UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

ANNUAL CHARGES FOR	**)**	
USE OF GOVERNMENT LANDS	**)**	**Docket No. RM11-6-000**

COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION AND EDISON ELECTRIC INSTITUTE ON THE NOTICE OF PROPOSED RULEMAKING ON ANNUAL CHARGES FOR USE OF GOVERNMENT LANDS

I. INTRODUCTION AND INTEREST

On November 17, 2011, the Federal Energy Regulatory Commission (FERC or Commission) issued its Notice of Proposed Rulemaking (NOPR or Notice)[1] proposing to revise the methodology used to compute annual charges assessed for the use of government lands under Part 11 of the Commission's regulations.[2] The National Hydropower Association (NHA) and Edison Electric Institute (EEI) appreciate the opportunity to comment on the Commission's Notice in order to help ensure that the methodology adopted by the Commission results in reasonable annual charges, as required by Federal Power Act Section 10(e)(1).[3]

NHA is a non-profit national 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 more than 180

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[1] 76 Fed. Reg. 72,134 (Nov. 22, 2011).

[2] 18 C.F.R. Part 11 (2011).

[3] 16 U.S.C. § 803(e)(1). NHA also filed comments in response to the Commission's Notice of Inquiry in the proceeding. 76 Fed. Reg. 10,811 (Feb. 28, 2011) (NOI). *See* Comments of the National Hydropower Association on the Notice of Inquiry on Annual Charges for Use of Government Land, Docket No. RM11-6-000 (filed Apr. 29, 2011) (NHA Comments on NOI).

organizations including public utilities, investor-owned utilities, independent power producer project developers, equipment manufacturers, environmental and engineering consultants and attorneys. Many of NHA's members own and operate hydroelectric projects located on federal lands.

EEI is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. EEI's U.S. members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70 percent of the U.S. electric power industry. EEI members own and operate the majority of the hydropower projects licensed by the Commission, and many of these projects involve the use of federal lands within the project boundaries. Therefore, EEI members will be directly affected by the federal land use fees rule the Commission ultimately adopts in this proceeding.

II. GENERAL COMMENTS

NHA and EEI commend the Commission's efforts to find a reasonable fee structure for assessing charges for federal land use by hydropower licensees. Any adopted fee schedule must use a reasonable approximation of the fair market value (FMV) of federal lands occupied by hydroelectric projects, recognize the hydropower industry's varied use of federal lands and public benefit, and provide an opportunity for relief on a case-by-case basis in the extreme case that a licensee's lands are drastically overvalued under the Commission's fee schedule.

The NOPR represents significant progress in this regard, incorporating several improvements suggested by NHA and EEI in their comments on the Commission's Notice of

Inquiry issued on February 28, 2011.[4] NHA and EEI recognize and strongly support the Commission's decision in the NOPR to not include the BLM's zone system in determining the fee schedule and to discontinue the practice of doubling the charges for non-transmission line lands. These changes are positive steps towards creating a reasonable annual charge methodology. However, additional modifications to the fee schedule are needed to achieve an accurate assessment of the value of federal lands used by hydropower projects and to fully comply with Section 10(e)(1). Specifically, the method for valuing project lands needs to recognize and account for the fundamental difference between agricultural lands and hydropower project lands, and the fact that hydropower projects provide great public benefits and minimally encumber the federal lands they occupy. Also, there needs to be an opportunity for case-by-case relief where the Commission's methodology substantially overstates the value of occupied federal lands.

III. SPECIFIC COMMENTS

The Commission proposes to create a fee schedule based on the methodology adopted by the U.S. Bureau of Land Management (BLM) in 2008[5] for calculating rental rates for linear rights-of-way, which calculates assessments using a formula that includes a land value per acre, an encumbrance factor, a rate of return, and an annual adjustment factor. The Commission-created fee schedule would base county land values on average per-acre values from the National Agricultural Statistics Service (NASS) Census rather than the zone system adopted in the 2008 BLM Rule. All other adjustments to the formula components described in the 2008

[4] 76 Fed. Reg. 39, 10811 (Feb 28, 2011).
[5] Update of Linear Right-of-Way Rent Schedule, 73 Fed. Reg. 65,040 (Oct. 31, 2008) (2008 BLM Rule).

