

THE FEDERAL POWER ACT'S CONTROVERSIAL MUNICIPAL PREFERENCE: THE MERWIN DAM DISPUTE AND LEGISLATIVE PROPOSALS TO AMEND FEDERAL HYDRO-LICENSING PROCEDURES

For more than a half-century, the Federal Energy Regulatory Commission (FERC or Commission) and its predecessor, the Federal Power Commission (FPC), regulated hydroelectric development of the nation's rivers under the Federal Power Act (FPA) with little interference by Congress.¹ However, increasing criticism of the FERC has reawakened congressional interest in hydro-power regulation.² Congress recently considered a number of proposals to amend the FPA.³ Of these, seven related directly to a controversy born in the 1970s between public and private power:⁴ the issue of preference in competitive FERC relicensing proceedings.

Section 7(a) of the Federal Power Act directs the FERC to give initial licensing preference to municipal and state project applicants;⁵ however, the statute does not clearly specify whether the FERC must also apply the preference in its relicensing proceedings.⁶ Several Commission orders and court decisions since 1978 have only added to the controversy, which intensifies as more licenses expire each year.⁷ Presently, the D.C. Circuit United States Court of

1. Originally enacted in 1920, the Federal Power Act has not been substantially amended since 1935. 16 U.S.C. §§ 791-828(c) (1982). The FERC took over the FPC's duties in 1977. Department of Energy Organization Act, Pub. L. No. 95-91, §§ 301(b), 401-407, 92 Stat. 565, 578, 582-587 (1977).

2. The FERC's critics cite the Commission's refusal to cooperate with state and other federal agencies. *See, e.g.*, Statement of Keith L. Colbo, Chairman, Northwest Power Planning Council to the Subcommittee on Energy Conservation and Power of the House Commerce Committee (Sept. 11, 1984); Wolfe, *Hydro-power: FERC Licensing and Emerging State-Federal Water Rights Conflicts*, 29 ROCKY MTN. MIN. L. INST. 851 (1983).

3. In 1985, Congress considered at least nine separate pieces of legislation to amend various provisions of the FPA. *See infra* note 75 (listing seven of the bills); *see also* S. 870, 99th Cong., 1st Sess. (1980), introduced by Senator Mitchell of Maine (to amend section 10(a) of the Act); Congressman Swift of Washington circulated a draft bill to amend section 10(a).

4. "Public" power companies include state and municipal units for developing electricity, as distinguished from the investor-owned "private" power companies. However, most statutes consider all regulated electricity producers and retailers to be "public utilities" whether they are publicly or privately owned. *See, e.g.*, OR. REV. STAT. § 757.005 (1983).

5. 16 U.S.C. § 800(a) (1982); *see infra* note 15 and accompanying text. Section 7(a) provides: In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

6. Under the current regulatory scheme, the FERC may license hydroprojects for up to 50 years. Upon expiration, project operators must return to the Commission for relicensing. *See infra* note 13.

7. Almost 300 hydropower licenses, involving more than 500 dams, are due to expire before the year

Appeals is grappling with the issue in *Clark-Cowlitz Joint Operating Agency v. FERC (Merwin Dam)*.⁸

This article surveys circumstances leading to the public preference controversy, analyzes the D.C. Circuit's attempts to resolve the controversy in the *Merwin Dam* case, and examines legislative proposals to modify or eliminate the municipal preference. In the final analysis, the *Merwin Dam* case may prove most significant as a spur to congressional action against the municipal preference and in favor of a preference for existing licensees. Such a change would return stability to the hydropower market, potentially yielding net savings of up to 4.5 billion dollars per year for ratepayers.⁹

I. THE ORIGINS OF CONTROVERSY

A. *The Federal Power Act's Municipal Preference*

At the turn of the twentieth century, private power companies monopolized the nation's electric power industry, charging high rates for poor service made available only in urban areas.¹⁰ In response, Progressive conservationists, led by Theodore Roosevelt and Gifford Pinchot, promoted federal regulation of waterpower development to secure cheap and widely distributed electricity through "efficient" resource management.¹¹ The 1920 Federal Water Power Act culminated their efforts.¹²

By providing limited license terms,¹³ a recapture provision,¹⁴ and a municipal preference clause,¹⁵ the 1920 Act sought to guarantee the competitiveness of public power in hydroelectric power generation. Specifically, the preference provision of section 7(a) requires the Commission to "give preference to applications . . . by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted . . . to conserve and utilize in

2000. ELECTRIC CONSUMERS PROTECTION ACT OF 1985, S. REP. NO. 161, 99th Cong., 1st Sess. 5 (1985).

8. Initially, the court ruled that the FERC must apply the municipal preference on relicensing, but quickly vacated its decision and granted a rehearing *en banc*. 775 F.2d 366 (D.C. Cir. 1985), *vacated*, No. 83-2231, slip op. (D.C. Cir. Jan. 16, 1986).

9. See United States General Accounting Office, *Evaluation of Cost Estimates Related to the Relicensing of Hydroelectric Projects*, transmitted in a letter from G.A.O. Director J. Dexter Peach to the Honorable Edward J. Markey, Chairman, Subcommittee on Energy Conservation and Power, Committee on Energy and Commerce, House of Representatives [hereinafter *GAO Report*], at 2, *reprinted in*, ELECTRIC CONSUMERS PROTECTION ACT OF 1985, S. REP. NO. 161, 99th Cong. 1st Sess. 245, 248 (1985).

10. See, e.g., President Roosevelt's statement at 43 CONG. REC. 978, 979-80 (1909). For detailed analyses of the Progressive Conservation movement, see S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959); Fly, *The Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. PA. L. REV. 274 (1938); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9 (1945).

11. See S. HAYS, *supra* note 10, at 91.

12. 16 U.S.C. §§ 791-828(c) (1982). On the struggle which culminated in the 1920 Act, see J. KERWIN, FEDERAL WATER-POWER LEGISLATION (1926).

13. Section 6 of the Act limits license terms to fifty years. 16 U.S.C. § 799 (1982). Pending legislation would reduce license terms to 30 years. See *infra* notes 78 and 82.

