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CLIENT ALERT:

FERC Gearing Up for Relicensings: Existing Licensees Asked to Choose a Relicensing Process by June 1, 2015

FERC is gearing up for a drastic expected increase in the number of hydroelectric relicensings over the next fifteen years, during which almost half of all currently-licensed projects will enter relicensing, and the number of expiring licenses will increase from about 12 per year to an average of 34.

In preparation, FERC has issued a notice to the licensees of the approximately 100 projects set to enter the relicensing process during the two-year period between October 1, 2016, and September 30, 2018.¹ FERC notes that its regulations require licensees to notify the Commission of their intent to file an application for a new license “[b]etween 5 and 5.5 years before [their] existing license expires.” But FERC now asks each licensee listed in the notice to inform it by June 1, 2015, whether it intends to use FERC’s default Integrated Licensing Process (ILP) or whether it intends to request permission to use the Traditional Licensing Process (TLP) or Alternative Licensing Process (ALP).

In part, the notice is driven by FERC’s own staffing limitations: FERC Staff’s role during the pre-filing period is significantly different under each of these three different licensing processes such that Staff is significantly less involved in the TLP. FERC specifically asks that licensees “seriously consider the TLP if [they] expect [their] project to have non-complex resource issues, relatively little controversy, and a lack of significant disputes over studies.”

The licensing process selected can also have significant implications for applicants. The costs of, and staff resources required for, relicensing can differ significantly depending on the process selected, as can the timeframe during which those resources must be committed. Particularly for small projects that may be economically marginal, that difference may be crucial.

¹ Notice of License Expiration and Request for Information Regarding Process Selection, Apr. 1, 2015, eLibrary No. 20150401-4007, available at <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13826003>; Notice of License Expiration, Request for Information Regarding Process Selection, and Correcting Record for P-2696, P-2697, P-2698, and P-3113, Apr. 2, 2015, eLibrary No. 20150402-3031, available at <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13826986>.

While FERC's regulations provide that the ILP is the default licensing process, in recent years applicants in well over half of licensings have been granted authorization to use either the TLP or ALP (primarily the former). That said, use of the TLP or ALP still isn't automatic—FERC wants to hear from resource agencies, and potentially stakeholders, before allowing applicants to use either process.

Below, we briefly discuss each of the three licensing processes, as well as some thoughts for potential stakeholders who are in the vicinity of a project up for relicensing.

The Integrated Licensing Process

FERC's default licensing process, the ILP, is front-loaded so that applicants perform studies of project impacts—and ideally reach a settlement with stakeholders—prior to filing their license application. During the pre-filing period, stakeholders recommend specific studies, applicants develop a detailed study plan that must be approved by FERC Staff, and applicants perform the studies included in their approved study plan. Resource agencies have an opportunity to initiate a formal “study dispute panel” when their study recommendations aren't accepted. Ideally, the studies included in the FERC-approved study plan are completed prior to filing a license application; but in some proceedings, such studies continue well beyond that date.

The ILP stakeholder and study process can be very costly. However, because it is designed to get stakeholders, particularly federal and state resource agencies with mandatory conditioning authority, in the room early and often, the ILP might help interested parties reach consensus in proceedings with controversial resource issues at play. For instance, the ILP is often used in projects where issues regarding anadromous fish are front and center.

The Traditional Licensing Process

FERC characterizes the TLP—which, as its name suggests, pre-dates the ILP—as a “paper-driven” process. The applicant, with some stakeholder consultation, develops its own study plan, and files Draft and Final License Applications.

The TLP can allow an applicant to limit the costs it incurs prior to filing its application; accordingly, particularly given FERC's encouragement in this notice, this may be an attractive option. For projects where significant opposition is expected, however, the TLP may leave applicants in the position of scrambling post-filing to perform additional studies, respond to additional information requests, and get resource agencies and others on board—particularly if their pre-filing studies are deemed unsatisfactory by stakeholders after the fact.

Even under the TLP, however, licensees can informally establish a robust stakeholder process—and some have found it beneficial to do so in order to minimize opposition later on.

The Alternative Licensing Process

The ALP is intended to be a collaborative process, incorporating stakeholders, resource agencies, Indian tribes, and citizens' groups potentially affected by the project. The goal of the ALP is settlement: FERC states that the ALP is intended to “facilitate an orderly and expeditious review of an

agreement or offer of settlement” in the application itself.² And in Order No. 2002, where it adopted the ILP as the default licensing process, FERC stated that it retained the ALP specifically because “of its demonstrated track record of reducing license application processing times and fostering settlement agreements.”³

Applicants are required to make good faith efforts to consult with all resource agencies, Indian tribes, and citizens’ groups affected by their proposal. If those entities think an applicant hasn’t done so, they may file a request with the Commission asking FERC Staff to resolve a dispute during the pre-filing process and may also petition for Staff to prescribe additional procedures.

For Stakeholders

Entities in the vicinity of a project coming up for relicensing should also take this time to consider their strategy in the process to come. Projects come up for relicensing only every 30 to 50 years, so this is a rare opportunity to influence how the waterway is used for power generation, water supply, recreation, environmental benefits, and other uses. The Federal Power Act also provides that other entities may compete for the new license at relicensing, although the incumbent has a significant advantage in that competition if it is also applying for a new license.

If the licensee of a project that affects you indicates that it intends to apply for a new license, and that it intends to request FERC to allow it to use the TLP or ALP, you should consider whether or not you object to that request. For instance, if you have reason to think you will want to request that certain studies be performed, you might prefer the ILP. Meanwhile, if the licensee indicates it intends to use the ILP (or request the ALP), you might start thinking about whether you need to plan to commit time and resources to the stakeholder process that will soon be underway.

If you have questions, or would like additional information, please feel free to contact us to discuss.

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² *Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing* at 72, FERC.gov (Aug. 2004), available at http://www.ferc.gov/industries/hydropower/gen-info/handbooks/licensing_handbook.pdf.

³ Hydroelectric Licensing Under the Federal Power Act, Order No. 2002, 68 Fed. Reg. 51,070, 51,072 (Apr. 25, 2003), FERC Stats. & Regs. ¶ 31,150, P 14 (2003), *clarified*, Order No. 2002-A, 69 Fed. Reg. 5268 (Feb. 4, 2004), 106 FERC ¶ 61,037 (2004).