BLM Rule would apply to the Commission's creation of a fee schedule.[6] NHA and EEI believe the NOPR is generally a reasonable approach to the assessment of federal land use charges, but recommend that the Final Rule include certain modifications discussed below to ensure that the Final Rule fully complies with the Commission's obligations under Federal Power Act Section 10(e)(1) and to base its decisions on substantial evidence in the record.

A. BLM's Downward Adjustment to the NASS Census County Land Values is Insufficient for Hydropower Lands

In order to better reflect the actual value of federal lands subject to land use charges for linear rights-of-way, the 2008 BLM Rule adjusts county land values downward by 20 percent to remove the value of irrigated croplands and lands encumbered by buildings.[7] FERC proposes to make the same adjustment,[8] reasoning that BLM's adjustment addresses the concerns the Commission had regarding the potential for overvaluation of lands used for hydropower development when it rejected the use of an agricultural land values index in Order No. 469.[9]

The Commission's longstanding position, with which NHA and EEI agree, is that reasonable land use charges are those that are based on a reasonable approximation of the FMV of the lands in question.[10] NHA and EEI submit that BLM's 20 percent adjustment, which was not chosen to reflect FMV of lands used for hydropower development, is insufficient for that purpose. As NHA and EEI pointed out in their comments in response to the NOI, hydropower lands are in many instances incapable of supporting any agricultural use because they feature

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[6] NOPR, 76 Fed. Reg. at 72139-41.

[7] 2008 BLM Rule, 73 Fed. Reg. at 65043-44.

[8] NOPR, 76 Fed. Reg. at 72,139-40.

[9] Order No. 469, Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges, FERC Stats. & Regs., Regs. Preambles 1986-1990 ¶ 30,741 (1987).

[10] *Id*. at 30,588-89; NOI, 76 Fed. Reg. at 10,814; NOPR, 76 Fed. Reg. at 72,137.

very steep slopes and/or thin soils covering rocky substrate, or no soil at all, and are often in remote locations.[11] In contrast, linear rights-of-way for BLM lands apply to a broad range of lands usable for multiple purposes. The NOPR notes this fact, but does not further explain why BLM's 20 percent adjustment to remove only the value of irrigated croplands and buildings applied to the entire range of lands subject to BLM linear rights-of-way should be applied to the decidedly different subset of lands used for hydropower development.[12] The Commission should revisit this matter and adopt a larger downward adjustment based on the record evidence in this proceeding regarding the fundamental difference between lands suitable for hydropower development and the very broad category of lands to which BLM rights-of-way apply.

B. The Proposed Encumbrance Factor Should be Reduced

The Notice establishes a single encumbrance factor for all federal lands. NHA and EEI believe this proposal properly responds to the record developed in this proceeding. However, NHA and EEI do not believe the proposed 50 percent encumbrance factor reasonably reflects the record in this proceeding regarding the extent to which federal lands at Commission-licensed hydropower projects are managed for non-hydropower purposes by the federal land management agencies pursuant to their mandates to manage federal lands for multiple purposes. Likewise, it does not reflect the fact that in many instances it is the licensed project itself and the funding provided to federal agencies by the project that makes it possible for the federal agency to achieve its management objectives, by creating and enhancing public recreation opportunities, protecting and enhancing fish, wildlife, botanical, and cultural resources, providing water supplies for municipal and agricultural purposes, and displacing carbon-based power generation that would otherwise be needed. The record in this proceeding

[11] NHA Comments on NOI at 2-3; EEI Comments on NOI at 2.

[12] NOPR, 76 Fed. Reg. at 72,139-40.

is replete with evidence of these public benefits.

The NOPR states that the public benefits provided by hydropower licensees, such as Commission-required recreation facilities, cannot completely offset the rental fee for the use of federal lands.[13] NHA and EEI agree, but submit that the record developed in this proceeding demonstrates that federal lands at hydropower projects are often used by the land managing agencies for non-project purposes. The NOPR also states that public uses required by Commission licenses are acknowledged in the proposed rule by discontinuing the practice of doubling the charges for non-transmission line lands.[14] NHA and EEI recognize and support discontinuing this practice; however discontinuance of a practice based on an assumption that non-transmission line lands are encumbered to the exclusion of all non-hydropower uses does not address the question of what a reasonable encumbrance factor should be. NHA and EEI therefore request that the Commission revisit this issue and adopt a lower encumbrance that reflects the record in this proceeding.

