THE ROLE OF THE FEDERAL ENERGY REGULATORY COMMISSION IN LICENSING SMALL HYDROELECTRIC PROJECTS

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INTRODUCTION

The Public Utility Regulatory Policies Act of 1978 (PURPA)[1] contains provisions designed to encourage the development of electricity by waterpower, a renewable resource. Since the general rule is that hydroelectric projects require a license for construction and operation from the Federal Energy Regulatory Commission (FERC), interest in the jurisdiction and procedures of that agency has recently increased. This general rule, however, has exceptions, the number of which may be increasing. Additionally, if a license is required, the type and size of the proposed project will determine the requirements which must be met in applying to FERC for the license. PURPA has had no substantial influence in reducing these requirements. This article will discuss these issues to assist the reader in answering the following questions: First, does FERC have jurisdiction over a particular proposed hydroelectric development? Second, if FERC does have jurisdiction, what are the filing requirements to obtain a license for that particular project?

I. JURISDICTION

FERC's jurisdiction over hydroelectric projects originated in the Federal Water Power Act of 1920,[2] now Part I of the Federal Power Act.[3] The Federal Power Commission (FPC), created by the 1920 Act, became FERC upon the creation of the United States Department of Energy in 1977[4] with no change in licensing jurisdiction.

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1. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified in scattered sections of 15, 16, 26, 30, 42, 43 U.S.C.).

2. Federal Water Power Act of 1920, Pub. L. No. 280, 41 Stat. 1063 (1920).

3. 16 U.S.C. §§ 791-828c (1976 & Supp. III 1979).

4. 42 U.S.C. §§ 7171-7177 (Supp. III 1979).

Prior to 1920, construction of a dam across a navigable waterway by private interests was forbidden under section 10 of the Rivers and Harbors Appropriations Act of 1899[5] without congressional authorization. At the turn of the century, it was not difficult to obtain a private bill from Congress for such construction. The right to occupy sites on navigable streams was granted in perpetuity under these bills. When President Theodore Roosevelt assumed office, however, he vetoed all such legislation on the grounds that Congress was giving to private interests resources belonging to the people of the country as a whole. Construction of waterpower projects by nonfederal interests came to a halt.

Efforts to develop a statute which would permit the power potential of the country's rivers to be developed by private capital, while protecting the public's interest in the resources, started with President Roosevelt's first veto. It culminated many years later in the 1920 Federal Water Power Act. Under that Act, a nonfederal entity may be licensed to develop waterpower subject to conditions protecting the public interest for a maximum term of fifty years.[6] At the end of the license term, the United States may take over, own, and operate the project upon payment to the developer of its remaining undepreciated investment in the project.[7] FERC jurisdiction under the 1920 Act extends both to projects utilizing navigable waters and to those using the waters of nonnavigable streams when the project affects interstate or foreign commerce.[8] The full reach of this jurisdiction, however, was not finally settled until the 1965 decision of the United States Supreme Court in *FPC v. Union Electric Co.*[9]

Initially, potential developers successfully asserted that licensing jurisdiction extended only to rivers which were navigable in fact. Until fairly recently the United States Corps of Engineers would designate a river as nonnavigable unless there was active, commercial navigation on the river. In the 1940's, for instance, the

5. 33 U.S.C. § 403 (1976).
6. 16 U.S.C. §§ 797(e), 799 (1976).
7. *Id.* § 807 (1976).
8. *Id.* §§ 797(e), 817 (1976).
9. 381 U.S. 90 (1965).

upper reaches of the Connecticut River were classified as nonnavigable by the Corps since they were no longer being used for commercial navigation; after litigation, the river was, nevertheless, held to be navigable under the Federal Power Act.[10] In *United States v. Appalachian Electric Power Co.*,[11] the United States Supreme Court held that a stream which was not navigable in fact but was capable of being made navigable fell within the definition of navigable waters in the Federal Power Act. This broader definition has now been adopted by the Corps.

