

**TESTIMONY OF
COMMISSIONER WILLIAM MASSEY
FEDERAL ENERGY REGULATORY COMMISSION
BEFORE THE
SUBCOMMITTEE ON ENERGY AND AIR QUALITY
UNITED STATES HOUSE OF REPRESENTATIVES**

June 27, 2001

Mr. Chairman and Members of the Subcommittee on Energy and Air Quality:

Thank you for the opportunity to testify on the subject of the Commission's role in the licensing of hydroelectric power. As I am sure you will agree, recent events in the California and western electricity markets have highlighted the critical role of hydropower in meeting our nation's energy needs.

The Northwest Power Planning Council has reviewed the reports that snowpack levels are less than 50 percent of average in many areas of the Columbia and Snake River basins, and that spring and summer streamflows well below average are forecast for most of the west. In addition, the Council notes that reports of below average water storage in the west have "serious implications for the reliability of power supply" as well as "serious implications for power prices through the west...." The Council has requested that the Commission give expedited consideration to modifications of operations at licensed projects in the region in order to alleviate power shortage.

These events have presented the Commission with some tough challenges in carrying out its responsibility to determine the proper balance between the development of hydropower as a renewable energy source and environmental protection. The Commission has met these challenges in a thoughtful and responsible manner. We

recently issued three orders amending licenses to increase hydropower generation in the western United States. In each of these instances, I agreed with the Commission's finding that temporary measures required to increase power production could be implemented without any long-term environmental impact. Let me briefly summarize these cases:

1. On March 15, 2001, Idaho Power Company filed a request for a 1-year waiver of article 410 of its Twin Falls Project No.18 license. The project is located on the Snake River in Idaho. Article 410 requires spills of 300 cubic feet per second (cfs) over Twin Falls during certain daylight hours to protect aesthetic resources at the falls. On May 8, 2001, the Commission issued an order that allowed the aesthetic flows to be temporarily suspended through March 31, 2002 except on state and federal holidays. The order also required the licensee to resume releasing flows over Twin Falls if necessary to maintain the state water quality standards for dissolved oxygen. The additional power that can be generated by the suspended flows is between 6,300 and 9,700 MWh, an increase of 15 to 17 percent.

2. On March 19, 2001, Idaho Power Company filed a 1-year waiver of Article 407 of its Milner Project No. 2899 license. The project is located on the Snake River in Idaho. Article 407 requires the release of 200 cfs to enhance the fishery resources in the 1.6-mile-long reach. The amendment was publicly noticed on March 26, 2001. On May 8, 2001, the Commission issued an order approving the request to suspend the minimum flow in the bypass reach through March 31,

2002. The additional power that would be generated by the suspended flow is between 10,250 and 14,086 MWh, an increase of from 31 to 50 percent.

3. On May 9, 2001, Public Utility District No. 2 of Grant County, Washington (Grant County), filed an application to suspend its spill flow requirements at Priest Rapids Project No. 2114 from May 9, 2001 through this summer's migration season. The project is located on the Columbia River in Washington and is comprised of the Priest Rapids and Wanapum developments. The application was noticed for public comment on May 10, 2001. On June 1, 2001, the Commission issued an order approving a spill flow exchange, an alternative to Grant County's proposal offered in comments from the Bonneville Power Administration (BPA). Under the spill exchange, BPA will provide spill during the spring of 2001 at the Bonneville and Dalles dams, foregoing up to 300 MW-months of generation, in order to increase the downstream survival of various salmon and steelhead species, some of which are listed under the Endangered Species Act (ESA). Later, during the summer, if necessary for BPA to meet its reliability criteria, Grant County will eliminate spill at Priest Rapids and Wanapum dams for up to sixteen hours per day (during daylight hours), thereby providing generation to be delivered to BPA to offset BPA's generation lost as a result of the spring spill. The spill exchange would allow Grant County to produce an additional 219,600 MWh. Increased generation by Grant County from suspended summer spills would be used to offset reduced generation by BPA from

increased spring spill. The Commission staff's analysis determined that suspension of spills by Grant County in accordance with the spill exchange would result in a four percent decrease in project passage survival for less than half the outmigrating non-listed summer/fall chinook salmon, and would have no effects on other salmon and steelhead species, including those listed under the ESA.

