

151 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 11

[Docket No. RM15-18-000]

Commencement of Assessment of Annual Charges

(May 14, 2015)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) proposes to revise its regulations regarding when the Commission will commence assessing annual charges to hydropower licensees and exemptees, other than state or municipal entities, with respect to licenses and exemptions authorizing unconstructed projects and new capacity. Specifically, the Commission proposes to commence assessing annual charges two years from the effective date of the project license, exemption, or amendment authorizing new capacity, rather than on the date that project construction starts. The proposed revisions will provide administrative efficiency and promote certainty among licensees, exemptees, and Commission staff as to when annual charges will commence.

DATES: Comments are due **[Insert date sixty (60) days after publication in the FEDERAL REGISTER]**.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic filing through <http://www.ferc.gov>. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format, rather than in a scanned format.
- Mail/Hand Delivery. Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.

Instructions: For detailed instructions for submitting comments and additional information on the rulemaking process, see the Comment Procedures section of this document.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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NOTICE OF PROPOSED RULEMAKING

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I. Background

1. Section 10(e)(1) of the Federal Power Act (FPA),¹ and section 3401 of the Omnibus Budget Reconciliation Act of 1986,² require the Federal Energy Regulatory Commission (Commission) to, among other things, collect annual charges from licensees in order to reimburse the United States for the costs of administering Part I of the FPA. The Commission assesses these annual charges against licensees and exemptees of projects with more than 1.5 megawatts (MW) of installed capacity under section 11.1 of its regulations.³
2. Currently, the Commission begins assessing these annual charges against licensees and exemptees with original licenses or exemptions authorizing unconstructed projects on

¹ 16 U.S.C. 803(e)(1) (2012).

² 42 U.S.C. 7178 (2012).

³ 18 CFR 11.1 (2014).

the date project construction starts.⁴ The Commission also begins assessing annual charges for new capacity, authorized by a relicense⁵ or an amendment of a license or exemption, on the date that the construction to enable such capacity starts.⁶ Because this proposed rule affects only projects with respect to which annual charges are assessed when project construction starts, we will not further discuss state or municipal projects, projects that do not have installed capacity that exceeds 1.5 MW, or constructed projects without newly authorized capacity.⁷

3. Recently, to determine when project construction starts for annual charges purposes, the Commission has included language in its orders requiring the licensee or

⁴ *Id.* (c)(5).

⁵ We use the term “relicense” to refer to any new or subsequent license.

⁶ 18 CFR 11.1(c)(5) (2014). We refer to the addition of capacity and a reduction of capacity (on occasion, capacity is reduced as a result of construction, in which case annual charges are lowered) as “new capacity.”

⁷ Licensees or exemptees that are state or municipal entities are already not assessed annual charges until project operation commences. 18 CFR 11.1(d)(6) (2014). As noted above, the Commission does not assess annual charges with respect to projects with installed capacity of less than or equal to 1.5 MW. Licensees or exemptees of constructed projects without new capacity are assessed annual charges immediately, because their entire capacity is already in place. *See* 18 CFR 11.1(c)(5) (2014).

exemptee to notify the Commission when project construction begins.⁸ Otherwise, the Commission has to contact the licensee or exemptee to determine that date.

4. Annual charges assessment should typically commence within two years of the effective date of the order issuing a license, exemption, or amendment adding capacity.⁹ Original licenses and relicenses require a licensee to start construction no later than two years from the effective license date pursuant to section 13 of the FPA.¹⁰ Similarly, exemptions of unconstructed projects include standard exemption Article 3, which allows the Commission to revoke an exemption if actual construction of the proposed generating facilities has not begun within two years.¹¹ Amendments adding new capacity include an ordering paragraph that typically requires the licensee or exemptee to start construction within two years of the amendment's issuance date.¹²

⁸ See, e.g., *Eagle Crest Energy Company*, 147 FERC ¶ 61,220, at Article 207 (2014) (requiring the licensee to notify the Commission of the date when it starts construction of the unconstructed project); *Wisconsin Electric Power Co.*, 144 FERC ¶ 62,268, at ordering para. (G) (2013) (requiring the licensee to notify the Commission of the date when it starts construction of the newly authorized capacity).

