



ELECTRONICALLY FILED

Michael Pulskamp
U.S. Bureau of Reclamation
Denver Federal Center, Bldg 67
P.O. Box 25007
Denver, CO 80225
mpulskamp@usbr.gov

RE: Comments Regarding the Bureau of Reclamations Draft Directive and Standard for Lease of Power Privilege at Bureau Facilities

Dear Mr. Pulskamp:

On November 4, 2011, the Bureau of Reclamation (“Bureau”) announced that it is seeking public comment on a draft Directive and Standard for Lease of Power Privilege (“LOPP”) at Bureau facilities. The National Hydropower Association (“NHA”) welcomes the Bureau’s initiative and appreciates the opportunity to comment on the Bureau’s draft LOPP directive release.

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 organizations, including consumer-owned utilities, investor owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys. NHA’s members develop, own and operate hydroelectric facilities located on federal lands, including lands under the Bureau’s control.

The Bureau is the second largest generator of hydropower in the U.S. and NHA commends the Bureau for its work to manage its hydropower resources and encourage the development of untapped resources within its jurisdiction. Hydropower development is experiencing a renaissance and NHA’s members are eager to work with the Bureau to maximize the development of existing infrastructure. Not only will this new development produce more clean and renewable hydropower, but it will also bring economic benefits to towns and municipalities through jobs created in the construction, manufacturing and consulting fields. NHA sees significant undeveloped potential on Bureau property, and through the LOPP process, we look forward to growing our relationship with the Bureau and existing water users.

I. Summary of Comments

NHA has reviewed the draft LOPP directive carefully and we believe it will make the process more responsive to project sponsors needs and more consistent throughout the Bureau, increasing its effectiveness. Although the draft LOPP directive provides guidance and timeframes on LOPP requirements, assigns roles and responsibilities within the

Bureau for LOPP development, sets a standard methodology across the Bureau for LOPP charges and identifies all potential charges for developers, NHA encourages additional clarification on some of these points.

While the draft LOPP directive is an improvement over the current procedure in the Reclamation Manual, NHA believes that the draft directive is subject to two main criticisms. First, the role of the 1992 Memorandum of Understanding (“MOU”) between the Bureau and the Federal Energy Regulatory Commission (“FERC”) in the draft LOPP directive is not clearly defined. NHA believes that the MOU provides a solid and workable basis for dividing responsibility between the Bureau and FERC, and for resolving any disputes that may arise concerning those responsibilities. NHA suggests revising the draft LOPP directive to clarify that the Bureau will continue to follow the terms of the MOU in its regulation of non-federal hydro development at Bureau projects.

Second, the goal of promoting greater consistency within the Bureau and greater transparency in decision making would be enhanced by (i) establishing clearer standards and criteria for evaluating proposals submitted to the Bureau and (ii) clarifying who the decision-makers will be and how final LOPP decisions can be appealed within the Bureau and the Department of the Interior.

NHA welcomes the opportunity to work directly with the Bureau to incorporate these ideas into the draft LOPP directive. In this regard, FERC has had great success with public workshops, and NHA encourages the Bureau to consider a similar approach in this case, with specific outreach to include project developers, water users, irrigators, system operators and other stakeholders.

II. The 1992 Memorandum of Understanding between the Bureau and FERC

NHA believes that the draft LOPP directive should more clearly describe the Bureau’s relationship to FERC under the 1992 MOU. Section 5 of the draft directive says that requests to develop hydro projects at Bureau facilities will be “evaluated under” the MOU. This is an ambiguous statement that could be interpreted to mean that the Bureau views the MOU as a guidance document, rather than as a controlling agreement between the Bureau and FERC. NHA believes, however, that the MOU is a solid, time-tested structure that would greatly assist the Bureau’s efforts to encourage non-federal hydro development through the LOPP process. In particular, the MOU provides a clear framework and timetable for deciding whether a particular project should be developed under the jurisdiction of the Bureau or FERC. The MOU also provides opportunity for public input and, through the Presumptions included in it, clear guidance on the standards that will govern decisions.

