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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Power and Light Company

Project No. 935

ORDER RESOLVING FUNDING FOR WASHINGTON
DEPARTMENT OF GAME POSITIONS
(Issued March 26, 1987)

On October 16, 1984, the Pacific Power and Light Company (PP&L), licensee for the Merwin Project, FERC No. 935, requested that the Commission decide the issue of funding of Washington Department of Game (WDG) positions required to monitor fish and wildlife programs at the project, pursuant to article 53. Article 53 required the licensee to continue to negotiate with WDG on their request for one full-time fish biologist and one full-time wildlife biologist to administer and monitor the programs under articles 48 (wildlife mitigation), 51 (resident fish mitigation), and 52 (boat access). PP&L conducted unsuccessful negotiations with WDG prior to referring the matter to the Commission. WDG filed comments on January 25, 1985.

PP&L believes that less than 30 days of funding per year is necessary and is willing to pay for all foreseeable WDG activities associated with the project. WDG believes that two full-time positions are necessary for the life of the project to do studies to determine the success of the mitigative program and to design program modifications as necessary.

WDG has not provided sufficient justification for the funding of two full-time positions for up to 30 years. Many of the monitoring needs recommended by WDG, such as eagle telemetry, are beyond the scope of an acceptable monitoring plan and would not be necessary for the life of the project. In addition, PP&L has demonstrated competent management of its wildlife lands and detailed documentation of wildlife management activities, thus lessening the role of WDG.

Because of the importance of the resources involved and the magnitude of the mitigative effort, careful monitoring and evaluation of the fish and wildlife programs is necessary. Sufficient funding should be provided during a 5-year initial transition and evaluation period. This period is especially important because it includes the construction and initial operation of the fish hatcheries and early phases of the wildlife mitigative plan. We believe that one full-time fish and wildlife biologist would be sufficient during this initial period. After the initial period, a reduced level of funding for long-term monitoring is appropriate.

The Director orders:

- (A) PP&L shall fund annually, for a period of 5 years, one full-time WDG position to monitor the project's fish and wildlife program. For the 5 years following the initial 5-year period, PP&L shall fund one WDG position for a period not to exceed 6 months of funding.
- (B) Should funding of positions be required beyond the 10-year period provided for in paragraph A, PP&L shall negotiate at that time with WDG to arrive at an acceptable level of funding. In the event that a mutual agreement cannot be reached, the Commission reserves the right to establish the level of funding required for the duration of the license term.
- (C) This order is issued under authority delegated to the Director and is final unless appealed to the Commission under Rule 1902 within 30 days of this order.


William C. Wakefield II
Acting Director, Division
of Project Management

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

30 FERC ¶62,079

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JAN 29 1985

Pacific Power and Light Company) Project No. 935-014

ORDER AMENDING LICENSE

(Issued January 23, 1985)

On October 6, 1983, a new license for the Merwin Project No. 935 was issued to Pacific Power and Light Company (Licensee) 1/. Article 49, Part VII. C. of that license directs the Licensee to complete biological and in-stream flow studies and to review flow requirements with the Washington Departments of Fisheries and Game by December 31, 1984, in the interest of more closely matching project flow regulation to the respective needs of the fishery resource, recreation, and power.

On December 17, 1984, the Licensee filed an application for an extension of time until March 1, 1985, to complete the requirements of Article 49. 2/ The Licensee states that the required studies are expected to be complete by December 31, 1984, but that additional time will be required for review by all parties. The Licensee has contacted the Washington Departments of Fisheries and Game and states that those departments support its request for more time to complete the review. This order grants the requested extension.

It is ordered that:

Article 49, Part VII. C. of the license for Project No. 935, issued October 6, 1983, is amended to read as follows:

1/ 25 FERC ¶61,052

2/ Authority to act on this matter is delegated to the Director, Office of Hydropower Licensing, under §375.314 of the Commission's regulations, 49 Fed. Reg. 29,369 (1984) (Errata issued July 27, 1984), (to be codified at 18 C.F.R. §375.314). This action may be appealed to the Commission by any party within 30 days of the issuance date of this order pursuant to Rule 1902, 18 C.F.R. §385.1902 (1983). Filing an appeal and final Commission action on that appeal are prerequisites for filing an application for rehearing as provided in Section 313(a) of the Act. Filing an appeal does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically directed by the Commission.

Article 49, Part VII. C. Biological and in-stream flow studies necessary to determine the flow requirements of the Lewis River for the enhancement of the fishery resource below Merwin Dam are incomplete as of November 1982. When such studies are complete, or by March 1, 1985, this Article shall be reviewed by the Washington Departments of Fisheries and Game together with the Licensee to determine whether or not any modification should be made to the flow regulation below Merwin in the interest of more closely matching such flow regulation to the respective needs of the fishery resource, recreation, and power.



Quentin A. Edson
Director, Office of
Hydropower Licensing

25 FERC 161, 052

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 191

Pacific Power & Light Company)
Project No. 935-000, 002
003 and 004

Clark-Cowlitz Joint Operating Agency)
Project No. 2791-000

OPINION AND ORDER OVERRULING OPINION NO. 88,
REVERSING INITIAL DECISION AND ISSUING
NEW LICENSE TO ORIGINAL LICENSEE

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Power & Light Company) Project No. 935-000, 002,
003 and 004

Clark-Cowlitz Joint Operating Agency) Project No. 2791-000

OPINION NO. 191

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Issued: October 6, 1983

HYDRO-ELECTRIC PROJECT
Relicensing
Municipal Preference
Public Interest
FEDERAL POWER ACT
Section 7(a)
Section 10(a)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler III, Chairman;
Georgiana Sheldon, J. David Hughes,
A. G. Sousa and Oliver G. Richard III.

Pacific Power & Light Company) Project No. 935-000, 002,
) 003 and 004
)
Clark-Cowlitz Joint Operating Agency) Project No. 2791-000

OPINION NO. 191

OPINION AND ORDER OVERRULING OPINION NO. 88,
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Project No. 935-000, et al.

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INTRODUCTION

In 1929, the Federal Power Commission issued a 50-year license under the Federal Water Power Act (FWPA) to a predecessor of Pacific Power & Light Company (PP&L), to construct, operate and maintain a hydro-electric development on the Lewis River along the common boundary between Clark and Cowlitz counties in southwestern Washington. The development was built and placed into operation, and is known today as the Merwin Project. In 1976, before the license expired, PP&L applied under the Federal Power Act (FPA) 1/ for a new license to continue to operate and maintain the development. In 1977, Clark-Cowlitz Joint Operating Agency (JOA) 2/, a "municipality" within the purview of Section 3(7) of the FPA 3/, filed a competing application for a new license to acquire and continue to operate and maintain the development, claiming a licensing preference under Section 7(a) of the FPA. 4/

1/ The Federal Water Power Act was amended in 1935 to change its name to the Federal Power Act, modify certain existing provisions substantively and designate them as Part I, and enact Parts II and III. It is customary to distinguish between the pre- and post-amendment statute by its pre- and post-amendment names in the context that the FPA, as a new statute, superseded the FWPA.

Although the license expired in 1979, PP&L is continuing to operate and maintain the development under annual licenses issued pursuant to Section 15(a) of the FPA.

2/ JOA is composed of Public Utility District No. 1 of Clark County, Washington (Clark PUD), and Public Utility District No. 1 of Cowlitz County, Washington (Cowlitz PUD), and was established in 1976 to compete for, acquire, and operate and maintain, the Merwin Project.

3/ The term "municipality" is defined in Section 3(7) to mean "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".

4/ Section 7(a) reads,

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

The Commission 5/ consolidated the applications for joint disposition. On April 28, 1983, after a hearing, an administrative law judge issued an Initial Decision finding:

1. At 40, that the economic impacts of choosing between PP&L and JOA are not "applicable, relevant, and material to a determination of the broad public interest in this proceeding", and
2. At 3, that "the plans of JOA are equally well adapted as those of PP&L to conserve and utilize in the public interest the water resources of the region."

On the basis of the latter finding, the Initial Decision concluded that JOA was entitled to a preference under the Commission's

4/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are 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.

Section 7(a) contains two preferences. The first preference, to States and municipalities, is commonly called the "municipal preference", and should be distinguished from the second preference "between other applicants".

- 5/ The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

declaratory City of Bountiful decision (Bountiful) 6/, and broke the tie by awarding the new license to JOA.

In affirming Bountiful, the Eleventh Circuit commented that much of the material on which the Commission relied was "weak". In that light, the Court gave "great deference to the Commission's statutory interpretation":

We hold that the state and municipal preference in section 7(a) of the Federal Power Act applies in all competitive relicensing cases, not just those where the original licensee is not an applicant. We further hold that the preference applies in a tie-breaker situation.

Today, in the perspective of this adversary relicensing proceeding, we have come to the conclusion that Bountiful was wrong and should be overruled. We believe that Bountiful's conclusion was legally erroneous and that States and municipalities have a relicensing preference against all adversary non-preference applicants other than "original licensees" in possession of project works. 7/ In other words, in relicensings, the municipal preference is limited to those situations in which States or municipalities, and non-preference applicants other than "original licensees" in possession of project works, ask for new mutually exclusive licenses for a hydro-electric development that is presently licensed to the "original licensee". And we also believe that Bountiful erred in a practicable sense in failing to address the relationship between Sections 7(a) and 10(a) 8/ within the scheme of the FPA.

- 6/ City of Bountiful, Utah, et al., Docket No. EL78-43, Opinion No. 88 issued June 27, 1980, 11 FERC 161,337; reh. den., Opinion No. 88-A issued August 21, 1980, 12 FERC 161,179; aff'd. sub nom Alabama Power Company, et al. v. Federal Energy Regulatory Commission, 685 F.2d 1311 (11th Cir. 1982); cert. den. (Nos. 82-1321, et al.) July 6, 1983.

- 7/ Section 4(e) of the FPA authorizes the issuance of licenses to "citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality...." In the combined contexts of Sections 4(e) and 7(a), as the latter is interpreted herein, citizens, associations of citizens and corporations that apply for licenses become "non-preference applicants", whereas States and municipalities become "preference applicants" against all "non-preference applicants" other than "original licensees" in possession of project works.

- 8/ Section 10 reads in pertinent part,

All licenses issued under this Part shall be on the following conditions:

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

As set forth in Section 10(a), the Commission's primary responsibility under Part I of the FPA has always been to license projects that, in the judgment of the Commission, will be best adapted to a comprehensive plan for beneficial public uses of waterways. Section 10(a) has been interpreted consistently by the Commission, and the courts, as requiring that judgment to be exercised in accordance with a public interest standard. 9/ Since evidence

8/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

(a) That the project adopted, including the maps plans, and specifications, shall be such as in the judgment of the Commission 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, including recreational purposes; and if necessary in order to secure such a plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

For convenience, the Section 10(a) mandate is sometimes expressed herein as the "project that is best adapted to a comprehensive plan for beneficial public uses", and the "comprehensive plan" or similar expressions extracted from Section 10(a).

9/ For example: In Calaveras County Water District, Project No. 2903, 22 FERC ¶61,257, issued March 3, 1983, the Commission said, "Under Section 10(a) of the Federal Power Act, the Commission is obligated to determine whether the District's project is in the public interest."

In Idaho Power Company, Project No. 2930, 21 FERC ¶61,181, issued November 26, 1982, the Commission said, "Our obligation under Section 10(a) of the Federal Power Act is to consider all issues relevant to the public interest...."

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

of economic impacts is competent, material and relevant under Section 10(a) to a licensing action, infra, and since Bountiful failed to address the relationship between Sections 7(a) and 10(a), the Initial Decision erred in holding that evidence of economic impacts is not "applicable, relevant, and material to a determination of the broad public interest in this proceeding", including Section 10(a), as well as Section 7(a).

9/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

In Kings River Conservation District, Project No. 2890, 18 FERC ¶61,264, issued March 22, 1982, the Commission said, "[W]e believe that justifying the need for a hydroelectric project on the basis of cost savings from oil displacement is a legitimate objective in the public interest within the meaning of Section 10(a) of the Federal Power Act."

In Public Utility District No. 1 of Snohomish County and City of Everett, Washington, Project No. 2157, 17 FERC ¶61,056, issued October 16, 1981, the Commission said, "In approving the Licensees' application the Commission must determine that the proposal meets the public interest standard of Section 10(a) of the Federal Power Act."

In Georgia Power Company, Project No. 2336, 10 FERC ¶62,164, issued February 26, 1980, the Commission said, "It would be contrary to the public interest and the obligation to ensure that the project continues to meet the standard of Section 10(a) of the Federal Power Act to approve prospectively such an unknown and indefinite lease of project lands."

These statements go back at least as far as Southern California Edison Company, Project No. 1930, 8 FPC 364, issued November 17, 1949, wherein the Commission said, at 386, "Our responsibility under section 10(a) is to protect the public interest.... In granting this license under the authority of Congress we are required, as its agent, to control the use of the navigable waters. It is only by such control that we may assure adaptation of the project to all public purposes...."

