

FERC'S FIRST-IN-TIME RULE:
AN IMPEDIMENT TO HYDROPOWER DEVELOPMENT

Barbara E. Schneider*

As the agency charged with the implementation of Part I of the Federal Power Act (Act),¹ the Federal Energy Regulatory Commission (FERC or Commission) exercises exclusive control over the non-federal development of hydropower in the United States. Under this Act, the FERC is authorized by Congress to issue licenses for the construction, operation and maintenance of hydroelectric projects located on navigable waters,² public lands³ and reservations⁴ or which utilize surplus water or water power from a government dam.⁵ Although the FERC, and the Federal Power Commission (FPC) before it, have issued licenses since 1920, widespread interest in hydroelectric energy development began to grow only in the last five years. This sudden interest can be directly traced to the enactment of federal legislation such as the Public Utility Regulatory Policies Act of 1978,⁶ the Energy Security Act⁷ and the Crude Oil Windfall Profits Tax Act of 1980,⁸ all of which provide significant economic and regulatory incentives for the private development of both cogeneration and small power production facilities, including hydropower facilities. Such incentives, coupled with the increasing cost of oil-based generation, have made hydropower an attractive and relatively economic energy source.

A FERC license gives the holder an exclusive franchise to engage in hydropower generation at a particular site for up to a 50 year period.⁹ The drafting of a license application, which requires the preparation of between 5 to 21 separate exhibits depending on the site selected, requires a substantial expenditure of an applicant's time and money. In recognition of this, Congress empowered the Commission, "[t]o issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required. . . ."¹⁰

The holder of a preliminary permit is granted a maximum of three years to secure the data needed to prepare a license application. The key advantage

*B.A., State University of New York at Buffalo; J.D., Georgetown University Law Center; Member, District of Columbia Bar; Associate, Chapman, Duff and Paul, Washington, D.C.

¹16 U.S.C. §§ 792, *et seq.*

²"Navigable waters" is defined as "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruption between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority." 16 U.S.C. § 796(8).

³"Public lands" is defined as "such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws." 16 U.S.C. § 796(1).

⁴"Reservations" is defined as "national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks." 16 U.S.C. § 796(2). For purposes of the Act, the terms "public lands" and "reservations" are mutually exclusive. 16 U.S.C. § 796(1).

⁵"Government dam" means "a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others." 16 U.S.C. § 796(10).

⁶16 U.S.C. §§ 2601, *et seq.*

⁷Pub. L. No. 96-294.

⁸Pub. L. No. 96-223.

⁹16 U.S.C. § 799.

¹⁰16 U.S.C. § 797(f).

accorded a preliminary permittee is the advantage of "preference". As long as there is a preliminary permit in effect, the FERC will not accept any additional preliminary permit applications or any license application for the site subject to that preliminary permit.¹¹ The preliminary permit holder is the only one who may file a license application during this period. Assuming the permittee does file a license application during this period, the FERC will issue a license to the permittee over all subsequent competing license applicants as long as the permittee's license application is deemed equally well adapted "to develop, conserve and utilize in the public interest the water resources of the region".¹² In the unlikely event that the Commission initially determines a competitor's license application is superior to that of the preliminary permittee, the Commission will refrain from immediately issuing the license to the competitor. Instead, the FERC will notify the preliminary permittee of the specific reasons why its plans are not as well adapted as its competitor's and it will be afforded a reasonable period "to render its plans at least as well adapted as the other plans."¹³ Thus, for all practical purposes, a preliminary permittee with the money and expertise necessary to perfect a license application will eventually receive a license.

The significant procedural advantages accorded a preliminary permittee as the "priority applicant" and the time and expense of preparing a FERC license application are responsible for the lack of determined competition between applicants at the licensing stage. Instead, the critical battle between potential developers interested in a particular site occurs at the preliminary permit stage. It is during this competitive preliminary permit proceeding that a second statutory preference plays a significant role.

