

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

June 17, 2015

The Honorable Ed Whitfield, Chairman  
Subcommittee on Energy and Power  
Committee on Energy and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, D.C. 20515

Dear Representative Whitfield:

Thank you for the opportunity to appear before the Subcommittee on Energy and Power on Wednesday, May 13, 2015. Attached are my responses to the Supplemental Questions for the Record.

Sincerely,

A solid black rectangular redaction box covering the signature of Ann F. Miles.

Ann F. Miles  
Director, Office of Energy Projects

**Additional Comments for the Record**  
**Ann F. Miles**

**The Honorable Ed Whitfield**

1. You state on page 16 of your written testimony: "It would be a significant change if the Commission, rather than the land-managing agencies, were to decide if conditions imposed by those agencies adequately protected reservations. I do not support this change."

**A. Your statement suggests that the discussion draft requires the Commission to decide if an agency's 4(e) condition is adequate. Assuming the intent of the discussion draft is not to require the Commission to evaluate the agency's condition, but simply to decide if an applicant or other party's proposed alternative condition is equal to or better than the level of protection established by the agency in its 4(e) condition, would you still oppose this provision in the discussion draft? If so, why?**

Answer: The agencies that have been tasked by Congress to manage federal lands are in a strong position to assess whether proposed alternative conditions would provide the same level of protection to the lands they manage as the conditions that the agencies have proposed, and I am not sure that it would be helpful for such a judgment to be made by the Commission. However, the Commission is required by the Federal Power Act (FPA) to balance all aspects of the public interest. In its environmental analysis, the Commission independently evaluates the benefits and costs of all proposed, recommended, and required measures, including federal agency conditions filed under sections 4(e) and 18 of the FPA and conditions included in water quality certifications issued by states under section 401 of the Clean Water Act (CWA). Accordingly, if the draft were to be clarified to the effect that, in making decisions on whether and/or what conditions to include in a license, the Commission has the authority to require an alternative condition, including one developed by Commission staff, in lieu of an agency condition imposed under federal law, I would support that revision.

**B. Do you believe that federal land management agencies are better qualified than FERC to determine if a proposed alternative condition would cost less or improve electric generation compared to an agency's condition, or would you say that FERC is better qualified to make these determinations?**

Answer: I believe that the Commission is qualified to make these determinations and does so as to all alternatives that it considers in its environmental documents. Federal land management agencies should be able to make these determinations, whether based on the Commission's environmental document or their own analysis.

**C. Isn't it true that Section 4(e) of the Federal Power Act requires FERC, not the land management agency, to determine whether a project will be interfere or be inconsistent with the purpose of a federal reservation? And in making that assessment, haven't courts held that FERC is required to independently evaluate a reservation's purposes?**

Answer: Yes. Section 4(e) of the FPA provides that the Commission can issue a license for a project located within a federal reservation only if it finds that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and the courts have held that the Commission must make that determination independently. Pursuant to the Supreme Court's decision in U.S. v. New Mexico, these purposes are watershed protection and timber production.

**D. You also say in your testimony that "the Commission staff, in its NEPA review, regularly assesses the adequacy of all environmental measures proposed, recommended, or required." Do you agree that FERC is fully capable of assessing the levels of environmental protection provided by various, alternative measures? If not, why not?**

Answer: Yes.

**2. On page 17 of your testimony, you suggest that the trial-type hearing procedures be eliminated from the Federal Power Act in favor of dispute resolution processes laid out in the Commission's regulations, the Commission's Dispute Resolution Service, and existing hearing opportunities.**

**A. How many times since 2005 has the Commission referred a dispute under Section 33 of the Federal Power Act over a Section 4(e) condition or Section 18 fishway prescription to its Dispute Resolution Service?**

Answer: None. However, since 2005, the Dispute Resolution Service (DRS) has received 158 inquiries about hydropower matters. Most were referred to other Commission Offices for response; however, sixteen of the inquiries stayed in DRS and were resolved through the Alternative Dispute Resolution Process.

**B. How many times since 2005 has the Commission set a dispute over material facts in a hydroelectric license proceeding for a trial-type hearing before a FERC Administrative Law Judge? How many times has the Commission denied a request for trial-type hearing during this period?**

Answer: The Commission has not ordered a trial-type hearing before an Administrative Law Judge in a hydroelectric licensing proceeding since 2005. I am not aware of how many times such a hearing has been requested, but I do not believe that it has been often.

**C. Since the Commission staff is not required to be a party to the Section 4(e) and Section 18 trial-type hearings, assigning the hearings to FERC Administrative Law Judges would not create a substantial additional workload and increased administrative costs for the Office of Energy Projects, correct?**

Answer: Not necessarily. The Commission's environmental, engineering, and legal staffs would likely be asked to provide significant technical assistance to administrative law judges assigned to these cases. Also, the Commission itself might be called upon to resolve procedural issues, as well as consider requests for rehearing of the results of trial-type hearings, which could occupy substantial staff time.

**Wouldn't any administrative costs associated with the hearings be recovered from licensees through FERC annual charges?**

Answer: Yes, but because the Commission recovers its costs through general charges to regulated entities, entities that did not request trial-type hearings would ultimately be charged for a share of the costs caused by those that did request hearings.