁴ See, e.g., *Duke Energy Progress, Inc.*, 153 FERC ¶ 61,056 at P 40; *Douglas PUD*, 143 FERC ¶ 61,130 at P 18; *Chelan PUD*, 127 FERC ¶ 61,152 at P 16.

authorized actions implemented under the prior license (“previously-authorized voluntary actions”); (3) replace the current license term policy with a policy for a 50-year default license term unless a lesser license term would be in the public interest (for example, to better coordinate the license terms of projects in the same river basin); (4) add a more quantitative cost-based analysis to the current policy; and (5) alter the current policy to accept license terms agreed upon in settlement agreements, when appropriate. Comments on alternative policy options were also encouraged. The NOI established January 24, 2017, as the deadline for comments, which staff extended to March 24, 2017.

7. Industry members, federal and state resource agencies, environmental and recreation groups, and individuals filed comments. Most commenters support revising the current policy. Several commenters state that under the current policy stakeholders lack certainty, and, consequently, license applicants lack guidance on what measures will yield longer license terms and are deterred from proposing additional protection, mitigation, and enhancement measures. Further, many commenters state that because the policy is forward-looking, licensees delay seeking authorizations for capacity upgrades and environmental and recreational enhancements until they apply for a new license. Some industry commenters state that under the current policy, license applicants and settlement parties cannot use the license term as a bargaining chip because the Commission might reject that term in the license order. To address these concerns, many commenters recommend that the Commission consider previously-authorized voluntary actions and defer to the license term that was negotiated as part of a settlement agreement.

8. Commenters disagree on the 50-year default license term policy option. Industry commenters generally support the 50-year default license term because they state it would provide a clear, predictable standard. Industry commenters add that such policy would eliminate the current “penalty” for efficient, well-maintained, and relatively low-impact projects that do not require substantial environmental or developmental measures and therefore only receive a 30-year license.

9. In contrast, environmental groups, individuals, and most resource agencies oppose the 50-year default license term option. Several resource agencies argue that this option would provide little incentive for a license applicant to voluntarily propose or agree to mitigation measures because such measures would no longer factor into the Commission’s license term decision. The resource agencies also contend that such policy would result in applicants focusing their license application study efforts on disproving project effects rather than on identifying potential mitigation measures.

10. Most commenters recommend against the policy option to adopt a more quantitative cost-based analysis. Many commenters state that it would be difficult to develop a quantitative cost-based analysis that takes into account the diverse hydropower fleet and environmental and recreational values.

11. As an alternative to the five policy options, several industry commenters recommend that the Commission adopt a 40-year default license term with credit (up to an additional 10 years) for previously-authorized actions and deference to settlement agreements. They state that under this alternative, licenses should be issued for less than 40 years only when a license applicant has agreed to a settlement agreement with a

negotiated license term of less than 40 years, or voluntarily coordinates its license term with other projects in a river basin.

II. Discussion

12. The extensive comments received have given the Commission a deeper understanding of the effects that the current license term policy has on stakeholders in hydropower licensing proceedings. The Commission recognizes the importance of providing license applicants and other stakeholders as much certainty as possible.

License applicants expend significant financial resources on preparing their license applications and complying with their licenses thereafter. Further, stakeholders need certainty to determine the protection, mitigation, and enhancement measures that they will negotiate and license applicants will propose.

13. The current policy also affects the Commission's staff and resources needed to review and process license applications. Staff anticipate that over 300 projects will enter the relicensing process through 2025. Under the current policy, staff would establish the license term for each of those projects case by case.

14. After considering this matter and the comments on the NOI, the Commission has decided it is in the public interest to change its license term policy. With this Policy

Statement, the Commission establishes a 40-year default license term policy for original and new licenses for hydropower projects located at non-federal dams.¹⁵

15. There are three circumstances where the Commission will consider issuing a license for less or more than 40 years. First, the Commission will establish a shorter or longer term if necessary to coordinate license terms for projects located in the same river basin. Second, the Commission will defer to a shorter or longer term explicitly agreed upon in a generally-supported comprehensive settlement agreement, provided that such term does not conflict with coordination. Settlement agreements that state the settlement signatories would not oppose a certain term or would support a term within a range of years will not be considered to include an explicitly agreed upon license term.¹⁶

16. Third, the Commission will consider a longer license term – provided that doing so is consistent with coordinating license terms within a basin – when a license applicant specifically requests a longer license term based on significant measures expected to be required under the new license or significant measures implemented during the prior

¹⁵ This policy does not apply to pilot hydrokinetic projects, which have terms of up to five years. *See* FERC, *Licensing Hydrokinetic Pilot Projects*, www.ferc.gov/industries/hydropower/gen-info/licensing/hydrokinetics/pdf/white_paper.pdf.