In the *Appalachian* case, staff counsel for the Commission had urged, as another basis for FPC licensing jurisdiction, that since the electric power to be developed by the project was intended for use in another state it made no difference whether the stream was navigable or nonnavigable. Staff counsel argued that since the power developed would move interstate, the project would affect interstate commerce in electricity and, therefore, the project was subject to the Commission's licensing jurisdiction in any event. This argument was not accepted.[12] More than twenty years later, however, the same staff counsel urged the same theory in order to take jurisdiction of a very large pumped storage project proposed by the Union Electric Company. The company intended to use as its water supply a very small, nonnavigable stream in the mountains of Missouri.[13] This time the FPC accepted the argument,[14] and it was upheld by the United States Supreme Court.[15] A jurisdictional basis for licensing essentially all hydroelectric projects in the country, whether located on navigable or nonnavigable waterways, was thereby established.

It is perhaps easiest to remember the reach of FERC jurisdiction if one starts with the proposition that, subject to a few exceptions in arid areas, the water in all streams in the country

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10. *In re* Bellows Falls Hydro-Electric Corp., 2 F.P.C. 380 (1941).

11. 311 U.S. 377 (1940).

12. United States v. Appalachian Elec. Power Co., 107 F.2d 769, 793-94 (4th Cir. 1939), *rev'd on other grounds*, 311 U.S. 377 (1940).

13. Union Electric Company, 27 F.P.C. 801 (1962).

14. *Id.*

15. Federal Power Commission v. Union Elec. Co., 381 U.S. 90 (1965).

originates in watersheds of navigable rivers. The United States has jurisdiction over streams in such watersheds to protect its interests in navigable waterways under the commerce clause.[16] If a hydroelectric project is connected to the interstate electric transmission network (as most are), the project can be said to affect interstate commerce in electricity, since electricity flows freely within the network to where it is needed, its direction of flow not being controlled. Since jurisdictional waters are being used to affect interstate commerce, the project is subject to the licensing jurisdiction of FERC, without any need to determine whether the waters used are navigable or nonnavigable.[17] Once this broad definition of the jurisdiction of FERC became established, it resolved the tremendous backlog of disputes over that jurisdiction, since almost every hydroelectric project today is connected to the interstate transmission network.

Prior to *Union Electric,* there had been many jurisdictional battles.[18] During that period, the FPC declined jurisdiction of a substantial number of projects located on nonnavigable streams when it found that operation of a proposed project for the generation of electric power would not affect water commerce on downstream navigable portions of the waterway.[19] The FPC has tried to reverse some of these findings since *Union Electric* in cases where the projects have an effect on interstate commerce in electricity.[20] The earlier orders are good precedent for the proposition that if a

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16. U.S. CONST. art. I, § 8, cl. 3. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

17. A waterpower project which develops mechanical energy, as opposed to electric energy, may avoid the requirement of a FERC license if its operations on a nonnavigable stream do not affect interstate commerce.

18. *E.g., In re* Wisconsin Mich. Power Co., 3 F.P.C. 499 (1943); *In re* Wisconsin Pub. Serv. Corp., 3 F.P.C. 495 (1943); *In re* Nantahala Power & Light Co., 2 F.P.C. 388 (1941); *In re* Bellows Falls Hydro-Electric Corp., 2 F.P.C. 380 (1941). *See also* Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (D.C. Cir. 1967); Bangor Hydro-Electric Co. v. FPC, 355 F.2d 13 (1st Cir. 1966).

19. *E.g.,* City of Petoskey, Michigan, 2 F.P.C. 1034 (1941); Clam River Dam Co., 2 F.P.C. 953 (1941); The Cal. Or. Power Co., 2 F.P.C. 941 (1941); Nantahala Power & Light Co., 2 F.P.C. 754 (1940); Nantahala Power & Light Co., 2 F.P.C. 753 (1940). *See also* Nantahala Power & Light Co. v. FPC, 384 F.2d 200 (4th Cir. 1967), *cert. denied,* 390 U.S. 945 (1968).

20. *E.g., In re* Nantahala Power & Light Co., 2 F.P.C. 388 (1941).

project's effect upon interstate commerce is minimal, FERC may elect to decline to exercise its licensing authority, and allow a proposed project to be constructed and operated under state laws.[21] FERC, however, has yet to decline jurisdiction because the project has a minimal effect upon interstate commerce in electricity.

