

# REPORT OF THE COMMITTEE ON REGULATION UNDER PART I OF THE FEDERAL POWER ACT

## I. SUMMARY

Perhaps the most significant trend in activity under Part I of the Federal Power Act, during this reporting period (April 1 to December 31, 1980), was the phenomenal and unprecedented growth in the volume of filings for preliminary permits. Spurred on by financial and regulatory incentives under the Public Utility Regulatory Policies Act of 1978 (PURPA), potential developers combed the map for available sites and filed record numbers of permit applications, many in competition with each other. At the close of the reporting period a staggering backlog of applications had accumulated, prompting the Commission Staff to seek ways to streamline the permit process. At a public meeting convened specially for the purpose, the Commission members examined the problem and ordered preparation of a Staff discussion paper, with several Commissioners hinting at a possible administrative or legislative dismantling of the permit program with a shift to direct licensing.

Also during the reporting period, the Commission began implementing several deregulatory provisions in PURPA and in the Energy Security Act of 1980 (ESA). The Commission adopted or amended procedures for case-by-case granting of exemptions for (1) certain 30 MW or less "small power production facilities" (exemption pursuant to PURPA Section 210 from Federal and State regulatory rates and financial and organizational matters); (2) certain 5 MW or less "small power production facilities" (exemption from Part I regulation, pursuant to ESA Section 404); and (3) certain 15 MW or less facilities located on man-made conduits (exemption from Part I regulation, pursuant to PURPA Section 213). The Commission subsequently proposed a generic licensing exemption for certain 5 MW or less small power production facilities; this rulemaking is in the comment stage.

In the same deregulatory spirit, the Commission, by letters addressed to each licensee, offered to amend any license to include a new article (developed in a licensing case) giving the licensee fairly broad powers to permit certain activities on project lands, make long-term leases, and convey fee title and rights of way without specific Commission approval.

Aside from the heightened preliminary permit activity and the implementation of exemption authority, the most closely followed hydro event probably was the Commission's decision in *City of Bountiful, Utah, et al.*, Docket No. EL78-43, which held that the municipal preference under Section 7(a) of the Act applies in relicensing proceedings. Several petitions for review of this decision have been filed.

## II. FEDERAL ENERGY REGULATORY COMMISSION RULE CHANGES

### A. *Exemption for Small Power Production Facilities* (from rate and related regulation)

On February 19 and March 20, 1980, the Commission promulgated its "Small Power Production and Cogeneration Facilities" regulations, codified at 18 C.F.R.

Pt. 292, and thereafter amended several times. These regulations implement Section 210(e) of PURPA and provide, *inter alia*, for the case-by-case exemption of certain hydro facilities from specific Federal and State regulatory provisions governing rates and financial and organizational matters. Eligible hydro facilities must be 30 MW or smaller and may not be "primarily engaged in the generation or sale of electric power" (outside of cogeneration or small power production).

Under the Part 292 regulations, an applicant need only submit a notice establishing its identity and describing the facility. In the alternative, an applicant may seek positive Commission certification of its qualifying status. During the reporting period the Commission certified qualifying facilities in *Lawrence Hydro Electric Associates*, QF80-1 (May 30, 1980); *Ottumwa Water Works and Hydro-Electric Plant*, Docket No. QF80-2 (June 18, 1980); *Twin Falls Canal Company*, Docket No. QF80-8 (September 2, 1980); and *French Paper Company*, Docket No. QF80-21 (October 28, 1980). In the latter case, one-third of the facility is owned by an electric utility.

Meanwhile, the Commission has acknowledged problems with the rule's interpretation of the statutory eligibility provision, which excludes applicants "primarily engaged in" electric generation and sale. As adopted, the rule imposed an ownership test which excluded facilities which were owned 50% or more by electric utilities or by public utility holding companies. Thereafter, the Commission has relaxed the restriction to permit ownership by (1) any public utility holding company that is either not an *electric* utility holding company as defined in the Public Utility Holding Company Act, or is exempt by SEC rule or order adopted pursuant to that Act, (2) any electric utility which is a subsidiary of such exempt holding company or which is declared by the SEC not be an electric utility pursuant to that Act. Order Nos. 70-B (issued August 14, 1980), 70-C (issued September 26, 1980) and 70-D (issued January 28, 1981). On December 17, 1980 staff proposed a shift to a revenues test (excluding applicants deriving over 50% of revenues from electric generation and sale); the Commission rejected this proposal but invited resubmission of a proposal establishing a lower percentage threshold.