In Namekagon Hydro Company v. Federal Power Commission, 216 F.2d 509 (7th Cir., 1954), the Seventh Circuit upheld the denial of a license on the ground that the unique recreational value of a waterway outweighed its power value, stating, at 512,

Under Sect. 10(a) of the Act it was the Commission's responsibility to protect the public interest. The Act requires that the Commission exercise its judgment.

See note 30, at 33-34, for additional cases.

Accordingly, we are overruling Bountiful, and, for reasons to be addressed, we are also reversing the Initial Decision and issuing a new license to the original licensee, PP&L.

BOUNTIFUL IS OVERRULED

The Relative Bountiful and Merwin Perspectives

The Bountiful Commission described the limited scope of its declaratory inquiry (Op. 88, at 10), as follows:

[T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

The Commission added (Op. 88, at 10) that it was not deciding any factual issues under Section 7(a) pertaining to specific projects, nor whether any particular applicants were "entitled" to the municipal preference, if it was applicable.

Today, in Merwin, we are required to decide the kinds of issues that the Bountiful Commission sought to avoid in framing that proceeding and decision. A municipality and a non-preference applicant are asking for new mutually exclusive licenses for a hydro-electric development that is presently licensed to the non-preference applicant. We have a factual record, and must decide factual issues under Section 7(a) and other provisions of the FPA. In deciding an applicant's entitlement to a preference (as distinguished from the applicability of the municipal preference to a class of applications, as in Bountiful), we must also decide public interest issues within the limits delegated by Congress in 1920, as later amended. And we must select a licensee.

In this changed perspective, we have concluded that Bountiful erred legally and should be overruled.

It could be argued that this part of the decision overruling Bountiful is gratuitous and obiter dictum because the Commission has found unanimously that the new Merwin license should be issued to PP&L. In other words, it does not matter whether the municipal or second preference provision of Section 7(a) is applied because the Commission is in full agreement that the plans of PP&L are better adapted than those of JOA and, consequently, that there is no tie.

We could not agree with such an argument. Our position is that the Bountiful decision was wrong, that the second preference provision is the applicable one when the original licensee in possession of the project works is one of the adversary applicants, and that we should overrule Bountiful so that the correct preference provisions will be applied in future relicensing proceedings. Applications raising eight adversary relicensing situations are now pending.

Furthermore, JOA supports the proposition in the Initial Decision, at 38, that the new Merwin license cannot be issued to PP&L without first giving JOA an opportunity to cure any deficiencies in its plans "found by the Commission". We do not reach that question in view of our position that the second preference provision is the applicable one, and the fact that the language on which the Initial Decision and JOA rely is contained in the municipal preference provision. If we are wrong, however, as to the second preference provision, and the municipal preference provision is determined to be the applicable one, our alternative position, infra, at 36-38, is (1) that the opportunity to cure deficiencies is not one to cure deficiencies "found by the Commission" after a hearing, (2) that JOA has had the opportunity to cure deficiencies that is provided by the municipal preference provision, and (3) that it would be absurd to provide an opportunity to cure incurable deficiencies, such as the economic implications of allocating the benefits of particular water resources to the customers of one applicant or the other. Our alternative position necessarily is also the position of our colleagues, Commissioners Sheldon (who was a member of the Bountiful Commission) and Hughes, who stand by the Bountiful decision in issuing the new Merwin license to PP&L without giving JOA the opportunity that it claims.

The rationale of our alternative position necessitates an understanding not only of the legislative amendments that brought the controversial language into Section 7(a), but also both preference provisions of Section 7(a). In the light of that understanding, our decision to overrule Bountiful in the course of issuing the new Merwin license to PP&L without giving JOA the opportunity that it claims, is neither gratuitous nor obiter dictum.

The Commission Can Overrule Bountiful

In the light of the following court decisions, we have also concluded that there is no legal impediment to the Commission's overruling its erroneous Bountiful decision.

In Chisholm, et al. v. Federal Communications Commission, 538 F.2d 349 (D.C. Cir. 1976), cert. den. sub nom. Democratic National Committee v. Federal Communications Commission, 429 U.S. 890 (1976), the District of Columbia Circuit upheld a declaratory opinion and order of the Federal Communications Commission that overruled a statutory interpretation of over ten years' duration, stating, at 364,

[A]n administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding. See, e.g., Automobile Club v. Commissioner of Internal Revenue, 353 U.S. 180, 77 S.Ct. 707, 1 L.Ed.2d 746 (1957). See also American Trucking v. AT&S F.R. Co., 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847, 860 (1967); NLRB v. A.P.W. Product Co., 316 F.2d 899 (2d Cir. 1963).

It is, of course, incumbent upon an agency reversing its own policy to provide "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App.D.C. 175, 454 F.2d 1018, 1026 (1971).

In Phillips Petroleum Company v. Federal Power Commission, 556 F.2d 466 (10th Cir., 1977), the Tenth Circuit affirmed a Commission decision overruling a prior decision, stating, at 470, that the Commission acted properly and "was not bound by its earlier error."

In Alabama Power Company v. Federal Energy Regulatory Commission, supra, the Eleventh Circuit was not impressed with the materials on which the Commission relied in Bountiful, and, in that light, gave "great deference to the Commission's statutory interpretation." It is possible, therefore, that the Eleventh Circuit was misled inadvertently by the Commission's Bountiful

decision, which we now realize was erroneous. With respect to the denial of the petitions for a writ of certiorari to the Eleventh Circuit, Justice Frankfurter said in Maryland v. Baltimore Radio Show, Inc., et al., 338 U.S. 912 (1950), at 919,

Inasmuch ... as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's view on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated. [10/]

In other words, the Supreme Court has not ruled on the merits of the Eleventh Circuit's affirmance of the Commission's erroneous Bountiful decision.

And, in Sprague v. Woll, 122 F.2d 128 (7th Cir., 1941), cert. den. 314 U.S. 669 (1941), the Seventh Circuit affirmed a District Court holding that the Interstate Commerce Commission, if it concluded that its original determination [in reliance upon a Supreme Court decision on the same question] was erroneous, had the power to correct its error." The Seventh Circuit said, at 131, that the decision of the Supreme Court did not bind the Interstate Commerce Commission as to subsequent determinations. 11/

10/ See, also, Supreme Court Practice, Fifth Edition, by Stern and Gressman, at 353-360, and the cases cited therein.

11/ Chronologically, the Interstate Commerce Commission (ICC) determined that the Chicago North Shore & Milwaukee Railroad Co. (North Shore) was a "street, suburban, or interurban electric railway which is not operated as part of a general steam railroad system of transportation" within the purview of Section 20a of the Interstate Commerce Act and, therefore, that the North Shore was exempted by that provision from obtaining the ICC's authorization for the issuance of securities. Ultimately, the ICC's determination of the North Shore's status was upheld by the Supreme Court in United States v. Chicago North Shore & Milwaukee Railroad Co., 288 U.S. 1 (1933). In 1936, the ICC determined that the North Shore was a "street, interurban, or suburban electric

While the statutory interpretation that was overruled in Chisholm was of over ten years' duration, the declaratory Bountiful interpretation is relatively new and is being overruled herein in the first adversary proceeding in which it has been applied. On the other hand, our present interpretation is the same as the Commission's 1967 interpretation that was submitted to Congress in connection with the 1968 amendments to the FPA. See Op. 88, at 32-39. Unfortunately, the rationalization apparently was not reduced to a written form, which we will now undertake in conformity with the above-quoted portion of Chisholm.

The Municipal Preference Revisited

We turn, first, to the licensing scheme of the FPA, which is not in dispute. Section 4(e) authorizes the Commission to issue licenses for the development of water power in bodies of water over which Congress has jurisdiction, or upon the public lands and reservations of the United States. Section 6 limits the maximum term of licenses to fifty years, without provision for renewal. Therefore, a licensee that wants to remain as such beyond an initial period of fifty years is required by Section 15(a) to apply for a "new license". In the event that a "new license" is not issued by the time an "original license" expires, the Commission avoids a hiatus of ownership and control by issuing an "annual license to the then licensee under the terms and conditions of the original license", pursuant to the proviso of Section 15(a).

11/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

electric railway ... operating as a part of a general steam-railroad system of transportation" within the purview of the Railway Labor Act and, therefore, that the North Shore was not subject to that Act. In so concluding, the ICC was influenced by the Supreme Court's 1933 decision and the fact that the claimed exemption was unopposed. Thereafter, the ICC was requested to determine the North Shore's status under the Railroad Retirement Act and the Carriers Taxing Act. In 1938, the ICC, on its own motion, reopened its determination under the Railway Labor Act, received additional evidence, and found that the North Shore was not a street, interurban, or electric railway within the meaning of the exemption provisos of the three statutes, and that the North Shore was part of the general steam-railroad system of transportation. The Seventh Circuit held that the ICC could come to a different conclusion as to the North Shore's status, and did so properly, notwithstanding the Supreme Court's 1933 decision as to the North Shore's status under a substantively identical statutory provision.

Section 7(a) is the provision of the FPA that contains the standards to be applied in selecting between or among adversary applicants for preliminary permits, and initial and subsequent licenses. The first (or municipal) preference of Section 7(a) directs the Commission to give preference to applications of States and municipalities "in issuing licenses to new licensees under section 15 hereof". Accordingly, the municipal preference refers immediately to Section 15(a) to ascertain what is said about issuing licenses to "new licensees":

SEC. 15. (a) That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

As is evident from the text, Section 15(a) authorizes the Commission to issue a new license to the "original licensee" or a "new licensee". In context, the "original licensee" is an applicant-licensee in possession of the project works, and a "new licensee" is any other applicant seeking authority to acquire the project works.

In the light of the reference in Section 7(a) to Section 15(a), the plain meaning of "new licensees" in Section 7(a) is the same as in Section 15(a). In other words, the municipal preference of Section 7(a) directs the Commission to give preference to applications of States and municipalities in issuing licenses to applicants other than "original licensees" in possession of the project works.

Secretary LANE. I think that was in one of the bills, was it not? [13/]

The CHAIRMAN. It is not in this one.

Bountiful traces through Congress the various changes to the first paragraph of Section 7 of the Administration Bill, and states as to each that there was no expressed intent to eliminate the municipal preference against "original licensees" that was contained in the Administration Bill, as introduced. Since the asserted preference was said in Bountiful to be a silent one that existed because of the absence of qualifying words, the asserted preference obviously wouldn't have been addressed by members of Congress, such as Chairman Sims, who failed to discern the broad scope attributed to the original language. And, since Bountiful concedes (Op. 88, at 25) that the particular language "made it appear that the municipal preference applied only to the issuance of preliminary permits and some initial licenses," there is no substance to the rationale that there was no expressed intent to eliminate the municipal preference against "original licensees", in the Administration Bill.

The Administration Bill, as amended, was referred to a conference on September 30, 1918. The report of the conference was introduced in the House on February 26, 1919, and was passed. The Senate, however, filibustered, and the bill died. Another Committee on Water Power was formed in the House in the 66th Congress, and the bill as agreed to in conference in the previous session was introduced as H.R. 3184. No further hearings were held, and, on June 24, 1919, that bill was reported without change to the Committee of the Whole House.

On the following day, June 25, 1919, Gifford Pinchot (Pinchot), who was then President of the National Conservation Association, wrote to Senator Jones, Chairman of the Committee on Commerce, and a friend of private power, proposing numerous changes to Senator Jones' water power bill, S. 152, in which Section 7 was identical to Section 7 of the bill reported out of conference in the previous session. Section 7 stated in pertinent part,

That 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 municipalities....

13/ See Op. 88, at 16, for a brief discussion of the Adamson, Ferris, Myers and Shields bills that immediately preceded the Administration Bill.

Borrowing language from Senator Lenroot's S. 1192, which was a pro-conservationist revision of the water power bill reported out of conference the previous session, Pinchot suggested to Senator Jones:

The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word "issued" in line 11, page 12, of your bill, the words, "and in issuing licenses to new licensees under Sec. 15 hereof", or word of like import.

On September 12, 1919, the Committee on Commerce reported the House-approved bill to the Senate with amendments in which the first paragraph of Section 7 was changed in the exact manner suggested by Pinchot.

At this point in the analysis, the Bountiful opinion turns to the language of the first paragraph of Section 7 just prior to the amendment, concludes that Section 7 contained a silent relicensing preference for States and municipalities, 14/ and reasoned that the Pinchot-suggested amendment merely clarified Section 7 so that the municipal preference therein would "surely" -- using Pinchot's word -- apply to relicensings. We agree with Bountiful that the significance of the Pinchot-suggested amendment should be judged in the light of the language that was changed. But we believe, contrary to Bountiful, that Section 7 did not, immediately prior to the amendment, contain a relicensing preference for States and municipalities. That amendment gave them a limited relicensing preference.

