



July 21, 2015

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

RE: Commencement of Assessment of Annual Charges, Docket No. RM15-18-000

Ms. Bose:

On Friday, May 22, the Federal Energy Regulatory Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) titled *Commencement of Assessment of Annual Charges*¹ and requested comments from interested stakeholders by July 21. The National Hydropower Association (NHA)² submits the following comments for the Commission's consideration.

I. Introduction & Background

The NOPR proposes to “commence assessing annual charges two years from the effective date of an order issuing a license, exemption, or an amendment authorizing additional capacity, rather than on the date project construction starts.”³ The NOPR further clarifies that “annual charges will be assessed two years from the effective date of an order... regardless of whether the Commission has granted an extension of time for construction or a stay of the construction deadline.”⁴ The NOPR will only impact non-municipal licenses, as the Commission will continue assessing annual charges for municipal licensees upon the date the project begins operations.

In Order 576,⁵ a Final Rule that addressed this very issue, the Commission adopted the current practice of assessing annual charges “at the same time as the commencement of project construction.”⁶ The

¹ *Commencement of Assessment of Annual Charges*, 80 Fed. Reg. 29,562 (May 22, 2015).

² NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of over 200 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

³ 80 Fed. Reg. at 29,563.

⁴ *Id.* However, the NOPR states that “Stays of entire licenses, however, will continue to stay the assessment of annual charges.” 80 Fed. Reg. at 29,563, n.18.

⁵ *Charges and Fees for Hydroelectric Projects*, 60 Fed. Reg. 15,040 (March 15, 1995).

Commission adopted this approach because it “strikes a reasonable balance and compromise among the financial concerns of the different licensees.”⁷

II. Summary of Comments

NHA believes the NOPR would significantly impact the hydropower industry resulting in fewer hydropower projects being built. As such, NHA respectfully opposes the NOPR and recommends that the Commission continue the current practice adopted in Order 576 of commencing assessment of annual charges for non-municipal licensees at the commencement of project construction. The important flexibility and meaningful relief provided to the industry by maintaining the current practice far outweighs the NOPR’s justifications for the change in policy. Further, at a time when Congress and the Administration have acted to incentivize the development of new hydropower, NHA believes the NOPR would frustrate the intent of these policies.

Alternatively, should the Commission proceed, NHA recommends that the Commission adopt a new policy where the assessment of annual charges takes place at the commencement of project operations. Therefore, the assessment of annual charges for all licensees, municipal and non-municipal, would commence when a project begins operations.

III. Maintaining the Current Practice of Commencing Assessment of Annual Charges at the Commencement of Project Construction is not an Administrative Burden

In Order 576, the Commission outlined several reasons for assessing annual charges at the commencement of project construction, reasons that undermine the NOPR and remain relevant and applicable today. For example, the NOPR relies on administrative efficiency arguments to justify the change in policy and implies that because so few licensees or exemptees, on a yearly basis, receive extensions or stays to start construction that the NOPR will have a minimal impact on the hydropower industry. The NOPR states “the Commission has included language in its orders requiring the licensee or exemptee to notify the Commission when project construction begins. Otherwise, the Commission has to contact the licensee or exemptee to determine that date.”⁸ The NOPR further states that “Licensees and exemptees will no longer need to notify the Commission when project construction starts for the purpose of assessing annual

⁶ *Id.* at 15,040

⁷ *Id.* at 15,043

⁸ 80 Fed. Reg. at 29,563.

charges, and, in turn, the Commission will not have to contact the licensee or exemptee for this purpose.”⁹ Therefore, the NOPR will “foster certainty... as to when annual charges will commence.”¹⁰

NHA disagrees and believes the NOPR’s tenuous efficiency and certainty arguments do not outweigh the important flexibility that is provided to the hydropower industry by maintaining the status quo. First, any administrative efficiency problems have been corrected by the Commission, as noted in the NOPR, through the inclusion of provisions in new licenses requiring licensees to inform the Commission when construction commences. Thus, the Commission is no longer burdened with contacting the licensee to determine the start date of construction. Second, the Commission has an interest in identifying when construction commences in order to monitor compliance with Section 13 of the Federal Power Act (FPA),¹¹ which, as the NOPR acknowledges,¹² requires construction to commence within two years of license issuance or as extended by the Commission.