In competitive preliminary permit proceedings (and competitive licensing proceedings where no competitor holds a preliminary permit), the FERC is required to give preference to the applications of states¹⁴ and municipalities.¹⁵ This preference, known as the "municipal preference", is mandated by Section 7(a) of the Act:

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued . . . the Commission shall give preference to applications therefor by States and

¹¹ 18 C.F.R. § 4.30(c)(2).

The Act does not prohibit the issuance of more than one preliminary permit at a time. Although the Commission has considered the feasibility of issuing "sequential permits" on several occasions, it has declined to do so:

The Federal Power Act does not address the permissibility of issuing "sequential" permits. The primary benefit of issuing a "sequential" permit would be the potential for expediting the issuance of a new permit to another party should the initial permit be surrendered or revoked. However, the circumstances under which the initial permit was surrendered or revoked could affect the terms and conditions of any subsequent permit issued or, more importantly, whether any new permit at all should be issued. It would not be possible to anticipate these factors in issuing a "sequential" permit at the time of issuance of the initial permit.

Missouri Joint Municipal Electric Utility Comm., 17 FERC ¶ 61,147 at 61,286 (1981). See Richmond Power and Light Co., 20 FERC ¶ 61,232 (1982). *But see* Opinion No. 531, Ohio Power Co. 38 FPC 881, 887 (1967) (Bagge, Comm., concurring in part and dissenting in part); 38 FPC at 890, (Carver, Comm., concurring in part and dissenting in part).

¹² 18 C.F.R. § 4.33(h)(1).

¹³ 18 C.F.R. § 4.33(h)(2).

¹⁴ A "state" is defined as "a State admitted to the Union, the District of Columbia, and any organized Territory of the United States." 16 U.S.C. § 796(6).

¹⁵ A "municipality" is defined as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." 16 U.S.C. § 796(7).

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;

...¹⁶

Thus, in situations where a municipal applicant for a preliminary permit is competing with one or more non-municipal applicants, the Commission's regulations provide that a preliminary permit will be issued to the municipal applicant if its plans are "at least as well adapted to develop, conserve, and utilize in the public interest the water resources of the region."¹⁷

Where all or none of the competitors are entitled to the municipal preference, however, the FERC's selection process is complicated. In such situations, the Commission's regulations provide that it "will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans."¹⁸ In almost every instance, the Commission is unable to conclude that either applicant has presented a better adapted plan of development. The award of the preliminary permit is then controlled by an additional administrative preference not contained in the Act known as the "first-in-time" rule:

If both of two applicants are either a municipality or a state, or neither of them is a municipality or a state, and the plans of the applicants are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant whose application was first accepted for filing.¹⁹

¹⁶16 U.S.C. § 800(a). A hotly contested issue which has yet to be definitively resolved is whether the municipal preference may be invoked in a relicensing proceeding to defeat the original licensee. Compare *City of Bountiful, Utah*, Opinion No. 88, 11 FERC ¶ 61,337 (1980), *City of Bountiful, Utah*, Opinion No. 88-A, 12 FERC ¶ 61,179 (1980), *aff'd sub nom. Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3573 (1983) (municipal preference applicable in all relicensing proceedings) with *Pacific Power & Light Co.*, Opinion No. 191, 25 FERC ¶ 61,052 (1983), *Pacific Power & Light Co., Order Granting Interventions and Denying Rehearing*, 25 FERC ¶ 61,290 (1983), *appeal filed sub nom. Clark-Cowlitz Joint Operating Agency v. FERC*, No. 83-2231 (D.C. Cir. Nov. 29, 1983), (reversing *Bountiful, supra* and holding municipal preference not applicable against the original licensee in relicensing proceedings). See also H.R. 4402, 98th Cong., 1st Sess., 129 Cong. Rec. H 10055 (daily ed. Nov. 16, 1983).