Turning to the pre-amendment language, we are constrained to concede that the issuance of a license "where no preliminary permit has been issued" conceivably might be construed as including a "new license". Since preliminary permits are issued only for

14/ But, as the Supreme Court said in Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4 (1942), at 11, "The search for significance in the silence of Congress is too often the pursuit of a mirage." And, in Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980), at 592, "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."

proposed water power developments, and "new licenses" are issued only for existing developments, no "new license" would ever follow a preliminary permit and, therefore, all "new licenses" arguably qualify as "licenses where no preliminary permit has been issued". Such an interpretation is too strained.

Furthermore, if the pre-amendment language included "new licenses", entitlement to the preference literally would have depended on whether the existing water power development was initially permitted, and then licensed, or simply licensed without a prior permit. It would be absurd to believe that only the latter would qualify as new "licenses where no preliminary permit has been issued".

Prior to the amendment suggested by Pinchot, the first paragraph of Section 7 did not contain a relicensing preference for States and municipalities because the language appears to have been limited to applications for preliminary permits and initial licenses only. It is beyond dispute that Section 7 gave States and municipalities a permitting preference for proposed water power developments. And it is also beyond dispute that Section 5 gave preliminary permittees a licensing preference for proposed developments, even against States and municipalities that had not sought the permitting preference. As a result, it was necessary in Section 7 to exclude from the municipal preference applications for initial licenses when preliminary permits had been issued, which the pre-amendment language did. As a result, the pre-amendment language appears to have been limited to preliminary permits and some initial licenses, as Bountiful concedes, supra.

It may be true that the proponents of the Administration Bill intended to include a relicensing preference for States and municipalities, and we do not dispute that the language of that bill was broad enough to include such a preference, albeit in silence. But the language of the Administration Bill was changed several times in the 20 months between its introduction and the consideration of the Pinchot-suggested amendment to a successor bill by another Congress. And Bountiful concedes that particular language changes did not always accomplish the stated purposes of the changes. As a result, any relicensing preference for States and municipalities that may have been contained in the Administration Bill as introduced was amended out of the bill, perhaps inadvertently, by the time Pinchot suggested his amendment to Senator Jones. The Committee on Commerce amended the bill as it appeared in September 1919, rather than what the Administration Bill may have said 20 months earlier in January 1918. Accordingly, we interpret the

Pinchot-suggested amendment as providing a limited relicensing preference for States and municipalities, where none had existed before. Adversary relicensings between States or municipalities, and "original licensees" in possession of project works, were thereby left to the Commission's judgment under the "best adapted" standard of the second preference of Section 7.

Bountiful gives great weight to the statement of Congressman Lee on May 4, 1920, when the FWPA was passed by the House, that

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period.

Congressman Lee didn't say that the bill gave a preference to States and municipalities over any other applicant in receiving new licenses. He said that the bill gave a preference over any other applicant in acquiring properties of another licensee. Since "original licensees" in possession of project works that apply for new licenses do not acquire properties of another licensee if they receive the new license, Congressman Lee obviously was not speaking of a preference against "original licensees". He said that States and municipalities have a relicensing preference over any other applicant -- meaning, other than the "original licensee" -- in acquiring properties of another licensee -- meaning, properties of the "original licensee" -- at the end of a license period. And that is consistent with our interpretation that States or municipalities have a relicensing preference against all adversary non-preference applicants other than "original licensees" in possession of project works. 15/ Indeed, Bountiful

15/ It is also consistent with the part of Section 15(a) that speaks of new licensees paying the amount, and assuming the contracts, that the United States would pay and assume, "before taking possession of such project or projects". If Congressman Lee had intended the result in Bountiful, he would have said, in substance,

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fails to cite any statement in the legislative history of the FWPA that indicates, unambiguously, that the water power bill contained a State and municipal relicensing preference against an "original licensee". 16/

Contrary to Bountiful (Op. 88, at 51), there is nothing absurd about a State or municipal relicensing preference that is limited to strangers to the original license (new licensees) and, consequently, excludes "original licensees". Such a preference is not limited to worthless water power developments for which "original licensees" wouldn't reapply for licenses, and "new licensees" wouldn't compete. An "original licensee" might be a manufacturing concern that fails, or decides to relocate elsewhere, for reasons not associated with the worthiness of the hydro-electric development, in which case preference and non-preference applicants may become adversaries for acquiring the hydro-electric properties of a perfectly valuable development. Or, an "original licensee" may be unwilling to accept the terms and conditions of a new license, in which case preference and nonpreference applicants may also become adversaries for acquiring the properties of a worthwhile development.

16/ The only reasonably contemporaneous unambiguous statement to that effect of which we are aware is the obiter dictum statement of Judge Clayton in Alabama Power Co. v. Gulf Power Co., 283 F. 606 (M.D. Ala., 1922), at 617:

In further regard to the scope of the [FWPA], the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that if the United States does not at the end of such period take over the project the state or municipality under section 7 is given the preferential right over the original lessee to a renewal of the license.

Judge Clayton had been a member of Congress until 1914, four years before the Administration Bill was introduced and six years before the amended bill became the FWPA. It should be observed that he spoke of the original "lessee", a term used in earlier water power bills, that he called the Federal Water Power Act the "Federal Power Commission Act" at 613, and that he also called the Federal Power Commission the "Water Power Commission" at 620. These errors suggest confusion between the FWPA as finally signed and earlier legislative proposals, and, under such circumstances, we are not persuaded by his statement.

Nor is there anything absurd about the absence of a relicensing preference for States and municipalities that are "original licensees". Bountiful merely assumes that Congress intended the municipal preference of Section 7(a) to cover all licensing situations in which States and municipalities compete against citizens, associations of citizens, and corporations. But, as is stated in Senate Report No. 180, 66th Congress, 1st Session, dated September 12, 1919, at 3, "This bill proceeds on the theory of private development with ultimate public ownership possible." The history of the FWPA establishes time and time again that private capital was ready to develop the nation's water resources, whereas public capital was not. As a result, it should not be surprising that Congress did not focus on the possibility of a State or municipality becoming an "original licensee". And it is not absurd for a State or municipal "original licensee" to prevail in an adversary relicensing if it continues to have the best adapted plan for beneficial public uses of the waterway, just as a non-preference "original licensee" should prevail if it continues to have the best adapted plan.

Section 7(a) was not amended in 1968 in the light of such an interpretation. As early licenses approached their expirations in the 1960's, the Commission was asked by the Chairman of the Senate Commerce Committee to determine whether any amendments to the relicensing provisions were needed. 113 Cong. Rec. 26,185 (1967). The Commission responded that the municipal preference of Section 7(a) did not apply against "original licensees" and, consequently, recommended that Congress leave Section 7(a) unchanged so that relicensing decisions involving "original licensees" would be based without preference on the merits of relicensing applications. As a result, Congress amended some of the relicensing provisions, but left Section 7(a) intact. 17/

17/ See letters from the Commission's Chairman to the Vice President and the Speaker of the House, and the Chairman's testimony before the pertinent Committees. Hearings on S. 2445 before the Senate Commerce Committee, 90th Cong., 2d Sess. at 6, 13-14, 19 (1968); Report of the House Interstate and Foreign Commerce Committee, H. Rep. No. 1643, 90th Cong., 2d Sess. at 8 (1968); Hearings on H.R. 12608 before the House Comm. on Interstate and Foreign Commerce at 19, 23 (1968).

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Nor is there anything absurd about the absence of a relicensing preference for States and municipalities that are "original licensees". Bountiful merely assumes that Congress intended the municipal preference of Section 7(a) to cover all licensing situations in which States and municipalities compete against citizens, associations of citizens, and corporations. But, as is stated in Senate Report No. 180, 66th Congress, 1st Session, dated September 12, 1919, at 3, "This bill proceeds on the theory of private development with ultimate public ownership possible." The history of the FWPA establishes time and time again that private capital was ready to develop the nation's water resources, whereas public capital was not. As a result, it should not be surprising that Congress did not focus on the possibility of a State or municipality becoming an "original licensee". And it is not absurd for a State or municipal "original licensee" to prevail in an adversary relicensing if it continues to have the best adapted plan for beneficial public uses of the waterway, just as a non-preference "original licensee" should prevail if it continues to have the best adapted plan.

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Next, we turn to the effects of interpreting "new licensees" in Section 7(a) one way or the other. Section 7(a) describes two preferences, or standards, to be applied by the Commission in choosing between or among adversary applicants in four areas of potential competition for preliminary permits and licenses, as follows:

- (1) Preliminary permits
- (2) Initial licenses not associated with outstanding preliminary permits
- (3) New licenses, when the adversaries necessarily would become "new licensees"
- (4) New licenses, when the adversaries include "original licensees"

The four areas cover the entire possible field of competition with the exception of initial licenses associated with outstanding preliminary permits. That area was intentionally omitted because preliminary permits are issued for the sole purpose of maintaining priority of application for licenses, and because permittees are to receive such priority if any license is issued and if they comply with the terms of their permits.

If the plans of States or municipalities are better adapted than, or as well adapted as, the plans of adversary citizens, associations of citizens, or corporations, the Commission is directed by the first preference of Section 7(a) to give States or municipalities preference with respect to (1) preliminary permits, (2) initial licenses not associated with outstanding preliminary permits, and (3) new licenses -- but only when the adversary applicants necessarily would become new licensees. On the other hand, "as between other applicants", or, stated another way, as between (a) States or municipalities inter se, and (b) citizens, associations of citizens, or corporations inter se, the Commission is authorized (but not required) by the second preference of Section 7(a) to give preference with respect to (1) preliminary permits, (2) initial licenses not associated with outstanding preliminary permits, and (3 and 4) new licenses, irrespective of whether the adversary applicants necessarily would become "new licensees", or include "original licensees". The Commission is also authorized (but not required) by the second preference of Section 7(a) to give States or municipalities adversary to citizens, associations of citizens, or corporations, preference with respect to (4) new licenses -- but only when the adversary applicants include "original licensees".

Our interpretation covers all of the possible combinations of adversaries in all of the areas of potential competition, and provides a standard for the Commission to apply in every possible permitting and licensing situation, with the exception of the one area of competition intentionally excluded. The Commission can apply either the "equally well adapted" or the "best adapted" standard to the issuance of all (1) preliminary permits, (2) initial licenses not associated with outstanding preliminary permits, (3) new licenses when the adversaries necessarily would become "new licensees" and (4) new licenses when the adversaries include "original licensees", depending on whether any applicants are States or municipalities, and, in some cases, "original licensees". There will be no regulatory gaps in any situation, except as intended; and the claim to the contrary in Bountiful (Op. 88, at 52), is simply wrong.

One of the principal purposes of the FWPA was to provide a relationship between Government and industry in which private capital would begin immediately to develop our nation's water resources. Congress realized that some provision would have to be made for those developments upon the expiration of the initial 50-year terms. As Secretary of the Interior Franklin K. Lane testified, before the Committee on Water Power, 18/

... We need development, and when a plant has been going for 50 years you can not throw the people who are dependent upon it and the industries into the air. It has got to continue to run. If it is a project that we [the Government] want ... we will be able to take it under this or any other bill that I have seen.

* * *

... [I]t must be recognized that there may be some plants that the Government itself will not want to take over, that it will not be advisable for the Government to take over, and care should be exercised so that those plants can be allowed to continue in operation under certain kind[s] of reasonable rule or regulation or provision by which the people

18/ Hearings before the Committee on Water Power, 65th Congress, 2nd Session, at 454-455.

who have put the money in and who are operating it under the Government lease or other people can have it, and that its operation will be continuous.

The Secretaries of the Interior, Agriculture and War caused the Administration Bill to be drafted. As Secretary of War Newton D. Baker testified, before the Committee on Water Power, 19/

The purpose of this bill was to have a 50-year term, and at the end of the 50-year term ... the Government was to have the three options of either taking over the property, granting it to a new licensee, or regranting it to the original licensee or his successors in interest. The intention of the bill was to make those three options identical, so far as the financial obligation was concerned. If the Government took it over, it would pay X dollars; if it granted it to a new licensee, the new licensee would pay X dollars; if it regranting it to the original licensee, it would ascertain and fix, as a new starting point for his net investment, X dollars, the same number of dollars in each instance.

Our interpretation is consistent with the intent of treating the three alternatives as being identical, not only with respect to the financial obligation, but also as to the selection of the particular alternatives. As discussed in the next section, Congress delegated to the Commission the initial authority and responsibility to choose among the three alternatives on the basis of public interest considerations. Bountiful, on the other hand, does not treat the three alternatives as being identical because it provides a preference in relicensings against "original licensees".

The fact that the FWPA provided financially identical alternatives indicates that Congress did not intend the wholesale transfer of hydro-electric properties from private to municipal hands that some now envision under Bountiful. Congress obviously foresaw some transfers, principally to the United States. But, Congress could not and did not foresee the near constant inflation spanning the past half-century that has triggered the preference controversy.