14. Section 7(c), 16 U.S.C. § 800(c) (1982).

15. Section 7(a), 16 U.S.C. § 800(a) (1982). See *supra* note 5.

the public interest the water resources of the region."¹⁶ Thus, where competing applications would equally serve the public interest, section 7(a) provides the preference as a tie-breaker, directing the FERC to license the public operator.

For fifty years after 1920, the FPA's municipal preference clause incited little controversy. The FPC and the FERC consistently applied the preference in their initial licensing decisions.¹⁷ However, controversy arose in the 1970s that today threatens the elimination of the preference clause.

B. *The Relicensing Issue*

By 1971, hydroelectric project licenses originally issued in the 1920s began to expire in accordance with the FPA's restriction on license terms.¹⁸ Project operators returned to the FPC, and later to the FERC, for "new" licenses.¹⁹ When states and municipalities filed competing applications to take over those projects, under section 15(a) of the Federal Power Act,²⁰ the Commission had to decide whether section 7(a)'s public preference applied on relicensing.

The issue is controversial because it dichotomizes equally-suited competitors fighting over "extremely valuable rights" meted out by the FERC.²¹ Private power interests contend that the preference clause gives municipalities and states an unfair advantage in relicensing proceedings, destabilizing the electricity market by causing sudden rate increases to consumers, contrary to the intent of Congress when it enacted the Federal Power Act.²² Public power advocates counter that the preference is necessary to prevent privately-owned utilities from monopolizing the nation's waterpower resource.²³

The FERC has been grappling with the municipal preference problem since its inception in 1977,²⁴ the courts have been involved since 1980, and Congress has been looking into the matter for two years and appears to be on the verge of eliminating the public preference from FERC relicensing decisions.

16. *Id.* On the anti-private monopoly purpose of this provision, see Poirier & Hardin, *Public Preference and the Relicensing of Hydroelectric Projects*, 21 HARV. J. ON LEGIS. 459, 466-69 (1984).

17. *See, e.g.*, Pacific Gas & Elec. Co., 2 F.P.C. 300, 305 (1940) ("When an application for preliminary permit or license filed by a private power company conflicts with an application filed by a State or municipality, preference is given to the latter by the language of Section 7(a) of the Federal Power Act. . . ."); FERC Regulations, 18 C.F.R. §§ 4.33(g)(3) & 4.37(b)(3) (applying the municipal preference to initial permitting and licensing proceedings).

18. *See supra* note 13 and accompanying text.

19. Under the Federal Power Act, relicensing applications are treated as applications for new licenses. 16 U.S.C. § 808 (1982). *See infra* note 20.

20. 16 U.S.C. § 808 (1982). Section 15(a) provides:

the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee.

21. ELECTRIC CONSUMERS PROTECTION ACT OF 1985, S. REP. NO. 161, 99th Cong. 1st Sess. 5 (1985).

22. *See, e.g.*, Poirier & Hardin, *supra* note 16, at 478-79. On Congress' intent to provide low-cost power through the FPA, see *supra* note 11 and accompanying text.

23. *See, e.g.*, Radin, *Federal Energy License Belongs to No Company*, THE OREGONIAN at B11 (1985); *see also*, S. REP. NO. 161, *supra* note 21, at 228 (Minority Views of Senator Metzenbaum).

24. The FERC was created under the Department of Energy Act of 1977 to take over the FPC's duties under the Federal Power Act. *See supra* note 1.

II. THE MUNICIPAL PREFERENCE CONTROVERSY IN THE COURTS

A. *City of Bountiful*

At first blush, section 7(a) appears to make its public preference inapplicable in relicensing proceedings against existing licensees because of section 15(a)'s distinction between "new" and "original" licensees. Specifically, section 7(a)'s preference expressly applies only in cases involving "new licensees under section 15," which authorizes the Commission to issue "new" licenses to "original" licensees or to "new" licensees, in the event the United States does not exercise its option to recapture a project after its initial license expires.²⁵ In 1975, a FERC administrative law judge (ALJ) ruled that the "plain meaning" of sections 7(a) and 15(a), read together, denies preference to public applicants in competitive relicensing proceedings against "original" licensees.²⁶ However, this decision was vacated on review by the full Commission in *Carolina Power & Light (Carolina Power)* on abstention grounds.²⁷

Four years later, the FERC decided *City of Bountiful (Bountiful)*, applying the municipal preference to all Commission relicensing proceedings.²⁸ The City of Bountiful, Utah, and Utah Power & Light (UP&L) filed competing applications for a new license to operate UP&L's Weber River Project. In July 1978, Bountiful petitioned the FERC for an order declaring the city entitled to relicensing preference under sections 7(a) and 15(a) of the FPA.²⁹ Many groups intervened on both sides of the controversy. Among the intervenors supporting Bountiful was the Clark-Cowlitz Joint Operating Agency (Clark-Cowlitz or JOA), a municipality established in 1976 to compete for Pacific Power & Light's (PP&L) Merwin Dam Project. PP&L intervened on behalf of UP&L.³⁰

In a lengthy opinion, the FERC declared that section 7(a)'s preference applies in all competitive relicensing proceedings.³¹ Unlike the ALJ in *Carolina Power*, the FERC found "sufficient ambiguity" in sections 7(a) and 15(a) to require resort to legislative history to discern the purpose of the provisions.³² A review of that history convinced the Commission that Congress intended section 7(a)'s public preference to apply on relicensing.³³ The FERC also based

25. See *supra* note 5 and 20.

26. The ALJ's ruling is reprinted in the Commission's *Carolina Power & Light* decision, 55 F.P.C. 1272, 1276 (1976).

27. *Carolina Power & Light*, 55 F.P.C. 1272 (1976). Specifically, the Commission ruled that the ALJ should have abstained from addressing the preference issue after determining that neither party to the proceeding was a municipality under the FPA. *Id.* at 1274. The FPC concluded that the preference issue should await resolution in a case where it would affect the parties to the proceeding. *Id.* The FERC arrived at this same conclusion three years later in *Escondido Mutual Water Co.*, 6 F.E.R.C. ¶ 61,189 at 61,404 (1979), after concluding that neither party to the proceeding was a municipality under the FPA.

28. *City of Bountiful*, 11 F.E.R.C. ¶ 61,337 (1980).

