

**Testimony of J. Mark Robinson
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Before the Committee on Indian Affairs
United States Senate**

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Mr. Chairman and Members of the Committee:

My name is Mark Robinson, and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. I appreciate the opportunity to appear before you to discuss the Commission's regulation of non-federal hydropower projects and how the Commission considers Tribal issues, including Tribal Fish and Wildlife programs, as well as to address the hydroelectric relicensing provisions of the pending Senate energy bill, S. 14. As a member of the Commission's staff, the views I express in this testimony are my own, and not necessarily those of the Commission or of any individual Commissioner.

The Commission currently regulates over 1,600 hydroelectric projects at over 2,000 dams pursuant to Part I of the Federal Power Act (FPA). Together, these projects represent 57 gigawatts of hydroelectric capacity, more than half of all hydropower in the United States, and over five percent of the electric generating capacity. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable energy source.

The Commission's hydropower activities generally fall into three categories. First, the Commission licenses and relicenses hydroelectric projects. Relicensing involves projects that were last licensed 30 to 50 years ago. The Commission's second

role is to manage hydropower projects during their license term. This post-licensing workload has grown in significance as new licenses are issued and as environmental standards become more demanding. Finally, the Commission oversees the safety of licensed hydropower dams. This program is widely recognized for its leadership in dam safety.

My testimony today will provide brief overviews of the current hydroelectric licensing activity and the licensing process. I will then focus on how the Commission's licensing process ensures consideration of the concerns of Indian Tribes, and on Title V, Section 511 of S. 14.

I. Current Hydroelectric Licensing Activity

The Commission will process 218 relicense applications this decade. These projects include many large-capacity and complex projects, and have a combined capacity of about 22 gigawatts, or 20 percent of the Nation's installed hydroelectric capacity. Of these projects, the 39 located in the northwest represent approximately 20 percent of the projected proceedings, but involve approximately 8,500 megawatts of capacity, or more than one-third of the capacity at issue.

New opportunities to balance competing resources

Relicensing projects upon expiration of the current license is of particular significance because it involves projects that were last licensed up to 50 years ago. In the intervening years, enactment of numerous environmental, land use, and other laws, as well as judicial interpretation of those laws, have greatly affected the Commission's

ability to control the timing and conditions of the licensing process. Under the standards of Section 10(a)(1) and 4(e) of the FPA, projects can be authorized if, in the Commission's judgment, they are "best adapted to a comprehensive plan" for improving or developing a waterway for beneficial public purposes. This standard is very broad, but typically involves power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation. The Commission is required to give "equal consideration" to developmental and non-developmental values.

Balancing need for power and stakeholder concerns

While the Commission's responsibility under the FPA is to strike an appropriate balance among the many competing developmental and environmental interests, various statutory requirements give other agencies a significant role in licensing cases. Several entities have mandatory authorities that limit the Commission's control of the cost and time investments for licensing. For example, Section 4(e) of the FPA authorizes federal land-administering agencies to provide mandatory conditions for projects located on federal reservations under their jurisdiction. Further, Section 18 of the FPA gives authority to the Secretaries of the Departments of the Interior and Commerce to "prescribe" fishways. And, Section 401(a)(1) of the Clean Water Act precludes the Commission from licensing a hydroelectric project unless the project has first obtained state water quality certification, or a waiver thereof. These certificates typically contain their own set of conditions.

In addition, the Commission must ensure that licenses it issues are consistent with the terms of any applicable treaties between the United States and Indian Tribes, and must consider the impacts of projects on Tribal interests. The Commission also must ensure compliance with other federal statutes, including the Coastal Zone Management Act, Endangered Species Act (ESA), Federal Land Policy and Management Act, Wild and Scenic Rivers Act, National Historic Preservation Act, and Pacific Northwest Electric Power Planning and Conservation Act, each with its own procedural and substantive requirements. Compliance with all these requirements involves a multitude of different processes ancillary to licensing, which has lengthened the time required to obtain a license.

Complexities and regional variation in relicenses

Primary issues being addressed at those 218 projects with applications for relicensing filed from 2000 and 2010 vary by region, but include power, water use, fish passage, endangered species, recreation, shoreline management, reservoir level fluctuation, and instream flows. Water quality and cultural resources are concerns in all regions. The projects are distributed about equally between the eastern and western United States, but are concentrated in the Northwest and Southeast regions.

Hydropower issues in the northwestern United States often concern federally listed threatened or endangered salmonids (salmon, trout, and char), which often are of great concern to Indian Tribes. Most relicensing proceedings in this region requires formal consultation with resource agencies under the ESA.