As is discussed in Bountiful (Op. 88, at 4), the preference controversy is bottomed on the bargain cost-related (rather than value-related) price embodied in the "net investment" concept of

19/ Id., at 680-681.

the FPA, that the United States or a new licensee would pay to the original licensee before taking possession of a hydro-electric development. The "net investment" concept was designed in a period of wartime inflation when it was generally believed that inflation was a cyclical and temporary matter, to be followed by deflation. Thus, the respective proponents of a cost-related or value-related takeover or relicensing price were ideologically reversed from the situation today. See 42 FPC, at 334. See, also, Justices Brandeis' and Holmes' contemporaneous dissenting argument favoring a cost-related rate base in State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U.S. 276 (1923), wherein they said, at 302, that a value-related rate base "may subject investors to heavy losses when the high war and post-war price levels pass -- and the price trend is again downward."

Having lived through all or a significant part of the period covered by the table below 20/ the members of Congress in 1920

20/ The following tabulation is compiled from the General Price Index (which we note officially) on pages 231-2 of the 1949 edition of Historical Statistics of the United States, 1789-1945, prepared by the Bureau of the Census, United States Department of Commerce:

GENERAL PRICE INDEX (1913 = 100)		
1861 - 70	1881 - 85	1901 - 81
1862 - 79	1882 - 87	1902 - 84
1863 - 96	1883 - 84	1903 - 86
1864 - 129	1884 - 79	1904 - 86
1865 - 127	1885 - 77	1905 - 88
1866 - 123	1886 - 76	1906 - 91
1867 - 117	1887 - 77	1907 - 93
1868 - 114	1888 - 78	1908 - 91
1869 - 111	1889 - 77	1909 - 94
1870 - 102	1890 - 78	1910 - 97
1871 - 99	1891 - 77	1911 - 96
1872 - 102	1892 - 76	1912 - 100
1873 - 100	1893 - 75	1913 - 100
1874 - 96	1894 - 71	1914 - 100
1875 - 92	1895 - 72	1915 - 103
1876 - 87	1896 - 71	1916 - 117
1877 - 84	1897 - 72	1917 - 139
1878 - 78	1898 - 73	1918 - 157
1879 - 77	1899 - 77	1919 - 173
1880 - 82	1900 - 79	1920 - 193

The last part tracks closely (but not exactly) the language of Section 7(a). Senate Report No. 621, 74th Congress, 1st Session, explained, at 43,

A new subsection (g) is added to section 4 to authorize the Commission to investigate the occupancy of power sites on waters under its jurisdiction, and to issue appropriate orders to preserve its authority over the navigable waters entrusted to its care.

Section 4(a) of the FPA, enacted in 1920, authorizes the Commission to investigate "the utilization of the water resources of any region to be developed...." In the light of the phrase "region to be developed", the term "region" in Section 7 of the FWPA (now Section 7(a) of the FPA) appears to refer to the geographic area covered by an applicant's plans. In the further light of the 1935 amendments to Sections 4, 7 and 10(a), and the official explanations, it also appears that Congress crafted the term "waterway or waterways" for Section 10(a) to be synonymous with the 1920 "region" in Sections 4(a) and 7. As indicated, the focus of Section 10(a) is the comprehensive plan for improving or developing a waterway or waterways for beneficial public uses, which covers the approximate geographic area covered by the 1935 Section 4(g) "region" associated with an occupied power site, and the Section 7(a) "region" associated with an applicant's plans, and ordinarily does not extend beyond the basin or basins that are to be, or have been, improved or developed. 27/ Since the scope of the Section 7(a) inquiry is subsumed within the scope of the Section 10(a) inquiry, the Section 7(a) "water resources of the region" should not ordinarily extend beyond the waterway basin or basins that are to be, or have been improved or developed, as to which the Commission's licensing action ordinarily is most meaningful. 28/

27/ Escondido involved a trans-basin conveyance of water and, therefore, the Commission's inquiry included the basin from which the water was conveyed as well as the basin to which it was conveyed. The geographic and other factors were such that the Commission's action was meaningful to both basins.

28/ The natural reading of the original phrase, "the navigation and water resources of the region," favors an interpretation that covers geographically the waterways that would be or are utilized, and the resources of those waterways that would be or are conserved and developed. Since the question in both preferences of Section 7(a) is whether the plans

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

Since the municipal preference of Section 7(a) directs the giving of priority, and the second preference authorizes (but does not require) the giving of priority, rather than the issuance of a license, 29/ and since the expressed scope of the Section 7(a)

28/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

are equally well, or best, adapted, etc., and since those plans ordinarily focus on the waterways or portions of waterways that would be or have been developed, it does not seem plausible that Congress directed the Commission to base its judgment on a "region" that extends beyond the approximate geographic limits of the plans to be considered. Today's regional power grids did not exist in 1920, and Congress was simply trying to describe a geographic area that would be flexible according to circumstances from one development to another, and in which the Commission's licensing action would be meaningful. Congress, in 1935, appears to have confirmed such an interpretation, particularly in the light of Section 4(g) which relates the phrase "of the region" to the power sites which it authorized the Commission to investigate.

29/ As is the case whenever an agency's actions are open to interpretation, the parameters of the municipal preference will be developed as this and future Commissions are confronted in adversary relicensings with new factual situations, and attempt resolutions that are either upheld or overturned by the courts. Certain parameters, however, are evident to us.

First, and perhaps foremost, the first preference of Section 7(a) does not direct the issuance of a license. It mandates the giving of preference, which means an advantage or priority. But that falls short of requiring the issuance of a license to the preference applicant in all cases, and leaves room for the issuance of a license to the non-preference applicant, instead.

Second, the municipal preference is mandatory insofar as it states that "the Commission shall give preference...." But that directive becomes operative only if -- "provided" -- the plans of the preference applicant "are deemed by the Commission" -- which calls for an exercise of the Commission's judgment -- to be as well adapted as the plans of the non-preference applicant to conserve and utilize the water resources "in the public interest" -- which provides a "public interest" standard for that judgment. In other words, a State or municipality is not entitled automatically to a preference,

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

public interest inquiry is subsumed within the broader scope of the Section 10(a) public interest inquiry, supra, there may be areas of public interest consideration outside Section 7(a) that are within the purview of Section 10(a). For example, the Initial Decision found that PP&L's and JOA's plans are equally well adapted to conserve and utilize in the public interest the water resources of the region insofar as those plans pertain to power production, flood control, fish and wildlife, and recreational facilities, all of which are appropriate areas for public interest consideration under Sections 7(a) and 10(a). But the Initial Decision also found, at 40, that economic impacts

are beyond the scope of matters entrusted by Congress to the Commission's purview under Section 7(a) and thus are not ... applicable, relevant and material to a determination of the broad public interest in this proceeding.

The rationalization is premised, at 38, on the notion that

... Section 7(a) of the Act requires the Commission to afford the municipal applicant, whose plan is not "equally well adapted," an opportunity to cure, "within a reasonable time," any deficiencies found by the Commission and thus make its plan "equally well adapted." The only reasonable

29/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

which "is not an absolute one" (Holyoke Water Power Co., et al., Project Nos. 2004 and 2014, 8 FPC 471 (1949), at 487). The entitlement depends on an evaluation by the Commission of current public interest factors. As Congressmen Doremus and Raker said on the floor of the House:

MR. DOREMUS. You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

MR. RAKER. That being the case they should be allowed that discretion, and not be directed absolutely to grant the application.

MR. DOREMUS. They would still have the discretion to determine whether the plans submitted by the State or municipality were adapted to conserve [sic.] the public interests.

inference is that Congress had in mind deficiencies of a quality and nature such that a willing and able municipal applicant could, within a reasonable time, overcome them and prevail in the license contest.

For the reasons hereinbefore discussed, we do not and cannot agree that the municipal preference of Section 7(a) is applicable to this adversary relicensing proceeding. The applicable provision is the second preference of Section 7(a) "between other applicants", under which the Commission is authorized, but not required, to

give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region....

On the other hand, the expressed scope of the public interest inquiries of both preferences of Section 7(a) are identical for practicable purposes and, as indicated, subsumed within the broader scope of the Section 10(a) public interest inquiry. We will, therefore, examine the rationale of the Initial Decision in the light of the municipal preference of Section 7(a) on which it is based.

We do not and cannot agree that incurable deficiencies are to be excluded from public interest consideration under Section 7(a). If that were the case, every State or municipality ultimately would be able to obtain a license by changing its plans, if it chooses to do so. Such an interpretation is inconsistent with the language of Section 7(a) that grants a preference, as distinguished from the license, supra. It is also inconsistent with the language that requires the Commission to make a public interest judgment with respect to whether a State or municipality is entitled to the preference, which is not absolute, supra. The exclusion of incurable deficiencies would reduce that judgment to a nullity.

Furthermore, the exclusion of incurable deficiencies from public interest consideration under Section 7(a) could lead to absurd results, as illustrated by the following hypothetical situations:

Assume, in a hypothetical adversary relicensing in which the municipal preference is applicable, that all Sections 7(a) and 10(a) public interest considerations are equal, except that the Commission is persuaded by the relative economic impacts of

the alternative licensings 30/ that the best adapted plan for beneficial public uses, including the utilization of the power,

30/ The perceived economic benefits for an applicant's rate-payers underlies every license application to construct a hydro-electric development, or to continue to operate and maintain an existing development. Therefore, when deciding whether the claimed benefits should be enjoyed by the rate-payers of one applicant or the other, the Commission must scrutinize the claims and weigh the economic impacts of its licensing action. Economic impacts have always been an appropriate area for public interest consideration under Section 10(a), and the statement in the Initial Decision, at 40, that they are not relevant to a determination of the public interest in this proceeding, is simply wrong. A half-century ago, before the FWPA became the FPA, the Commission said in one of its earliest reported decisions, Great Northern Power Company, 1 FPC 124 (1933), at 126 (emphasis added),

The Federal Water Power Act clearly expresses its prime purpose to give preference to development projects promising the best use of the water resources. Section 4(a) indicates the broad scope of economic and engineering studies to this end; section 7 specifically defines the basis for preferential treatment of applicants; and section 10(a) specifies "beneficial public uses" as the test to be applied in the Commission's final judgment.

With the plain intent of the law in mind, the Commission must consider all the facts bearing upon the local need for utilization of the waters of the Sultan River, especially as related to conflicting rights.

The Escondido Commission considered economic impacts (Op. 36, at 89), and the Bountiful Commission said (Op. 88, at 60),

To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as economic costs and benefits, the distribution of the benefits of hydro-

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

requires that the power be enjoyed by the segment of the public served by the non-preference applicant. If economic impacts are not within the scope of Section 7(a) consideration, as the Initial Decision determined, the Commission would be required by the municipal preference of Section 7(a) to break the tie by issuing the license to the State or municipality, and by Section 10(a) to include a condition requiring all the power to be sold

30/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

power and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Furthermore, the Supreme Court said in United States ex rel. Chapman v. Federal Power Commission, 345 U.S. 153 (1953), at 171 (emphasis added),

... The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here.... Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine....

And the District of Columbia Circuit, in National Hells Canyon Association, Inc. v. Federal Power Commission, 237 F.2d 777 (D.C. Cir., 1956, cert. den. 353 U.S. 924 (1957)), said, at 779-780, that the recurrence in Sections 7(b) and 10(a) of the phrase, "in the judgment of the Commission",

emphasizes the broad discretion as to these technical matters which Congress has committed to the Commission. 'Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine,' said the Supreme Court ...

in the foregoing case.

at cost to the adversary citizen, association of citizens, or corporation, for its ratepayers. In 1920, Congress could not have intended such an arrangement. 31/

Assume, in another hypothetical relicensing in which the municipal preference is applicable, that all Sections 7(a) and 10(a) public interest considerations are equal, that the Commission is persuaded that the best adapted comprehensive plan requires an additional storage reservoir, and that the adversary applicants are willing to build such a reservoir, but the State or municipality is unable to obtain the financing. Although the inability to raise the funds would be an incurable deficiency, the Commission would be required by Section 7(a) to break the tie by issuing the license to the applicant that couldn't carry out the best adapted comprehensive plan.

There is a fundamental flaw in the rationale of the Initial Decision that the parts of the applicants' plans should be weighed individually against one another (power production, flood control and the like), without also weighing the plans as a whole against each other. We can understand that the individual parts can be changed to the satisfaction of the State or municipality. And we can also understand that an assignment of all the benefits to the citizen, association of citizens, or corporation, would not be a viable option to the State or municipality. But we find that the "plans" of an applicant include the goal of operating

31/ In the light of the technical limitations of the 1917-20 period when the FWPA was being formulated, Congress undoubtedly intended the municipal preference to be a vehicle for giving preference applicants an advantage in acquiring the use of water power sites for their own ratepayers. Electric utilities are limited to economic transmission distances, which were considerably shorter than they are today, and by impediments to interconnections, such as polarity, cycle and voltage differences, which have largely disappeared today. Furthermore, the United States was not generally electrified, but moved rapidly toward electrification in urban areas in the 1920's and in rural areas in the 1930's.