29. *Id.* at 61,710.

30. *Id.*

31. *Id.* at 61,711.

32. *Id.* at 61,727; see also *supra* note 26 and accompanying text.

33. *Bountiful*, 11 F.E.R.C. at 61,716. Specifically, the Commission relied on an October 31, 1917 memorandum from O.C. Merrill, then Chief Engineer of the Forest Service, which stated the principles of the Wilson Administration's water power bill, including the importance of giving states and municipalities an

its determination on the lack of a reasonable alternative interpretation. According to the Commission, the interpretation promoted by UP&L and other privately-owned utilities—that section 15(a) makes section 7(a)'s preference inapplicable in competitive relicensing proceedings against original licensees—would produce “absurd results as well as a regulatory gap” because it would apply the preference in some relicensing cases but not in others.³⁴

Thirty-eight private utility companies, including PP&L, appealed the FERC's ruling to the Eleventh Circuit United States Court of Appeals.³⁵ Four public utilities, including Clark-Cowlitz intervened on behalf of the Commission.³⁶ After determining that the case was ripe for review, the appeals court affirmed the FERC's ruling in *Alabama Power Co. v. FERC*.³⁷ The court agreed with the FERC that the relevant statutory language was ambiguous and found the legislative history “helpful,” though “weak for the purpose of determining legislative intent.”³⁸ However, the appeals court, like the FERC, was convinced that the interpretation promoted by the petitioners would achieve “absurd results” in cases where the public applicant is the original license holder—by applying for the “new” license, the state or municipality would, in fact, lose its preference—and cause “confusing and sporadic” administration of the preference clause.³⁹ Mostly, however, the court deferred to the Commission's interpretation, in accordance with well-settled principles of administrative law limiting the reviewability of agency interpretations of enabling legislation.⁴⁰

B. *The Merwin Dam Case*

1. FERC Reverses Its *Bountiful* Interpretation: A Secret Meeting and the *Merwin Dam* Order

The FERC's victory in *Alabama Power* established the applicability of the FPA's public preference to all Commission relicensing decisions. But the FERC soon came to consider that ruling a defeat. After the 1980 presidential election, the Commission underwent a substantial change in personnel, producing significant policy changes.⁴¹ On April 25, 1983, the new Commission, meeting in secret, abruptly reversed its position on the preference issue and voted to support efforts to obtain Supreme Court review of the *Alabama Power*

opportunity to acquire privately-owned projects after initial licenses expired. *Id.* at 61,715. The Commission discovered no subsequent history conflicting with Merrill's views. *Id.* at 61,716.

34. *Id.* at 61,731.

35. *Alabama Power Company v. FERC*, 685 F.2d 1311, 1313 (11th Cir. 1982).

36. *Id.* at 1314 n.6.

37. *Id.* at 1318.

38. *Id.* at 1317-18.

39. *Id.* at 1316.

40. *Id.* at 1316, 1318. *But see* D.C. Circuit Judge Mikva's determination, *infra* text accompanying note 61, that the 11th Circuit did not merely defer to the Commission's interpretation, but independently assessed section 7(a). On the doctrine of judicial deference to agency statutory interpretations of enabling legislation, *see, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 141 (1982) (“the interpretation of an agency charged with the administration of a statute is entitled to substantial deference.”)

41. *See Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366, 369 (D.C. Cir. 1985), *petition for reh'g granted*, 787 F.2d 674 (D.C.Cir. 1986).

decision.⁴² When the Supreme Court denied *certiorari*, the FERC itself rejected the Eleventh Circuit's review of the law in *Pacific Power & Light Co. (Merwin Dam)*.⁴³

The FPC initially licensed PP&L's Merwin Dam Hydroelectric Project in 1929.⁴⁴ In 1976, three years before its 50-year license expired, the utility applied to the Commission for relicensing. Soon after, Clark-Cowlitz, a cooperative established to compete for PP&L's license and a "municipality" under section 3 of the FPA, filed its competing application.⁴⁵

On October 6, 1983, the FERC officially overruled *Bountiful* and awarded a new license to the private applicant, PP&L.⁴⁶ The "new" Commission rejected the JOA's claim that the statutory language concerning the preference issue was ambiguous, basing its decision on the "clear, plain and reasonable" meaning of section 7(a),⁴⁷ which according to the FERC, denies preference to municipalities in competitive relicensing proceedings against "original" licensees, under section 15(a).⁴⁸ Thus, the 1983 Commission sided with the ALJ in the 1976 *Carolina Power* decision, against the 1980 Commission in *Bountiful*, and against the Eleventh Circuit's *Alabama Power* ruling. The FERC was not troubled by *Alabama Power* because, it concluded, the Eleventh Circuit in that case merely deferred to the agency's interpretation of its own statute,⁴⁹ and therefore presented "no legal impediment" to the Commission's subsequent correction of that interpretation.⁵⁰

Ultimately, the FERC's rejection of *Bountiful* in *Merwin Dam* was unnecessary because the Commission determined that the private utility's application was better adapted to the public interest based on "broad economic considerations."⁵¹ These considerations included that comparative costs of alternative power to the utilities and potential rate impacts on their customers resulting from the Commission's relicensing decision. The FERC concluded that the cost of alternative power to PP&L, if denied the license, would be greater than the cost of alternative power to the JOA, if the Commission rejected its application.⁵² Assuming those costs would result in higher rates to consumers, the Commission ruled that PP&L's application was better adapted to the public interest under sections 7(a) and 10(a) of the Federal Power Act, entitling the privately-owned utility to the new license.⁵³

42. *Id.* at 369-70.

43. 25 F.E.R.C. ¶ 61,052 (1983).

44. *Id.* at 61,175.

45. *Id.* See also *supra* note 30 and accompanying text.

46. *Merwin Dam*, 25 F.E.R.C. at 61,176.

47. *Id.* at 61,179.

48. *Id.* at 61,176.

49. *Id.* at 61,175, 61,178.

50. *Id.* at 61,177.

51. *Id.* at 61,195-201; see *Clark-Cowlitz*, 775 F.2d at 370-71.