In 1980 a new jurisdictional issue was created when FERC issued a declaratory order finding that licensing was not required for the proposed Seboyeta pumped storage project in Valencia County, New Mexico.[22] The proposed development will dam an arroyo into which water will be pumped from a nearby mine. The lower reservoir of the project will be the dammed arroyo; the upper reservoir will be a manmade basin. The jurisdictional issue to be decided was thought to be whether or not the arroyo was a "stream"[23] as that term was understood by Congress when it enacted the 1920 Federal Water Power Act, since there was no question that the electricity generated by the project will flow in and thereby affect interstate commerce. The Commission's order described the flows in the arroyo as follows:

> Flows are concentrated only a few days a year. In a wet year, flows occur on only 20 to 60 days, and in an average rainfall year on only 10 to 30 days. In a typical dry year, the channel may not carry water at all, and flows would occur on no more than 5 days.[24]

Public Service Company of New Mexico urged that the arroyo was not a stream as that term was understood by members of Con-

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21. 16 U.S.C. § 817 (1976 & Supp. III 1979). Part I of the Federal Power Act, 16 U.S.C. §§ 791-828c (1976 & Supp. III 1979), may be read to require compliance with state laws in order to obtain a FERC license. It has been held, however, that the federal statute preempts the field. First Iowa Hydroelectric Coop. v. FPC, 328 U.S. 152 (1946). *See also* 44 Fed. Reg. 67, 648-49 (1979); Scotch, *Small Hydropower Development and the Environment: A Survey of State and Federal Law*, 5 VT. L. REV. 251 (1980).

22. Public Serv. Co. of N.M., FERC Docket No. EL 79-18 (Order issued March 21, 1980). For a detailed exploration of decisions on FERC jurisdiction prior to the Seboyeta order, see Essy, *Hydroelectric Facilities Licensing—A FERC Jurisdictional Primer*, 1 ENERGY L.J. 67 (1980).

23. For an early discussion of whether a similar arroyo was a stream or surface water run-off, see Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593 (1897).

24. Public Serv. Co. of N.M., FERC Docket No. EL 79-18 at 3 (order issued March 21, 1980) (footnotes omitted).

gress in 1920.[25] FERC rejected this argument, relying upon later cases and statutes to hold that the arroyo was a stream over which Congress had jurisdiction since, when it did flow, on occasion its waters reached downstream navigable waters.[26] The Commission went on to state: "Nonetheless, we do not believe it is the kind of nonnavigable stream encompassed within the meaning of § 23(b) of the act."[27]

The Commission then interpreted *Union Electric* as holding that FERC's jurisdiction extends "only to those nonnavigable tributaries of navigable waters that require supervisory power to preserve or improve water commerce, including downstream navigation."[28] There was no evidence or allegation that the arroyo in question required supervisory power to preserve or improve any of the factors associated with water commerce "such as, flood control, irrigation development, navigability, water resources projects, fishery resources, or water recreation."[29] The Commission therefore concluded that the Act did not require licensing of the Seboyeta project.[30]

Great care must be taken to distinguish this issue from the issue which was pertinent prior to *Union Electric*: whether or not the proposed project on a clearly jurisdictional stream would directly affect downstream water commerce. Here the issue is not the project, but the stream itself in its undeveloped state. The new question is whether the stream requires the exercise of federal supervisory jurisdiction for the benefit of downstream water commerce, as broadly defined by FERC.

It is too early to predict whether the Seboyeta case is a turning point and whether FERC, after so many years of extending its jurisdiction, is now looking for ways to avoid jurisdiction. If so, in

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25. Memorandum of Law by Petitioner at 4-9, Public Serv. Co. of N.M., FERC Docket No. EL 79-18 (1979).

26. Public Serv. Co. of N.M., FERC Docket No. EL 79-18 at 6 (order issued March 21, 1980).

27. *Id.*

28. *Id.* at 7.

29. *Id.*

30. *Id.* at 9.

addition to an argument that a stream does not require the exercise of FERC's supervisory jurisdiction, FERC may also accept an argument that a license is not required for a small hydro project because of the project's minimal effect upon interstate commerce in electricity.