Today, with almost universal electrification, much longer transmission distances, regional power grids, and automatic switching and dispatching devices, the technical means for operating a hydro-electric development for another's ratepayers are available. But it would be absurd for any preference applicant receiving a license to do so without obtaining some benefit for its own ratepayers.

and maintaining the development under a license, as well as the many parts that are set out in the numerous exhibits to the application for the license. 32/

Additionally, we do not agree with the statement in the Initial Decision, at 38, that the municipal preference of Section 7(a) requires the Commission to allow preference applicants an opportunity to cure deficiencies "found by the Commission". As is discussed in Bountiful (Op. 88, at 26), a comma and the words "or shall be made equally well adapted," were added to Section 7 through a floor amendment proposed by Congressman Sinnott, who explained (58 Cong. Rec. 2038 (1919)),

The object of my amendment is to enable the municipality to modify or amend its application provided the application first filed is not equally well adapted to developing the water resources as the application filed by some other individual or corporation. I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think, if the municipality or the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that opportunity to modify and amend its plan and make it as good and as efficient as any other plan filed.

Later, the phrase, "within a reasonable time to be fixed by the Commission," was added to Section 7 to "make more clear and certain the meaning of the House provisions", as Senate Report No. 180, 66th Congress, 1st Session, characterized most of the changes therein.

Congressman Sinnott was interested only in the substantive right of amendment sometime during the licensing process. He did not indicate how or when that right should be implemented, nor did he suggest any requirement that the Commission inform a State or municipality of specific reasons why its plans are not as well adapted as those of another applicant. Congressman Sinnott was concerned that one or more citizens, associations of citizens, or corporations, might submit better ideas, and he wanted to make sure that States or municipalities would have an opportunity to copy or

32/ The word "plan" has a number of meanings. The most appropriate ones in the context of a plan of an applicant are "a detailed formulation of a program of action" and "an orderly arrangement of parts of an overall design or objective". Webster's New Collegiate Dictionary, G.&C. Merriam Co., 1977 edition. Note the relationship between "detailed/program" and "parts/objective" -- that a plan includes the entirety formed by the pieces, as well as the pieces themselves.

improve upon those ideas. That falls short, however, of imposing an obligation on the Commission to articulate shortcomings in a State's or municipality's plans, and to give the applicant an opportunity to remedy those perceived shortcomings. 33/ 34/

33/ We do not suggest that the Administrative Procedure Act doesn't require an articulation of rationale in a final agency action, but there is no associated substantive right to amend a licensing application.

Furthermore, the notion that Section 7(a) requires an opportunity to cure deficiencies "found by the Commission", is probably derived from 18 CFR § 4.33(g)(4), which applies to adversary applications for preliminary permits and licenses for proposed water power developments, and provides, in pertinent part,

... the Commission will inform the municipality or state of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the municipality or state to render its plans at least as well adapted as the other plans.

The fact that such an opportunity is provided in that situation does not make it a statutory requirement. Plans associated with proposed hydro-electric developments involve infinitely more possibilities than plans associated with existing developments, wherein adversary applicants propose to continue to operate and maintain the same project works. Such works must be designed for proposed hydro-electric developments, and the Commission staff attempts through comments to effect the best designs for each situation.

34/ Although the second preference of Section 7(a) is applicable to this adversary relicensing proceeding, we find that JOA has had a reasonable time fixed by the Commission to make its plans as well adapted as those of PP&L to conserve and utilize in the public interest the water resources of the Lewis River. PP&L filed the first application on April 26, 1976, and the application was made available to the public. The Commission issued and published notice of the filing on August 20, 1976, at about the time JOA was formed, and JOA filed its application six months later on February 18, 1977, within the time fixed by the Commission in 18 CFR § 16.3(b). Since PP&L was the first applicant, and JOA and its constituent PUD's had almost ten months to make its plans as well adapted as those of PP&L, and in fact utilized PP&L's plans in part, JOA had the opportunity with which Congressman Sinnott was concerned to make its plans as well adapted as those of PP&L.

We find that the seventeen words "or shall within a reasonable time to be fixed by the Commission be made equally well adapted" guarantee States or municipalities an opportunity and a reasonable period of time to render their plans as well adapted as, or better adapted than, any other plans, if they are willing and able to do so -- to the end that their plans may be at least as well adapted as any other plans when the Commission passes judgment on the adversary plans. Under current procedures, that judgment is exercised, first, through an initial decision of an administrative law judge, and then through an opinion and order of the Commission on exceptions to that initial decision.

Lastly, the rationale of the Initial Decision, at 38, appears to say that the municipal preference of Section 7(a) requires the Commission to provide some sort of post-hearing opportunity to cure deficiencies found in plans of States or municipalities. Such a procedure would seem to require multiple steps in adversary relicensings, and conflict with the one-step relicensing procedure that was legislated into the FPA in 1968. See Bountiful (Op. 88, at 32-33).

In any event, we do not read the municipal preference of Section 7(a) as requiring such a post-hearing opportunity, particularly because any curable deficiencies found by the Commission can be remedied through the imposition of license conditions. The municipal preference requires, first, a Commission judgment as to whether the plans of the State or municipality and the other applicants are equally well adapted, etc. If they are, or if the plans of the State or municipality are better adapted, the matter ends there, for the State or municipality must be offered the license. But if the plans of a citizen, association of citizens, or corporation are judged better adapted, and if the State or municipality has a post-hearing right to cure deficiencies that have been found (contrary to our interpretation), the municipal preference would appear to require a second judgment as to whether the plans of the State or municipality are capable of being made equally well adapted within a reasonable period of time. If they are, the matter would end there, for the State or municipality must be offered the license subject to conditions that would make the plans equally well adapted. 35/ And if they are not, the matter would also end there, under the maxim that the law does not require the doing of useless acts. In that case, the citizen, association of citizens, or corporation, with the better adapted plans would be offered the license.

35/ States or municipalities with deficient plans would not lose any substantive rights if the Commission offers them licenses subject to conditions that make their plans equally well adapted.

Since every project must be such as in the judgment of the Commission will be best adapted to a comprehensive plan for beneficial public uses, including the utilization of water power (which is part of the Section 7(a) public interest inquiry as well as the Section 10(a) public interest inquiry), and since Section 7(a) directs or authorizes the giving of preference, which falls short of directing the issuance of a license, Section 7(a) must be interpreted in a manner that is consistent with Section 10(a). We hold, therefore, that the economic impacts of an adversary licensing action are an appropriate area for public interest consideration under both preferences of Section 7(a), as well as Section 10(a). If all other considerations are equally well adapted to (develop,) conserve and utilize in the public interest the water resources of the region, and the economic impacts favor a citizen, association of citizens, or corporation, over a State or municipality, the license must be issued to the citizen, association of citizens, or corporation.

If the Commission has the right to deny a license on the ground that a proposed project is not best adapted for beneficial public uses of a waterway, Namekagon Hydro Company v. Federal Power Commission, 216 F.2d 509 (Seventh Cir., 1954), the Commission also has a right to deny a license to a particular applicant within the framework of Section 7(a) on the ground that the (development,) conservation and utilization of the water power by that applicant is not best adapted for beneficial public uses of the waterway. We agree, in this connection, with Commissioner Moody's 1973 dissenting statement, 50 FPC, at 692, that Namekagon "clearly indicates that we should deny that which cannot be modified to serve the public interest."

In summary, Section 7(a) is the provision of the FPA that contains the standards to be applied in selecting between or among adversary applicants for preliminary permits and licenses. Section 10(a), on the other hand, is the provision that contains the standard for fixing the terms and conditions of all licenses. Although certain limitations associated with the 1920 public interest are attached to Section 7(a), licensees and the terms and conditions of licenses are selected on the basis of the same public interest standard under which, currently, consumers of all classifications should receive the benefits ^{36/} of inexpensive hydro-electric power without regard to whether they are served by public or private entities. If the public interest favors the consumers served by a private entity, Sections 7(a) and 10(a) require the license to be issued to that entity to permit its consumers to receive the benefits.

^{36/} In the light of the technical limitations of the 1917-20 period (note 31, supra), consumers served by a particular hydro-electric development ordinarily would receive its benefits by utilizing the power generated by the development. Today, questions of utilization are largely academic; consumers receive the benefits of a particular hydro-electric development through computed rates and are thus said to "utilize" the particular power.

The Current Public Interest

In 1920, Congress crystallized in Section 7 of the FWPA a conception of that era that a permitting and licensing preference for States and municipalities was in the public interest. However, Congress also left room for the Commission to pass judgment on entitlement to that priority based on current conceptions of the public interest when licenses expire. ^{37/} The judgment is to be based on how well the plans of the respective applicants are adapted to (develop,) conserve and utilize the water resources of the region.

The legislative history of the FWPA discloses that Congress was concerned with the development of our nation's water power resources at a time when the Federal, State and local governments were not generally prepared to finance the construction of hydro-electric projects to any great extent, but power trusts and monopolies were ready and willing to take up that slack. These "water power grabbers" were viewed by Gifford Pinchot and others as being "eager for plunder" ^{38/} and, as a result, a water power bill developed that proceeded on the theory of private development with ultimate public ownership possible. ^{39/}

Although that policy crystallized in the FWPA may have reflected the 1920-era public interest, the foundation for a change evolved during the ensuing decade as the holding company form of business organization gained popularity. By 1932, systems in eight large holding company groups generated about three-fourths of the output of all privately owned systems. ^{40/}

The stock market crash nine years after the enactment of the FWPA precipitated the Great Depression and a wave of reform legislation, including the Public Utility Act of 1935 that changed the electric power industry significantly. Title I of that Act,

^{37/} The notion that relicensings should be determined on evaluations of current public interest factors goes back to President Theodore Roosevelt's landmark Rainy River veto message in 1908, which sought water power legislation that would leave "to future generations the power or authority to renew or extend the concession [license] in accordance with the conditions which may prevail at the time."

^{38/} See Chemehuevi Tribe of Indians v. Federal Power Commission, (D.C. Cir., 1973), 489 F.2d 1207, at 1218, n. 54.

^{39/} Senate Report No. 180, 66th Congress, 1st Session.

^{40/} The 1970 National Power Survey of the Federal Power Commission, at I-2-2.

known as the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79), (1) authorized and directed the Securities and Exchange Commission, among other matters, to simplify the corporate structures of public utility holding companies, including electric utility holding companies, eliminating some of them, and (2) placed the remaining and resulting holding companies, together with their operating subsidiaries under the regulatory authority of that agency. Title II of that Act amended the Federal Water Power Act by designating the 1920 provisions (as amended) as Part I, adding Parts II and III, and changing its name to the Federal Power Act. Part II of the FPA authorizes and directs the Commission, in Section 202, to take certain actions for the purpose of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources".

Section 202 was the Commission's first major new mandate and, in our opinion, it altered significantly the Part I focus on a State or municipality "acquiring properties of another licensee at the end of a license period," in the words of Congressman Lee. Section 202 empowers and directs the Commission to divide the United States into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and to modify those districts from time to time in such a manner as in the Commission's judgment will promote the public interest. Furthermore, Section 202 says that it shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. "The essential thrust of § 202," according to the Supreme Court, 41/

is to encourage voluntary interconnections of power.... Only if a power company refuses to interconnect voluntarily may the Federal Power Commission ... order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest."

Since Congress thus enlarged the FWPA into the FPA, it has directed the Commission to temper the assessment of the 1920 Part I public interest by an assessment of the 1935 Part II public interest. And that is equally true with respect to subsequent legislation amending, and independent of, the FPA.

41/ Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), at 373.

Even Gifford Pinchot foresaw the overriding importance of large interconnected transmission systems. In 1923, while he was Governor of Pennsylvania, Pinchot wrote to the Governor of New York to attempt to persuade the withdrawal of litigation challenging the validity of the FWPA. 42/

... I have come confidently to expect the growth of a nation-wide interlocking power system; no small part of this future power development, especially water-power development, will, I believe, be made by state municipal enterprise - some, perhaps, by national or even international undertakings...

* * *

The freedom of commerce among the several states, the unrestricted exchange across state lines of services, goods and resources guaranteed by the Federal Constitution, is the strongest man-made basis of the prosperity of each state. This consideration applies not only to energy riding in a coal car, but equally to energy floating over a wire, whether the burning of fuel or the falling of water was the source. Furthermore, really cheap power cannot be supplied to consumers unless the burning coal and the floating water contribute their energy to a common reservoir for the common supply of industries, farms, homes, and railroads.

Such a system must transcend state lines and is likely to become nation wide. The new art of electric transmission is already so developed that the giant power system with which we are immediately concerned should now include all power producers and consumers in the northern section of the United States and should perhaps draw also upon resources of water power in Canada.