52. The FERC staff estimated a potential net cost of almost 20 million dollars if the Commission granted the new license to Clark-Cowlitz. *Pacific Power & Light*, 25 F.E.R.C. at 61,198.

53. *Merwin Dam*, 25 F.E.R.C. at 61,195-96.

2. The D.C. Circuit Reverses the FERC

Clark-Cowlitz appealed, the FERC's ruling to the D.C. Circuit, arguing that (1) the FERC's reversal of *Bountiful* was unlawful with respect to the parties on preclusion grounds, (2) the *Bountiful* interpretation of section 7(a) was the one correct interpretation, and (3) the FERC's economic analysis, under the "best adapted" standard, was unreasonable and arbitrary.⁵⁴ The appeals court agreed, reversing the FERC's *Merwin Dam* order and remanding the case to the Commission for a new proceeding applying the municipal preference.⁵⁵

Judge Mikva, writing for a unanimous panel, concluded that the *Bountiful* decision precluded the FERC from relitigating the municipal preference issue as to Clark-Cowlitz and PP&L, both of whom were parties to the earlier proceeding.⁵⁶ In addition, by invalidating the FERC's new interpretation of section 7(a) as "unsupported by either the statute's language or its legislative history," the court prevented the FERC from applying it in future cases.⁵⁷ The court found that section 15(a)'s distinction between "new" and "original" licensees, relied on by the FERC in its interpretation of section 7(a), merely "highlights an ambiguity in the statute."⁵⁸ After reviewing the provisions' legislative history, the court concluded that Congress intended the Commission to apply the preference in all relicensing proceedings.⁵⁹ The court also relied on the Eleventh Circuit's *Alabama Power* ruling, which, according to Judge Mikva, did not merely defer to the FERC's *Bountiful* interpretation, but independently assessed section 7(a) of the FPA, and held that the FERC's original interpretation was the one correct interpretation of that statute.⁶⁰ Judge Mikva severely rebuked the FERC for its lack of respect for court decisions and prior Commission positions, stating:

"We find disturbing . . . the Commission's suggestion that it is free to reinterpret statutes in any way it pleases without regard for precedent, and equally disturbing the hint that the Commission does not think itself in anyway bound by the actions of prior Commissions, let alone court decisions affirming those actions."⁶¹

54. *Clark-Cowlitz*, 775 F.2d at 368. At the same time, the JOA filed suit against the FERC for withholding transcripts of its April 25, 1983 secret meeting. See *supra* note 42 and accompanying text; see also *infra* note 55.

55. *Clark Cowlitz*, 775 F.2d at 368. In a separate opinion, the D.C. Circuit ordered FERC to make public transcripts of its April 25, 1983 closed meeting. *Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 359, 360 (D.C. Cir. 1985), *petition for reh'g granted*, 788 F.2d 762 (D.C. Cir. 1986). Immediately following this ruling, the author requested those transcripts both informally and under the Freedom of Information Act, 5 U.S.C. § 552 (1982), but the FERC refused to comply, pending possible appeal. See *FERC Response to Author's Request Under the Freedom of Information Act*, 5 U.S.C. § 552 (Nov. 15, 1985). Of course, since then, the D.C. Circuit has granted a rehearing in the *Merwin Dam* case. See *infra* note 72 and accompanying text.

56. *Clark-Cowlitz*, 775 F.2d at 375 ("every consideration of equity, judicial economy, and consistency militates in favor of a finding of preclusion here.").

57. *Id.* at 376.

58. *Id.*

59. *Id.* at 379 ("the legislative history removes any shadow of doubt as to what Congress wanted to happen when relicensing time arrived. The municipal preference applies to all relicensing including those involving an incumbent licensee.")

60. *Id.* at 3372-73.

61. *Id.* at 375-76.

The court subsequently rejected the economic impacts analysis employed by the FERC in its *Merwin Dam* order as part of its "best adapted" standard for reviewing competing applications.⁶² Judge Mikva concluded that the FERC's comparative consumer cost analysis would effectively nullify the municipal preference provision of section 7(a), citing legislative history indicating that Congress intended to prevent the Commission from exercising discretion over implementation of the preference clause.⁶³

In a concurring opinion, Judge Wright agreed with Judge Mikva that the FERC's *Merwin Dam* interpretation of section 7(a) was unreasonable, and therefore invalid, in light of what he perceived as Congress' clear intention that the Commission apply the public preference on relicensing.⁶⁴ However, he disagreed with Judge Mikva's assessment of the *Alabama Power* decision: according to Judge Wright, the Eleventh Circuit merely deferred to the agency in reviewing the FERC's *Bountiful* interpretation of section 7(a).⁶⁵ Moreover, Judge Wright was reluctant to agree with the court's decision foreclosing the FERC from changing its interpretation of the preference clause in a case involving parties to the *Bountiful* proceeding because of his concern that such a decision might unduly bind future Commissions to outdated policies.⁶⁶ Nevertheless, Judge Wright found the FERC's *Merwin Dam* order arbitrary and capricious because it did not address the ALJ's conclusions under the "best adapted" standard of application review; while he would not preclude the FERC's "broad economic considerations," he felt that the Commission should at least consider the ALJ's findings before drawing its own conclusions.⁶⁷

3. The D.C. Circuit Vacates Its *Merwin Dam* Ruling

The D.C. Circuit decided *Merwin Dam* on October 22, 1985. PP&L immediately petitioned the court for a rehearing *en banc*, arguing that the court had improperly overruled the "broad economic considerations" employed by the FERC as part of its "best adapted" analysis.⁶⁸ The utility relied on language from the Commission's *Bountiful* ruling which supported the FERC's consideration of economic factors in its comparative analysis of applications.⁶⁹ PP&L further alleged that a review of technical factors in the competing proposals would indicate that its application is better adapted to the public interest, and therefore, the court's application of the tie-breaking preference was inappropri-

62. *Id.* at 382.

63. *Id.* at 380-81. In addition, the court ruled that FERC's application of the economic analysis to the parties in *Merwin Dam* was arbitrary and capricious because it conflicted with the ALJ's findings that the parties were equally well-adapted, but ignored the ALJ's analysis. *Id.* at 382. See *infra* note 67 and accompanying text.