*B. Exemption for Small Power Production Facilities*  
(licensing and other Part I regulation)

On November 7, 1980, the Commission issued a rule "Exemption from all or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects With an Installed capacity of 5 Megawatts or Less", *reh. denied* January 27, 1981. The rule, which implements Section 408 of the Energy Security Act of 1980, establishes procedures for exemptions on a case-by-case basis. Exemptible projects include any small project the capacity of which is proposed to be installed or increased (to a total of 5 megawatts or less) and which uses an existing dam or natural water feature. Eligibility is generally restricted to project owners, except with respect to projects located entirely on Federal lands, for which any person may apply.

The exemption rule features a system of priorities and preferences which favor a timely exemption application over any competing preliminary permit application even if the latter claims a municipal preference. Formal exemption applications are required and Commission approval must be obtained, but applications will be processed under 120-day fast track procedures

On December 22, 1980, the Commission issued a Notice of Proposed Rule-making to establish a generic exemption for two subcategories of small hydro projects now eligible under the above case-by-case exemption rule. Under the generic exemption, projects falling within the prescribed subcategories would enjoy significantly reduced procedural burdens. Projects within the installed capacity range of 100 kW to 5MW would need to file only a Notice of Exemption certifying eligibility and absence of particular environmental impacts. Projects of less than 100 kW need not file even the Notice and are exempt by rule. The system of preferences and ownership requirements established in Order No. 106 would be followed in most essential respects in the proposed generic rule.

Eligibility requirements would be identical to those established in the case-by-case rule, except that "natural water feature" projects are ineligible and additional eligibility criteria are imposed to ensure maintenance of the status quo in environmental, fish migration, water flow, historical preservation and wildlife protection considerations.

The Commission further gave notice of intent to prepare an environmental impact statement regarding a possible future generic exemption of all projects eligible under Section 408 of the Energy Security Act but not now contemplated for exemption in the December 22 proposal.

*C. Exemption for Projects Located On Certain Man-Made Conduits  
(licensing and other Part I regulations)*

On April 18, 1980, the Commission adopted procedural regulations for exempting small conduit hydroelectric facilities from Part I of the Federal Power Act. Under Federal Power Act Section 30 (added by PURPA Section 213), a facility is eligible for exemption if it: (1) is used for electric power generation; (2) utilizes the hydro potential of a man-made conduit operated primarily for distribution of water; (3) has an installed capacity of 15 megawatts or less; and (4) is located on non-Federal lands.

Under the regulations, exemption applicants need only submit a brief introductory statement and four exhibits describing the facility and its mode of operation, a general location map, an environmental report, and structural drawings. Any application not acted upon within a 90-day period will receive an automatic exemption, pending Commission action (in the absence of a suspension for hearing, to be imposed infrequently). A denied exemption application may be converted to a license application, retaining the original filing date.

In promulgating this rule, the Commission adopted a case-by-case approach, but it left open the possibility for reconsidering a generic exemption at a later date.

Pursuant to the rule, the Commission issued exemptions in *City of Colorado Springs, Colorado*, Project No. 768 (August 14, 1980) (dismissing the pending relicensing application); *Great Lawrence Sanitary District*, Project No. 3235 (October 29, 1980) (waiving requirement that project withdraw an equivalent amount of water downstream to qualify for an exemption); and *Twin Falls Canal Company*, Project No. 3216 (December 18, 1980) (involving identical facility exempted from rate regulation in Docket No. QF80-8).

#### *D. Safety of Water Power Projects and Project Works*

On January 21, 1981 in Order No. 122, the Commission issued a final rule, effective March 1, 1981, governing the safety of all water power projects and project works licensed, or required to be licensed, or (in some cases) exempted from licensing under Part I of the Federal Power Act. The rule revokes existing dam inspection procedures in Part 12 of the Commission's rules and substitutes new practices and procedures that encompass reporting of safety-related incidents and preparation and implementation of emergency actions plans, and inspection by independent consultants. Other responsibilities imposed upon licensees or applicants for licenses include maintenance of quality control programs, installation and maintenance of monitoring instrumentation, and testing of spillway gates. Considerable authority is delegated to the Regional Engineer to inspect and supervise projects, order the submission of reports, and require an applicant or licensee to take all necessary or desirable action, including the installation of safety devices. Orders of the Regional Engineer will be appealable.