⁹ Unless otherwise specified, orders are effective on the date of issuance. 18 CFR 385.2007(c)(1) (2014). On occasion, a relicense is issued before the expiration of the prior license. In that circumstance, the effective date would not be the date of issuance and would instead be established in the order to coincide with the expiration of the prior license.

¹⁰ See 16 U.S.C. 806 (2012).

¹¹ 18 CFR 4.94(c) (2014).

¹² See, e.g., *Northern States Power Co.*, 138 FERC ¶ 62,022, at ordering para. (E) (2012).

5. In some cases, construction may not begin by the two-year deadline and therefore annual charges assessment may begin more than two years after the effective date (e.g., when a license's start of construction deadline is extended by the Commission for an additional period of no more than two years as permitted by section 13 of the FPA).¹³

In rare cases, the Commission has granted requests for stay of a license's start of construction deadline, or of an entire license, in certain narrowly circumscribed circumstances.¹⁴ On average, the Commission grants extensions and stays of a license's start of construction deadline 3.4 and zero¹⁵ times per year, respectively.

6. Similarly, exemptees may not begin construction by the deadline, and may request that the Commission extend the deadline to start construction. The Commission expects the prompt development of exemption projects and that exemption applicants will anticipate and solve problems that affect construction either before or during the time that they seek their exemptions.¹⁶ From 2010 through 2014, the Commission granted

¹³ 16 U.S.C. 806 (2012).

¹⁴ Such circumstances may exist where there are preconditions to construction that are beyond a licensee's control but will likely be resolved within a definitive period of time. *See City of Broken Bow, Oklahoma*, 142 FERC ¶ 61,118, at PP 8-9 (2013) (staying the start of construction deadline where City presented sufficient proof it would not be able to timely start project construction for reasons outside of its control).

¹⁵ 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.

¹⁶ *Ralph and Raleigh Coppedge*, 28 FERC ¶ 61,363, at 61,654 & n.11 (1984) (citing, *FERC Stats. & Regs.*, Regulations Preambles 1977-1981 ¶ 30,204, at 31,368 (1980). *Exemption from All or Part of Part I of the Federal Power Act of Small* (continued ...)

two extensions of start of construction deadlines, or on average 0.4 times per year, to exemptees.

7. Licensees and exemptees can experience delays and may request an extension of an amendment order's start of construction deadline as well. From 2010 through 2014, the Commission granted six initial extensions of a start of construction deadline, or an average of 1.2 extensions per year, to licensees granted amendments authorizing new capacity.

II. Proposed Revisions

8. The Commission proposes to revise section 11.1(c)(5) of its regulations regarding when it will commence assessing annual charges with respect to hydropower licenses and exemptions authorizing unconstructed projects and new capacity. Specifically, the Commission 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.

9. The Commission anticipates the proposed rule will provide administrative efficiency and foster certainty among licensees, exemptees, and Commission staff as to when annual charges will commence. Licensees and exemptees will no longer need to notify the Commission when project construction starts for the purpose of assessing annual charges and, in turn, the Commission will not have to contact the licensee or

exemptee for this purpose.

10. This proposed change, however, will affect those licensees and exemptees that do not start construction within two years. Annual charges will be assessed two years from the effective date of an order issuing a license, exemption, or an amendment authorizing additional capacity, regardless of whether the Commission has granted an extension of time for construction or a stay of the construction deadline.¹⁷ As noted above, 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 of the start of construction deadline.¹⁸

11. In addition, licensees and exemptees that do not start construction by the deadline established in their license or exemption, or as extended by the Commission, will be affected. If a licensee fails to start construction within two years of its license's effective date or as extended by the Commission, the Commission must terminate the license pursuant to section 13 of the FPA.¹⁹ Similarly, as noted above, standard exemption Article 3 states that the Commission may revoke an exemption if the exemptee fails to start construction within the time prescribed by the Commission. From 2010 through 2014, the Commission terminated one license, or an average of 0.2 licenses per year, and

¹⁷ Additionally, this proposed change may affect any licensees and exemptees that utilize a phase-in approach for adding capacity.

¹⁸ Stays of entire licenses, however, will continue to stay the assessment of annual charges.

¹⁹ 16 U.S.C. 806 (2012).

no exemptions. Therefore, we estimate that annually 0.2 licenses would have been assessed annual charges after the two-year deadline until their termination for failure to construct.