64. *Clark-Cowlitz*, 775 F.2d at 383 (Wright, J. concurring)

65. *Id.* at 382.

66. *Id.* at 382-83.

67. *Id.* at 383.

68. Petition for Rehearing and Suggestion of Appropriateness of Rehearing *En Banc*, *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, No. 83-2231 at 7 (Dec. 4, 1985). See also *supra* note 53 and accompanying text.

69. *Id.* at 4.

ate.⁷⁰ Finally, the petitioner argued that the FPA's judicial review provision precludes the court from reviewing the FERC's conclusion that PP&L's application to operate Merwin Dam is "better adapted to the public interest."⁷¹ On January 16, 1986, the D.C. Circuit, by majority vote, vacated its *Merwin Dam* ruling and ordered a rehearing *en banc*.⁷²

Arguments for and against allowing the FERC to consider broad economic factors in reviewing competing applications under its "best adapted" standard reflect a conflict between a statutory provision and a policy inherent to the Federal Power Act. Obviously, if the FERC ignores the economic implications of its decisions, it impedes Congress' implicit goal of securing economical electric power.⁷³ On the other hand, if the *Merwin Dam* court rules that the FERC properly employed the comparative cost analysis as part of its "best adapted" standard of application review, the FPA's preference provision would effectively be nullified; the economic analysis would virtually guarantee that competing applications would never be "equal" and, as a result, the tie-breaking preference would become an anachronism. Such a result is contrary to settled judicial principles requiring courts to effectuate legislative enactments.⁷⁴ Thus, *Merwin Dam* presents the D.C. Circuit with a dilemma, requiring the court to choose between two interpretations of a statute, neither of which is entirely satisfying.

Congress may be a better forum for deciding the public preference controversy. It may amend the Federal Power Act to clarify its policy priorities, resolving the court's dilemma. However, even if Congress amends the FPA's preference clause, the *Merwin Dam* case would likely be exempted from the legislation because of the settled expectations of the parties to the dispute.

III. MUNICIPAL PREFERENCE IN CONGRESS

A. Pending Legislative Proposals to Amend Section 7(a) of the FPA

While the D.C. Circuit continues to grapple with *Merwin Dam*, public and private power interests have taken their concerns to Congress. In 1985, renewed congressional interest in hydropower regulation produced seven legislative proposals to modify, eliminate or reinforce section 7(a)'s preference clause.⁷⁵ Two of those seven bills, S. 426 and H.R. 44, were passed early in 1986 by the Senate and House, respectively, and are now before a joint confer-

70. *Id.* at 9-10.

71. *Id.* at 10-14.

72. *Clark-Cowlitz Joint Operating Agency v. FERC*, 787 F.2d 674 (D.C. Cir. 1986).

73. On this goal, see *supra* notes 10-15 and accompanying text.

74. Judge Mikva recognized that the preference would be nullified if the FERC were allowed to employ broad economic considerations, which could effectively guarantee that no ties would ever arise. See *supra* note 63 and accompanying text.

75. See *supra* notes 2 and 3 and accompanying text. The seven bills included S. 426, 99th Cong., 1st Sess. (1985), introduced by Senator Wallop (discussed *infra* notes 76-78 and accompanying text); H.R. 44, 99th Cong., 1st Sess. (1985), introduced by Mr. Shelby (discussed *infra* notes 79-82 and accompanying text); S. 403, 99th Cong., 1st Sess. (1985), introduced by Senator Johnston; S. 1219, 99th Cong., 1st Sess. (1985), introduced by Senator Metzenbaum; S. 1260, introduced by Senator Evans; H.R. 1815, 99th Cong., 1st Sess. (1985), introduced by Mr. Matsui; and H.R. 1959, 99th Cong., 1st Sess. (1985), introduced by Mr. Miller. See also S. REP. NO. 161, 99th Cong., 1st Sess. 6-7 (1985).

ence committee for consolidation.

1. S. 426

On April 17, 1986, the Senate, by majority vote, passed S. 426, a measure introduced by Wyoming Senator Malcolm Wallop to eliminate the municipal preference from FERC relicensing proceedings and require the Commission to renew existing licenses meeting its public interest standard.⁷⁶ As approved, the bill would require the FERC to consider the relative economic impacts of its relicensing decisions on applicants and their ratepayers,⁷⁷ and require increased compensation of original licensees not awarded new licenses.⁷⁸

2. H.R. 44

The House of Representatives passed H.R. 44 only four days after the Senate passed S. 426.⁷⁹ The bills are similar in most respects. Both measures eliminate the municipal preference from FERC relicensing proceedings and require the Commission to consider the rate impacts of its relicensing decisions.⁸⁰ But, unlike the Senate bill, which creates a new preference in favor of original licensees, H.R. 44 provides no tie-breaking procedure at all.⁸¹ Perhaps this is in recognition that no ties would arise under a statute requiring the FERC to undertake a complete economic impacts analysis when reviewing competing applications on relicensing.⁸² Finally, both S. 426 and H.R. 44 would exempt the

76. S. REP. NO. 161, 99th Cong., 1st Sess., 132 Cong. Rec. S. 4445-51 (April 17, 1986).

77. *Id.* at 2.

78. *Id.* at 9. In addition, the bill would substantially amend other provisions of the Federal Power Act. For example, section 3 of the bill would require the FERC to consider, as part of its licensing examination under section 10(a) of the FPA, "the extent to which a project is consistent with a comprehensive plan or plans" prepared by appropriate authorized state and federal agencies, including the Northwest Power Planning Council. Note, however, that this provision would add nothing to the FERC's mandate under existing law. *See id.* at 8 ("section 3 does not impose any new duties or obligations beyond those which the FERC is already subject to under existing law nor would it modify current FERC practice"). On the FPA's comprehensive planning requirement and the FERC's refusal to plan for development, *see Cole, Reviving the Federal Power Act's Comprehensive Plan Requirement: A History of Neglect and Prospects for the Future*, 16 ENVTL. L. 639 (1986).