In fact, in Order 576, the Commission found the opposite of what is proposed in the NOPR, stating “...we prefer to use the date of commencement of construction as the benchmark for commencement of annual charge assessments, as opposed to the date of commencement of operation, because the former has come to be defined (for other purposes) with considerably greater precision in the case law.”¹³ Section 13 of the FPA is precisely why, in the words of Order 576, commencement of construction has become so clearly defined and with greater precision.

The NOPR also provided statistics on the frequency of extensions or stays between 2010 and 2014, “on average, 5 (3.4 licenses + 0.4 exemptions + 1.2 license amendments) affected projects each year receive extensions of the start of construction deadline, and zero receive a stay...”¹⁴ The NOPR seemingly contends that negatively affecting 5 hydropower projects annually is insignificant. This ultimately begs the question: how much of an administrative burden or inconvenience can these five projects cause on Commission resources in terms of tracking the commencement of construction? The NOPR does not describe the burden of tracking the construction start date, especially, as noted above, most – if not all – licenses require the licensee to report the construction start date to the Commission.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 16 U.S.C. § 806 (2012).

¹² 80 Fed. Reg. at 29,563.

¹³ 60 Fed. Reg. at 15,043.

¹⁴ 80 Fed. Reg. at 29,563.

Finally, the NOPR, if adopted, could result in new administrative burdens for both the Commission and non-municipal licensees and exemptees. If a licensee or exemptee ultimately does not commence construction, for any number of reasons as described below, under the NOPR, payment of administrative charges may already have commenced resulting in the licensee requesting refunds of such charges. The Commission would then be required to set up a new process for issuing refunds for these projects.

For these reasons, NHA believes that the Commission will not attain the administrative efficiency on which the NOPR is predicated, and recommends that the Commission continue the current practice of commencing assessment of annual charges at the commencement of project construction.

IV. The NOPR Would Significantly Impact the Hydropower Industry

If the five projects per year that are potentially impacted by the NOPR are put in context with the Commission's total hydro licensing, exemption and amendment workload on a yearly basis, it becomes clear that the NOPR would have a significant impact on the hydropower industry, but would result in only a small benefit to the Commission. As noted in the NOPR, between 2010 and 2014, the Commission, on average, issued 10.6 licenses, exemptions, or amendments per year.¹⁵ Therefore, approximately half of all applicants going through the licensing, exemption, or amendment processes will be negatively affected by the NOPR. This fact demonstrates that the Commission's proposed change in policy will have broad applicability and impact.

The five projects projected to be affected per year are exactly the projects the Commission contemplated when issuing Order 576:

Licenses are issued for terms of as long as 50 years, and the projects themselves are often designed and constructed to last much longer than the license. Thus, over time, providing a modest level of relief to licensees of projects that haven't yet commenced construction imposes a very small burden on the existing licensees, because the licensees of newly constructed projects will be sharing the total annual charges burden long after the expiration of the short pre-construction period. *Moreover, if a few years of pre-construction relief from annual charges enables one or more licensees of new projects to bring their projects to fruition, these new projects will help share the existing*

¹⁵ *Id.* at 29,564.

*licensees' burden... It also marks the point in time at which funding is available from construction loans.*¹⁶

Therefore, projects experiencing difficulties that would require “pre-construction relief” are precisely the types of projects that the Commission had in mind when issuing Order 576 and adopting the current practice of assessing annual charges upon the commencement of construction. By shielding projects from annual charges during the pre-construction phase in order to “bring them to fruition,” Order 576 acknowledged that the assessment of annual charges too early in the lifecycle of a project can be an impediment to project completion.

The detrimental impact of the NOPR is also supported in the Department of Energy’s *2014 Hydropower Market Report* (Market Report).¹⁷ Examining the major licensing milestones¹⁸ of sixteen projects between 2005 and 2013, the Market Report found that the phase of licensing and project development between license issuance and the start construction took the most time, more than four years,¹⁹ typically, longer than obtaining the license itself.²⁰ The Market Report also found that between 2005 and 2014, the Commission issued 46 original licenses, and after removing 7 original licenses related to repowerings, expansions or other activity, of the “remaining 39 licensed projects, 32 are still engaged in the preconstruction or construction activities.”²¹ Post-licensing activities that delay progress toward commencing construction are numerous, and include, but are not limited to, “obtaining, if needed, USACE 408 permits, as well as any other required state and local permits, arranging project financing, finalizing the engineering design, securing an interconnection agreement, and, if the developer is not a utility, finding a buyer for the power that the project will produce.”²² As evidenced by this overwhelming list of hurdles, the post-licensing, preconstruction phase is critical in the pre-operational lifecycle of the project. Each of these hurdles injects uncertainty into the project, and any of them could derail a project and prevent the licensee from bringing it to fruition.