12. In sum, we anticipate that, on average, 5.2 (5 extensions + 0.2 terminations) licensees and/or exemptees per year will begin paying annual charges before starting construction or before the Commission terminates its license or revokes its exemption under the proposed rule.

III. Regulatory Requirements

A. Information Collection Statement

13. The Paperwork Reduction Act²⁰ requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contemplated by proposed rules.²¹ The proposed revisions discussed above do not impose or alter existing reporting or recordkeeping requirements on applicable entities as defined by the Paperwork Reduction Act.²² Therefore, the Commission will submit this proposed rule to OMB for informational purposes only.

²⁰ 44 U.S.C. 3501-3521 (2012).

²¹ *See* 5 CFR 1320.11 (2014).

²² 44 U.S.C. 3502(2)-(3) (2012).

B. Environmental Analysis

14. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.²³ Commission actions concerning annual charges are categorically exempt from this requirement.²⁴

C. Regulatory Flexibility Act

15. The Regulatory Flexibility Act of 1980 (RFA)²⁵ generally requires a description and analysis of proposed and final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and minimize any significant economic impact on a substantial number of small entities.²⁶

²³ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 52 FR 47,897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

²⁴ *See* 18 CFR 380.4 (a)(11) (2014).

²⁵ 5 U.S.C. 601-612 (2012).

²⁶ 5 U.S.C. 603(c) (2012).

16. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.²⁷ The SBA revised its size standard for electric utilities (effective January 22, 2014) from a standard based on megawatt hours to a standard based on the number of employees, including affiliates.²⁸ Under SBA's current size standards, a hydroelectric generator is small if, including its affiliates, it employs 500 or fewer people.²⁹ The Commission, however, currently does not require information regarding the number of individuals employed by hydroelectric generators to administer Part I of the FPA, and therefore, is unable to estimate the number of small entities using the new SBA definitions. Regardless, the Commission anticipates that the proposed rule will affect few small hydroelectric generators.

17. As noted earlier, the proposed rule will only affect non-state or municipal licensed projects with an installed capacity exceeding 1.5 MW that are unconstructed or have newly authorized capacity. From 2010 through 2014, the Commission issued on average 3.6 original licenses and 0.4 exemptions per year authorizing unconstructed projects to affected licensees and exemptees, and 1.6 relicenses and 5 license amendments per year authorizing new capacity. In sum, on average a total of 10.6 licensees and exemptees may be affected by the proposed rule annually.

²⁷ 13 CFR 121.101 (2014).

²⁸ SBA Final Rule on "Small Business Size Standards: Utilities," 78 FR 77,343 (Dec. 23, 2013).

²⁹ 13 CFR 121.201, Sector 22, Utilities (2014).

18. Of the 10.6 total entities, only those that do not start construction within two years, or receive a stay of their license, will be negatively affected by the acceleration of annual charges. As noted above, on average, 5.2 affected licensees and/or exemptees per year do not start construction within two years. Conversely, small entities that would otherwise start construction before the two year mark after their effective date will benefit from the proposed rule as it delays the commencement of their annual charges.

19. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

D. Comment Procedures

20. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[INSERT DATE 60 days after publication in the FEDERAL REGISTER]**. Comments must refer to Docket No. RM15-18-000, and must include the commenter's name, the organization they represent, if applicable, and their address.

21. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

22. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC, 20426.

23. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

E. Document Availability

24. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

25. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

26. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference

Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

List of subjects in 18 CFR Part 11

Electric Power, Reporting and recordkeeping requirements.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 11, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 11 – ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

1. The authority citation for Part 11 continues to read as follows:

Authority: 16 U.S.C. 792-828c; 42 U.S.C. 7101-7352.

2. Revise § 11.1(c)(5) to read as follows:

§ 11.1 Costs of administration.

* * * * *

(c) * * *

(5) For unconstructed projects, the assessments start two years after the effective date of the license or exemption. For constructed projects, the assessments start on the effective date of the license or exemption, except for any new capacity authorized therein. The assessments for new authorized capacity start two years after the effective date of the license, exemption, or amendment, authorizing such new capacity. In the event that assessment commences during a fiscal year, the charges will be prorated based on the date of commencement.

* * * * *