S. 426 would also limit license terms under the Federal Power Act to thirty years and section 10 of the bill would establish fish and wildlife agency conditions to FERC-regulated projects as prerequisites for receiving PURPA benefits, such as exemption status and tax credits. *See S. REP. NO. 161, 99th Cong., 1st Sess. 1-3 (1985).*

79. H.R. 44, 99th Cong., 1st Sess., 132 CONG. REC. H1996-2012 (1986).

80. ELECTRIC CONSUMERS PROTECTION ACT OF 1985, H.R. REP. NO. 507, 99th Cong., 2d Sess. 2-5 (1986); *see also supra* notes 76-77 and accompanying text. Specifically, the House bill would prevent the Commission from licensing any other applicant if to do so would result in rate increases for the consumers of the original licensee.

81. However, the House bill creates a *de facto* preference for original licensees by prohibiting the FERC from awarding a license to a new applicant where so doing would cause rate increases to the original licensee's customers. *See id.* at 4. It is difficult, if not impossible, to imagine a situation in which a rate increase would not befall an original licensee's customers upon issuance of a new license to a new applicant.

82. An economic analysis of competing applications will always yield differentiation if sufficiently detailed. The existing licensee will likely prevail in every case because the adverse economic consequences it would bear, if denied the license, would exceed the benefits to the public competitor. However, it should be noted that the comparative consumer cost analysis the two bills would require is superfluous under the House

ongoing *Merwin Dam* dispute from the effects of the new legislation because of "the advanced state of the *Merwin* proceeding and in fairness to the legitimate expectations of the competing applicants."⁸³

B. *Why Congress May Eliminate the Municipal Preference From FERC Relicensing Proceedings*

The recent action on Capitol Hill to eliminate the FPA's preference clause from FERC relicensing decisions suggests that conditions have changed since Congress enacted the preference clause in 1920. In the past fifty years, the operations of privately-owned utilities have been thoroughly regulated by state and federal governments to provide the public with service virtually indistinguishable from the service provided by publicly-owned utilities.⁸⁴ Today, states set the rates private utilities may charge their retail customers for service they are obligated to provide even to the most sparsely populated areas of their service territories.⁸⁵ Moreover, since 1935, the FPC and the FERC have regulated wholesale and interstate sales of electricity under Title II of the Federal Power Act.⁸⁶ Thus, the municipal preference controversy no longer seems to pit the publicly-owned protectors of the public weal against evil-designing private monopolizers.⁸⁷

The public interest, which impelled enactment of the preference clause 66 years ago,⁸⁸ soon may spur the clause's elimination from FERC relicensing decisions. As the Commission discovered in *Merwin Dam*, the transfer of

bill, which would forbid the FERC from licensing a competing applicant where doing so would result in a rate increase to the original licensee's customers, regardless of the comparative economic values. *See supra* note 81.

83. *See* S. REP. NO. 161, 99th Cong., 1st Sess. 3, 10-11; H.R. REP. NO. 507, 99th Cong., 2d Sess. 10, 16-17.

In addition to its relicensing provisions, H.R. 44, as passed by the House, would amend other provisions of the FPA concerning comprehensive planning and conditions imposed by other agencies on FERC licensees. Some of these provisions differ markedly from the Senate bill. For example, the House bill would allow the National Marine Fisheries Service to impose mandatory conditions on FERC-licensed projects. *See* H.R. REP. NO. 507, 99th Cong., 2d Sess. 2. The Senate bill would not. Most significantly, the House bill makes energy conservation a coequal consideration with energy development in FERC licensing decisions, requiring the FERC to deny licenses where proposed projects would exacerbate regional power surpluses. *See* 132 CONG. REC. at H 2004 [comments of Congressman Wyden]. In addition, the House bill establishes environmental requirements for projects hoping to take advantage of federal subsidies under the Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978). On that statute, *see* Cole, *supra* note 78, at 647-48. Finally, H.R. 44 would place a moratorium on hydro-licensing until the FERC prepares a complete environmental study of its overall program. *See* 132 CONG. REC. H2004. These provisions have no counterparts in the Senate bill, and constitute the major stumbling blocks in the Joint Conference Committee's efforts to consolidate S. 426 and H.R. 44.

84. *See* 25 F.E.R.C. at 61,221 n.31; *Merwin Dam Ruling Costly*, THE OREGONIAN at E2 (1985); Blamer, *From Symbiosis to Synergy: A Cast Study of Public and Private Electric Power in the Pacific Northwest*, 13 ENVTL. L. 637, 638 (1983). *See also supra* notes 10-15 and accompanying text.

85. *See, e.g.*, OR. REV. STAT. § 757.020 (1983).

86. *See* R. PIERCE, JR., G. ALLISON & P. MARTIN, ECONOMIC REGULATION: ENERGY TRANSPORTATION AND UTILITIES 739-40 (1983).

87. However, public and private power companies remain distinguishable in certain respects. For instance, private companies are owned by shareholders, while public utilities are ratepayer and electorate driven. The substantive importance of that distinction is debatable in such a highly regulated industry.

88. *See supra* note 10-15 and accompanying text.

projects from private to public operation can result in substantial overall net costs to regional customers, a result contrary to the public's continuing interest in inexpensive power.⁸⁹ Recent studies indicate that a public preference on relicensing could result in net nationwide costs of between 200 million and 4.5 billion dollars each year.⁹⁰ Such monumental costs, incurred ultimately by electric consumers over short periods of time, would destabilize the electric power industry and possibly local economies in various regions of the country.⁹¹ By contrast, a preference favoring the "equally well adapted" original licensee would have no such destabilizing impact: the unsuccessful competitor would simply continue to purchase or generate power at its traditional sources.⁹²

In addition, Congress apparently senses some unfairness in the current preferential treatment of public applicants in FERC relicensing proceedings. Not only are public applicants assured of winning all ties, such ties are virtually ensured if the FERC is prohibited from employing a more detailed economic analysis of competing projects.⁹³ Moreover, under the current statutory scheme, the unsuccessful private applicant is not guaranteed complete fifth amendment compensation for the value of its lost property right in the project.⁹⁴ This perceived unfairness, together with the public's continuing interest in stable and low electricity rates, constitutes the rationale behind congressional efforts to eliminate the FPA's preference clause.