In addition, Section 5 of the draft LOPP directive says “The Senior Advisor, Hydropower and the respective regional director will coordinate and agree on jurisdiction before proceeding with the LOPP solicitation.” This provision highlights an interesting gap in the MOU that should be clarified in the final LOPP procedure. The MOU says that the Bureau makes a preliminary determination of jurisdiction “upon a request for a lease of

power privilege for a hydroelectric power development located at or within a [Bureau] project.”¹ The final decision is to be made by FERC, even though the initial development proposal went to the Bureau.

However, this decision making structure does not address the situation when the Bureau determines, on its own initiative under Section 6(A) of the draft LOPP directive, to request proposals for LOPPs. To fill this gap, the draft LOPP directive should be modified to provide that, before the Bureau proceeds to issue a request for LOPP proposals on its own initiative, it will initiate consultation under the MOU to obtain FERC’s determination that development under a LOPP is appropriate. FERC will docket the Bureau’s consultation request in its new “LP” docket, enabling interested members of the public, including potential developers, to participate in the decision process. To ensure full public participation, the Bureau could also issue a formal notice that it is seeking a FERC determination under the MOU. Once FERC has made the jurisdictional determination, the Regional Director would evaluate and choose among applications for a LOPP.²

Section 4(D)(1) of the draft LOPP directive says that the determination of jurisdiction by the Regional Director triggers the publication of a public solicitation for a LOPP. Since the MOU contemplates that the jurisdictional determination is to be made by FERC, the LOPP procedure should be revised to provide that receipt of FERC’s determination of jurisdiction is the trigger for publication of a public notice.

The draft LOPP directive does not include a method for appealing the jurisdiction decision, and it is not clear that one now exists at the Bureau or in the Department of the Interior. Therefore, ensuring that all potential proposals to initiate an LOPP solicitation follow the procedures in the MOU will ultimately simplify the Bureau’s process, because the Federal Power Act provides a clear and expeditious procedure for challenging final jurisdictional determinations by FERC.

III. Standards and Criteria for Granting a LOPP in Competitive Situations

Section 6(C) of the draft states that the Bureau will “give more favorable consideration” to proposals that are “well-adapted to developing, conserving, and utilizing the water and natural resources” of a Bureau project and that “clearly demonstrate that the offerer is qualified” to develop and operate the proposed hydropower project. At present, however, the draft LOPP directive does not explain any standards for making these

¹ Memorandum of Understanding between the Federal Energy Regulatory Commission and the Department of the Interior, Bureau of Reclamation, 58 Fed. Reg. 3269, 3270 (Jan. 8, 1993).

² NHA recognizes that the Bureau has traditionally resorted to the MOU process only after it has received a development proposal. However, as competitive pressures to develop hydropower projects at Bureau locations increase, the ability and willingness of developers to participate would be enhanced if the jurisdictional status of a potential project were established *before* the LOPP process was initiated.

determinations. In particular, the draft LOPP does not explain how the Bureau will evaluate competing proposals if neither offerer has a preference advantage under Section 9(c) of the Reclamation Project Act of 1939.

Although Section 8(H) of the draft LOPP directive describes the minimum conditions that must be addressed in the LOPP, NHA encourages the Bureau to develop and assign relative weights to the criteria when evaluating project proposals, particularly in situations where there is competition. NHA believes that the 1986 Electric Consumers Protection Act (“ECPA”) provides a useful starting point for developing such weighted criteria. FERC has elaborated on these criteria in its Exhibit H.³ NHA is familiar with the ECPA criteria as they have been developed by FERC and would be happy to assist the Bureau in developing similar weighted criteria for use in the LOPP process. Publishing decisional criteria and ensuring that they are fair and transparent is of paramount importance in creating open competition. Clear standards would also assist Bureau field staff when making decisions on LOPP proposals.

One element of the decisional criteria developed by FERC that the Bureau should *not* adopt, however, is the preference for the first application filed in cases where one application is not demonstrably superior to the other. In the draft LOPP directive the timeline for the solicitation of a LOPP proposal to the submission deadline is too short to accord decisive significance to the application that was filed first. NHA believes that the draft LOPP directive could be modified in two ways to address this problem.