### III. JURISDICTIONAL ISSUES

#### *A. Absence of Post-1935 Construction*

On May 6, 1980, the Director dismissed the license application in *Puget Sound Power and Light Company*, Project No. 2495, in accordance with the decision in *Puget Sound Power and Light Company v. FPC*, 557 F.2d 1311 (9th Cir. 1977). The court found that work done on the project, which consisted of extensive repair and maintenance to restore the facility after a landslide, was not post-1935 construction within the meaning of the Federal Power Act.

#### *B. Navigability*

In *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company*, Docket No. E-9530, Opinion No. 61-A (August 8, 1980), the Commission denied an application for rehearing of Opinion No. 61, issued August 10, 1979, in which the Commission had found that four developments on the Truckee River together with two nearby water supply reservoirs are parts of a jurisdictional water power project, based upon the historic flotation of logs. In the order denying rehearing, the Commission undertook to clarify the basis for including the six developments together in one project. It stated that the interlocking of the several reservoirs "into a system for exchanging functionally equivalent water" and the "historical and continuing common sharing of those interlocked reservoirs for power generation" were major determinative factors. An appeal of Opinion Nos. 61 and 61-A is currently pending, *sub nom. Sierra Pacific Power Company v. FERC*, No. 80-7453 (9th Cir.).

In *Washington Water Power Company*, Project No. 2545 (April 1, 1980), the Presiding Administrative Law Judge issued his initial decision on the issue of Commission jurisdiction to license the Little Falls development on the Spokane River in Washington State. The ALJ found that the company lacked a valid pre-1920 permit and that the relevant portion of the river was navigable (based upon historic flotation of logs). Accordingly, the ALJ concluded that the Little Falls development required a license and ordered the company to file for an

amendment to its existing license for adjacent Project No. 2545 so as to include the Little Falls development.

Finally, in *Spaulding Fibre Company, Inc.*, Docket No. EL78-41 (July 9, 1980), the Commission held that the North Rochester and South Milton projects on the Salmon Falls River in Stafford County, New Hampshire and York County, Maine, require licensing. The Commission found the river to be navigable based on historical use of pleasure craft subsequent to improvements, indicating the river's suitability for commercial interstate ferry-type traffic.

In each of the following matters, the Commission dismissed a license application for lack of sufficient evidence of navigability of the affected stream, and for absence of post-1935 construction: *Niagara Mohawk Power Corporation*, Project No. 2648 (April 29, 1980) (East Canada Creek); *Duke Power Company*, Project No. 2563 (April 29, 1980) (Green River, in North Carolina); *Guadalupe-Blanco River Authority*, Docket No. EL79-4 (May 22, 1980) (Guadalupe River, above mile 167, in Texas); *Utah Power and Light Company*, Docket No. EL78-16 (May 22, 1980) (Snake River, in Utah); *Pepperell Paper Company*, Project No. 2623 (June 12, 1980) (Nashua River, in Massachusetts); *Town of Lake Lure, North Carolina*, Project No. 2665 (June 27, 1980) (Broad Lake, in North Carolina); and *Niagara-Mohawk Power Corporation*, Project No. 2706 (August 14, 1980) (Caroga Creek, in New York).

#### IV. RELICENSING

##### A. Preference in Relicensing

On June 27, 1980, the Commission issued Opinion No. 88 in *City of Bountiful, Utah, et al.*, Docket No. EL78-43, holding that the statutory scheme of the Federal Power Act "is one in which a municipal or State applicant competing for a successor license against a citizen or corporate applicant is entitled by Section 7(a) to preference if the Commission finds that the plans of the State or municipality are, in the words of Section 7(a), '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.'"

In its open meeting of June 25, the Commission offered little illuminating discussion. Chairman Curtis stated that the preference (which the Commission agreed was to perform a tie-breaking function) would not recognize a tie created by the filing of a mere "xerox" copy of the current licensee's proposal. Other public interest aspects will be considered, and these will be determined on a case-by-case basis, according to Commissioner Sheldon.