¹⁶ *See, e.g., Chelan PUD*, 127 FERC ¶ 61,152 at n.27 (settlement states that the signatories do not oppose the licensee's efforts to seek a 50-year term); *Duke Energy*, 156 FERC ¶ 61,010 at P 24 (settlement states the signatories agree to support a license term that is not less than 40 years nor more than 50 years).

license term that were not required by that license or other legal authority¹⁷ and for which the Commission has not already given credit through an extension of the prior license term. The Commission will consider, on a case-by-case basis, measures and actions that enhance non-developmental project purposes (i.e., environmental, project recreation, water supply), and those that enhance power and developmental purposes, together with the cost of those measures and actions to determine whether they are significant and warrant the granting of a longer license term. Maintenance measures and measures taken to support the licensing process will not be considered. As guidance, we note that the Commission has found that measures including the construction of pumped storage facilities, fish passage facilities, fish hatcheries, substantial recreation facilities, dams, and powerhouses warranted longer license terms.

17. There are a number of reasons for establishing a 40-year default license term with exceptions for coordination, deference to generally-supported comprehensive settlement agreements, and consideration of previously-authorized voluntary actions. This policy will provide significant certainty to licensees, resource agencies, and other stakeholders. A 40-year default license term will provide a simpler method for Commission staff to establish license terms, and, thus, increase administrative efficiencies. A case-specific assessment will only be required for those license applications that request a longer license term, and are not explicitly supported by a generally-supported comprehensive

¹⁷ See, e.g., *Chelan PUD*, 127 FERC ¶ 61,152, at P 14 (stating that the licensee acted in order to comply with the Endangered Species Act, not to simply voluntarily resolve relicensing issues early).

settlement agreement. Because many projects would be relicensed less frequently, the policy would also lower administrative costs for all stakeholders, provide licensees longer license terms to recoup costs, and reduce regulatory burden. Further, the policy will place efficient, low-impact projects that require minimal measures – and thus, would receive a 30-year term under the current policy – on more equal footing with projects that require more measures.

18. The policy may also encourage licensees to voluntarily make capacity upgrades and enhance recreational and environmental resources during the prior license term. Affected resources will benefit from licensees undertaking preventative or remedial measures sooner rather than later. In addition, the policy may further encourage license applicants to engage with stakeholders to negotiate a license settlement agreement. Because a generally-supported comprehensive settlement agreements represent stakeholder values, terms negotiated as part of those agreements are in the public interest, provided they do not conflict with coordination.

19. A 40-year default license term will not adversely affect environmental and recreation resources. All of our licenses contain extensive environmental and recreation measures. While under our new policy some projects may be relicensed less frequently and unanticipated project effects on environmental resources may go unmitigated for longer durations of time than before, there are many tools available to address these unanticipated effects in a timely manner. The Commission may address serious,

unanticipated environmental effects using its standard reopener article,¹⁸ and licensees often file applications for license amendments to address significant, unanticipated environmental issues. Further, resource agencies frequently reserve authority to address those effects under FPA section 4(e) (federal reservation)¹⁹ and section 18 (fishway prescription),²⁰ and in water quality certifications issued under section 401 of the Clean Water Act. Stakeholders have also negotiated with or encouraged licensees to propose measures that include adaptive management approaches to allow for appropriate modifications as additional information is gathered, new technologies develop, and societal and environmental needs change.

20. This Policy Statement will apply to all licenses issued following its publication in the *Federal Register* with no retroactive application. License applicants with pending license applications may file a comprehensive settlement agreement, or addendum to an existing agreement, that includes an explicitly agreed upon license term or may make a filing demonstrating why the Commission should award them a longer license term than

¹⁸ Each license incorporates a Commission L-Form that includes standard reopener clauses to enhance fish and wildlife resources. *See Standardized Conditions for Inclusion in Preliminary Permits and Licenses Issued Under Part I of the Federal Power Act*, 54 F.P.C. 1792 (1975).

¹⁹ 16 U.S.C. 797(e) (2012) (licenses for projects located on federal reservations are subject to and contain conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary).

²⁰ 16 U.S.C. 811 (2012) (Secretaries of the Interior and Commerce may prescribe fishway prescriptions).

40 years. The Commission, however, will not entertain applications to amend existing licenses to extend their license terms simply on the basis of this new license term policy. Pursuant to current policy, licensees that seek to extend existing licenses with terms of less than 50 years, must justify such requests, for example by proposing development, environmental, and recreation enhancements in a license amendment application accompanied by a request that the Commission extend their license term.²¹

III. Document Availability

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

22. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the

²¹ See, e.g., *Idaho Power Co.*, 132 FERC ¶ 62,001 (2010) (10-year extension of the license term due to the costs of replacing the project's existing powerhouse and increasing generating capacity); *PPL Holtwood, LLC*, 129 FERC ¶ 62,092 (2009) (16-year extension of license term due to costs associated with the constructing a new powerhouse, installing two turbine generating units at the existing powerhouse, and various environmental measures).

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By the Commission.

(S E A L)

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