C. The Final Rule Should Provide an Opportunity for Licensees to Demonstrate that the Commission's Methodology Results in Substantially Inaccurate Land Valuation with Regard to Specific Projects

The NOPR rejects recommendations that the Commission provide an opportunity for licensees to demonstrate that a different valuation is warranted when the licensee believes the application of the proposed methodology results in a substantially inaccurate valuation of the lands at their project.[15] NHA and EEI understand the Commission's desire for administrative efficiency, to control the costs administering the hydropower program, and to avoid disputes and litigation. However, NHA and EEI believe that adoption of the proposed rule with the

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[13] *Id*. at 72,140.

[14] *Id*.

[15] *Id*.

adjustments advocated by NHA and EEI would result in the reasonable approximation of the FMV of federal project lands in nearly every case, consistent with the Commission's longstanding interpretation of the requirements of FPA Section 10(e)(1) and the charge to the Commission in that section to avoid increasing the prices that consumers pay for electricity. That outcome would also make it a very rare circumstance in which a licensee would have an incentive to undertake the trouble and expense, with uncertain results, of attempting to show that the methodology results in an unreasonable land valuation. Thus, providing an opportunity for licensees to demonstrate that the Commission's methodology results in substantial overvaluation of federal project lands at a specific project should cause very little or no diminution in administrative efficiency or any other potential adverse consequences of concern to the Commission. NHA and EEI therefore request that the Commission reconsider this matter and grant the relief requested by NHA and EEI.

D. The Final Rule Should Provide for a One Year Phase-In of the New Charges

NHA and EEI continue to believe that the Commission should allow a one-year phase-in period for the new fee schedule. Even with the changes proposed by NHA and EEI, the federal land fee charges will increase significantly, which in many cases will have budgetary and consumer rate impacts. A one-year phase-in period is consistent with the BLM 2008 Rule, which included a first year reduction of 25 percent.[16]

E. The Final Rule Should Adopt a Single, Statewide Average Land Value for Alaska

NHA and EEI support the proposed use of county-level data in the NASS Census rather than BLM's zone method because it will result in more accurate land valuations. However, that method is highly problematic with respect to lands in Alaska because the NASS Census does not

[16] BLM Final Rule, 73 Fed. Reg. at 65,060.

report land values at the borough level. In addition, the NASS Census divides Alaska into five "areas," but the five Alaska areas established in BLM's 2008 final rule have different geographical boundaries. NHA and EEI request the Commission to clarify whether it proposes to assess charges based on the NASS Census boundaries or the boundaries established by BLM.

In any event, NHA and EEI believe neither approach would produce a "reasonable" annual charge. Using BLM's area boundaries would limit the application of the excessively high NASS Census land values in Southeast Alaska, but BLM's approach would inappropriately place nearly all of the state's lands suitable for hydropower in the "Kenai Peninsula" area. That would result in the use of NASS Census data from just 124 farms covering 38,289 acres to develop land values for the entire State; an area exceeding 500,000 square miles. A more reasonable approach would be to use the statewide average land value, which is available in the same table as the Alaska area figures in the NASS Census. Because land values would be based on all of the farms and agricultural acreage in Alaska, the estimated FMV would rest on a much better data base. Moreover, no additional administrative burden would be imposed on the Commission.

IV. CONCLUSION

NHA and EEI appreciate the Commission's efforts and openness in this process and the proposed improvements to the methodology for assessing federal land use charges. However, NHA and EEI also believe that the proposed rule does not fully provide for reasonable annual charges based on the FMV of hydroelectric project lands and an appropriate encumbrance factor, and that the Final Rule should provide an opportunity for licensees to challenge the land valuation component of the formula for calculating land use charges in those rare instances where the methodology results in the use of a substantially overstated land value. We also note

that several NHA and EEI member companies are filing individual responses to the NOPR and refer the Commission to those comments.

Respectfully submitted,

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