¹⁷18 C.F.R. § 4.33(g)(3). If the plans of the non-municipal applicant are deemed "better adapted," the Commission will inform the municipality of the specific reasons and afford the municipality a reasonable period of time "to render its plans at least as well adapted as the other plans." 18 C.F.R. § 4.33(g)(4).

¹⁸18 C.F.R. § 4.33(g)(1). To accomplish this comparative analysis, the FERC requires all competing applicants to include in their application, "a detailed and complete statement of how the plans reflected in the competing application are as well adapted or better adapted than are the plans reflected in the initial application to develop, conserve, and utilize in the public interest the water resources of the region. The statement may be supported by any technical analysis that the competing applicant deems appropriate to support its proposed plan of development". 18 C.F.R. § 4.33(d)(2) (hereinafter referred to as "better adapted statement").

¹⁹18 C.F.R. § 4.33(g)(2). This rule originated in Order No. 54, Water Power Projects; Final Regulations Prescribing General Provisions for Preliminary Permit and License Applications and Final Regulations Governing Applications for, Amendments to, and Cancellation of Preliminary Permits, Docket No. RM79-23, 44 Fed. Reg. 61,328 (1979). In the preamble to this rule, the Commission stated:

Section 4.33(g) sets forth the bases for selection among competing applicants when there are two or more applications for a preliminary permit, or two or more applications for a license by applicants who did not hold an outstanding preliminary permit at the time the license application is filed. These provisions reflect the provisions of section 7(a) of the Act, 16 U.S.C. § 800(a), including the concept of state or municipal preference and the concept that, where the preference does not apply, the applicant whose plan is "best adapted" will prevail. *The regulation injects the additional concept that, all other things being equal, the principle "first in time, first in right" will apply.*

44 Fed. Reg. 61,328, 61,333 (emphasis supplied).

Thus, where all or no preliminary permit applicants are entitled to the municipal preference, the FERC's regulations set forth a two-staged decision making process. First, each competing preliminary permit application is scrutinized to determine whether a particular application proposes a "better adapted" plan of development. To the extent the FERC determines an applicant's plans are better adapted, it issues the preliminary permit to that applicant. Second, if the plans are deemed "equally well adapted", then the "first-in-time" applicant is awarded the preliminary permit.

In practice, however, this two-staged decision making process is a fiction. The FERC routinely awards a preliminary permit to the first-in-time applicant. This reflexive reliance upon a filing date rather than an analysis of the relative quality of competing applications is contrary to the requirements of the Act and has converted the FERC's preliminary permit process from a contest of merit into a contest of speed.

This emphasis upon speed has had an adverse impact upon the manner in which hydroelectric sites are actually developed. FERC's reliance on the first-in-time rule frequently results in the award of a preliminary permit to an entity whose plans are not "best adapted" but who is merely the applicant who was able to develop and submit a preliminary permit application first. In most instances, permit applications can be prepared with relatively little effort or expense because the technical data required by FERC can be obtained from public agencies such as the Corps of Engineers. Thus, this rule encourages hydroelectric developers to submit preliminary permit applications for a large number of sites without engaging in the prefeasibility studies essential to determine whether development of a site is economically practical. Instead, such studies are routinely performed by developers *after* a preliminary permit is issued and the resulting delay in performing such studies has led to the surrender of a large number of preliminary permits where the preliminary permit holder subsequently determines development of the site is infeasible. For example, in a recent six-month period, one preliminary permit was surrendered for every two new applications that were accepted for filing.²⁰ The FERC's reliance upon the first-in-time rule thereby permits trigger-happy hydroelectric developers to tie-up potential sites for several years and precludes actual development by others.

