

A. Broader Issues

As a preliminary matter, a number of commenters note the range of activities potentially includable within the scope of the word "decommissioning." Depending on the circumstances, it could mean simply ceasing to operate a project, without physically removing any project facilities. At the opposite end of the spectrum would be removing a dam and dredging out the accumulated silt in the reservoir, a potentially complex and costly process that could involve serious environmental impacts of its own. Environmental commenters find legal authority for the Commission to mandate physical removal of project works.⁵⁷ Licensees, on the other hand, contend that once a project's license ends and the project ceases to generate electrical power (and, perhaps, the generator is disconnected and removed), the Commission lacks jurisdiction to mandate anything further.⁵⁸

Licensees suggest that hydroelectric projects, if properly maintained, may be physically and economically viable "indefinitely," such that decommissioning would be a rare occurrence.⁵⁹ These commenters stress the formidable structural integrity of dams, designed to last for "thousands" of years.⁶⁰ Environmental commenters, on the other hand, analogizing to mines, forests, nuclear plants, and landfills, etc., suggest that all hydropower projects have a finite "life-cycle"; that they all silt up in the end; and that plans for their decommissioning should be routinely considered from the outset of their operation.⁶¹ Commenters of all persuasions agree that project facilities that become unsafe should be removed (if they can't be repaired) to alleviate the hazard.⁶² Some licensees suggest that when projects become uneconomic the licensee will itself take the initiative of proposing decommissioning and surrender of the license.

Commenters who believe that the decommissioning of a hydropower project will be a comparatively rare event urge case-by-case analysis of the issues as they may arise, in the peculiar factual context presented by the case at hand.⁶³ Commenters who believe that

decommissioning is part of the inevitable life cycle of all hydropower projects prefer a more generic approach to determining the Commission's policy and practice.⁶⁴ These commenters advocate advance planning for decommissioning, contending that, absent a decommissioning policy by the Commission, the inevitable costs of decommissioning will be borne by taxpayers.⁶⁵

As a preliminary matter, a number of commenters draw a distinction between shutting down project operations and removing project facilities, and, along with this, a distinction between the power to cause a project to cease operating and the power to cause someone (i.e., the licensee) to incur the expense of removing its project's facilities. Licensees concede the Commission's authority to terminate a project at relicensing as long as the licensee is compensated for its investment. The compensation could come from either a government or a private purchaser.⁶⁶

In this regard, several commenters suggest (but without legal discussion or citation) that an involuntary decommissioning of a project would constitute a taking of property without due process of law in violation of the U.S. Constitution.⁶⁷ Other commenters dispute that assertion, with extended discussion of legal precedent in support of their position. In general, they contend that a license is not a property right, and that the termination of a license does not constitute a taking of property even if the termination results in an economic loss.⁶⁸ They go on to contend that the FPA also does not provide an absolute right to compensation.⁶⁹

Citing extensively to the legislative history of the FPA, including its amendments and precursors, licensees argue that Congress sought to encourage investment in hydro power projects by assuring investors that they would be able to recover the value of their project at the expiration of the license.⁷⁰ Also citing to that legislative history, environmental groups and government agencies respond that Congress sought to protect the investors' financial interests in the event that the project was taken over and operated by the government, or by another group of investors, after the license expired, but

did not intend to reimburse the investors if the project was decommissioned at the expiration of the license term; at that point, the investors would already have fully recovered their investment.⁷¹

The crux of the licensees' position⁷² is that sections 14 and 15 of the FPA give the Commission four choices at relicensing, and *only* four choices.⁷³ EEI expresses it as follows:⁷⁴

In a relicensing proceeding, FERC has authority to:

- issue a new license to the existing licensee or a new licensee;
- recommend a federal takeover in accordance with the provision of the FPA applicable to such action;
- issue a nonpower license to an applicant for such a license, or
- issue annual licenses to the existing licensee until a final decision is made.

A unilateral order of surrender to be followed by decommissioning or project removal at the licensee's expense are not options available to FERC under the FPA.

A corollary argument to this view is that the FPA section 15 authority to issue an annual license is mandatory and not discretionary. Thus, the Commission is compelled to issue annual licenses (in perpetuity if necessary) until such time as it either issues a new license or a nonpower license or recommends federal takeover; the FPA does not afford the Commission the option of issuing no license at all.⁷⁵

Environmental groups and government agencies characterize this result as "absurd."⁷⁶ Discussing the standards in sections 4 and 10 of the

⁷¹ See, e.g., Wisconsin Department at 3-13; Washington Department at 1-2.

⁷² See, e.g., EEI at 16-20.

⁷³ Section 14 of the FPA, 16 USC 807, authorizes federal takeover of hydropower projects at the expiration of the license, pursuant to prescribed procedures, and provided that the United States pays the licensee its "net investment" in the project, not to exceed its "fair value." Section 15, 16 USC 808, prescribes the relicensing procedures in the event that there is no federal takeover under section 14. These procedures include issuance of a new license (to either the existing licensee or a new licensee), an annual license, or a nonpower license.

The compensation to be paid by the new owner to the prior owner is defined in section 14 to be "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken."

⁷⁴ EEI at 3-4. See also NHA at 7-8. EEI further contends (at 13-14) that nonpower licenses can only be used as the transitional authority pending assumption of jurisdiction by another agency, and cannot be used as a vehicle to implant an involuntary decommissioning.

⁷⁵ See e.g., EEI at 25, 29; Chelan at 15-16.

⁷⁶ See, e.g., Kennebec at 30-34; Kennebec reply comments at 6-7; Michigan at 8.

⁵⁷ See discussion and citations below; a variety of legal theories was advanced.

⁵⁸ See, e.g., EEI at 12; APPA reply comments at 4-7.

⁵⁹ EEI reply comments at 13.

⁶⁰ *Id.* at 5.

⁶¹ See, e.g., Reform at 5-6, 11-13.

⁶² See, e.g., NHA at 28; APPA at 9.

⁶³ See, e.g., NHA at 5; EEI at 4; PG&E reply comments. (Reply comments are specifically identified as such; all other citations are to initial comments.) See also New England at 4-5.

⁶⁴ See, e.g., Reform at 5-6, 11-13.

⁶⁵ Reform at 13-14.

⁶⁶ See discussion and citation below.

⁶⁷ See e.g., Pacificorp at 3.

⁶⁸ Kennebec at 12-18; Walton at 7-8.

⁶⁹ Kennebec at 18-20.

⁷⁰ NHA at 11-16; EEI at 18, 20-33; Duke at 9-13; Mt. Hope at 4-5.