When deliberating whether to license, relicense or amend a hydropower license, the Commission has the responsibility to consider all aspects of the public interest. Amendments to the Federal Power Act, enacted as the Electric Consumers Protection Act of 1986, require FERC to give equal consideration to environmental resources and energy conservation, as well as developmental values such as power production. Thus, the ultimate responsibility for determining the proper balance between the development of hydropower as a renewable energy source and environmental protection rests with FERC.

On May 8, 2001, the Staff of the Commission, pursuant to Section 603 of the Energy Act of 2000, submitted to Congress a comprehensive review of policies, procedures and regulations for the licensing of hydroelectric projects, with the goal of reducing the cost and time for obtaining a license. As the Staff report notes, the views of individual Commissioners were not incorporated into the document, nor was it presented to the Commission for approval or disapproval. However, the document does serve as a useful platform for discussion of my role as a decision maker on items presented for formal Commission action.

At the outset, it must be noted that the Chairman of the Commission is the administrative officer with responsibility for directing the agency's hydropower program (Office of Energy Projects). Internal Staff concerns with available resources, relationships with sister agencies, non-governmental agencies or state resource agencies, come to the attention of individual Commissioners primarily in the context of internal debate regarding particular orders.

The Staff report's primary recommendation is that Congress should establish one-stop shopping at the Commission for all federal authorizations. This proposal has some immediate appeal. An argument can be made that the agency with the authority to determine the ultimate outcome of a particular proposal should drive a single administrative process in conjunction with a single NEPA document. The Staff report recommends that federal agencies with mandatory conditioning authority retain that authority, subject to a statutory reservation of Commission authority to reject or modify the conditions proposed by other agencies if they are found to be inconsistent with the Commission's overall public interest determination. Other federal agencies bring to the table valuable expertise and historical insight that should be given its proper weight, however. The concept that the Commission should ultimately be able to reject or modify another federal agency's condition should be tempered by a recognition of that agency's particular expertise. If the agency's condition is based on substantial evidence and there is a rational connection between the facts and the policy recommendation, the condition should be given substantial deference by the Commission. I agree, however, that federal

agency conditions should be sensitive to cost impacts, and that costs should bear a thoughtful relationship to the environmental return. I agree that the Commission should not be placed in the position of having to accept a "Cadillac" condition or not license a project.

Closely related to the report's recommendation of a "one-stop shopping agency" is its discussion concerning the effect of three court decisions on the Commission's ability to incorporate or reject state water quality certifications and FPA Section 18 fishway prescriptions in balancing developmental and environmental concerns. A proposed environmental action may also adversely affect other environmental resources. For instance, in a recent case involving an interpretation of the Endangered Species Act, a proposal for fish ladders upstream to a reservoir were opposed by resource agencies concerned that the introduction of a new species could adversely affect existing fish stocks. These three judicial decisions are as follows:

- PUD NO. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994), where the Court held that a State imposing a condition under the Clean Water Act could regulate not only water quality, such as its chemical composition, but also the method by which water is released by a project.
- American Rivers I v. FERC, 129 F.3d 99 (2nd Cir. 1997), where the court held that the Commission lacked authority to determine whether conditions submitted by state agencies pursuant to Section 401 of the Clean Water Act were beyond the scope of that section.

- American Rivers II v. FERC, 187 F.2d 1007 (9th Cir. 1999), where the court ruled that the Commission lacked authority in individual cases to determine whether prescriptions submitted under Section 18 of the FPA are in fact fishways.

I agree with the Staff report that the Commission may be hampered in performing its balancing obligation if section 401 Clean Water Act certifications and Section 18 fishways prescriptions continue to hamstring our ability to weigh competing choices and values. This is at the heart of my decision making role as a Commissioner of this agency. Congressional intervention may be necessary to refocus and underscore the Commission's role as the ultimate authority in balancing competing concerns in hydroelectric license matters.

Thank you for the opportunity to submit this written statement, and I will be pleased to respond to any questions.