A developer who believes that a proposed project does not require a FERC license must nevertheless file with FERC a "Declaration of Intention."[31] If FERC finds either that (1) the project is not on a stream which requires its supervision for the benefit of downstream water commerce or (2) the project does not affect interstate commerce, the Commission will decline to exercise its licensing authority, and the project may proceed in accordance with state laws.[32] In the absence of such a negative finding by FERC, the developer is subject to the penalty provisions of the Act if construction proceeds without a license.[33] If the developer's investigation leads to the conclusion that a license will be required, a declaration of intention need not be filed, and the developer may proceed directly to file an application for license.[34]

II. Licensing

Once it has been determined that a FERC license is required, it is necessary to ascertain under which set of regulations application should be made. There are separate regulations for each of the following categories:

- projects under 2,000 hp (1500 kW), proposed and existing but never licensed;[35]
- projects larger than 2,000 hp, proposed and existing but

31. 16 U.S.C. § 817 (1976). *See* 18 C.F.R. § 24.1 (1980) for the regulations governing such filings.

32. 16 U.S.C. § 817 (1976). *See also* text accompanying note 21 *supra*.

33. *Id.* § 825o (1976) ($5,000 fine and/or up to 2 years imprisonment).

34. A developer may wish to obtain a priority over other potential applicants to develop a particular site while gathering the information required for a license application. The "preliminary permit" authorized by 16 U.S.C. § 798 (1976) is designed solely for this purpose. *See* 44 Fed. Reg. 61,328 (1979) for new regulations governing applications for preliminary permits.

35. 18 C.F.R. § 4.60 (1980).

never licensed;[36]
- projects larger than 2,000 hp at existing but unlicensed dams when there will be "no significant environmental impact;"[37]
- projects of no more than 15,000 kW which make use of a water conduit operated primarily for nonpower purposes.[38]

The 1920 Act distinguished between licenses for projects developing less than 100 horsepower of capacity and those developing more than 100 horsepower.[39] The statutory requirements for the first category were considerably less onerous than for the second in that many provisions of the Act could be waived.[40] In 1962 the dividing line between the categories was changed to 2000 horsepower (1500 kilowatts), while the other statutory distinctions were left unchanged.[41] These two categories of projects and their licenses are often referred to as "minor" and "major." The regulations governing the applications for license in these categories apply equally to proposed projects and development at existing, unlicensed projects. All projects, proposed and existing, may still apply for licenses under one or the other of these categories.

PURPA attempted to create two new categories of projects: (1) projects of 15,000 kilowatts or less at existing dams[42] and (2)

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36. *Id.* § 4.40 (1980).

37. *Id.* §§ 4.50-.51 (1980).

38. Nonpower purposes include such uses as municipal water supply and irrigation. 45 Fed. Reg. 28,090-92 (1980) (to be codified in 18 C.F.R. §§ 4.90-.94).

This article was prepared before passage of the Energy Security Act of 1980 on June 30, 1980. Pub. L. No. 96-294, 94 Stat. 611 (1980). Section 408 of the Act authorizes FERC to exempt power projects up to 5000 kW proposed to be constructed at existing dams from the licensing requirements of Part I of the Federal Power Act either on a case by case basis or by rulemaking. FERC has adopted regulations for applications for exemption on an individual basis. 45 Fed. Reg. 76115 (1980), 45 Fed. Reg. 77420 (1980) (corrections). These regulations are currently being appealed because they purport to exempt a proposed project from the preference provisions of the Act. A proposed rulemaking is pending, RM 81-7, to grant a blanket exemption to those projects which meet criteria similar to those in category three, see note 37 *supra*, discussed at text accompanying notes 51-54 *infra*.

39. Federal Water Power Act of 1920, Pub. L. No. 66-280, § 10(e), 41 Stat. 1063, 1069 (1920).

40. *Id.* § 10(i), 41 Stat. 1063, 1070.

41. 16 U.S.C. § 803(e) and (i) (1976).

42. *Id.* § 2708 (Supp. III 1979). Congress raised this figures to 30,000 kW in the Energy Security Act which was approved on June 30, 1980. Pub. L. No. 96-294.

projects of no more than 15,000 kilowatts which make use of a water conduit operated primarily for nonpower purposes.[43] Although FERC has recognized the latter category by separate regulations,[44] it has not recognized the former as a new category.