Although aware of the foregoing criticism, the Commission has consistently taken a hard line in defending its first-in-time rule:

The Commission has consistently consolidated competing applications for preliminary permit into one comparative proceeding, citing *Ashbacher* [*Radio Corp. v. FCC*, 326 U.S. 327 (1945)] for the rationale that mutually exclusive applications should not be considered independently. We do not find, however, that *Ashbacher* speaks to the substantive criteria that should be employed when comparing preliminary permit applications. The Commission's procedures for comparing preliminary permit applications are set forth in the regulations, 18 C.F.R. 4.33. These rules are grounded in both public interest considerations and a pragmatism necessary in light of the unprecedented increase in permit applications, adding to a case load that must be handled with limited resources. The fact that most (but not all) competitions for preliminary permits have been resolved in favor of the earliest filing time merely indicates that development of the power potential at existing dams does not often lend itself to multiple and radically different proposals. *In those instances where significant and substantiated differences in a later-filed application show a superior scheme of development — one better adapted to conserve and utilize in the public interest the water resources of the region — then that later-filed application will be awarded the preliminary permit.*²¹

²⁰See Hydrowire, Vol. 4, No. 8 (Apr. 25, 1983) through Vol. 4, No. 20 (Oct. 20, 1983).

²¹Alabama Electric Cooperative, Inc., 15 FERC § 61,168 (1981) (emphasis supplied; footnotes omitted). See also *Continental Hydro Corp.*, 20 FERC ¶ 61,347 (1982).

From FY 1980 through FY 1982, 3,301 preliminary permit applications were filed and approximately 1,300 contested preliminary permit proceedings resulted.²² "Significant and substantiated" differences, however, were demonstrated to the FERC's satisfaction on only *three* occasions. In *Marsh Island Hydro Associates*,²³ the Commission awarded a preliminary permit to the second-in-time applicant Bangor Hydro-Electric Company (Bangor) because Bangor's proposal represented "a better plan for the development of the energy potential of the water resources." In support, the Commission noted that Bangor "has significantly greater *flexibility* to achieve an optional plan for the comprehensive development of the water resources" because it had the ability to flood out a neighboring hydroelectric project owned by Bangor and located downstream of the proposed project.²⁴

In *Water Power Development Corporation*,²⁵ the Commission awarded a preliminary permit for one of two sites to a later applicant because only the later applicant had proposed a "hydraulically interdependent scheme of development" utilizing both branches of the river in question. The Commission concluded that issuing separate permits to different applicants for the two branches of the river, "given the potential for coordinated operation between the two branches via a trans-basin tunnel, is clearly inconsistent with a comprehensive plan of development for the river basin as a whole."²⁶

In *City of Ukiah, California*,²⁷ involving a competition between two municipal entities, the Commission awarded a preliminary permit to the second-in-time applicant, Sonoma County Water Agency (Sonoma). The Commission, by analogy to *Marsh Island*, *supra*, concluded that Sonoma, by virtue of its partial control of the water releases at this federally-owned dam, had demonstrated "the ability to produce substantially more power at the site than would be possible if Ukiah were the operator of the hydro facility."²⁸ "Sonoma's control of water releases from Warm Springs Dam cannot be disturbed under the Act and therefore, in this instance, uniquely qualifies Sonoma as a superior applicant for a preliminary permit."²⁹ The City of Ukiah has appealed the Commission's decision to the D.C. Circuit Court of Appeals.³⁰ Thus, this court's decision could have a significant impact upon the procedures utilized by the Commission in competing preliminary permit proceedings.

These three cases demonstrate that the Commission, in limited circumstances, is willing to draw reasoned comparisons between proposed plans of development presented in preliminary permit applications of "equal status". Despite these

²² According to FERC's Division of Hydropower Licensing, the FERC has issued 1,882 preliminary permits in the last 4 years:

FY 1980	138 preliminary permits issued
FY 1981	578 preliminary permits issued
FY 1982	750 preliminary permits issued
FY 1983	416 preliminary permits issued

²³ 16 FERC ¶ 16,236 (1981). Neither applicant qualified as a municipality for purposes of the Section 7(a) preference.

²⁴ *Id.* (emphasis supplied).

²⁵ 19 FERC ¶ 61,002 (1982).

²⁶ *Id.* at ¶ 61,002.

²⁷ 18 FERC ¶ 61,108 (1982).