In their fight to retain relicensing advantage, public power interests suggest that the municipal preference actually enhances the competitive process; they argue that elimination of the preference would guarantee perpetual licensing of private operators, who already control the vast majority of the nation's

89. 25 F.E.R.C. at 61,196-201.

90. GAO Report, *supra* note 9, at 9-10, reprinted in S. REP. NO. 161, 99th Cong., 1st Sess. 245-57 (1985). In the *Merwin Dam* dispute alone the FERC staff estimated a potential net cost of almost \$20 million if the Commission granted the new license to Clark-Cowlitz. See *supra* note 52.

91. Rate stability is a concept traditionally employed in utilities regulation, specifically in ratemaking proceedings. See, e.g., WISCONSIN PUBLIC SERVICE COMMISSION, *GENERIC ENVIRONMENTAL IMPACT STATEMENT ON ELECTRIC UTILITY TARIFFS* 47, No. 1-1C-10 (June 1, 1977), reprinted in A. PIERCE, JR. G. ALLISON & P. MARTIN, *supra* note 86, at 389-90. One commentator has similarly used the concept of 'stability' to justify the public trust doctrine. According to Joseph Sax, the purpose of the trust is to prevent "the destabilizing disappointment of expectations held in common but without formal recognition such as title." Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C.D. L. REV. 185, 188 (1980). By analogizing Sax' theory to electric power rates and supplies, there should be no public preference on relicensing because it promotes destabilization of electric rates and service.

92. According to the Senate Committee on Energy and Natural Resources, a preference favoring original licensees would, in fact, save money by discouraging "spurious but expensive 'improvements'" by utilities willing to spend large sums of money to acquire project licenses. S. REP. NO. 161, 99th Cong., 1st Sess. 6 (1985).

93. Whether the FERC can employ an economic analysis in comparing competing applications is at the center of the *Merwin Dam* dispute. See *supra* notes 51-53, 62-63 and accompanying text. To end the uncertainty, pending legislation would codify a comparative economic analysis as part of the FERC's "public interest" test. See *supra* note 80 and accompanying text.

94. Under the existing statutory provision, original licensees not granted new licenses may recover only their net investment plus severance damages. 16 U.S.C. § 87(a) (1982). Under pending legislation, existing licensees who fail to get relicensed would be compensated "under a Constitutional 'just compensation' standard." S. REP. NO. 161, 99th Cong., 1st Sess. 8 (1985). Under a just compensation standard, the licensee could possibly recover the current value of the project, in excess of its "net investment."

hydroelectric projects.⁹⁵ Their arguments ignore the fact that a better adapted public power applicant could still prevail in competition against an original licensee, without the preference clause.⁹⁶ Moreover, the municipal preference will likely survive for initial licensing decisions because (1) the tie-breaking preference is not usually required in initial licensing decisions, where competing applications are less likely to be identical,⁹⁷ and (2) a preference for public power on initial licensing does not result in the same kind of economic destabilization caused by application of the preference on relicensing, when a dispossessed utility is forced to replace cheap power with more expensive power.⁹⁸ Finally, it is difficult to see how the FERC's relicensing process is more competitive with the preference clause, which just as surely guarantees relicensing in perpetuity to "equally well adapted" public operators by ensuring that no private operator will control a hydroproject after the initial fifty-year license term expires.

IV. IMPLICATIONS OF THE CONTINUING *MERWIN DAM* DISPUTE

With the likelihood that Congress will soon eliminate the Federal Power Act's municipal preference from the FERC relicensing decisions, the D.C. Circuit's disposition of *Merwin Dam* appears to have no significance beyond the parties to the proceeding.⁹⁹ But there is more at stake in the case that the preference issue; also at issue is the authority of a federal agency to change its statutory interpretation in the face of contrary judicial precedent.¹⁰⁰

For decades, the FERC and the FPC interpreted the Federal Power Act with virtually complete judicial and congressional acquiescence.¹⁰¹ The Com-

95. See MINORITY VIEWS OF SENATOR METZENBAUM, S. REP. NO. 161, 99th Cong., 1st Sess. 228. The Senate Committee, in recommending passage of S. 426, recognized that open competition might suffer under the bill's new preference for existing licensees, but concluded that the public interest is not always forwarded by open competition. *Id.* at 6.

96. But note that a public applicant, to be "better adapted" must show that the existing licensee's ratepayers will not suffer, if it is awarded the license. See *supra* note 80.

97. Contrast relicensing proceedings, where there are "practical limitation [sic] on project improvements and thus the potential scope of relicensing competition." S. REP. NO. 161, 99th Cong., 1st Sess. 6.

98. See *supra* notes 90-92 and accompanying text.

99. Because pending legislation would grandfather the case, there is no chance of the dispute being mooted. See *supra* note 83 and accompanying text.

100. See *supra* notes 42-43, 61 and accompanying text.

101. See, e.g., *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("It is the Commission's judgment on which Congress has placed its reliance for control of licenses."); *National Hells Canyon Ass'n v. FPC*, 237 F.2d 777, 784 (D.C. Cir. 1956) ("we [the court] cannot substitute our judgment for that of the Commission concerning the technical questions which were before it.") *Monongehela Power Co. v. Alexander*, 507 F. Supp. 385, 391-92 (D.D.C. 1980) ("The Court's duty here is to repeal the FPC's exclusive authority only if it is positively repugnant to or irreconcilable with the FWPCA [Federal Water Pollution Control Act Amendments of 1972]. Given the FPC's substantial environmental responsibilities, it cannot fairly be said that the difference in emphasis and perspective of the FWPCA rises to a level sufficient to support an implied repeal. Accordingly, an exemption for FPC-licensed projects from the licensing requirements of the FWPCA must be inferred."). However, recent court decisions indicate that the FERC should no longer rely on their almost automatic acquiescence. See *Blumm, A Trilogy of Tribes vs. FERC: Reforming Federal Hydroelectric Licensing*, 10 HARV. ENVTL. L. REV. (1986).