Beginning with the Act of March 7, 1928 (45 Stat. 200, 212-213), involving the development of power on the Flathead Reservation, but principally in the years following the Public

42/ Federal Water-Power Legislation, by Jerome G. Kerwin (Kerwin), Columbia University Press, 1926, at 286.

Utility Act of 1935, the Commission was given a number of mandates under a variety of statutes, most of which were specific, but some of which were of a general nature. For example, the Commission is required by the National Environmental Policy Act of 1969 to consider the environmental consequences of its "major Federal actions significantly affecting the quality of the human environment". If, therefore, the choice of licensees in a given situation would have a significant environmental impact, as, for example, if the choice would require the losing applicant to construct new or replacement capacity, and one of the applicants has an environmentally superior alternative source of capacity that is not available to the other, the Commission could decide that the environmental consequences of its choice should be the determining factor.

In 1977, the Federal Energy Regulatory Commission was created as an independent agency within the Department of Energy to supersede the Federal Power Commission, and was given a number of new mandates under the Department of Energy Organization Act. Congress found in Section 101 of that Act that "the United States faces an increasing shortage of nonrenewable energy resources" and that

this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United States and to the health, safety and welfare of its citizens....

And Congress declared in Section 202 that the purposes of that Act, among others, were "to place major emphasis on the development and commercial use of ... technologies utilizing renewable energy resources", such as water resources, and, concurrently, "to assure, to the maximum extent practicable, that the productive capacity of private enterprise shall be utilized in the development and achievement of the policies and purposes of this Act ... [Emphasis added]."

Most recently, the Public Utility Regulatory Policies Act of 1978 gave the Commission certain mandates under a newly established program to encourage the development of small hydro-electric projects in connection with existing dams, as well as the authority to order permanent interconnections that was lacking at the time of the Otter Tail decision, supra.

The growth of the Commission's statutory responsibilities was paralleled by a growth of the responsibilities of State regulatory bodies. Beginning in 1838 when the New Hampshire Public Utilities Commission was formed, but principally as the end of the nineteenth century approached, many states began to form units that were charged with the regulation of public services, such as rail services. These railroad, or public

service, or public utility, commissions, as they were called, grew in number and authority throughout the twentieth century, with the result that today every State except Nebraska has a utility commission with regulatory jurisdiction over the rates of privately owned electric utilities. ^{43/} And Nebraska is served entirely by public power entities and cooperatives. ^{44/}

As of the end of 1920, when the FWPA was enacted, less than 5,000 MW of the estimated 146,000 MW, or about 3%, of the total estimated conventional hydro-electric power potential of the 48 contiguous States had been developed. As of the end of 1970, a half-century later, more than 52,000 MW, or about 36%, of that estimated potential was developed. ^{45/} Some of the estimated 94,000 MW of undeveloped capacity is precluded from development by statutes such as the Colorado River Basin Project Act (43 U.S.C. § 1501) and the Wild and Scenic Rivers Act (16 U.S.C. § 1271). The following table taken from The 1970 National Power Survey of the Federal Power Commission, at I-7-9, shows that while investor owned utilities dominated the development of water power in the 20 years following the enactment of the FWPA, Federal and non-Federal public authorities have dominated that development in more recent years.

TABLE 7.2
Conventional Hydroelectric Capacity by Class of Ownership, Forty-Eight Contiguous States, 1920-1970
[Thousands of Megawatts]

Class of Ownership	Installed Capacity: Year End					
	1920	1930	1940	1950	1960	1970
Investor-owned utilities	3.5	7.7	8.5	9.7	13.4	16.6
Non-federal public utilities	0.2	0.7	1.1	1.5	4.4	12.1
Federal	*0.0	0.2	1.7	6.5	14.6	22.9
Industrial	1.1	1.1	1.1	1.0	0.7	0.7
Total, all plants	4.8	9.7	12.4	18.7	33.1	52.3

*Less than 50 MW

- ^{43/} 1977 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners, at 393.
- ^{44/} The 1970 National Power Survey of the Federal Power Commission, at I-2-6.
- ^{45/} Id. at I-7-21.

In the light of (1) the growth of the Commission's statutory responsibilities and those of State regulatory bodies, particularly the evolution at the State level of universal electric utility rate regulation in the private sector, 46/ (2) the demise and simplification of public utility holding companies, and (3) the shift from the private to the public sector in the development of water power, including the fact that a substantial number of sites (presumably the best) are no longer available for development, we find it impossible to continue to see privately owned electric utilities in the eyes of Gifford Pinchot as "water power grabbers" who are "eager for plunder". We see them, instead, as regulated entities serving segments of the public, just as public power entities serve other segments of the public. As a result, we believe that the Part I public interest in the ultimate public ownership of water power sites is considerably weaker today than in 1920. 47/ 48/ As a further result, we believe that the focal point of the Part I public interest today is the impact on consumers of choosing between an "original licensee" in possession of project works, and a "new licensee" -- without regard to whether the consumers are characterized as domestic, rural, commercial, industrial or in some other manner, because the cost of electricity is reflected not only in the bills paid to the local distributor, but also in the prices paid for goods and services.

- 46/ See Sections 19 and 20 of the FPA which authorized the Commission to regulate rates, charges, services and the issuance of securities, and prohibited unreasonable discriminatory and unjust rates, charges and services, until such matters were brought under State regulation and control.
- 47/ The Commission is contributing to the weakening of that public interest through the policy of relicensing projects for 30-year terms absent unusual circumstances or certain exceptions justifying longer terms, such as substantial new investment. This policy requires new decisions on private or public ownership more often than the maximum 50 years allowed. See South Carolina Electric & Gas Co., Project No. 1894, 53 FPC 537 (1974), and The Montana Power Company, Project No. 2301, 56 FPC 2008 (1976). Furthermore, Congress thus far has not enacted any legislation to take over any hydro-electric project, although most recently a bill was introduced to take over the Escondido Project No. 176.
- 48/ The Part I "public interest" was fractured by the Act of August 15, 1953, as amended (16 U.S.C. §§ 828-828c), which provides that Section 14 of the FPA, among others, is not applicable to developments owned by States and municipalities. Accordingly, a licensee or the United States must pay a value-related condemnation price, rather than the cost-related net investment price as enacted in 1920, if it wants to acquire water power properties from a State or municipality.

THE NEW LICENSE

In General

Having determined (1) (supra, at 18) that the second preference of Section 7(a) is applicable to this adversary relicensing, (2) (supra, at 28) that the selection of the licensee and the best adapted comprehensive plan are to be based on the same public interest standard, and (3) (supra, at 33, n. 30, and 39) that the economic impacts of an adversary licensing action are an appropriate area for public interest consideration under Section 7(a) as well as Section 10(a), we have weighed the economic considerations together with all other considerations that are relevant to the "best adapted" standards of Sections 7(a) and 10(a). And we have concluded that the new license for the Merwin hydro-electric development should be issued to PP&L under the conditions that are contained in Ordering Paragraph (F).

We have reviewed the non-issues (i.e., the April 1982 Stipulations) as well as the issues addressed in the Initial Decision, and, for the reasons discussed therein, we are unable to find any significant differences in the plans of PP&L and JOA insofar as concerns power production 49/, flood control, 50/ fish and wildlife 51/ and recreational facilities, as to which reference

- 49/ PP&L contends in its Assignment of Error No. 16 that the issuance of the license to JOA would result in a loss of secondary power and thus significantly change the production of power at Merwin. We have not found it necessary to pass on that contention in view of our decision on other grounds to issue the license to PP&L; and, since there are no other claimed differences, we have accepted the conclusion of the Initial Decision for the purpose of this decision.
- 50/ In view of the recent consummation of a flood control agreement, infra, the substance of its terms has been incorporated into the new license as Article 43. Since the agreement obligates the Yale and Swift hydro-electric developments to contribute to flood control storage, Article 54 requires PP&L to amend its licenses for those developments to add identical special conditions.
- 51/ PP&L contends in its Assignment of Error No. 30 that the wildlife management plan, which it has begun to implement utilizing non-project lands, would be delayed up to five years if the license is issued to JOA. Since the Merwin hydro-electric development has been operated by PP&L for almost a half-century without such a program, such a delay would not amount to a significant difference between the applicants' wildlife management plans.

is made to the special license conditions contained in Ordering Paragraph (F). Furthermore, we have no reason to question JOA's ability to finance the acquisition of the Merwin hydro-electric development, or the ability of either applicant to finance the development's continued operation and maintenance. Nor do we have any reason to doubt that JOA would become as sensitive and responsive to local public needs as PP&L has demonstrated (Ex. T-1, at 23-32; Tr. 263-265 and 270-271).

In this instance, the economic implications of the alternative licensing actions clearly weigh in favor allowing the power benefits of the Lewis River at Merwin to remain with the segment of the public served by PP&L. We therefore focus our discussion on that aspect of this adversary relicensing.

Economic Impacts

JOA's constituents, Clark and Cowlitz PUD's, serve 118,200 customers in Clark and Cowlitz counties, Washington. PP&L, on the other hand, serves 643,400 customers in scattered portions of six states, Washington, Oregon, California, Idaho, Montana and Wyoming. The following table derived from Exhibit 52 compares their respective 1981 electric customers, energy sales and revenues:

COMPARISON OF 1981 ELECTRIC CUSTOMERS, ENERGY SALES, AND REVENUES

NUMBER OF CUSTOMERS		
Class	Clark/Cowlitz	PP&L
Residential	106,199	550,411
Industrial/Commercial	11,352	92,475
Other	661	565
Total	118,212	643,451
SALES (MWh)		
Class	Clark/Cowlitz	PP&L
Residential	2,137,129	6,940,201
Industrial/Commercial	4,504,162	11,484,298
Other	46,350	4,581,146
Total	6,687,641	23,005,645
REVENUES (\$1,000)		
Class	Clark/Cowlitz	PP&L
Residential	\$40,085	\$196,315
Industrial/Commercial	52,934	259,820
Other	1,485	121,599
Total	\$94,504	\$577,734

When antitrust issues are raised, as they have been in this proceeding, electric utilities are treated as direct competitors of one another to the extent that they have common or contiguous service areas and, therefore, could be alternative suppliers of electric energy. See Connecticut Light and Power Company, Docket No. ER78-517, 8 FERC ¶61,187 (1979), rehearing denied 9 FERC ¶61,313 (1979). In this sense, PP&L and JOA are direct competitors of one another to the extent that PP&L's service area in Portland, Oregon, and the vicinity, lies across the Columbia River from Clark County, Washington. None of PP&L's other service areas are within or border Clark or Cowlitz counties, Washington.

PP&L generates electric power at 40 facilities from the following sources of energy (Item A, at 6-7):

	Number of Plants	Name Plate Rating (MW)
Hydro-electric	33	863.4
Steam electric	5	2,450.2
Combustion Turbine	1	23.8
Nuclear electric	1	30.4
	40	3,367.8

Merwin, the second largest of PP&L's hydro-electric developments, has a name plate rating of 136 MW and thus represents 15.8% of its hydro-electric capacity and 4% of its total capacity.

The Merwin hydro-electric development is interconnected with PP&L's interstate transmission system which, in turn, is interconnected with the transmission lines of the Northwest Power Pool, including those of the Bonneville Power Administration (BPA). ^{52/}

^{52/} The following portion of the Initial Decision, at 24-26, is not in dispute and is repeated here for convenience:

An appreciation of the parties' contentions requires some understanding of the role played by BPA in the Pacific Northwest, especially its function as marketing agent for electricity produced by federally developed (as opposed to federally licensed) hydroelectric projects. The ensuring account is taken primarily from Ex. T-1, p. 4-23, and Legislative History of the Pacific Northwest Power Planning and Conservation Act, prepared by Bonneville Power Administration Library (Department of Energy, 1981).

The development of the Columbia River system began in the 1930's. From the beginning, the federal government has played a major role. Congress directed BPA in the Bonneville Project Act of 1937 to build and operate transmission lines

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

Furthermore, Merwin is operated under the Pacific Northwest Coordination Agreement (Item D) in electrical coordination with the Northwest Power Pool (Item A, at 5) and in hydraulic coordination with PP&L's other hydro-electric developments on the Lewis

52/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

and to market electricity from federally developed hydro-projects on the river at rates set only high enough to repay the federal investment over a reasonable time period (16 U.S.C. § 832).

In the early 1960's the U.S. and Canadian governments negotiated a treaty for the cooperative use of dams built by Canada on the upper reaches of the river to provide, among other things, reservoir storage for production of additional power at the U.S. dams downstream. Also in the 1960's, Congress authorized construction of three major powerlines linking the Columbia River hydroprojects with power markets in California and the rest of the Pacific Southwest.

With the dams developed in Canada and the United States, the Columbia River system provided virtually all the electricity needed in the Pacific Northwest until the early 1970's. Thereafter, the region's publicly-owned and investor-owned utilities turned mainly to coal-fired and nuclear plants to meet load growth throughout the Pacific Northwest.