On August 21, 1980, the Commission denied all applications for rehearing. Several investor-owned utility parties had sought reversal of the holding that the "municipal preference" provision is applicable in a competitive relicensing proceeding. Additionally, several public power parties had sought deletion from Opinion No. 88 of the explanation of the Commission's public interest standard to be used in evaluating whether a state's or a municipality's plans are "equally well adapted" within the meaning of Section 7(a).

A number of appeals have been filed, and a consolidated review appears likely to be held in the Fifth Circuit.

### *B. Federal Takeover*

On October 23, 1980, the Commission directed the appointment of a "settlement judge" to resolve a dispute over the relicensing application in *Northern States Power Company*, Project No. 108, for an existing storage reservoir in Wisconsin. The Departments of the Interior and Agriculture sought Federal takeover in conjunction with a claim, based upon an 1854 treaty, of the Lac Courte Oreilles Band of Chippewa Indianse, with regard to recreation, forestry, housing and the gathering of wild rice. The licensee seeks to maintain the function of the reservoir for flow regulation to downstream hydro projects. The Commission concluded that the goals of the licensee and Bank were not mutually exclusive and could be resolved before a "settlement judge".

### *C. Other Selected Relicensing Actions*

#### 1. Pacific Gas and Electric Company

Project No. 175 (April 18, 1980) (Balch Project). The license provides for an expiration date in the year 2026, coterminous with that of the Helms Pumped Storage Project No. 2735, creating a term longer than the usual 30-year relicensing term under current Commission policy. The license also contains a schedule of minimum flows, a temperature monitoring program, and a provision directed at preserving the habitat of the southern bald eagle, an endangered species.

#### 2. Portland General Electric Company

Project No. 477 (May 23, 1980). Special license conditions for the Bull Run Project require maintenance of minimum flows, future upgrading of a fish passage, a substitute plan to replace a fish passage, and a study to investigate juvenile salmonid mortality at fish screens.

#### 3. Pennsylvania Power and Light Company

Project No. 487 (June 19, 1980) (Wallenpaupeck Project). Special license conditions require minimum flows to compensate for water lost at PP&L's Martin's Creek steam-electric station, and consulting with government agencies in an effort to halt eutrophication of the reservoir.

#### 4. Arkansas Power and Light Company

Project No. 271 (July 2, 1980) (Carpenter-Rommel Project). Special license conditions call for a detailed fish and wildlife plan, a study for the need for continuous minimum flows, a study of the impact of coldwater discharges on downstream fish hatcheries, and a revised recreation plan.

#### 5. Susquehanna Power Company and Philadelphia Electric Power Company

Project No. 405; *Safe Harbor Water Power Company*, Project No. 1025; *Pennsylvania Power and Light Company*, Project No. 1881; and *York Haven Power Company*, Project No. 1888 (August 14, 1980) (Conowingo, Safe Harbor, Holtwood and York Haven Projects). By separate orders dated August 14, 1980, the Commission relicensed four major Susquehanna River projects totaling over 870

MW of installed capacity, and approved at least 150 MW of additional capacity for the Safe Harbor Project. The latter project received a fifty-year license term; the other three projects' licenses terminate together in September 2014. Special license articles applicable to one or more of the projects require studies regarding minimum flows, dissolved oxygen, temperature levels, debris management, causes of and remedies for ice jams, and flood plain management. Three of the licenses require minimum flows, and one requires debris removal.

By separate order in Docket No. EL80-38, the Commission initiated proceedings to determine the status of the anadromous fishery in the Susquehanna River Basin (particularly the American shad), and the appropriate measures to be required of licensees of Project Nos. 405, 1025, 1881 and 1888 to protect or enhance that fishery. Possible requirements include fish passage facilities, hatcheries and flow releases.

In separate orders on rehearing of the relicensing orders, the Commission on November 18 and 19, 1980 agreed to modify the licenses to require licensees (excluding Project No. 1888) to negotiate interim minimum flow requirements; to require a recreational study plan for Project No. 405; and to clarify a license term for Project No. 1888. The Commission rejected all other claims of the intervenor agencies, including their requests that the Commission defer totally to the jurisdiction of the Susquehanna River Basin Commission on all matters raised by it; for a designation of specific interim minimum flows; for delegation of final authority to order terms and conditions affecting wildlife and recreation; that a one-year deadline be imposed on minimum flow and water quality studies; that an adjudicatory hearing be held; and that an Environmental Impact Statement be prepared for Project No. 1025.