²⁸ *Id.* at ¶ 61,204. In *Suncook Power Corporation*, 24 FERC ¶ 61,107 (1983), the Commission affirmed a February 24, 1983 order granting an exemption to a second-in-time applicant as opposed to a first-in-time license applicant in view of the fact that the second-in-time applicant's proposal would produce 5.9% more energy annually.

²⁹ *Id.*

³⁰ *City of Ukiah v. FERC*, No. 83-114 (D.C. Cir. argued Dec. 2, 1983).

isolated examples, however, the overwhelming majority of second-in-time applicants have been unsuccessful in their attempts to overcome the presumption in favor of the first-in-time applicant. In fact, the Commission has severely limited the precedential value of these three cases by repeatedly narrowing its definition of what factors constitute "significant and substantiated" differences. The limited precedential value of these cases is demonstrated by the Commission's refusal to address arguments that specific proposals for development by second-in-time applicants are superior with regard to: (1) annual generation³¹; (2) installed capacity³²; (3) environmental impact³³; (4) economic feasibility³⁴; (5) control over and right to water supply³⁵; (6) ability to coordinate operations of the proposed facility with existing reservoirs³⁶; and (7) proximity to site, and familiarity with the project area and needs of the region.³⁷

On petitions for review to the United States Court of Appeals for the Third and D.C. Circuits, the Commission's use of the first-in-time rule was upheld.³⁸ The D.C. Circuit opinion, *City of Dothan, Alabama, supra*, avoided any direct consideration of the overall merits of the first-in-time rule. Judge MacKinnon, writing for the court, took a narrow view of the question under review: "[O]ur role is to consider whether the Commission's determination that the plans of Georgia and Dothan are equally well adapted to the public interest objectives of the Act is supported by substantial evidence".³⁹ The court's affirmance of the Commission's decision exhibited a great deference to the Commission's "very considerable expertise in hydroelectric matters".⁴⁰ Judge Mikva, however, in a strong dissent, sharply criticized the first-in-time rule, noting that the "record now before us paints a dismal picture of an agency so understaffed or swamped by work that it appears to be institutionally incapable of giving all but the most obvious problems the attention required by law."⁴¹ In his opinion, the FERC has structured its administrative procedures in such a way that the agency has every incentive to grant preliminary permits based on filing date rather than on the quality of competing applications:

In Order No. 132, 46 Fed. Reg. 14,119 (February 13, 1981), the Commission delegated to the Director of the Office of Electric Power Regulation (OEPR) the authority to grant preliminary permits if competing applicants "do not propose and substantiate materially different plans." *Id.* at 14,120. This order does *not* give the OEPR Director authority to grant permits under more complex circumstances, however; that task is for the Commission. In

³¹WPB Power, Inc., 17 FERC ¶ 61,008 (1981); Twin Falls Canal Co. and North Side Canal Co., Ltd. 17 FERC ¶ 61,051 (1981); City of Riverton, Wyoming, 19 FERC ¶ 61,294 (1982); Sunnyside Valley Irrigation District, 20 FERC ¶ 61,234 (1982).

³²Seminole Electric Cooperative, Inc., 9 FERC ¶ 61,244 (1979); Vigilante Electric Cooperative, Inc., 11 FERC ¶ 61,270 (1980). *But cf.* Fairview Orchards Associates, 24 FERC ¶ 61,022 (1983) (Order denying an exemption application which proposed development of 175 kw and granting a preliminary permit application which proposed to develop 2,000 kw).

³³Sunnyside Valley Irrigation District, 20 FERC ¶ 61,234 (1982).

³⁴Town of New Roads, Louisiana, 12 FERC ¶ 61,093 (1980); Western Montana Electric Generating and Transmission Corp., 19 FERC ¶ 61,028 (1982); City of Riverton, Wyoming, 19 FERC ¶ 61,294 (1982); Brasfield Development Ltd., 20 FERC ¶ 61,358 (1982).