The Bonneville Project Act of 1937 directed the publicly-owned utilities and cooperatives be given first call on available federal hydropower resources. They consequently came to be known as "preference customers." It was not until the 1970's that their preference needed to be exercised and, in 1973, BPA refused to renew long-term firm power contracts with investor-owned utilities since it could not do so if preference customers were to continue to have first call on federal resources. Nonetheless, BPA continued to sell some peaking power to those private utilities and also "non-firm" power to the region's investor-owned utilities and utilities outside the region when electricity surplus to the needs of the preference customers was available.

Because of the extensive historical involvement of the federal government in the region's electrical power systems Congress began to address the difficult questions arising from the growing pressures on a regional power supply that had once

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

River (Item B, at 18; Item A, Exhibit I, at 1-2; PP&L's Brief on Exceptions, at 2, 27-28). 53/ As a result, PP&L receives power (in addition to the power it generates) from public and other private utilities, BPA, and the Columbia Storage Power Exchange

52/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

seemed inexhaustible. After three years of deliberation, in 1980, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act") (16 U.S.C. § 839). The statute defines the Pacific Northwest region essentially to include the area consisting of Oregon, Washington and Idaho, the portion of Montana west of the Continental Divide, and such portions of Nevada, Utah and Wyoming that are within the Columbia River drainage basin.

The Regional Act directs that BPA should continue its traditional role of transmitting and marketing power, but gives it additional responsibilities. BPA now must acquire all necessary energy resources to serve all utilities (public and private) in the region who choose to apply to BPA for wholesale power supplies. It may purchase the generating capabilities of needed new thermal plants and must spread the benefits and cost of resources among all of its customers through its rates.

Sales to publicly-owned utilities and cooperatives continue, under the Regional Act, to be governed by the supply preference Project Act of 1937. However, for the first time, a similar preference and price advantage is extended to investor-owned utilities' residential (and farm) customers in the Pacific Northwest region: the utilities sell to BPA, at their average power cost, an amount of energy equal to their residential loads; BPA sells back enough energy at BPA standard rates to cover these loads, with the rate advantages required to be passed on to such customers.

As matters stand now, the benefits of the region's low-cost, federally developed hydropower are made available first under BPA's priority firm (PF) rate to its preference customers and (through the exchange contracts mentioned above) the regional residential customers served by investor-owned utilities. The balance of purchases made by investor-owned utilities are billed at BPA's higher new resources (NR) rate (Ex. T-45, pp. 9-13).

53/ Project No. 2071 (Yale), licensed in 1951 (10 FPC 917), and Project No. 2111 (Swift No. 1), licensed in 1956 (16 FPC 117).

(CSPE) (Tr. 696-700), which markets Canada's share of downstream power benefits derived from water storage developments in Canada (Item E, at U-5).

Clark and Cowlitz PUD's, on the other hand, purchase almost all of their requirements from BPA. Clark PUD obtains the balance from CSPE and the Washington Public Power Supply System (WPPSS) Packwood project (Ex. T-17, at 3; Item E, at U-4 and 5). And Cowlitz PUD obtains the balance from CSPF, the Wanapum and Priest Rapids hydro-electric developments (on the Columbia River) of Grant County PUD No. 2, and, beginning in September 1983, its own Swift No. 2 run-of-the-river hydro-electric development on the Lewis River (Project No. 2213, 16 FPC 1281). (See Item E, at U-4 and 5; Ex. E-54A; Ex. T-12, at 13.)

The focal point of the adversary positions in this proceeding has been the cost of alternative power. If the new license were to be issued to JOA, Clark and Cowlitz PUDs would purchase less power at the Priority Firm rate from their principal supplier, BPA, and would thereby release that relatively inexpensive power for sale to other preference customers of BPA. PP&L, on the other hand, would replace the lost Merwin power. In the short term, PP&L could replace part by purchasing relatively inexpensive BPA power that is presently available at the same Priority Firm rate 54/, or by generating or purchasing more expensive thermal power. In the longer term, PP&L could build a thermal generating facility 55/ or purchase BPA power that may be available at the New Resources rate, which, in turn, will consist essentially of relatively expensive thermal power.

According to a JOA witness, Clark PUD's cost of power would decrease by \$4,500,000 for its fiscal 1983 if Merwin were licensed to JOA, and Cowlitz PUD's similar cost would decrease by \$3,200,000, for a total of \$7,700,000 (Ex. T-19B, at 11). According to the same witness, and assuming that PP&L replaced its Merwin power with BPA

54/ Approximately 20% of PP&L's 550,000 residential customers, which is equal in number to all of Clark and Cowlitz PUDs' residential customers, are located in California and Wyoming and, consequently, would not receive the benefit of any purchases of BPA power at the Priority Firm rate. Nor would any of PP&L's 92,000 commercial and industrial customers, wherever located, receive the benefit of any such purchases.

55/ PP&L would measure the cost of alternative power by the \$832,400,000 cost of a 161 MW coal-fired cycling plant in eastern Oregon, but will accept for this purpose the staff's calculation of \$731,700,000.

power at the 1982 New Resources rate, PP&L's cost of power would increase by \$26,300,000 (Ex. T-20, at 4). As a result, PP&L's power costs would increase by \$3.42 for each \$1.00 savings in JOA's power costs, if Merwin were licensed to JOA rather than PP&L.

According to a Commission staff witness, JOA's short term net revenue requirements would decrease by \$1,701,000 annually if Clark and Cowlitz PUD's could replace their BPA purchases with Merwin power (Ex. E-68B, Schedule 1: Line 5 minus Line 6). And PP&L's short term net revenue requirements would increase by \$15,169,000 annually if PP&L were able to replace its Merwin power at its average system cost (Ex. E-68B, Schedule 1: Line 2 minus Line 1). As a result, PP&L's net revenue requirements would increase by \$8.92 for each \$1.00 decrease in JOA's net revenue requirements, if Merwin were licensed to JOA rather than PP&L.

With respect to long term economic impacts, the Commission staff's present-worth cost (including fuel) of operating a 161 MW coal-fired plant to be available in 1988 is \$731,700,000 for 50 years. In comparison, PP&L's estimated cost of continuing to operate the Merwin hydro-electric development for the same period of time is only \$26,800,000 (Ex. T-16, at 9). On the other hand, no evidence of JOA's alternative costs for 50 years was introduced. But no one has challenged the statement in the Initial Decision, at 35, that no reliable long-term projection of future BPA rates can be made.

In view of the complexities involved, we are satisfied with approximations of the magnitude and direction of the economic implications of choosing one applicant or the other. And with the foregoing short and long term figures in mind, we adopt as our own the following paragraphs on pages 32 through 35 of the Initial Decision (emphasis added):

At the outset, it must be emphasized that the record does not permit a determination of precise cost and rate impacts on PP&L and JOA of relicensing the Merwin project upon which the Commission could reasonably rely with confidence. Neither staff nor either of the applicants has made a presentation which could be relied upon to the exclusion of the others; no party appears to urge to the contrary and, as PP&L concedes, "the circumstances of this case preclude a neat arithmetical calculation determining the exact economic impact in each of the next 50 years" (PP&L Reply Br. p. 24). Nor may clear-cut comparisons be made between the presentations of staff and the applicants since, as described above, the presentations address different time frames and employ differing costing methods. What can be reasonably determined is the general, relative cost and rate impacts on the applicants resulting from relicensing, and the appropriate parameters within which such impacts should be addressed.

The key to these relative impacts is the cost of alternative power to each of the competitors. To the extent that one applicant has an alternative power cost higher than the other, it is indisputable that such applicant will inevitably, on a system-wide basis, experience greater total dollar cost burdens without Merwin than will be saved by the other applicant with Merwin. The evidence is convincing that PP&L, whether it is forced to build a new thermal plant to replace Merwin, substitutes BPA power purchased at the NR rate, or (in the very short term) steps up generation from its existing production facilities, will incur a higher alternative power cost over all relevant periods than JOA. BPA's PF rate, which defines JOA's alternative power cost and is supported by cheap federal hydropower resources, is now and can be expected to remain at a level below any alternative power cost of PP&L.

Certain other facts are well established. First, approximately eighty percent of PP&L's residential customers are located in the Pacific Northwest and will be served under the residential exchange provisions of the Regional Act and receive the benefits of BPA's PF rate (rather than being exposed to PP&L's average power costs), whether or not PP&L receives the Merwin license. Therefore, relicensing will have no rate impact on these regional residential customers, and the full systemwide cost impact from PP&L's loss of Merwin would have to be borne by PP&L's remaining customers. Second, to the extent that PP&L looks to purchases from BPA under the NR rate to replace lost Merwin production, such purchases are available only to meet PP&L's requirements (other than residential exchange requirements) in the Pacific Northwest region: cost and rate impacts on any of PP&L's customers in California and Wyoming cannot be measured by direct reference to the BPA NR rate (Tr. 1693). Cost impact calculations which measure PP&L's cost of all replacement power at the BPA NR rate are, to this extent, misleading. Third, while PP&L would derive larger total dollar system benefits by retaining Merwin than would JOA from acquiring Merwin, the benefits per system residential customers clearly favor the JOA members:

This last observation raises the question whether great and perhaps controlling weight should be given, as JOA contends, to the benefits conferred on residential customers. There are cogent reasons why the benefits per system customer, or per residential customer, should not be determinative.

The calculation of benefits per system customer would automatically favor the competitor with the fewer number of customers, without regard to the mix of customers or their requirements. Further, giving great weight to such a calculation would inherently mean that larger benefits for the few take precedence over smaller benefits for the many.

Such a conclusion hardly comports with the public interest. Nor should consideration be limited to benefits per residential customer....

* * *

Returning once again to the relative cost burdens and benefits on just the systems of the two applicants, staff is correct that the primary focus should be on long-term impacts. But staff's blithe dismissal of new coal-fired thermal generation by PP&L to replace Merwin as "unplanned," and its attempt to bury the lost Merwin capacity in PP&L's projected need for 5,000 [MW] of added capacity by the year 2000, are not persuasive. By 1985, PP&L will be deficient in power supply (Ex. T-20, p. 3). A substitute for the cheap Merwin supply will, in the long term, have to come from somewhere. The only serious long-term substitutes advanced and supported on this record are thermal generation installed by PP&L or purchases by PP&L from BPA at future NR rates. But, as staff itself recognizes, long-term reliance on BPA purchases contemplates that PP&L will provide capacity to the pooled resources and, as noted, PP&L will be capacity deficient after 1985. The Pacific Northwest as a whole has a power surplus that is currently projected to last for only ten years. While, as PP&L concedes (Reply Br. p. 22), the NR rate may be buffered for a time by low-cost hydropower not needed to serve loads under the [PF] rate, the reasonable inference is that beyond that surplus period, new resources -- for the most part coal-fired generation (Ex. T-11, pp. 32-33) -- will have to be committed to the BPA system, and will constitute the principal, if not the sole, supply for NR service which will be priced accordingly. Thus, it is not at all unreasonable to anticipate that Merwin power would eventually be replaced by PP&L at a cost reflecting that of future coal-fired generation.

JOA argues in its brief opposing exceptions that PP&L doesn't need to replace Merwin power in the long term. JOA asks that we take official notice of part of a Form 10-K Report that PP&L filed with the Securities and Exchange Commission on March 31, 1983, disclosing that PP&L is (or was at the time) engaged in preliminary negotiations for the sale of its 10% interests in two 700 MW coal-fired generating units near Colstrip, Montana, that are expected to be completed in 1984 and 1985, respectively. And JOA argues that because (1) PP&L would dispose of 140 MW of generating capacity (compared to Merwin's 136 MW), and (2) an energy surplus is forecast for the Pacific Northwest into the 1990's, PP&L's alternative costs should not be measured by the hypothetical coal-fired plant, or by the cost of replacement power at BPA's New Resources rate or PP&L's average system costs. According to JOA,

The proper measure of the economic cost to the customers of PP&L if Merwin is licensed to JOA is the increased average cost of service to PP&L's customers resulting from removing the cost of Merwin generation from PP&L's resource mix.

JOA offers a calculation derived from PP&L's FERC Form No. 1 annual report for 1982 to establish that PP&L's lost revenues, less Merwin expenses, would have been \$8,570,000 for 1982, which compares to an estimated savings to JOA customers from Merwin of \$7,700,000 for 1983.

We will not accept JOA's calculation because it was not offered into evidence and has not been subjected to cross-examination, especially with respect to the assumptions. But it is significant that even JOA does not claim an economic balance in favor of its customers. It can claim only that the balance is not as one-sided as is claimed by PP&L and the Commission staff.

The point missed by JOA is that electric utilities that generate their own power, such as PP&L, are expected to have reserve generating capacity to provide for system reliability. One rule of thumb is that they should have enough reserve capacity to replace the unanticipated outage of their largest generating unit. 56/ As a result, it is not surprising, and is indeed expected, that PP&L can likely get along without Merwin for the foreseeable future, particularly in the light of the projected energy surplus for the Pacific Northwest. But that does not mean that PP&L's alternative costs should be measured by dropping Merwin from its resource mix, which, hypothetically, would diminish PP&L's system reliability.