#### 6. Pacific Gas and Electric Company

Project No. 184 (December 11, 1980) (El Dorado Project). Special license articles require the licensee to conduct a spillway capacity study; to submit results of seismic studies; to evaluate recreational needs; to maintain interim minimum flows pending the results of a minimum flow study; to study effectiveness of deer crossings; to conduct a canal improvement program; and to install additional safety devices. The Commission, in another license article, expressly preserved its right to require changes to or the elimination of diversions of water from the Truckee River system pending final disposition of *United States v. Truckee-Carson Irrigation District, et al.*, in the Ninth Circuit Court of Appeals.

### V. LICENSING

#### A. New Projects

New major construction or installation of capacity was authorized in two Commission original licensing orders.

On June 10, 1980, in *New York Irrigation District, et al.*, Project No. 2832, the Director issued a major license to five members of the Boise Project Board of Control for the proposed Lucky Peak Power Plant Project, to be located at the Corps of Engineers' Lucky Peak Dam on the Boise River in Ada County, Idaho. Total generating capacity would be 87.48 MW, and power generated would be

used for irrigation purposes of the member districts, with the surplus to be sold to Idaho Power Company. A request by the City of Boise for preferential rates was rejected for lack of statutory support. The applicants will be required to conduct a study to determine the need for recreational facilities, notwithstanding Idaho state law limiting use of irrigation funds and the fact that the project involves an existing dam.

By order of July 17, 1980 in *Ketchikan Public Utilities*, Project No. 2911, the Commission issued a license to construct and operate the Swan Lake Project, to be located on Falls Creek and Swan Lake on Revillagigedo Island, Alaska, for a 50-year term. Special license articles require a revision to Exhibit S to incorporate specific measures to protect fishery resources threatened by the flooding of spawning grounds and bald eagles which may perch on conductors. The Commission found the Swan Lake Project superior to two other alternative hydro projects and superior to diesel-electric or combustion turbine generation alternatives.

### *B. Existing Projects*

#### 1. Jurisdiction grounded upon interstate commerce

In *Nantahala Power and Light Company*, Project No. 2694 (November 19, 1980), the Commission reaffirmed its policy in establishing terms for projects licensed under the *Taum Sauk* rationale (where jurisdiction is founded upon a project's effect on the interstate generation and transmission of power). The policy calls for license terms retroactive to the date of the *Taum Sauk* decision and prospective 25 years from issuance.

#### 2. Jurisdiction grounded upon navigability

The Director issued major licenses to a number of projects constructed before 1935 and afterwards operated in navigable waters without required federal authorization. License terms prospective twenty years were granted, in accordance with policy announced in *Bangor Hydro-Electric Company*, Project No. 2666 (March 29, 1979). License terms generally were made retroactive to the date where the affected stream was deemed navigable, but not for a period exceeding 30 years.

### *C. License Articles Construed*

In a clarifying order issued on June 18, 1980 in *Lockhart Power Company*, Project No. 2620, the Commission explained the impact of several articles in the standard form L-3 for terms and conditions of major hydroelectric licenses. The Article 16 reservation to the United States of the right to construct and improve fish and wildlife facilities is limited to lands and interests in lands within project boundaries. Articles 22 and 24, which impose certain navigation-related servitudes on project lands, are not intended to abridge, modify, or constitute a waiver of any constitutional or other rights the licensee might have for just compensation for property taken by the United States.

### *D. Dam Elevation*

In *Swinomish Tribal Community v. FERC*, (D.C. Cir. June 20, 1980), the Court of Appeals upheld Opinions Nos. 808 and 808-A, which amended the



license for Project No. 553 to authorize raising the elevation of Ross Dam by 121 feet. Meanwhile, on July 2, 1980, in *City of Seattle, Washington, Department of Lighting*, Project No. 553, the Commission granted a stay of Opinion Nos. 808 and 808-A pending completion of appellate review and any further *certiorari* proceedings before the U.S. Supreme Court. The stay was granted under the Administrative Procedure Act because an extension under Section 13 of the Federal Power Act was no longer available, and the licensee was otherwise faced with the choice of commencing construction under a litigated license, or allowing the license to lapse by inaction.

