

project retirement based on current conditions.

## II. The Commission's Options at Relicensing

### A. The Original Legislation

When the Federal Water Power Act (FWPA)<sup>3</sup> was enacted in 1920 after several years of consideration and debate, sections 14 and 15 were key parts of the legislation. There was a keen interest by some members of Congress in providing the opportunity for eventual Federal takeover of Commission-licensed power projects, and that became reflected in section 14. This section was designed as a vehicle that would permit the Federal government to own, maintain, and operate valuable water-power projects under terms which could make such takeover practical when the circumstances warranted.<sup>4</sup>

Congress further provided in section 15 of the FWPA that if Congress did not elect the first option of taking over and operating the project when a license expired, then the Commission was authorized to issue a new license either to the original licensee or to a new licensee. Because of concern about what would happen to service, and to the industries and communities dependent upon the project for service,<sup>5</sup> if Congress and the Commission had not acted by the time the license expired, Congress included a provision for annual licenses until the takeover/licensing issue had been resolved.

The focus during this period was plainly on the three options: Federal takeover and continued operation; a new license to a new licensee and continued operation; and a new license to the old licensee, who would also continue operation.<sup>6</sup> In the first two

cases, the entity taking over the operation would have to pay the existing licensee for the project, according to the formula established in section 14.

This did not, however, necessarily mean continuation of business as usual. The statute provided for license terms of up to 50 years on original licenses.<sup>7</sup> As has been recognized:<sup>8</sup>

By so limiting the duration for which these licenses could be granted, Congress intended to preserve for the Nation the opportunity of reevaluating the use to which each project site should be put in light of changing conditions and national goals.

During the license period, as reflected in sections 6 and 28 of the FWPA, licensees enjoyed considerable security. At the end of that period, the Commission would reexamine the statutory standard and make a new determination. Under section 10 of the FWPA, new licenses (except the interim annual licenses) could be issued only on the condition:<sup>9</sup>

That the project adopted \* \* \* shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial uses; and if necessary in order to secure such scheme the commission shall have the authority to require the modification of any project and of the plans and specifications of the project works before approval.

Any new license that the Commission issued would be pursuant to the terms of the then-prevailing laws and regulations and carry such further reasonable terms and conditions as the Commission then deemed appropriate to implement the statutory standard.<sup>10</sup> Each license was to be conditioned on acceptance of those terms,<sup>11</sup> and if the licensee did not accept the license, as

conditioned, its rights to an annual license would end, as well.<sup>12</sup>

There was no mention in the legislation of the possibility of denying a license, which would put the project out of business. At the same time, there was no discussion of what was to occur if, at relicensing, the Commission could not make the requisite finding under the comprehensive development standard. That is, there was no direction concerning how the Commission was to reconcile the potentially conflicting terms of sections 10 and 15.

### B. The Current Statutory Scheme

Section 14 remains on the books, although the Federal Government has never taken over a licensed project under its terms, nor has the Commission ever recommended that it do so. Section 15 likewise remains on the books. As the first licenses were about to expire, 50 years after initial passage of the FWPA, a term was added to section 15 of what was now the Federal Power Act,<sup>13</sup> authorizing the Commission to issue nonpower licenses.<sup>14</sup> No such license has been issued, either. In nearly every instance, existing licensees have applied for, and received, new power licenses when their old ones expired.

All of these decisions have been made in the context of the Commission's implementation of the comprehensive development standard of section 10(a) of the Act. At the same time, section 10(a) has evolved since 1920.<sup>15</sup> It no longer has the almost exclusively pro-development focus of the 1918–20 period, when the original legislation was propelled by the largely undeveloped status of the country's water-power resources and the power shortages that had existed during World War I.<sup>16</sup>

<sup>3</sup> Pub. L. 66–280, 41 Stat. 1063 (June 10, 1920).

<sup>4</sup> That was before the period of the large-scale construction of hydropower projects by the Federal Government that would mark future decades. At that point, proponents of Federal ownership faced considerable resistance to the concept (e.g., 53 Cong. Rec. 3416 (1916) [remarks of Sen. Shields]; 53 Cong. Rec. 3356 [remarks of Sen. Works]; 56 Cong. Rec. 9121 (1918) [remarks of Rep. McArthur]; Water Power—Hearings before the House Committee on Water Power, 65th Cong., 2d Sess. 235–36 (1918) (hereinafter cited as "1918 House Hearings") [remarks of Rep. Sims]). Nonetheless, they wanted to leave future possibilities open via takeover. See, e.g., 53 Cong. Rec. 3297 (1916) [remarks of Rep. Hustling]; 53 Cong. Rec. 3228 [remarks of Sen. Walsh]; 1918 House Hearings at 447–53 [testimony of Secretary of the Interior Lane].

<sup>5</sup> See, e.g., 54 Cong. Rec. 1008 (1917) [remarks of Sen. Shields]; 59 Cong. Rec. 1048, 1442–43, 1474 (1920) [remarks of Sen. Fletcher]; 59 Cong. Rec. 1043, 1045 [remarks of Sen. Fletcher]; 59 Cong. Rec. 1049 [remarks of Sen. Myers].

<sup>6</sup> See, e.g., Water Power Bill to Provide for the Development of Water Power and the Use of Public Lands in Relation Thereto, and for other Purposes, Hearings on H.R. 14893 before the House

Committee on the Public Lands, 63d Cong., 1st Sess. 477 (hereinafter cited as "1914 Hearings before House Committee on Public Lands") [testimony of O.C. Merrill]; 51 Cong. Rec. 13037, 13623–24 (1914) [remarks of Rep. Ferris]; 53 Cong. Rec. 10469 (1916) [remarks of Rep. Adamson]; 1918 House Hearings 855 [letter from Secretary of Agriculture Houston]; *id.* at 451 [testimony of Secretary of the Interior Lane]; *id.* at 674 [testimony of Secretary of War Baker] (the Secretaries of Agriculture, War, and the Interior originally constituted the Commission and were instrumental in drafting the 1920 legislation).

<sup>7</sup> Section 6 of the FWPA.

<sup>8</sup> S. Rep. No. 1338, 90th Cong., 2d Sess. 2–3 (1968).

<sup>9</sup> Section 10(a) of the FWPA. This provision, with some additions, remains today as section 10(a) of the Federal Power Act, and is set forth at *infra* n. 46.

<sup>10</sup> Section 15 of the FWPA.

<sup>11</sup> Section 6 of the FWPA.

<sup>12</sup> 59 Cong. Rec. 6524 (1920) [remarks of Rep. Esch]; 59 Cong. Rec. 7779 [remarks of Sen. Jones].

It is Commission practice to issue annual licenses to permit it to complete certain actions, however. See 18 CFR 16.18(b)(1) and (2).

<sup>13</sup> 16 U.S.C. § 791a, *et seq.*

<sup>14</sup> Section 3 of Pub. L. 90–451, 82 Stat. 617 (Aug. 3, 1968).

<sup>15</sup> Section 10(a) now reads:

That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive scheme for improving and developing a waterway or waterways for the use and benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e) . . . .

Section 4(e) is set forth *infra*.

<sup>16</sup> See, e.g., H.R. Rep. No. 715, 65th Cong., 2d Sess. 15, 29 (1918); H.R. Rep. No. 61, 66th Cong.,