³⁵Crown Zellerbach Corp., 21 FERC ¶ 61,093 (1982); Idaho Renewable Resources, 21 FERC ¶ 61,127 (1982).

³⁶Pennsylvania Hydroelectric Development Corp., 15 FERC ¶ 61,152 (1981).

³⁷Town of New Roads, Louisiana, 12 FERC ¶ 61,093 (1980); John J. Hockberger, Sr., 20 FERC ¶ 61,087 (1982); Brasfield Development Ltd., 20 FERC ¶ 61,358 (1982).

³⁸Delaware River Basin Commission and Commonwealth of Pennsylvania v. FERC, 680 F.2d 16 (3d Cir. 1982); City of Dothan, Alabama v. FERC, 684 F.2d 159 (D.C. Cir. 1982).

³⁹684 F.2d at 164.

⁴⁰*Id.*

⁴¹*Id.* at 165 (Mikva, J. dissenting).

other words, a finding that projects are essentially equal is purely ministerial, and the permit will be awarded to the applicant that filed first; a finding that the second application is "better adapted" cannot even be made at the OEPR level. As a result, the deck is stacked in favor of initial applicants. Even a passing familiarity with the administrative process suggests the unlikelihood that a field director will burden his overworked home office when he can terminate a matter within his own authority, even if one-sidedly. The biases inherent in FERC's approach are further demonstrated by the "background" discussion in Order No. 132, which explains that the purpose of this delegation of authority to the OEPR Director is to clear FERC's backlog of competing preliminary permit applications.⁴²

That the Commission's first-in-time rule has withstood judicial review should not preclude the Commission from reconsidering the merits of this rule. Recent statistics provided by FERC indicate that the number of preliminary permit applications filed with the FERC has declined substantially. In FY 1981, 1,856 applications were received, as compared to 944 in FY 1982 and 624 in FY 1983.⁴³ Approximately 30-40% of all preliminary permit applications are competing applications which require additional staff review time.⁴⁴ The fewer number of applications to be processed reduces the administrative burden on the Commission Staff and provides the FERC with the opportunity to reconsider and overhaul its regulations in order to remedy the problems and inequities created by the first-in-time rule.

One issue which merits immediate consideration is the extent to which the Commission can quantify the specific factors which will permit a reasoned comparison of preliminary permit applications. The existing regulations provide that the Commission will "favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans."⁴⁵ Yet the Commission routinely determines that because of the nature of preliminary permit applications, no reasoned comparison between applications can be made. The Commission should identify what additional information would be needed to permit such a comparison. Under the existing standard, a second-in-time applicant must seek to demonstrate "significant and substantiated" differences which will show that it proposed a superior scheme of hydropower development. The public, however, has no accurate perception of what factors will be considered significant by the FERC nor how such factors should be substantiated.

To the extent invoking the municipal preference is insufficient to determine the entity to be awarded the preliminary permit, the Commission, under Section 7(a), may give preference to the applicant "whom it *finds and determines* is best adapted to develop, conserve, and utilize in the public interest the water resources of the region, *if it be satisfied as to the ability of the applicant to carry out such plans.*"⁴⁶ A plain reading of Section 7(a) supports the conclusion that a Commission *finding* as to an applicant's financial or legal ability to carry out its proposed plan of development is required in each and every proceeding where application of the municipal preference is insufficient to determine which entity will be awarded the preliminary permit. At

⁴²*Id.* at 167.

⁴³Statistics obtained from FERC's Office of Hydropower Licensing, *see also* Hydrowire, Vol. 4, No. 11, p. 2 (June 6, 1983) (Interview with Donald Giampaoli, Deputy Director, Division of Hydropower Licensing, FERC).

⁴⁴"Many years [of] experience in administering the Act show that cases involving competing applications take significantly longer to decide and demand more time and money from the perspective of developers." Exemption From All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects With an Installed Capacity of Five Megawatts or Less, FERC Statutes & Regulations, Regulations Preambles, ¶ 30,204 at 31,361-31,362 (45 Fed. Reg. 76,115 (1980))

⁴⁵18 C.F.R. § 4.33(g)(1).