### E. Project Lands

#### 1. Regulation of Project Land Uses, Encumbrances and Conveyances

In a significant action designed to reduce administrative paperwork, the Commission offered to amend any license to include a new article relaxing the requirement of Commission approval of certain uses and conveyances of project lands. The offer was made by letter to each licensee on June 18, 1980. The license article was developed initially in a license amendment proceeding involving the *Brazos River Authority*, Project No. 1490 (amendment granted May 15, 1980). The *Brazos* article allows the licensee to grant, without Commission approval, easements, rights of way, leases, or fee titles in project land for certain uses involving limited amounts of project lands. While the new license article can be substituted for existing restrictive articles, it does impose an annual reporting requirement, limited prenotification requirements, and compliance with conditions respecting wildlife, recreation and historic preservation.

A second major policy change was announced in the *Brazos* case—the Commission abandoned its policy forbidding lease of project lands beyond the term of a license. Hereafter, beyond-term leases may be approved in appropriate circumstances.

Finally, on May 20, 1980, the director denied an application for the sale to an adjacent landowner of 4.32 acres of project lands currently inundated by three small subimpoundments. *Duke Power Company*, Project No. 2232. The denial was based on the need to retain the subimpoundments within the project boundary to assure their future control, but the applicant was invited to file for approval of a lease of the land.

#### 2. Shoreline Regulation

In *Alabama Power Company*, Project No. 2628, Opinion No. 91, (July 24, 1980), the licensee sought a waiver of the requirement that it purchase in fee simple a strip of land around the entire perimeter of a soon-to-be-created reservoir. The Commission rejected the licensee's proposal of shortline protection through local zoning regulations, but did amend the license to give the licensee the option of purchasing easements containing adequate covenants in lieu of purchasing in fee simple the shoreline property. Such covenants would restrict the fee owner in clearing trees and shrubs and in undertaking certain improvements, and would guarantee public free access.

### 3. Condemnation Proceedings

An important conflict of laws issue was addressed in *Georgia Power Co. v. 138.30 acres of Land*, [1974 et seq.] Util L. Rep (CCH) 12,316 (5th Cir. May 27, 1980). There, in an *en banc* rehearing, the Fifth Circuit reaffirmed that Federal law controls the measure of compensation for condemned land, but held that "the law of the state where the condemned property is located is to be adopted as the appropriate Federal rule for determining the measure of compensation for condemned land, but held that "the law of the state where the condemned property is located is to be adopted as the appropriate Federal rule for determining the measure of compensation when a licensee of the Commission exercises the power of eminent domain pursuant to Section 21 of the Federal Power Act." In so holding, the Court vacated the panel decision in *Georgia Power Co. v. 138.30 Acres of Land*, 596 F.2d 644 (5th Cir. 1979) and overruled its earlier decision in *Georgia Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178 (5th Cir. 1977), *cert. denied sub nom. Boswell v. Georgia Power Co.*, 440 U.S. 907 (1979). The utility, which seeks the application of "uniform national law" yielding a lesser compensatory amount, has petitioned for certiorari. *Georgia Power Co. v. 138.30 Acres of Land*, 49 LW 3274 (S.Ct. No. 80-255).

## VI. PRELIMINARY PERMITS

During the reporting period the Commission was inundated by an unprecedented number of preliminary permit applications: 371 in the last 6 months of fiscal 1980, and about 400 in the first three months of fiscal 1981. By the end of the reporting period, a backlog of about 690 applications had accumulated, of which 90 percent were filed within the previous six months. The sheer volume of applications threatened to overwhelm the regulatory mechanism, prompting commission Staff to seek means to streamline the permit process. Particularly ominous, in terms of administrative overload, was the impending appearance on the Commission agenda of unheard-of numbers of competing application cases, expected to swell to over 300 in light of some 95 notices of intent filed during the last month of the period.

Meanwhile, the Commission granted some 157 preliminary permits during the reporting period. By far and away the majority of permits were granted by the Director, Office of Electric Power Regulation, pursuant to delegated authority in non-competitive situations. Most permits granted involved projects utilizing existing dams; one novel project, *Passamaquoddy Tribal Council*, Project No. 3035 (June 19, 1980), proposed to use tidal power.

