



October 8, 2002

Patrick H. Wood, III
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: Hydropower Rulemaking, Docket No. RM02-16-000

Dear Chairman Wood:

The American Public Power Association (APPA), Edison Electric Institute (EEI), and National Hydropower Association (NHA) write to offer our preliminary thoughts in response to the Commission's proposal to undertake a hydropower licensing process rulemaking, published [at](#) 67 Fed. Reg. 58739 (September 18, 2002). In addition, we want to commend you for seeking to identify ways in which the Commission can improve the hydropower licensing process. Our associations have long sought administrative reforms on a number of licensing issues, and [we](#) look forward to working with you during this important rulemaking.

Together, APPA, EEI, and NHA represent the vast majority of owners, operators and licensees of hydropower projects licensed by the Commission.¹ As such, we and our members have a direct interest in this proceeding and offer important perspectives to the Commission. Our associations have previously participated in numerous proceedings addressing licensing issues before this Commission. This joint response to the Commission – showing concurrence among the associations on a large number of issues – is critical at this juncture as the results from this rulemaking will clearly have a significant impact on the industry as a whole.

General Recommendations

First and foremost, the Commission should retain the current traditional and alternative licensing processes, with such improvements to those processes as the industry may agree would be helpful. At the same time, we encourage the Commission to consider making additional options available to licensees, as we will discuss in the remainder of this letter. We encourage the Commission to remain flexible in the adoption and implementation of any such licensing improvements, recognizing that a one size hydro licensing process does not fit all. It is also important that any process accommodate settlements. Finally, industry generally believes that any proposal that reduces the authority, control, and decision making of the Commission is not in the best interests of licensees or the public.

As important, we [urge](#) you to consider a number of specific areas for improvement, some of which have been [explored](#) by the National Review Group (NRG) and Interagency Hydropower Committee

(IHC), but many others of which have not been explored by those groups. We are attaching prior correspondence in which we have provided a list of such areas for improvement. We highlight selected key issues in this letter. We encourage you to seize the rulemaking opportunity to further exercise your leadership and incorporate the key issues identified in this letter and that prior correspondence into the Commission's rulemaking. The issues we propose for inclusion in the rulemaking are consistent with the improvements proposed in the Commission's notice, are supported by an extensive Congressional record, and are ripe for action.

As administrator of Part I of the Federal Power Act and the central licensing agency, the Commission can make a number of improvements to the licensing process on its own without the need for joint agency action. We recommend that the Commission exercise its authority by taking such initiative. Other improvements to the licensing process, however, may require more direct involvement by other agencies. We encourage the Commission to take such steps.

As stated earlier, we strongly urge the Commission to pursue comprehensive licensing process improvements beyond those contained in the proposals of the NRG and the IHC. The NRG and IHC proposals address important issues, may hold merit, and should be considered in evaluating potential improvements to the licensing process. However, they address only part of a broader array of issues of concern. Additionally, the NRG and IHC proposals, which are currently being reviewed by the associations, were developed with limited industry involvement – the Commission's rulemaking should seek the broadest possible input from licensees.

We support the Commission's [proposal to explore improvements to the licensing process through a rulemaking](#) [as](#) outlined in [the Federal Register](#) notice, which provides an achievable and efficient timeline of one year while allowing for [such](#) input [by the industry](#). We welcome the opportunity to work with you to address important issues that we hope will lead to an improved, results-oriented licensing process that better recognizes the extremely valuable contribution of hydropower to our nation's energy portfolio.

As owners, operators and licensees of projects subject to licensing by the Commission, our members are directly affected by the licensing process and its results. The same is true for our members' customers, as well as the power grids to which they provide energy, capacity, and ancillary benefits. We encourage the Commission to employ the experience of licensees in this rulemaking to help ensure that both the licensing process and the resulting licenses are workable, equitable, and in the interests of the national energy infrastructure. This rulemaking presents a tremendous opportunity to resolve many substantive issues that go beyond the proposals currently under consideration and we encourage you to pursue those issues, which are described in more detail below.

Specific Areas for the Commission to Make Direct Improvements

- **NEPA efficiencies** – There [are a number of ways in which the Commission can improve the environmental review process under the National Environmental Policy Act \(NEPA\) in the context of licensing hydropower projects. For example, at the election of an applicant, the Commission should](#) move scoping to the beginning of the [licensing](#) process, permit licensees to conduct scoping and prepare draft EA's and EIS's, [and ensure greater reliance by other](#)

agencies on the environmental review and record prepared by the Commission. In addition, the Commission should continue to insist that the environmental baseline at relicensing remains the environment with the project at the time of relicensing, and that license conditions must start from that baseline.