At the beginning of 1996, the National Marine Fisheries Service had listed four strains (geographically distinct groups of a species) of salmonids. Today, there are 33 strains of salmonids listed by NMFS and the U.S. Fish and Wildlife Service. There is a significant overlap in the range of the listed salmonid strains and the concentration of hydropower sites in the Northwest and California. For example, about 130 licensed projects in these regions are located within the geographical boundaries of listed chinook salmon and steelhead trout. Thus, these listings, often requiring formal consultation under the ESA, have added considerable complexity and delay to the processing of relicensing applications.

Measures to efficiently process projects

Staff at the Commission has undertaken numerous measures to efficiently process these complex projects. The Commission has held hydropower licensing status workshops to move stalled cases, held licensing workshops with state agencies on integrating state processes, introduced electronic filing, implemented a revised *ex parte* communications rule, and provided numerous guidance documents for stakeholders on our web page. Perhaps more important, the Commission has proposed a new hydropower licensing process, developed with sister agencies, in a recent rulemaking discussed below.

II. The Commission's Licensing Process

The traditional licensing process

A. The Traditional Process in General

The Commission currently uses two different processes in licensing: the "traditional" process and the "alternative" process. Under the traditional process, three to three and one-half years prior to filing an application, a license applicant must consult with federal and state resource agencies, affected land managing agencies, Indian tribes, and state water quality certifying agencies to provide these entities with information describing the proposed project. The applicant must also conduct studies necessary for the Commission staff to make an informed decision on the application. Under the Commission's detailed regulations concerning pre-filing consultation and processing of filed applications, the formal proceeding does not begin until the license application is filed with the Commission. As a result, under the traditional process, the Commission staff does not generally participate in pre-filing consultation.

After an application is filed, two years prior to license expiration, the federal agencies with responsibilities under the FPA and other statutes, the states, Indian tribes, and other participants have opportunities to request additional studies and provide comments and recommendations. Federal agencies with mandatory conditioning authority also provide their conditions. The Commission staff may ask for additional information that it needs for its environmental analysis. All of this information is incorporated into the Commission staff's environmental review under

the National Environmental Policy Act (NEPA). The NEPA review is the basic evidentiary document on which the Commission bases its licensing decision.

Because of the sequential nature of the traditional process and the frequent need to gather further information after the application is filed, the traditional process can be lengthy. The median processing time after application filing is 47 months.

B. Consideration of Tribal Matters

At the licensing stage, Section 4(e) of the FPA provides two important substantive protections for federal reservations, including Indian reservations. First, it provides that:

licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired.

Second, section 4(e) provides that licenses issued within any reservation:

shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

In the traditional process, when an applicant files an application to license or relicense a proposed project, or to obtain an exemption from licensing, the Commission's regulations have specific provisions for notice to and participation by Indian Tribes. A potential applicant for a license or exemption must consult with any Indian Tribe that may be affected by the project prior to filing the application. During

this pre-filing consultation process, the applicant must provide affected Tribes with detailed information on the proposed project and must hold a joint meeting with pertinent Federal and state agencies and Tribes, after which the Tribes and agencies submit comments on the applicant's proposal. The applicant must gather information and conduct reasonable studies requested by an affected Tribe, and must provide the Tribe with a copy of its draft application and allow the tribe 90 days to comment on it. If these comments indicate a substantive disagreement with the applicant's conclusions regarding resource impacts or proposed mitigation and enhancement measures, the applicant must meet with the Tribe (and pertinent Federal and state resource agencies) to try to reach agreement, and must in any event describe disagreements and discussions about them in its filed application. An application for a license or exemption must identify any Tribe that may be affected by the proposed project, and the applicant must serve the Tribe with a copy of the final application.

When the application is accepted for filing, the Commission will circulate a notice of the application to affected Tribes. A Tribe may request additional scientific studies within 60 days after the filing date, and may file recommendations regarding fish and wildlife and any other matters by 60 days after the Commission issues a notice that the application is ready for environmental review. Commission staff's initial determination under Section 10(j) of the FPA of the consistency of Federal and state fish and wildlife agencies' recommendations with applicable law is served on affected Tribes, which may comment on and participate in negotiations between the staff and

Federal and state agencies. In addition, Tribes may file comments on Commission staff's draft environmental analyses and draft environmental impact statements.

In sum, Commission action on license applications is subject to procedural and substantive safeguards to ensure that the rights and interests of the Tribe, including Tribal fish and wildlife management programs, will be fully explored and carefully considered. In addition, as described above, no license for a project located on a reservation can issue without a finding that the proposed project will be consistent with the reservation's purposes, and any such license on a Indian reservation is subject to mandatory conditions proffered by the Secretary of the Interior. State resource agencies have the same opportunities as the Tribes to participate in the process, and in addition have authority under the Clean Water Act to impose license conditions and, under Section 10(j), to make fish and wildlife recommendations..