In several situations, the Commission had to choose among competing applications. The municipal preference rule in section 7(a), favoring any municipal applicant with plans at least as well adapted as its non-municipal competitors, turned the Commission's decisions in *Montana Department of Natural Resources and Conservation*, Project No. 2853 (June 4, 1980) (rejecting application of Vigilante Electric Cooperative); *Town of Madison Electric Works Department*, Project No. 2830 (June 25, 1980) (rejecting application of Madison Paper Industries); *City of Conway*, Project No. 2301 (November 26, 1980) (extinguishing prior conditionally-granted permit of Arkansas Valley Electric Cooperative); and *City of Fayetteville, North Carolina*, Project No. 3064 (December 31, 1980) (rejecting

application of John M. Jordan). In *Montana Department of Natural Resources and Conservation, supra*, the Commission deemed immaterial to an award of a permit the fact that the successful applicant lacked a distribution system, legislative authorization, sufficient funding, and a power market. In *City of Conway, supra*, the extinguished conditional permit of Arkansas Valley Electric Cooperative had been granted over the proposal of Arkansas Power and Light Company which had been found to be less well adapted.

On August 7, 1980, the Commission denied rehearing in *City of Redding, California, supra*, dismissing as contrary to its statutory authority a proposal to issue co-equal priority permits, and deeming irrelevant the petitioner's assertions that it was first to study the site's hydro potential. In contrast, the Commission granted permits to two projects proposing to divert water from identical streams in *Messrs. Thomas M. McMaster and Robert L. Schroder*, Project No. 3018, and *Puget Sound Power and Light Company*, Project No. 3239 (December 31, 1980). The Commission reserved priority to the earlier filing applicant (McMaster) in the event of a conflict.

In four situations, the Commission dealt with problems of conflict between a permit application and an existing license or permit. In *City of Winooski, Vermont*, Project No. 3101 (June 23, 1980), the Commission denied the appeal of its order rejecting an application due to a conflict with the proposed Chace Mill, Project No. 2756. In *Town of Madison Electric Works Department, supra*, the Commission granted a permit over the objections of the licensee of an existing project the boundaries of which encompassed the proposed project. The Commission held that standard license Article 13, which obligates installation of additional capacity in certain circumstances, does not place future within-boundary projects under license, nor does it preclude the application of third parties proposing such projects. In so holding, the Commission distinguished the situation in which a licensed project is under phased development specified in the license. In a similar vein, the Commission, in *Vermont Public Power Supply Authority*, Project No. 2905 (August 22, 1980), dismissed objections of two hydroelectric operators that their existing projects would be incorporated or inundated by a proposed project. The Commission explained that these concerns were more properly raised in a licensing proceeding. By way of contrast, the Commission, in granting a permit in *Public Utility District No. 1 of Klickitat County, Washington*, Project No. 2811, (August 29, 1980) denied the portion of the application regarding the existing Condit Project, under license to an electric utility company, inasmuch as licensed project works "are not the proper subject of a preliminary permit."

On January 12, 1980, the Commission held a special open meeting to consider a Staff report on the impending crunch of permit applications requiring dispository action. Staff identified three legal issues expected to recur with increasing frequency over the coming months: (1) eligibility of hybrid municipal-private applicants for a municipal preference; (2) appropriate criteria for determining which among competing plans is best adapted; and (3) whether a preliminary permit may be issued for developing a site contained within an existing licensed project's boundaries. During the course of discussion, several Commissioners hinted at a possible legislative or administrative dismantling of the permit system, with a shift to direct licensing, in hopes of reducing the Commission's caseload. Staff preparation of a discussion paper ordered by the Commission is

now under way. The paper will address current pressing issues in the preliminary permit area, and will examine, *inter alia*, the Commission's discretionary authority (if any) to decline in particular circumstances to choose among competing applicants, deferring ultimate resolution of priority issues to the licensing stage.