- **Studies** – The Commission should allow for better definition of information truly necessary to each particular licensing, better development of the information including reliance on existing data as appropriate, improved coordination, early guidance, and a clear and effective dispute resolution process.
- **FERC evaluation of mandatory conditions** – The Commission should evaluate and make findings and recommendations regarding proposed conditions as well as the reasonableness of the conditions, the evidentiary basis or lack thereof, and the impacts of the conditions on other aspects of the project license, in particular on project operations and safety. The Commission also should adjust final license conditions within its control to ensure a reasonable overall end result and should limit conditions to direct project-induced effects.
- **Analysis of PM&E measures** – The Commission should consider all power and non-power benefits of hydropower projects and consider least cost alternatives.
- **Better coordination and integration of CWA Section 401 certification, ESA Section 7 consultation, NHPA Section 106, CZMA, and tribal consultation** – The Commission should address how these processes cause duplication, unnecessary delay, and inconsistencies in the licensing process.
- **Settlements** – The Commission should create flexibility in its timelines to allow for the successful resolution of settlement efforts – provide options so licensees can alter processing deadlines so that promising settlement discussions are not arbitrarily derailed. Also, the Commission should take steps to accommodate and support the settlements themselves.
- **Fishways** – The Commission should define “fish” and “fishways” as the lead agency on these matters, per the intent and guidance of Congress as contained in Section 1702(b) of the Energy Policy Act of 1992, recognizing that prior to final adoption, the fishways definition would need concurrence of the resource agencies. In addition, the Commission should carefully consider the timing of mandatory conditions and allow for the appropriate review time and appeals within the issuing agency.

Areas for Commission Outreach to Other Agencies

We also encourage the Commission to explore ways of resolving additional important issues that may require joint action with other agencies. In particular, one of the biggest dilemmas with the current process is the imposition of mandatory conditions by other agencies without sufficient recognition of the impacts of those conditions on project operations [and benefits, and without sufficient consideration of less costly options for achieving similar resource goals](#). Resolution of this issue is crucial. Other potential issues for joint action include an appeals process for mandatory

conditions, consistent use of the existing project baseline throughout the licensing process, agency balancing of mandatory conditions and selected other items included in the attached letters that were previously sent to the Commission. The Commission should explore resolution of these issues via memoranda of agreement and joint rulemakings with ample opportunity for industry input.

Conclusion

APPA, EEI, and NHA want to take this opportunity to again underscore the importance of allowing individual licensees flexibility with regard to licensing process improvements – the Commission must continue to allow each licensee to pursue a licensing approach that is most suitable for its particular project. The Commission has recognized that each license proceeding possesses unique characteristics, benefits, and issues. It is important for the Commission to acknowledge this and to allow licensees to pursue the approach that is most suitable to the circumstances of the project. The ability of a licensee to choose the type of licensing proceeding must not be diminished by the rulemaking, even if the rulemaking produces new options and approaches to licensing in addition to the traditional approach and the ALP.

In closing, we again thank you for initiating a rulemaking on the hydropower licensing process – this is an important step in building a brighter future for our nation's largest renewable resource. The Commission should use this rulemaking to help ensure that both the licensing process and the resulting licenses are workable, equitable, and in the interests of the national energy infrastructure. We sincerely hope you will address the issues discussed in this letter and we look forward to working together to bring much needed improvements to a process that has long been in need of repair.

If you have any questions regarding the positions of the associations, please contact Linda Church Ciocci, Mark Stover, or Jeff Leahey at NHA (202-682-1700), Henri Bartholomot, Fred Davis, or Chuck Linderman at EEI (202-508-5622/ 5477/ 5652), or Rebecca Blood at APPA (202-467-2929).

Sincerely,

On behalf of:

Linda Church Ciocci, Executive Director, NHA
Fred Davis, Director, Governmental Affairs, EEI
Rebecca Blood, Senior Government Relations Representative, APPA

Attachments – HLRTF March 2002 Letter to FERC
NHA April 2002 Letter to FERC

cc: Commissioner Linda Breathitt
Commissioner Nora Brownell
Commissioner William Massey
Mark Robinson

Ann Miles
Tim Welch
John Clements
Secretary (for submittal to docket)

ⁱ NHA is the national association representing the interests of the United States' hydropower industry. NHA represents sixty-one percent of domestic, non-federal hydroelectric capacity and almost 80,000 megawatts (MW) across North America. NHA's 120 plus members include public utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys from all regions of the country.

APPA is the national organization representing the interests of more than 2,000 publicly-owned electric utilities throughout the United States that deliver electric energy to approximately forty million citizens. Hydroelectric projects comprise nearly twenty-two percent of public power's total generation and about 140 public systems have hydroelectric capacity.

EEI is the national association of investor-owned electric utility companies and utility affiliates and associates. Our Alliance of Energy Suppliers is a division of EEI that represents independent power producers, generators, and power marketers in U.S. wholesale electricity markets. Together, EEI and Alliance members serve about seventy percent of all electricity consumers in the United States and generate almost seventy percent of the nation's electricity. A large number of our members rely, either directly or through power purchase agreements, upon hydroelectric power to supply their customers' needs and to operate their systems. Our members operate approximately 366 such hydropower projects under federal licenses. As the national representative of the single largest group of hydropower project licensees, EEI and the Alliance have a vital interest in ensuring the continued viability of this important resource.