Section 405 of Title IV of PURPA, entitled "Small Hydroelectric Power Projects," calls on the Commission to adopt streamlined procedures for licensing the installation of hydroelectric power at existing dams up to a maximum capacity of 15,000 kilowatts,[45] projects ten times the maximum size of the existing category of "minor" projects under the Federal Power Act. Title IV also provides, however, that the simplified licensing procedures must be "consistent with the applicable provisions of law"[46] and specifically that the National Environmental Policy Act of 1969,[47] the Fish and Wildlife Coordination Act,[48] the Endangered Species Act,[49] and all other provisions of federal law still apply to the new category.[50] For FERC to have developed new regulations that accomplished the apparent intent of Title IV under this mandate would have been an implicit admission by FERC that its existing regulations governing major and minor projects were unnecessarily complex and cumbersome and that existing laws could be satisfied with less bureaucratic red tape. After careful examination, FERC determined such not to be the case.

FERC relegated the projects of less than 2,000 horsepower in Title IV's new category of existing dams to FERC's own existing category of minor projects. It then created a new category: projects larger than 2000 horsepower at existing dams *which will have no significant environmental impact.*[51] Those projects in Title IV's existing dam category which will be between 1500 kilowatts and 15,000 kilowatts in size and which meet the requirement of no sig-

43. *Id.* § 823a.
44. 45 Fed. Reg. 28,090-92 (1980) (to be codified in 18 C.F.R. §§ 4.90-.94).
45. 16 U.S.C. §§ 2705-2708 (Supp. III 1979).
46. *Id.* § 2705(a).
47. 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979).
48. 16 U.S.C. §§ 661-668 (1976 & Supp. III 1979).
49. *Id.* §§ 531-543.
50. *Id.* § 2705(b).
51. 18 C.F.R. §§ 4.50-.51 (1980).

nificant environmental impact will fit in this new FERC category. Since the new FERC category had to comply with all requirements of existing law, there was no reason for FERC to limit the maximum size of the projects to Title IV's 15,000 kilowatts; the new FERC category, therefore, has no size limit. All projects in the Title IV category that do not fall into FERC's minor project category or its new category for major projects with no significant environmental impact, must follow the filing regulations for FERC's major projects which are applicable whether or not an existing dam is involved.

A word of caution should be sounded in regard to the new FERC category: the standard "no significant environmental impact" is not defined in the regulations. The order adopting the regulations suggests that advice in regard to the standard may be obtained from Commission staff.[52] There is, however, among the members of the staff no one point of view on many such issues. If an applicant received wrong advice and the Commission later determined that the project would have a significant environmental impact, an applicant might be required to start over and comply with the requirements for a major license.[53] This concern is tempered by the fact that there is essentially no difference in the substantive work required in preparing an application under either set of regulations; procedurally the new category places the onus on the applicant to accomplish more coordination with state and local agencies prior to filing the application for license as opposed to after filing the application, but effects no other changes. Therefore, unless it is very clear that there will be no significant environmental impact, it makes no sense to follow the regulations governing

52. 44 Fed. Reg. 67,648 (1979).

53. *Id.* at 67,647 n.14. The order provides:

> The regulations recognize that changes in project works which do not raise normal impoundment areas or levels may still have a significant impact. If a peak load production project entails a major change in project operations resulting in a significant impact, it would not be within the scope of the definition of a major project—existing dam as defined in § 4.50(b)(5) and therefore these regulations would not govern that project.

this new category, even if it is true that they "in several ways ease the burden of compliance."[54]

PURPA authorizes FERC to exempt from licensing completely PURPA's other new category of projects, those which make use of water in a manmade conduit operated primarily for other water uses to develop 15,000 kilowatts or less of capacity.[55] In April, 1979 FERC issued proposed regulations to grant a blanket exemption to such projects.[56] A year later, however, the Commission decided that it would not give a blanket exemption.[57] Instead, it came out with a new form, "Application for Exemption for Small Conduit Hydroelectric Facility," and stated that upon the filing of the application it would make case-by-case decisions on requested exemptions.[58]

The application is relatively simple. Among other things it requires prior coordination with fish and wildlife agencies and a report on environmental impact.[59] It also calls for the applicant to provide "a description of alternate means of obtaining an amount of power equivalent to that provided by the proposed or existing facility."[60] It is not explained what bearing such information should have on the granting of an exemption.