The alternative licensing process

In an effort to improve the efficiency and the timeliness of the licensing process without sacrificing environmental protection, the Commission embarked on a journey of administrative and regulatory licensing reform. Beginning in 1997, the Commission altered its regulations to provide for an alternative to the traditional licensing process. The alternative licensing process adds efficiency by combining the pre-filing consultation process with the environmental review process under NEPA. Using this process, participants, and in some cases Commission staff, work collaboratively prior to the filing of the application to develop, in most cases, a preliminary draft NEPA

document. Participants in the alternative licensing process generally anticipate that their efforts will culminate in a settlement agreement. The alternative process has been successful in reducing the post-filing processing time to a median of 16 months. The requirements with respect to consideration of Tribal matters that I have discussed above with respect to the traditional licensing process also apply to the alternative process. Due to the collaborative nature of the alternative process, Tribes that wish to do so may become fully engaged in the licensing process beginning at a very early stage, and thus can help shape the environmental documentation and, in many cases, the license application, to ensure that their concerns are satisfied.

Integrated licensing process

A. The Integrated Licensing Process in General

Even in light of successes associated with the use of the alternative licensing process, stakeholders have continued to develop additional procedural modifications to the more formal traditional process that would further improve the efficiency and timing of licensing while maintaining environmental protections. Thus, the Commission, in cooperation with the Federal resource agencies, the Tribes, the states, and other stakeholders, developed the integrated licensing process that is the subject of the Commission's current rulemaking proceeding.

The integrated licensing process will integrate an applicant's pre-filing consultation with resource agencies, Indian tribes, and the public into the Commission staff's NEPA scoping process. This approach, however, would differ from the

alternative licensing process in several respects, such as ensuring Commission staff involvement at all stages, and better integrating the licensing process with the actions and processes of other federal and state agencies and Indian tribes.

The Commission is now engaged in an open rulemaking proceeding whereby the Commission is seeking public input on the new integrated process. Our proceeding has included input from Federal and state agencies, the Tribes, license applicants, non-governmental organizations, and the public, both before and after the February 2003 issuance of a Notice of Proposed Rulemaking. We are also engaged in joint drafting of rule language by Commission staff and the federal agencies with mandatory conditioning authority under the FPA.

This rulemaking proceeding was initiated in September 2002, when the Commission and the federal agencies with mandatory FPA conditioning authority issued a notice requesting comments on the need for a new licensing process. In order to obtain input from the Tribes, the states, and other key participants, the notice also established a series of regional public and Tribal forums to discuss issues and proposals.

Following the regional forums and submission of written comments in early December 2002, the Commission hosted public drafting sessions, including the Tribes, the states, and other stakeholders, in which discussion of the results of the regional forums and comments was followed by a broadly-based collaborative effort to develop consensus recommendations on an integrated licensing process and, where possible,

develop preliminary draft regulatory text. Subsequently, staff from the Commission and the federal agencies with mandatory conditioning authority worked together to develop regulatory language for a proposed rule.

Based on written and oral comments and the public drafting sessions, the Commission issued a Notice of Proposed Rulemaking on February 20, 2003, and asked for public comment. The proposed new integrated process would improve both the efficiency and timeliness of the licensing process by merging pre-filing consultation with the Commission's NEPA scoping; enhancing consultation with Indian Tribes; improving coordination of processes with federal and state agencies, especially those with mandatory conditioning authority; increasing public participation during pre-filing consultation; and developing a study plan and schedule, including mandatory, binding dispute resolution with respect to studies to be taken by the applicant. Further, unlike the more sequential traditional licensing process, an integrated process would allow for multiple Federal and state processes to take place simultaneously. The result should be the development of all information the Commission, federal agencies with mandatory conditioning authority, and state agencies or Indian Tribes with water quality certification authority need to carry out their respective statutory responsibilities by the time the application is filed.

We believe that the efficiency and timeliness of the proposed integrated licensing process will reduce costs associated with the license application process by minimizing the redundancy and waste caused by the often duplicative information

needs of the Commission, Indian Tribes, and various Federal and state agencies associated with the hydroelectric licensing process.

To obtain further public input on the proposed rule, the Commission held a series of six regional workshops. These regional workshops, co-hosted by Departments of the Interior, Commerce, and Agriculture, were geared toward members of the hydropower community, Indian Tribes, federal and state resource agencies, environmental organizations, and the general public. Each of the regional workshops, including the session held in Portland, Oregon on March 13-14, included a day reserved for the discussion of Tribal issues. Following the conclusion of the workshops, the Commission held a four-day stakeholder drafting session in Washington, D.C., from April 29 through May 2, to develop proposed final rulemaking language. The drafting meetings also included separate sessions devoted to Tribal matters.