First, if the Bureau allowed more time for the preparation of submissions in response to a request for proposals, at least in the case of larger projects – for example, over 2 MW – or projects that did not involve canals or conduits, it would receive more fully-developed proposals that would provide a better basis on which to make competitive decisions. NHA suggests that allowing 180 days is an adequate amount of time to prepare a proposal in response to a notice from the Bureau. This is consistent with the existing guidelines followed by the Bureau’s Great Plains Region.

Second, the draft LOPP directive could provide that in cases in which the Regional Director was unable to determine that one applicant was better qualified or had a better proposal, the Regional Director could request the submission of specific additional information intended to clarify the differences between the applicants and their proposals. In this respect, the Great Plains Region’s *Guidelines for LOPP* (March 19, 2009 draft) provides an excellent starting point: “If the top ranking [proposal] is not the highest preference, then the higher preference proposals are given 90 days to improve their proposals. Developers are only given the general areas where they were weak (no details/requirements will be provided).” This same process could be used to choose between equally-ranked proposals in competitions that did not involve a Section 9(c)

³ See 18 C.F.R. § 5.18(c).

preference applicant; and requests for additional information could be as detailed as necessary to enable the Bureau to determine which proposal was better.

IV. Appeal of a Decision Granting a LOPP

The draft LOPP directive states that the decision to grant a LOPP is to be made by the Regional Director. However, the draft does not state whether this decision can be appealed, and if so, what the appeal process is. Since the final jurisdictional determination under the MOU is made by FERC, an avenue for appeal exists in jurisdictional disputes; however, this process would not apply to the actual Bureau decision to grant a LOPP after a jurisdictional decision had been made. NHA believes that the final LOPP decision should include a formal appeals process with defined timelines, and that the most appropriate decision maker for such appeals would be the Commissioner of the Bureau.

V. Additional Points & Comments

a. Annual LOPP Charge

Section 10(B)(2) of the draft LOPP directive sets an annual charge of \$5.50/KW of installed nameplate capacity and 6% of gross revenue. While NHA acknowledges that an annual fee is both necessary and appropriate under the Reclamation Project Act of 1939, a fee based on capacity can impose an uneconomic burden on small projects, especially for projects that don't control the pattern of generation, which would be the case for projects at Bureau facilities. NHA has calculated the annual fees that would be payable if the same hypothetical project were built under FERC's jurisdiction, and believes that the annual fee proposed by the Bureau would be excessive, imposing an uneconomic burden on projects authorized under an LOPP:

Comparison of Estimated FERC and Bureau Annual Charges for Hypothetical 5.6 MW Hydro Project

Capacity: 5.6MW

Annual output: 17,270 MWh = 1.727 million kWh

** Does not include 'other federal; agency charges' or use of federal land charges (same under either system).

FERC Annual Charges

Formula: [Capacity in kW X (112.5 X output in million kWh)] X FERC Unit Charge
Calculation:

[5600 kw (112.5 X 1.7 M kWh)] X 1.456635 = \$15,848.33

BuRec Charges:

Formula: \$5.50 X installed kW plus 6% of gross
Assume \$50/MWH

Calculation:

$\$5.50 \times 5600 \text{ kW} = \$33,000$

$\$50/\text{MWH} \times 17,270 \text{ MWH} = \$863,500/\text{yr gross} \times .06 = \$51,810/\text{yr charge}$

$\text{Annual Charge} = \$51,810 + \$33,000 = \$84,810$

NHA urges the Bureau to consider a more reasonable fee structure, or whether other fee structures would be more appropriate under the circumstances, such as fees based on a percentage of gross revenue alone. Further, NHA recommends that for projects with a capacity less than 2 MW, billing be done quarterly, as this creates a more manageable cash flow profile for small projects.

b. Expedited LOPP Process

NHA suggests that the Bureau create an accelerated LOPP process that responds to the needs of small project developers. The traditional LOPP process can pose an insurmountable financing hurdle for small project developers, and an accelerated process for certain projects that meet a capacity, generation or other threshold requirement would facilitate development on Bureau infrastructure. NHA believes the Bureau can create an expedited LOPP process that balances appropriate regulatory review with the economics of smaller projects.