Note that the acquiescence traditionally shown the Commission by Congress and the courts may have been due in large part to the lack of challenges to Commission authority before the 1970s, resulting from (1)

mission felt free to alter its interpretations at will and without apparent rationalization.¹⁰² In *Merwin Dam*, the FERC attempted to overrule a prior Commission and the Eleventh Circuit U.S. Court of Appeals by reinterpreting the FPA's preference provision.¹⁰³ This practice is inimicable to principles of *stare decisis* established to guarantee continuity in judicial and agency decisionmaking, for the benefit of the parties appearing before them and the public at large. In addition, the FERC's rejection of the Eleventh Circuit's *Alabama Power* ruling in *Merwin Dam* violates the superiority of the reviewing court's precedent. For these reasons, the D.C. Circuit, in its disposition of the case, should retain Judge Mikva's strong indictment of the Commission's disregard for the appellate court's decision¹⁰⁴ and closely scrutinize the FERC's interpretation of the FPA. That would set a precedent of significant potential consequence to future cases involving the Commission.¹⁰⁵

V. CONCLUSIONS

In his concurring opinion to the D.C. Circuit's vacated *Merwin Dam* decision, Judge Wright expressed concern that the judiciary not bind future Commissions to outdated policies.¹⁰⁶ However, agencies are limited in their abilities

the lack of knowledge of the effects of dam construction and hydroelectric generation on fishery resources, (2) the lack of public interest groups to monitor Commission activities and (3) more stringent judicial standing requirements before 1972. See Cole, *supra* note 78, 665, n.143.

102. For instance, the 1921 Federal Power Commission believed that the FPA required it to prepare comprehensive development plans prior to issuing licenses or permits. See FIRST ANNUAL REPORT OF THE FEDERAL POWER COMMISSION, H. R. DOC. NO. 242, 67th Cong., 2d Sess. 30 (1921); see also 16 U.S.C. § 803(a) (1982). Pursuant to that mandate, the Commission prepared at least two plan documents. See FIRST ANNUAL REPORT OF THE FEDERAL POWER COMMISSION, *supra*, at 30-33 (summarizing the FPC's comprehensive plan for the Deschutes River in Oregon); see also SECOND ANNUAL REPORT OF THE FEDERAL POWER COMMISSION, H.R. DOC. NO. 473, 67th Cong., 3d Sess. 27-28, 177-200 (1922) (including the Commission's "Best Scheme of Development of the Colorado River Below Its Junction With the Green"). Later, without notice or explanation, the Commission dropped that interpretation in favor of a less restrictive interpretation, which merely required it to license projects in the "public interest." See, e.g., Southern Cal. Edison Co., 8 F.P.C. 364, 386 (1949); Clark-Cowlitz Joint Operating Agency, 25 F.E.R.C. ¶ 61,052, 61,176 (1983); This change in interpretation, which occurred before 1940, went unchallenged until 1984. See *infra* note 105. On the comprehensive planning requirement under section 10(a) of the FPA, see, Cole, *supra* note 78.

103. See *supra* notes 41-53 and accompanying text. Arguably, FERC didn't "overrule" the Eleventh Circuit if that court merely deferred to FERC's original interpretation. That, however, is a matter of dispute. Contrast *supra* notes 40, 49, 60 & 65 and accompanying text.

104. See *supra* note 61 and accompanying text.

105. For instance, such a precedent might have a dramatic impact in *National Wildlife Federation v. FERC (Salmon Basin)*, No. 84-7325 (9th Cir. filed May 14, 1984). In that case, the plaintiff charges that the Commission's refusal to prepare comprehensive plans is unlawful, under section 10(a) of the FPA, 16 U.S.C. § 803(a) (1982). The Federation relies on an early FPC interpretation of the statute requiring the Commission to prepare plans before issuing any permits or licenses. See Brief for Petitioners National Wildlife Federation and Idaho Wildlife Federation at 20, *National Wildlife Fed'n v. FERC*, No. 84-7325 (9th Cir. 1985); see also FIRST ANNUAL REPORT OF THE FEDERAL POWER COMMISSION, *supra* note 102, at 30. The FERC responds that it should not be bound by earlier Commission's opinion as to what the statute requires. See Brief for Respondent Federal Energy Regulatory Commission at 17, *National Wildlife Fed'n v. FERC*, No. 84-7325 (9th Cir. 1985). Presumably, Judge Mikva would deny the FERC's contention unless the Commission could rationalize the change in interpretations, i.e., show that the first interpretation was mistaken. See *supra* note 61 and accompanying text. In regard to the *Salmon Basin* case, see Cole, *supra* note 78, at 665-68.

106. See *supra* note 66 and accompanying text.

to alter policies, not by the courts, but by their enabling legislation. Where Congress has set forth a statutory requirement which can be interpreted in only one way, given its language and legislative history, the administrator cannot be permitted to change that interpretation to fulfill new policy objectives. Every appellate court that has examined the FPA's preference clause has concluded that the provision is susceptible of only one interpretation, given the statute's language and history.¹⁰⁷ Therefore, the FERC cannot be permitted to change that interpretation to fulfill new policy goals, however laudable, without congressional approval. Otherwise, the agency would usurp the role of legislator.¹⁰⁸

While the FERC's methods may be improper, its reasoning is sound. The municipal preference should be eliminated from FERC relicensing proceedings because it no longer promotes the goals Congress enacted it to achieve. Specifically, application of the public preference on relicensing no longer promotes less expensive and more widely available power; to the contrary, the costs of implementing the provision are monumental and, inevitably, destabilizing.¹⁰⁹

Private power interests, pointing to the inequities and adverse economic consequences of the current preference scheme, recently persuaded both houses of Congress to pass legislation eliminating the municipal preference from FERC relicensing proceedings.¹¹⁰ The House and Senate bills are currently before a joint conference committee for consolidation.¹¹¹ Meanwhile, the *Merwin Dam* case lives on in the D.C. Circuit, and may ultimately make its way to the Supreme Court. The final outcome in Congress and in the courts is certain to have economic significance for every electric ratepayer in the country.

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107. See *supra* notes 39 & 57-60 and accompanying text.

108. Note that the FERC need not obtain congressional approval to change a statutory interpretation that has not yet been settled in a judicial decision.

109. See *supra* note 91 and accompanying text.

110. See *supra* notes 76-83 and accompanying text.

111. For the most part, the required consolidation concerns provisions in the bills not directly related to the preference controversy. See *supra* notes 80 & 83 accompanying text.

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