¹⁶ 60 Fed. Reg. at 15,043 (emphasis added).

¹⁷ 2014 Hydropower Market Report (April 2015), available at: http://energy.gov/sites/prod/files/2015/05/f22/2014%20Hydropower%20Market%20Report_20150512_rev6.pdf (Market Report).

¹⁸ The Market Report defined the major licensing and development milestones as follows: 1) Application to Issued Permits, 2) Issued Permit to License Application, 3) License Application to Issued License, 4) Issued License to Start Construction, and 5) Start Construction to Operation. Market Report at 20.

¹⁹ *Id.* at 20.

²⁰ *Id.* at vi (Executive Summary)

²¹ *Id.* at 21.

²² *Id.*

The Market Report's findings related to delays are also supported by the NOPR, where "from 2010 through 2014, the Commission granted three requests for stays of construction deadlines to municipal licensees with projects at U.S. Army Corps of Engineers' dams."²³ Delays related to developing hydropower on Army Corps infrastructure is felt by both municipal and non-municipal licensees and frequently these delays are out of the control of a licensee or exemptee.

Order 576 also recognized that once construction begins, licensees can draw upon construction loan funds to pay annual charges, whereas such funds may not be available prior to the commencement of construction.²⁴ Construction loans continue to help licensees pay for annual charges, but increasingly, projects are being built with equity financing during the early stages of construction, compounding the NOPR's impact.

Although all projects would be negatively impacted by the NOPR's proposed change in policy, pumped storage projects would be particularly harmed by the NOPR, discouraging future pumped storage projects from being built. The Administration has recognized the challenges and transformations facing our energy infrastructure, and through the Quadrennial Energy Review (QER)²⁵ the President directed an integrated review of energy policy focused on energy transmission, storage, and distribution (TS&D). The QER specifically recognized the value of pumped storage in addressing these challenges, "energy storage technologies, including pumped hydro storage... provide valuable system flexibility" and that "pumped hydro storage is usable on a timescale from seconds to days."²⁶ The QER further outlined the numerous benefits and ancillary services that pumped storage projects provide:

pumped hydro storage currently represents the largest share of storage in the United States, with 42 pumped hydro storage plants totaling about 22 gigawatts of installed capacity, which is equivalent to about 2 percent of U.S. electricity generation capacity. There are currently an additional 37 gigawatts of projects that are in some stage of licensing at the Federal Energy Regulatory Commission (FERC). The original pumped hydro storage plants were built to store power to release at peak demand. New technology (such as variable speed pumps) enable pumped hydro storage to provide ancillary services (i.e., functions that maintain the reliability of the grid); integrate

²³ 80 Fed. Reg. at 29,563 n.15.

²⁴ 60 Fed. Reg. at 15,042, n.22.

²⁵ Quadrennial Energy Review: Energy Transmission, Storage, and Distribution Infrastructure (April 2015), available at: http://energy.gov/sites/prod/files/2015/05/f22/QER%20Full%20Report_0.pdf.

²⁶ *Id.* at 3-10.

variable renewables; and provide other services, such as restarting down generators during an outage.²⁷

However, the QER also noted current market structures that are limiting pumped storage's potential, stating "options such as dispatchable natural gas are cheaper and faster to permit than pumped hydro storage." The NOPR would further reduce the competitiveness of these projects and jeopardize the 37 gigawatts of projects currently in front of the Commission.

Finally, Commission staff has noted that, while the nation's legacy pumped storage projects were developed by vertically integrated load-serving utilities in the past, independent developers have shown greater interest in developing pumped storage projects in recent years.²⁸ The Commission's website, updated through April 1, 2015, shows that the Commission has issued 25 preliminary permits for pumped storage projects. Of these 25 pumped storage projects, all but three appear to have been issued to independent developers that do not have a consistent revenue stream during this pre-operational phase after license issuance. Nine are proposed to be constructed with an installed capacity at or exceeding 1,000 MWs. Accelerating the assessment of annual charges to such entities will put an incredible strain on them as they work to commence construction. Thus, the NOPR could make the development of pumped storage projects prohibitively costly, thereby discouraging future investment in these projects and failing to unlock the great promise these projects hold. These projects need to be incentivized and not penalized in order to meet the challenges and transformations facing our energy infrastructure.