The application for exemption is circulated by FERC to all interested state and federal agencies.[61] The Commission may order a hearing on the application.[62] If the requested exemption or a somewhat different exemption is granted, the Commission may prescribe terms and conditions to the exemption designed to protect the whole range of public interests in the water resource.[63] If the Commission denies the exemption, the applicant has thirty

54. *Id.* at 67,645.
55. 16 U.S.C. § 823(a), (b) (Supp. III 1979).
56. 44 Fed. Reg. 24,580 (1979).
57. 45 Fed. Reg. 28,085-92 (1980) (to be codified in 18 C.F.R. §§ 4.91-.94).
58. *Id.*
59. *Id.* at 28,091 (to be codified in 18 C.F.R. § 4.92(c)(5)(ii) and (iv)).
60. *Id.* (to be codified in 18 C.F.R. § 4.92(c)(5)(iii)).
61. *Id.* at 28,092 (to be codified in 18 C.F.R. § 4.93(c)).
62. *Id.* at 28,901 (to be codified in 18 C.F.R. § 4.93(b)).
63. *Id.* at 28,902 (to be codified in 18 C.F.R. § 4.93(f)).

days to convert the exemption application into a license application and ninety days thereafter to provide the additional information required in a regular license application for a minor or a major project as appropriate.[64] If there is any time pressure on an applicant, time may be saved by filing the application for license either alone or in conjunction with the application for exemption, unless, somehow, it is clear that an exemption will be granted.

The only apparent change PURPA makes in FERC's licensing jurisdiction is to permit the foregoing exemption.[65] The Commission has always had the power to simplify license applications, including applications for projects at existing dams. It has never seen fit to do so. On the contrary, during the last twenty years layers of requirements have been added to the license application process.[66] The new orders under PURPA have not reversed this trend.

Once the application appropriate to the project is filed with FERC, a very comprehensive review process is initiated.[67] Notice of the filing of the application is widely disseminated and opportunity is provided for interested persons to intervene to protect their

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64. *Id.* (to be codified in 18 C.F.R. § 4.93(g)).

65. As discussed in the conclusion, *infra*, the change may be more apparent than real.

66. New exhibit requirements added piecemeal during this period to 18 C.F.R. § 4.41 (1980) include: Exhibit R, a detailed plan for full public utilization of project waters and adjacent lands for recreational purposes; Exhibit S, a detailed report on effects on fish and wildlife and plans to enhance such resources; Exhibit T, a statement as to why development by applicant is better than by government; Exhibit U, a detailed statement on coordination of power output with other electric systems; Exhibit V, detailed maps, photographs, and drawings to show architectural design, landscaping, *etc.*, of project works, including transmission lines, and statement of measures to be taken to preserve and enhance natural, historic, and scenic values and resources in the project area; and Exhibit W, the applicant's environmental report, the guidelines for preparation of which cover seven pages in 18 C.F.R. §§ 2.80-.82 app. A (1980).

67. One primary standard for issuance of a FERC license is that the proposed project be consistent with a comprehensive plan for development of all water resources in the river basin for all public purposes. 16 U.S.C. § 803(a) (1976). For example, if a dam site is capable of producing 10,000 kW consistent with the comprehensive plan, the Commission will not license a project of 2,000 kW which will preclude such ultimate development. Furthermore, the Commission determines the appropriate size of a power installation by reference to regional power needs. Unless there are other public purpose factors which militate against using a hydro project to develop power to serve peak loads, the Commission will order the maximum installation which can be utilized to meet regional power demands. It remains to be seen whether or not the Commission will insist on this standard for small hydro projects.

interests. All state and federal agencies which the applicant has been required to contact prior to filing the application are again contacted by the Commission and asked for comments. The applicant is then forwarded copies of comments received from such agencies and asked to respond.