c. Disposition of Project at End of LOPP

The draft LOPP directive does not address what happens after the 40-year term of the LOPP has expired, e.g. who has what rights, or how extensions work, etc. Under the Reclamation Project Act of 1939, the Federal government has the right of first refusal to purchase the power plant, but NHA recommends that the draft LOPP directive should specify how fair payment is determined, whether extensions are possible, if preferences apply, and what the relevant time frames are.

d. Indemnification Provisions

Section 8(H)(4) of the draft LOPP directive seems to indicate that the Lessee under a LOPP must indemnify the U.S. for loss or damage due to “any act of neglect or omission of the Lessee *or the United States* in connection with its performance under the LOPP.” (emphasis added). Requiring the lessee to indemnify the United States for acts or omissions of the United States does not appear to make sense and NHA encourages the Bureau to clarify this statement. In any event, NHA encourages the Bureau to consider indemnification limits that are specific to project types.

Likewise, Appendix A, paragraph 6 of the draft LOPP directive requires a development proposal to “[i]dentify plans for assuming liability for damage to the operational and structural integrity of the Reclamation project caused by construction,

operation, and/or maintenance of the hydropower development.” However, it is not clear what scope and amount of liability protection the Bureau is seeking. NHA recognizes that protecting the integrity of its projects is a valid concern for the Bureau, but excessive insurance and liability requirements can destroy a project’s financial viability, particularly for smaller projects. Further explanation of the Bureau’s expectations and requirements for liability protection would facilitate developers’ efforts to address these concerns effectively and economically.

e. Lost Generation

Section 8(H) of the draft LOPP directive provides that a lessee under an LOPP “will be required to compensate Reclamation for lost generation and other interruptions to operations due to construction, operations and maintenance, or any other extraordinary event at the lessee’s facilities.” The intent of this provision is not clear. If it is intended as a liability provision, then some clarification, as discussed above, would be appropriate. If, however, it is a more general fee provision, NHA suggests deleting it, because it seems paradoxical to compensate the Bureau for lost generation when on one hand the Bureau is encouraging generation while on the other hand penalizing developers. In some circumstances, this provision will act as a disincentive to project developers to build projects at the very site where the Bureau is encouraging development.

f. Ancillary Services

Appendix A, paragraph 2 of the draft LOPP directive states that a proposal for a LOPP should describe “the ability of generation to provide ancillary services such as regulation, spinning reserves, and voltampere reactive support.” Such information will, in general, be a function of the actual power purchase agreement negotiated with the specific utility that will purchase the project’s output. In many situations, this contract will not have been finalized at the time the proposal is submitted. However, if the Bureau were to create a structure (as described in Section III, above), in which the Bureau seeks additional information to distinguish between closely-ranked competing proposals, this information might be an appropriate basis for the Bureau to decide among competitors.

g. Safety and Security Assessment

Appendix B, line items 10 and 11 of the draft LOPP directive provide that the LOPP lead will ensure that a “safety assessment” and “security assessment” are considered for study based on project requirements. It is not clear what these requirements entail, and NHA recommends that they be expanded and clarified.

h. Site Access

NHA has received reports that the Bureau has, in some cases, required potential developers to obtain permits before gaining access to Bureau facilities at which hydropower development is possible. While there may be some situations in which the requirement to obtain such permits is appropriate, the revised LOPP procedures should

make it clear that the Bureau will not require potential developers facing a deadline to submit an LOPP proposal to obtain a permit before gaining access to Bureau facilities - provided, of course, that the developer complies with all applicable safety and security requirements.

VI. Conclusion

NHA appreciates the Bureau's efforts to improve the LOPP process through its draft directive, which will further advance development of clean and renewable hydropower on Bureau infrastructure. With additional clarifications and modifications as outlined in these comments, the draft LOPP directive will provide a more transparent and responsive process for project developers, Bureau officials, and existing water users.

NHA looks forward to working with the Bureau to develop a holistic LOPP process, which includes input and early engagement from all interested stakeholders in proposed hydro development and the use of existing Bureau infrastructure. NHA commits to actively participating in any additional forums to further address and resolve the issues raised in the draft directive and these comments.

Respectfully submitted,

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

Linda Church Ciocci
Executive Director
National Hydropower Association
25 Massachusetts Avenue, N.W.
Suite 450
Washington, D.C. 20001
202.682.1700