

responsibility to deal with the decommissioning process for a particular project, especially with respect to assuring adequate resources for future maintenance of project works that are to be left in place.⁴⁹

Several commenters noted also that a licensee might seek to transfer an increasingly marginal project to a new licensee that lacked the financial resources to maintain it or close it down in an appropriate manner. Through that process, the former owner relieves itself of the responsibility, which then may fall to State authorities or, at least when Federal lands are involved, on other Federal agencies. While the Commission is aware of no widespread problems on this score, it agrees that transfer applications should be scrutinized to foreclose this sort of situation, and where warranted, other authorities should be consulted before transfers are approved.

E. The Project After Decommissioning

When a project will no longer be licensed, the Commission's jurisdiction is going to end. The future operation of any remaining works is then the responsibility of whoever next assumes regulatory authority. The Commission does not believe that, at that point, it has the authority to require the existing licensee to install new facilities, such as fish ladders. Basically, the Commission issues a license for a particular period, subject to certain conditions. The licensee may have an opportunity to obtain a new license at the end of that term, subject to new conditions; but, if it elects not to do so, the Commission cannot go forward and require the same future steps to be taken anyway, as part of the decommissioning process.⁵⁰ That new facility is a step for any successor agency to take.

Similarly, while the Commission may require licensees to provide certain recreational opportunities in association with licensed activities, that obligation ends when the project is no longer licensed. If these opportunities are to continue at all, it will have to be as a result of the former licensee's voluntary action or the requirements of the new regulatory regime that follows.

On that score, once the Commission's jurisdiction has concluded, the preemption which earlier displaced any

State laws would be at an end. The State would then be at liberty to impose its own licensing or other regulatory regime, free from any restrictions imposed earlier by operation of the Federal Power Act. That is, projects left in place would have to meet State-imposed requirements. Where the owner could not do so, presumably it would have to remove the project or take other appropriate remedial action authorized or required under State law.

The Commission's goal is that generally matters of this type can and will be resolved to the satisfaction of the successor agency as part of the Commission's decommissioning process, obviating the need for any later other action. There could then be a smooth transition to the new regime with a minimum of interruption.

IV. Funding Decommissioning Costs

There may be some situations, as noted earlier, where the Commission decides to recommend Federal takeover, which could involve taxpayer funding of project retirement costs. There may also be situations where the level of costs involved is so large that some sort of cost sharing arrangement must be worked out if the retirement plan is to be effectuated.⁵¹ Normally, however, the Commission anticipates that the licensee will be responsible for paying the costs (up to a reasonable level) of the steps needed to decommission the project, since the licensee created the project and benefitted from its operations.

A major focus of the NOI was on possible plans for funding of decommissioning costs over the life of the project. This step would help assure that the funds are available to do the job when the time for decommissioning arrives, thereby avoiding the possibility that State or Federal taxpayers might, by default, be compelled to pay them because the licensee lacks the resources. On the other hand, to require such prior funding in all cases could mean unnecessarily tying up substantial amounts of the capital of financially sound licensees in less than optimum investments for extensive periods.

In any event, there are several impediments to effectively carrying out such a funding program. First, there is the question of determining the proper

period for accumulating the funds. Some would argue that the license term is the proper period. However, it may be possible to anticipate that there is a substantial likelihood that a project will close down before the end of a license period. Poor physical condition, marginal economics, and similar factors may mark this potential situation. On the other hand, the prospect of a project closing down at the end of the license term cannot be assumed to reflect the general pattern, since physically, a hydropower project, with proper maintenance and replacement, may last far beyond the new term.

Secondly, there is the problem of measuring how much funding should be provided. This will depend, *inter alia*, on the scope of the decommissioning that is to occur. As discussed earlier, there are different possible decommissioning scenarios, for which the costs may vary markedly. Only at the time of decommissioning will the costs of that program actually be known.

The Commission's primary concern is that the licensee have the money available to carry out whatever decommissioning steps the Commission decides are appropriate if the project ceases to be licensed. In light of the practical problems involved in trying to deal with events far in the future, and because in many cases the time horizon and general financial strength of the licensee may be such that there is no substantial need for a pre-retirement funding program, the Commission will not act generically to impose such programs on all licensees. Accordingly, where the Commission has not required pre-retirement funding in a license, the licensee has no ongoing obligation to create a decommissioning fund as a contingency for the event that the project is required to be decommissioned at a later date.

There may be particular facts on the record in individual cases, however, that will justify license conditions requiring the establishment of decommissioning cost trust funds in order to assure the availability of funding when decommissioning occurs. The Commission would consider, for example, whether there are factors suggesting that the life of the project may end within the next 30 years, and would also look at the financial viability of the licensee for indications that it would be unable to meet likely levels of expenditure without some form of advance planning.

In other cases, licensees and others may wish to reach an agreement in the context of individual licensing cases concerning procedures for pre-retirement planning and funding. The

⁴⁹ The Commission contemplates that its role would end with seeing that the resources are made available at the time of decommissioning. The State would then be responsible for supervision of the future oversight and administration.

⁵⁰ On the other hand, during decommissioning negotiations, it might be mutually agreed that, rather than restoring fish passage by tearing down the existing facilities, a new fishway would be built instead.

⁵¹ This may be because the costs reach a level which the Commission considers unreasonable. However, there is a very practical aspect as well. As the costs of decommissioning rise, they may reach a point where it is more economical for the licensee to continue to produce power in order to fund future decommissioning. Where others would like to see the project closed, this provides an impetus for them to share the costs.