B. Consideration of Tribal Matters in the Integrated Process

In the Notice of Proposed Rulemaking, the Commission stated that the licensing process will benefit from more direct and substantial consultation between the Commission staff and Indian Tribes, including increased direct communication with Tribal representatives in appropriate cases. The Commission also stated that it would establish the position of Tribal liaison, to provide a single, dedicated point of contact to which Native Americans can go in hydroelectric licensing proceedings.

The Notice of Proposed Rulemaking states that the Commission staff will be

contacting Indian Tribes likely to be interested in a relicense proceeding at a very early point, for the purpose of initiating discussions concerning consultation procedures. Draft regulations provide for the following points where Commission staff will seek Tribal input and/or where there will be opportunities for Tribes to comment and otherwise participate in relicensing proceedings: (1) filing comments regarding an applicant's choice of licensing process; (2) attending scoping meetings to discuss issues, resource management objectives, existing information and information that must be developed, and to develop a process plan and schedule for the proceeding; (3) filing comments and information requests; (4) providing comments on the Commission's scoping documents and the applicant's draft study plan; (5) attending a study plan meeting to attempt to resolve study issues; (6) to the extent that Tribes have been authorized by the Environmental Protection Agency to exercise certification authority under Section 401 of the Clean Water Act, initiating dispute resolution with respect to studies as to which agreement is not reached; (7) reviewing the results of the first season of field studies, attending a meeting to discuss those studies, and requesting modifications to the study plan; (8) filing comments of the draft license application; (9) following the filing of the license application, filing motions to intervene, comments on the applicants, and proposed license terms and conditions; and (10) filing comments on a draft environmental assessment or environmental impact statement (or on an environmental assessment, in those cases where no draft is prepared). In addition, if a Tribe has intervened in a proceeding, it may file a request for rehearing of

a licensing order.

While I cannot predict the exact content of the Commission's final rule, I am confident that the integrated licensing process, which is premised on the early identification of issues, collaborative agreement on information gathering, and consistent participation throughout the licensing process of all interested individuals and groups, specifically including Indian Tribes,, will build upon the participation opportunities that already exist in the traditional process, and thus provide even greater assurance that Tribal matters will be fully considered.

III. Comments on Title V, Section 511 of S. 14

Section 511 would amend the FPA by providing an applicant for a hydroelectric license the opportunity to propose an alternative to mandatory license conditions proffered under FPA Section 4(e) and fishways prescribed under FPA Section 18 by the Secretaries of Agriculture, Commerce, and the Interior. If the Secretary determines that the alternative would, in the case of a mandatory condition, provide for adequate protection of the reservation or, in the case of a fishway prescription, will be no less protective of the fish resources than the original prescription, and will either cost less or result in improved project generation as compared to the original condition, the Secretary shall accept the condition,. In making the decision, the Secretary must give equal consideration to power and other developmental purposes as well as preservation of environmental quality. Further, if the Secretary does not accept an alternative condition or prescription, and the Commission finds the Secretary's original condition

or prescription to be inconsistent with law, the Commission could refer the dispute to the Commission's Dispute Resolution Service for an advisory opinion.

As discussed previously, the FPA requires that the Commission authorize only those projects that are best adapted to a comprehensive plan for improving or developing a waterway for beneficial public purposes, including power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation, giving equal consideration to developmental and non-developmental values. Aligning the criteria that the mandatory conditioning agencies must use to more closely parallel the Commission licensing criteria under the FPA should minimize conflict between those agencies' mandatory conditions and the Commission's conditions.

I support the idea of greater interaction between the resource agencies and the licensees in the development of environmental measures, which Section 511 would encourage. I believe that the proposed language with respect to mandatory conditions and fishway prescriptions would add a degree of accountability that currently does not exist. As Congress considers any legislation, however, it should be careful to ensure that any procedures that could add time or expense to the process are justified by improved outcomes.

I have reviewed the proposed legislation to see if there are any provisions that would exclude the Tribes and states from making recommendations regarding prospective hydropower applicants' proposed alternative conditions Section 511. I do not believe that anything in Section 511 precludes Tribes and states from participating

in the process by which the Secretaries would consider alternative mandatory conditions and fishway prescriptions. Also, Section 511 specifically states that nothing in that section shall prohibit other interested parties from proposing alternative conditions and prescriptions. Thus, Section 511 would not appear to adversely affect the Tribes or states.

In sum, the Commission's new integrated licensing process will provide at least 10 specific points for the Commission to obtain input from the Tribes and from the states. I am confident that this process will result in the best possible communication between the Tribes, the states, the Commission, and other stakeholders.

Thank you. I will be pleased to answer any questions you may have.