⁴⁶16 U.S.C. § 800(a) (emphasis supplied).

the present time, no such "finding" is made. The existing "better adapted" regulation merely indicates that the Commission will "take into consideration" the ability of each applicant to carry out its plans. In order to fulfill its statutory obligation to make such a finding, the Commission should modify this regulation to require all applicants to submit evidence of their legal and economic ability to carry out their proposed plan of development.⁴⁷

With regard to preliminary permit applications proposing hydropower development at federal water facilities,⁴⁸ another factor that should enter into the Commission's "better adapted" evaluation is the extent to which any competitor holds a proprietary interest in the federal project. Such entities, as "project sponsors" of the federal water facility, are directly or indirectly contractually obligated to reimburse the United States for all or a portion of the costs of the federal water project. In return for undertaking such reimbursement, the project sponsor is frequently accorded rights to a portion of the water in the federal facility for authorized purposes such as irrigation and storage.⁴⁹

Where the federal government constructs a project that includes as a primary purpose water for the control and use by a project sponsor and that entity, through a contract with the federal government, also operates the project, it has an inherent ability to study and consider various operational schemes for hydropower development that may not be available to a non-project sponsor applicant. In contrast, any non-project sponsor would be limited by the operational regimes dictated by the Bureau of Reclamation, the Corps of Engineers or the project sponsor. The project sponsor, as the entity controlling the actual water releases from the federal water project, will be best able to modify the pattern of releases and investigate alternative schemes of development which can increase the proposed project's generating capacity and power production. Finally, the project sponsor has Congressionally legislated contractual rights to the project as well as an established working relationship with the federal agency that initially constructed and retains supervisory control over the project.

In many instances, the federal agencies that constructed the project have indicated to the Commission their preference that the project sponsors be favored over other applicants.⁵⁰ Although many of the proceedings in which such requests have been made are still pending, to date, the Commission has never granted a second-in-time applicant a preliminary permit on the basis that development by the second-in-time applicant was favored by the agency which has overall responsibility for the federal water facility.⁵¹ It would be in the public interest to favor such entities

⁴⁷Where only one competitor is entitled to the municipal preference, no finding and determination relative to this entity's ability to carry out its proposed plan of development would be necessary.

⁴⁸Federal water facilities have been constructed by the Department of the Army's Corps of Engineers (COE) primarily for purposes of flood control, water storage and navigation and by the Department of the Interior's Bureau of Reclamation (BuRec) primarily for purposes of irrigation, flood control and water storage.

⁴⁹See e.g., *City of Ukiah, California*, 18 FERC ¶ 61,108 (1982).

⁵⁰E.g., Letters from Robert N. Broadbent, Commissioner, BuRec to Honorable Kenneth F. Plumb, Secretary, FERC, dated February 16, 1982 concerning Project No. 3789 (Lahontan Dam); Project No. 4533 (Pilot Butte Dam); and Project No. 3489 (Roza Dam). See also *Federal Programs and Policies For Small-Scale Hydropower*, Department of Energy, undated. At page 6 of this report, the recommendation is made that "power development preference" in some cases be accorded "to entities that are already operating facilities for other purposes, such as irrigation."

⁵¹See *Mitchell Energy Company, Inc.*, 21 FERC ¶ 61,153 (1982); cf., *City of Santa Clara, California*, 20 FERC ¶ 61,257 (1982). In *City of Santa Clara, California*, *supra*, the Commission stated that the Bureau of Reclamation's interest in this dam "does not, however, accord it any special authority to designate a preferred license applicant pursuant to the Federal Power Act". 20 FERC ¶ 61,257 at 61,488 (footnote omitted).

as opposed to issuing a preliminary permit to another entity which was merely the first to file and has no prior involvement with the operation of the facility. Thus, where one competitor is the project sponsor of a federal water facility, this factor should be considered by the Commission in determining which application is "better adapted".