V. The NOPR Undermines Recent Policies to Incentivize New Hydropower Development

As described above, delays between receiving a license and commencing construction are common. These delays combined with the tremendous interest in developing new hydropower projects led Congress to act on reducing delays in the licensing process. In the Water Resources Reform and Development Act of 2014 (WRRDA), Congress declared that "the development of non-Federal hydroelectric power at Corps of Engineers civil works projects, including locks and dams, shall be given priority."²⁹ In unanimously passing

²⁷ *Id.* at 3-11.

²⁸ Letter from Jamie Simler, Director of Office of Energy Policy & Innovation, Fed. Energy Regulatory Comm'n, Request for Comments Regarding Rates, Accounting, and Financial Reporting for New Electric Storage Technologies, Docket No. AD13-10-000, at 1 (June 11, 2010).

²⁹ Water Resources Reform and Development Act § 1008(a)(1), Pub. L. No. 113-121, 128 Stat. 1193, 1215 (2014).

the Hydropower Regulatory Efficiency Act of 2013 (HREA),³⁰ Congress directed the Commission to investigate the feasibility of a two-year licensing process on non-powered dams and for closed-loop pumped storage projects. Similarly, in recognizing hydropower's role in slowing the effects of climate change, developing hydropower on non-powered dams was recognized as a priority in the President's Climate Action Plan (CAP).³¹

The NOPR, if adopted, could disrupt the success and on-going implementation of WRRDA, HREA and CAP, ultimately preventing the development of the very projects that Congress and the Administration intended to incentivize.

VI. The Commission Should Commence Assessment of Annual Charges on All Licensees at the Commencement of Project Operations

The discussion above demonstrates the numerous issues a licensee faces during the postlicensing-preconstruction phase, any one of which could derail a project at any time, even after the Commission, resource agencies, the public, and the project proponent have expended considerable resources. This supports NHA's recommendation for the Commission to, at a minimum, maintain the current practice of assessing annual charges when a project begins construction.

However, if the Commission must change the date of commencement of annual charges for non-municipal licensees and exemptees, NHA recommends that the assessment of annual charges begin at the commencement of project operations, as it does for municipal licensees.

Order 576 recognizes that municipal licensees may obtain an exemption from annual charges prior to and during construction because the project is operating without profit.³² Like municipal licensees, there is no stream of revenue for non-municipal licensees during construction, because no power is being generated. Non-municipal developers have limited resources during the construction phase, and must devote those resources to project design and power marketing. While the Commission noted in Order 576 that the date of completion of construction is not defined with precision and may be difficult to determine,³³ the

³⁰ Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, 27 Stat. 493 (2013).

³¹ *The President's Climate Action Plan*, Exec. Office of the President (Jun. 25, 2013), available at: <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

³² 60 Fed. Reg. at 15,042.

³³ *Id.* at n. 22.

Commission can easily incorporate a new license article into future licenses requiring licensees to notify the Commission of this date, as it has done for the commencement of construction date.

VII. Clarifying the NOPR's Effective Date

If the Commission does proceed with the NOPR, NHA requests that the Commission clarify that the new policy would not take effect for any projects that have a current license, exemption, or preliminary permit or that has a request for any such application currently pending before the Commission. Licensees, exemptees, permittees, and applicants have operated to date based on specific assumptions relative to their project development needs. The imposition of annual charges at a date earlier than anticipated would disrupt these assumptions. Exempting current licensees, exemptees, permittees, and applicants from any such new policy that the Commission may adopt would provide certainty to these entities and assist them as they work through the various phases of development described above.

VIII. Conclusion

NHA appreciates the opportunity to provide comments on the NOPR and we commit to working with the Commission on growing hydropower's contribution to a clean energy future. With renewed interest in developing new hydropower projects, as demonstrated by the number of issued and pending preliminary permits in front of the Commission, across the spectrum of project types and sizes, the NOPR could impact far more than the projected five projects per year and prevent new hydropower from being built.

For these reasons, NHA recommends that the Commission continue the current practice adopted in Order 576 of commencing assessment of annual charges for non-municipal licensees at the commencement of project construction. Alternatively, NHA recommends that the Commission adopt a new policy where the assessment of annual charges takes place at the commencement of project operations, rather than accelerating the assessment of annual charges as proposed in the NOPR.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda Church Ciocci".

Linda Church Ciocci, Executive Director