

B. Specific Questions

The NOPR posed 15 specific questions. For convenience each question is reprinted here, followed by a summary of the comments received on it.

1. Does the Commission have the authority to determine that no project should be operated or maintained at the site of a project whose original license has expired? May the Commission decline to issue a new license for the project without issuing an annual license or a nonpower license or recommending federal takeover?

The comments on these issues were summarized above. With respect to the first sentence, licensees contend that the Commission's authority is limited to recommending federal takeover with full compensation to the original licensee. Environmental groups and government agencies disagree, finding implicit authority to decline to issue any license at all, neither a new license, nor a nonpower license, nor an annual license. Licensees contend that if the Commission does not issue a new license it must issue either an annual license or a nonpower license or recommend federal takeover. Environmental groups contend that once the relicensing proceeding has ended there is no further requirement to issue annual licenses (or anything else in lieu thereof).

2. Does the Commission have the authority to require the holder of an annual license to file an application to surrender it? Assuming no new application has been filed, can the Commission require the holder of an annual license to decommission the project and cease operating it?

NHA contends that FPA section 6 precludes involuntary decommissioning unless no application for a new license has been filed or the original licensee refuses to accept the terms of the new license tendered to it.¹⁰¹ NHA believes the Commission could construe a refusal to accept a "reasonable" new license, or a cessation of project operations, as constituting an implied surrender, but with substantial legal restraints on the Commission's ability to compel particular actions (e.g., removal of facilities) after surrender has occurred.¹⁰²

In addition to other statutory provisions discussed above, Reform contends that the Commission could issue a nonpower license, "on its own motion" under FPA section 15(f), that compelled a licensee to decommission its project, remove project facilities, and restore the project site.¹⁰³ Kennebec

finds such authority inherent in FPA section 309, and would use an annual license as the vehicle to compel decommissioning and site restoration.¹⁰⁴ Interior suggests that the Commission can use either a nonpower license or an annual license as a vehicle for mandating decommissioning.¹⁰⁵

Commerce believes that the Commission can reasonably conclude that Congress left a gap in the statutory scheme, and that the Commission can utilize its "policymaking authority and expertise" to fill that gap by construing the FPA to authorize the Commission "to order the surrender of an expired license and require the decommissioning of the project by the license holder." Commerce "encourages the Commission to take further regulatory or interpretive action to provide a better foundation" for this position.¹⁰⁶

3. Should the licensee's conduct and/or the particular circumstances of the case affect in any way the Commission's authority regarding decommissioning? For example, should it make any difference if the licensee requests or consents to project decommissioning? Should it make any difference if the decommissioning issue affects only part of a project (such as a reservoir, dam, or some other project facility)?

Interior and Commerce regard these factors as irrelevant to the Commission's authority to mandate decommissioning.¹⁰⁷ Kennebec suggests that the Commission's analysis under FPA sections 4 and 10 could result in a determination to omit authority at relicensing for some previously-licensed project facilities.¹⁰⁸ APPA agrees, provided that the new license as a whole is "reasonable."¹⁰⁹ Reform suggests use of FPA section 23(b) to remove those portions of a project that are located in navigable waters.¹¹⁰

4. Does question No. 1 pose an implicit choice between licensee responsibility and federal takeover, i.e., an implicit choice as to who is responsible for removing project works and who should bear that cost? If the Commission required the holder of an annual license to file an application to surrender it, would the Commission be required to ensure that the annual licensee received its "net investment" in the project and reasonable severance damages?

NHA contends that the choice is explicit, and is determined by the

FPA.¹¹¹ APPA distinguishes the federal takeover process under FPA section 14 from a voluntary "surrender" within the mutual agreement parameters of FPA section 6; notes that municipal license projects "are not subject to recapture or relicensing at the Section 14 price"; and contends that FPA section 15 requires issuance of annual licenses "until it receives the compensation to which it would be entitled in a federal takeover, paid either by the United States or a new licensee, or until it is offered a new license on reasonable terms" defined as "terms which yield a license that would be valued at no less than the takeover compensation."¹¹²

Reform distinguishes between the transfer of a project and the decommissioning of a project, contending that under FPA sections 14 and 15 the licensee is entitled to recover its net investment and reasonable severance costs only in the event of a federal takeover, third party takeover, or grant of a nonpower license, all of which involve a transfer of ownership of a project. In Reform's view, in the event of decommissioning of the project—either voluntary or involuntary—there is no change of ownership and, therefore, the "licensee does not qualify for the return of its net investment."¹¹³

Kennebec contends that the Commission has the legal authority to determine, in effect, who should most appropriately bear the cost of decommissioning: the "taxpayer" through federal takeover or the licensee. Kennebec believes those costs are most efficiently and appropriately borne by the licensee.¹¹⁴

Interior and Commerce agree that compensation of the licensee's net investment is required if the project is taken over, but not if it is decommissioned.¹¹⁵

5. Barring federal takeover or issuance of a non-power license or of a new license to a third party applicant, must an existing licensee be given a new license with whatever conditions are necessary for mitigation, enhancement, and protection of natural resources regardless of the effect of the conditions on the economic viability of the project? If such a new license were issued and the applicant declined the license, refused to comply with its terms, or indicated an intent to abandon the project, could the Commission construe the applicant/existing licensee's position as a *de facto* application to surrender the license? Could the Commission then order the decommissioning of part or all of the project (with or without removal of project facilities)?

¹⁰¹ NHA at 22–25.

¹⁰² *Id.* at 25–27.

¹⁰³ Reform at 25–28. EEI, at 26–27, disagrees.

¹⁰⁴ Kennebec at 38.

¹⁰⁵ Interior at 1.

¹⁰⁶ Commerce at 5–7.

¹⁰⁷ Interior at 6; Commerce at 8.

¹⁰⁸ Kennebec at 40.

¹⁰⁹ APPA at 6–7.

¹¹⁰ Reform at 29.

¹¹¹ NHA at 30.

¹¹² APPA at 7–9.

¹¹³ Reform at 30–31; see also Kennebec at 42.

¹¹⁴ Kennebec at 41.

¹¹⁵ Interior at 6; Commerce at 8–9.