A third factor that merits consideration under a "better adapted" analysis is the extent to which an applicant has a proprietary interest in an existing non-federal dam. Although the Commission's exemption procedures for projects of up to 5 MW provide some measure of preference for owners of existing dams, there may be cases where financing of the project dictates the need for a license as opposed to an exemption. Moreover, the 5 MW size limitation placed on exemption applications prevent many owners from employing this procedure. If an owner wishes to develop power at his or her dam and presents a plan of development of equal merit to the plan submitted by a non-owner of equal status, the interest in development expressed by an applicant who also holds a proprietary interest in the dam should tip the scales in favor of the owner's application.⁵²

The Commission's substantial reliance on the first-in-time rule is contrary to the Federal Power Act's directive that the Commission implement procedures to insure that the eventual project granted a license "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses. . . ."⁵³ The Commission's response to this criticism, that the matters to be addressed in an analysis of competing preliminary permit proceeding "are quite different" from matters considered in licensing proceedings,⁵⁴ merely begs the question because the issuance of the preliminary permit usually dictates the subsequent award of the license. It is doubtful that anyone will proceed with preparation of a license application when another entity who holds the permit is actively engaged in preparation of a "preferred" license application.⁵⁵ Therefore, by granting preliminary permits

⁵² Although the Commission has yet to address this issue, it has recently held that where two private preliminary permit applicants are competing at an unconstructed project site, the permit applicant that holds the water rights and real property interests associated with the site will *not* be considered to have a better adapted plan than its competitor, all other factors being equal. *Franklin Falls Hydro Electric Corp.*, 24 FERC ¶ 61,348 (1983). *Accord*, *Gregory Wilcox*, 25 FERC ¶ 61,434 (1983). Ironically, the Commission's refusal to grant a preference to site owners, in part, was premised upon the concern that such a preference "would have been based on considerations of expediency in implementation, not on any demonstrated superiority of the proposed scheme of development." *Franklin Falls Hydro Electric Corp.*, *supra* at 61,753.

By order issued October 20, 1983, the Commission terminated a variety of pending rulemaking dockets. 25 FERC ¶ 61,099. One of these rulemaking dockets, Docket No. RM82-29-000, a request to establish a "site owner preference", was terminated on the basis that the petition for rulemaking "does not contain information that casts doubt on the propriety of the decision in *Franklin Falls*". *Id.* (mimeo at 24).

⁵³ 16 U.S.C. § 803(a).

⁵⁴ *See e.g.*, *Crown Zellerbach Corp.*, 21 FERC ¶ 61,093 (1982) wherein the Commission states:

[L]icense and permit proceedings are quite different. The former concerns the actual construction of a project with known variables, while the latter contemplates only exploratory studies to determine a project's feasibility with many still undetermined factors. Because of the unavailability of data at the permit stage, the Commission in most instances is unable to discern any significant substantial differences among competing proposals.

21 FERC ¶ 61,093 at 61,287, n.2.

⁵⁵ The City of Ukiah, California, however, which has appealed the Commission's issuance of a preliminary permit to the Sonoma County Water Agency, *see text supra*, recently filed a Notice of Intent To File Competing License Application in response to Sonoma's filing of an initial license application in Project No. 3351-002.

merely because an entity is first-to-file, the Commission effectively precludes any licensing competition for a site. By further defining what factors will be considered in determining the best adapted proposal, the Commission will be provided with sufficient data to engage in a comparative analysis of a greater number of competing preliminary permit applications, thereby reducing the need to resort to a first-in-time rule.⁵⁶

⁵⁶ A recently issued notice of proposed rulemaking, however, suggests that the Commission intends to lessen the degree of scrutiny given to competing preliminary permit applications. *See Application for License, Permit, and Exemption from Licensing for Water Power Projects, Notice of Proposed Rulemaking*, 26 FERC ¶ 61,229 (issued Feb. 24, 1984) (mimeo at 28-29).