This process takes time. If all outstanding issues cannot be resolved to everyone's satisfaction,[68] the application is set down for hearing before an administrative law judge, and all parties are given an opportunity to present evidence and file briefs. Appeal from a decision of the administrative law judge to the full Commission is routine. If there is any controversy concerning a project, the time span from the filing of the application (after the substantial amount of time spent in its preparation) until a FERC license to construct becomes final, is measured in years, not months.[69]

One purpose of PURPA was to encourage electric power developments which use renewable resources. In the two years since the passage of the Act, FERC has reconsidered most of its regulations concerning the licensing of hydroelectric projects and revised and expanded many of them. There is nothing in the new regulations, however, which in any significant fashion simplifies the filing requirements for a FERC license or shortens the length of time which must be spent in acquiring one. Indeed, because of the sharp increase in the price of oil, many hydroelectric projects are now economically feasible which were not feasible prior to the increase.

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68. Most large projects and many small ones have so many facets that a hearing can be anticipated. In fact, time spent preparing for the hearing is often more worthwhile than time spent negotiating to avoid a hearing. It should be remembered that federal agencies do not speak with one voice, and often one federal agency will demand that a project be designed and operated in a way which is inconsistent with the demands of another federal agency. The hearing process is designed to resolve all the competing interests.

69. Once a license order is final and all appeals exhausted, does this mean that the license holder is in a position to start construction? The answer is "maybe." At least two large projects received final FPC licenses in the last decade, after years in the hearing process, but were then killed by Congress (Blue Ridge Project No. 2317) or the Corps of Engineers (Davis Project No. 2709). Although both of the foregoing were very large projects, a small project should anticipate the same intense scrutiny as these large ones, both before and after issuance of a license. Each and every license application will be examined from many different points of view. Disagreement among the various views is more readily predictable than agreement.

This economic reality and the publicity received by PURPA has led to a substantial increase in filings for new hydro projects both by traditional power developers and by entrepreneurs. The increase in filings has simply added to the backlog and increased the delays which have been endemic to FERC and its predecessor FPC for well over a decade.

CONCLUSION

The decade of the 1960's witnessed the expansion of licensing jurisdiction under the Federal Power Act; by the end of the 1960's, FERC was recognized as having jurisdiction over virtually all nonfederal hydroelectric developments in the country. The decade of the 1970's saw a great expansion of public concerns relative to all aspects of our history, culture, and environment. These concerns were translated into laws which, since they represent the public interest, must be considered in the licensing process. As a result, the licensing process has become unwieldy, cumbersome, and time consuming.

In 1980, in the case of the Seboyeta project, FERC declined jurisdiction over a stream even though it found the stream to be subject to the jurisdiction of Congress. It based its decision on the assertion that the Federal Power Act required it to license projects only in streams which required federal supervision to protect other public interests in the use of the water itself. There is also precedent prior to *Union Electric* for FERC to decline jurisdiction over a project because the project's effect on interstate commerce is *de minimus*. FERC has two grounds, therefore, on which it can find that a license is not required for small hydro projects. Declining jurisdiction might facilitate small hydro development.

On the other hand, nothing in PURPA *requires* FERC to facilitate small hydro development. With one arguable exception, all of the FERC regulations governing licensing which have been promulgated since PURPA were within FERC's jurisdiction before PURPA was enacted. None of these new regulations speed the licensing process.

The one possible exception is the new set of regulations under

which application may be made for an exemption from licensing for power developments utilizing water conduits operated primarily for nonpower purposes. PURPA specifically authorized such exemptions. There is no compelling language in the Federal Power Act, however, or in sixty years of decisions under it, which would require FERC, in the absence of PURPA, to find that water appropriated and diverted under other federal and state laws and flowing in a manmade conduit, prior to being totally used for irrigation or other consumptive purposes, constitutes a "stream." There is also no evidence that Congress intended to provide supervisory jurisdiction in FERC over power developments utilizing such waters to protect the public interest in the already designated downstream nonpower water use. In any event, FERC has decided not to grant a blanket exemption for such projects under either PURPA or the Federal Power Act but to require instead an application for exemption which is, in effect, the same as the declaration of intention required now for many decades by the Federal Power Act for all waterpower projects on nonnavigable streams when the requirement of a license is not conceded.[70]

70. *See* text accompanying notes 31-34 *supra*.