## VII. ACTIVITIES AT OTHER AGENCIES

### A. *Department of Energy Loan Program for Small Hydroelectric Power Project Feasibility Studies and Related Licensing Activities*

The Department of Energy issued, on January 17, 1980, a rule establishing a loan program for small (100KW to 30MW) hydroelectric power project feasibility studies and licensing activities. The rule, to be codified at 10 CFR, Part 797, implements Title IV of PURPA and makes available loans to defray up to 90 percent of the costs of feasibility studies and licensing activities for any small project to be installed at an existing dam not currently used for power generation. The loan program features low interest rates (currently in the 7 to 7-1/2 percent range), deferred repayment, and debt forgiveness if the project proves infeasible. The loan proceeds are not applicable to construction costs.

### B. *Federal Land Policy Management Act (FLPMA)*

On July 1, 1980, the Bureau of Land Management issued final regulations, 45 Fed. Reg. 44518, implementing Title V of FLPMA, to establish procedures for the granting of rights-of-way and permits over, upon or through public lands. The regulations do not exempt or excuse licensees of Commission-licensed projects from compliance, notwithstanding the Commission's stated objections to shared jurisdiction.

### C. *National Pollutant Discharge Elimination Permits*

In *National Wildlife Federation v. Costle*, D.C. District Court No. 79-0915, plaintiffs seek to compel the Environmental Protection Agency to regulate releases of water from dams as "discharges" of "pollutants" requiring NPDES permits of the Clean Water Act. The trial concluded on November 5, 1980, and the court took the matter under advisement. To date, no decision has been announced.

## VIII. MISCELLANEOUS

### A. *Annual Charges*

As discussed in last year's report, the Commission adopted a simplified method in Opinion No. 78, issued March 18, 1980, by which State and municipal licensees may claim the "sold to the public without profit" exemption from the Section 10(e) annual charge. *Sabine River authority, State of Louisiana, et al.*, Project No. 2305. In Opinion No. 78-A, issued May 19, 1980, the Commission denied an application for rehearing, rejecting an argument that the new method was unduly burdensome.

In two decisions, an Administrative Law Judge and the Director each employed a sharing-of-the-net benefits methodology for the calculation of annual charges. *Portland General Electric Company*, Project No. 2030 (September 23,

1980) (tribal lands); *Pennsylvania Electric Company, et al.*, Project No. 2280 (October 31, 1980) (government dam).

In *Washington Water Power Company*, Project No. 2545 (December 9, 1980), the Administrative Law Judge found that the beds and banks of the Coeur d'Alene Lake, Black Lake and St. Joseph River, navigable waters affected by the Post Falls development, has passed from the United States to the State of Idaho in 1890 and hence were not tribal lands, the use of which would create an obligation to pay annual charges.

#### *B. Antitrust*

On October 22, 1980, the Administrative Law Judge issued his initial decision in Phase I of *Municipal Electric Utilities Association of the State of New York, et al. v. Power Authority of the State of New York*, Docket No. EL78-24, *et al.*, declaring void and ordering replacement of several contracts for the sale, by PASNY, of Niagara project power to three investor-owned utilities. The ALJ found that these contracts reflected inadequate forecasts of the needs of preference customers, and failed to retain sufficient flexibility to meet those needs, resulting in an allocation of capacity between preference and non-preference customers contrary to that mandated by Pub. L. 85-159, approved August 21, 1957.

On December 10, 1980, in Phase II, the ALJ dismissed plaintiffs' complaint alleging anticompetitive behavior on the part of several defendant utilities with respect to the marketing of Niagara Project power, purportedly in violation of Pub. L. 85-159, the project license, section 10(h) of the Federal Power Act and the Federal antitrust laws. The ALJ denied the motions to dismiss to the extent that they reached allegations of anticompetitive language in several long-term power supply contracts, inasmuch as the ALJ's Phase I decision had ordered the reformation of those contracts, making further deliberations concerning those contracts unnecessary.

In *Nantahala Power and Light Company*, Project No. 2694 (November 19, 1980), in a relicensing proceeding, the Commission denied the late-filed petition to intervene of the Town of Highlands, North Carolina. The Town, a wholesale customer of the licensee, asserted that the licensee's parent company had distributed the ownership of its several hydroelectric plants between its two subsidiaries so as to allocate to the Town the higher costs of less efficient plants. The Commission held that intervention was unwarranted in view of the adequacy of the Town's participation in on-going Commission proceedings under Part II of the Act to protect its rights, and for lack of good cause shown to permit a late filing.

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