56/ We take official notice of the following paragraph on page I-15-7 of The 1970 National Power Survey of the Federal Power Commission:

Individual systems and power pools utilize a variety of methods for determining appropriate reserve levels. The methods vary from use of a simple percent of peak load, to matching reserves to the capability of the largest unit or pair of units in service, to very complicated calculations of outage probability taking into consideration such elements as number and size of units, forced outage rates, and expected load patterns. Reserve margins considered adequate for most systems, including the spinning reserve component, range between 15 and 25 percent of peak load.

The economic environment of the electric power industry in the Pacific Northwest was changed dramatically in 1980. As a result, it is not possible to project very far into the future the dollar impacts associated with the Regional Act. But it is possible to envision the direction they will take.

The Regional Act gave BPA the responsibility, which it did not previously have, for meeting the full future requirements of preference customers. 57/ As a result, JOA will have access for all of its customers to BPA's Priority Firm power, derived principally from BPA's existing Bonneville, Grand Coulee and other hydro-electric and thermal facilities. PP&L will also have access to that power, but only for its residential and farm customers in Washington, Oregon, Idaho and Montana.

On the other hand, PP&L will have a power deficit using only its own resources, including Merwin, from 1984-85 forward (Ex. T-20, at 3). Therefore, PP&L may -- if it builds thermal capacity -- have access for its commercial and industrial customers, and its residential and farm customers in California and Wyoming, to BPA's New Resources power, which is a blend of available hydro-electric power, and thermal power. With the passage of time, and assuming continuation of the inflation that has prevailed for the past half-century, the cost of BPA's New Resources power should reflect to an increasing extent the future costs of new thermal capacity and fuel, including of course the capacity that PP&L would build to gain access to the New Resources power. As a result, BPA's New Resources power should become considerably more expensive than its Priority Firm power, which should continue to reflect the embedded costs of BPA's existing hydro-electric capacity. And, while approximately 440,000 of PP&L's residential and farm customers should not be affected by our choice of the licensee, we have concluded that the adverse economic impacts on PP&L's remaining customers of licensing Merwin to JOA should be considerably greater than the adverse economic impacts on JOA's customers of relicensing Merwin to PP&L.

The Initial Decision states correctly, at 39, that the increasing concentration of the benefits of hydro-electric power is a consequence of congressional policy. But we do not agree that it is "the inevitable" consequence. We have a responsibility under the FPA to form a collective judgment as to what licensing action, including the selection of a licensee, will best serve the public interest, and to fashion that licensing action to accomplish that purpose. The congressional policy embedded in the statutes administered by the BPA and this Commission naturally enter into our consideration. In this instance, we have determined that the public interest strongly favors issuance of the new license to PP&L, and we have conditioned the license accordingly.

57/ Legislative History of the Pacific Northwest Electric Power Planning and Conservation Act, at vii.

Anticompetitive Considerations

The Supreme Court said in Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976), at 279 (reasserting and enlarging upon an earlier statement in Gulf States Utilities Corp. v. Federal Power Commission, 411 U.S. 747 (1973), at 758-9),

The exercise by the Commission of powers otherwise within its jurisdiction "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations...."

And the Commission has conceded on several occasions that anticompetitive considerations are relevant to its decisions to grant, withhold or condition water power licenses. See Pacific Gas and Electric Company, Project Nos. 2735 and 1988, 55 FPC 1543 (1976), at 1550-1, and Municipal Electric Association of Massachusetts v. Federal Power Commission, 414 F.2d 1206 (D.C. Cir., 1969), at 1209. 58/

In Northern Natural Gas Company v. Federal Power Commission, 399 F.2d 953 (D.C. Cir., 1968), the District of Columbia Circuit examined the relationship between regulatory agencies and the antitrust laws to determine the required extent of the Commission's consideration of those laws, stating, at 959,

that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same -- to achieve the most efficient allocation of resources possible.... This analysis suggests that the two forms of economic regulation complement each other.

Calling its analysis the "theory of complimentary regulation", the District of Columbia Circuit added, at 960-1,

58/ Every hydro-electric license is issued on the condition, as specified in Section 10(h),

That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of the antitrust law. [Citations omitted.] Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. [Footnote omitted.] In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" F.M.C. v. Aktiebolaget Svenska Amerika Linien, [390 U.S. 238, 88 S.Ct. 1005 (1968)] 390 U.S. at 244, 88 S.Ct. at 1009.

In the light of the foregoing authorities, we naturally agree with PP&L that the Commission is obliged to take into account the public policies underlying the nation's antitrust laws. But taking them into account does not require the Merwin hydro-electric development to be relicensed to PP&L to avoid the concentration of hydro-electric power in the hands of public bodies, or to avoid increasing PP&L's commercial and industrial rates. The Commission's obligation is to weigh PP&L's substantiated anticompetitive claims, together with all other relative factors, in exercising its judgment in the public interest.

We concur generally with the Initial Decision, at 36-38, to the effect that there has been no showing that the issuance of a new license to JOA would somehow violate the antitrust laws. But, as the District of Columbia Circuit indicated in Northern Natural, the Commission does not have authority to determine such violations. The showing that is relevant is that the issuance of a new license to one applicant or the other would violate the policies underlying the antitrust laws, in which case the Commission is obligated, as indicated, to weigh in the public interest any substantiated claims together with all other relevant considerations. In speaking of "other economic, social and political considerations" [emphasis added], the District of Columbia Circuit highlighted the fact that anticompetitive considerations are a type of economic implication which, as already decided, must be considered under the public interest standard of Sections 7(a) and 10(a).

Although anticompetitive considerations are relevant, we agree with the Initial Decision, at 37, that PP&L has not made a proper showing in this instance. Exhibit E-52 indicates that PP&L's average revenues per kilowatt-hour are higher than Clark or Cowlitz PUD's average revenues -- which permits PP&L to argue that the issuance of the license to JOA would increase its (PP&L's) costs and hence its rates, and lessen competition by

increasing its rate differentials with others. But we are unable to find in the record evidence of current rate differentials, if any, in the one geographic area of direct competition -- the Clark County, Washington, Portland, Oregon, vicinity. ^{59/} Considering that PP&L operates in six states and, therefore, has a number of direct competitors other than Clark PUD, it was incumbent upon PP&L to introduce evidence of current comparative rates (its own rates and its competitors' rates) as a foundation for further evidence that issuance of the new license to JOA would exacerbate the existing rate differentials.

The Records of Incumbents and Applicants

PP&L claims that its record as a licensee has been exemplary, and that it has been a model corporate citizen. And, apparently, it has no critics. PP&L calls attention to the flood control plan, infra, that it developed at the request of the City of Woodland. Without compulsion, PP&L organized a recreational department that developed facilities at the Lewis River and other developments, receiving national recognition. It engaged voluntarily in a five-year study of the fishery needs of the Lewis River, and undertook various measures to improve the fishery. And it volunteered 4,767 acres of non-project lands for a wildlife program.

JOA, as the challenging applicant, hasn't had an equal opportunity to perform, but naturally promises that it will do as well as PP&L. Its constituent, Cowlitz PUD, is the incumbent licensee of Swift No. 2; but since that is a run-of-the-river hydro-electric development (and, in any event, is operated by PP&L), Cowlitz PUD hasn't been in a position to provide flood control, recreational facilities, and fish and wildlife habitats. Considering that every incumbent licensee or its predecessor was, at one time, an applicant without a "track record", we have no reason to doubt that JOA, which is a public body, would become as good a corporate citizen, and as exemplary a licensee, as PP&L has been.

We commend PP&L and JOA for conducting this adversary relicensing proceeding on a high level, without attempting to blemish one another unfairly. Although we find it difficult to balance PP&L's good operating record against JOA's lack of such a record, we have concluded that PP&L's demonstrated performance is more convincing than JOA's promises.

^{59/} The record indicates at Tr. 704 that PP&L's Oregon industrial rates were 113% to 243% higher than Clark PUD's industrial rates in 1970. That evidence is too stale for this proceeding.

NPPC Fish and Wildlife Program

Pursuant to Section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (P.L. 96-501), the Northwest Power Planning Council (NPPC) developed in 1982 a fish and wildlife program to protect, mitigate, and enhance fish and wildlife resources in the Pacific Northwest. The project does not appear to conflict with NPPC's fish and wildlife program. Nevertheless, Article 56 reserves in the Commission the authority to order, where practicable, alterations in project structures and operations in order to take into account NPPC's fish and wildlife program.

OTHER MATTERS

The American Paper Institute Filings

On August 22, 1983, the American Paper Institute, Inc. (API) filed a motion pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR § 385.214) for leave to intervene out of time and for a stay of further proceedings herein, and a separate petition pursuant to Rule 207 (18 CFR § 385.207) to initiate a generic rulemaking proceeding to declare criteria (and the relative weights) to be applied to the selection of licensees in adversary relicensing proceedings. API states that it is a non-profit national trade association for the manufacturers of 90 per cent of the nation's pulp, paper and paperboard, a significant number of which own and operate hydro-electric developments that are licensed under the FPA. On September 7, 1983, JOA filed a reply in opposition.

API asserts that the time limitation for intervention should be waived

because when this proceeding was commenced neither API members nor other persons interested in future relicensing of projects was put on notice that rules of general applicability might be developed in the course of determining a dispute between the conflicting applicants in this proceeding. Recent developments have made API members aware that a determination of the present dispute without the benefit of the views of parties interested in the legal issues involved might result in determinations having broader applicability than intended.

The only "development" cited by API was the Supreme Court's denial of the petitions for a writ of certiorari to review the Eleventh Circuit's affirmance of the Commission's erroneous Bountiful decision.

API does not claim to have a direct financial interest in the outcome of this proceeding on its own behalf or as the representative of one or more of its members. Having no such interest, API states that it wants to intervene and cause this proceeding to be stayed because it

believes that a more efficient utilization of the Commission's resources would result if the Commission instituted a generic rulemaking proceeding to determine the appropriate criteria to be applied in all relicensing proceedings when a competing applicant seeks to displace an original licensee.

Alternatively, API asks that the proceeding be reopened so that the legal issues and criteria can be considered "in depth and with a more complete record", including API's active participation.

Although we understand API's indirect interest in this proceeding, the motion for leave to intervene and for a stay of further proceedings herein will be denied because API does not have or represent an interest that may be directly affected by the outcome, and because it has not shown good cause for waiver of the time limitation for intervention. Since API is aware of the Commission's Bountiful decision, and that decision indicates clearly (Op. 88, at 8, n. 12) that adversary applications had been filed for relicensing the Merwin hydro-electric development, API should have known that this adversary relicensing proceeding, which was the first one to be tried after the declaratory Bountiful decision, would probably result in a decision that would be considered at a later time to have established a precedent. On the other hand, no "rules of general applicability" have been developed herein, other than the precedential value of the decision.

The petition to initiate a generic rulemaking proceeding is being denied because relatively few of the many licensings under the FWPA and FPA have been contested, and, therefore, we choose for the time being to proceed on a case by case basis. A rule on relicensing criteria and their weights probably would be inappropriate until experience is acquired as to the kinds of issues that are raised, and their disposition by the Commission and the courts.

The Pacific Power & Light Company Filing

On August 24, 1983, PP&L filed a motion, which has not been opposed, to admit into the record the following documents:

Exhibit E-94: A photocopy of a document entitled "Contract By and Between Pacific Power & Light Company and Federal Emergency Management Agency," dated August 18, 1983, consisting of 13 pages including the signature page.

Exhibit E-95: A document, the first page of which bears the page number "19" and a section heading as follows: "3.3 Procedure for Regulation of High Inflow", and the last page of which is numbered "33", including an attached Plate IV entitled "Mudflow Control Storage."

Exhibit E-94 is a contract under which PP&L has agreed to operate the Merwin, Yale and Swift hydro-electric developments in a manner to provide 70,000 acre-feet of flood control storage from November 1 through April 1 each year, for the City of Woodland, Washington, on the Lewis River below the Merwin dam, and thereby enable Woodland to expand its residential areas. The exhibit is substantially the same as, and supersedes, an earlier draft that had been provided to everyone concerned in this proceeding, and is being submitted for the record pursuant to PP&L's commitment to do so when the final contract was signed.

Exhibit E-95 consists of the provisions in PP&L's Standard Operating Procedure Manual, referred to on pages 4 and 6 of Exhibit E-94, which develop the detailed regulation requirements during periods of high flow.

Since there is no opposition, Exhibits E-94 and E-95 will be admitted into the record.

As recommended by PP&L (Ex. T-8, at 22), Article 43 incorporates the substance of the flood control terms of Exhibit E-94 as a condition of the new license. But, since PP&L also committed its Yale and Swift hydro-electric developments to the flood control plan, and since flood control at Merwin would result in "excessive" power losses without Yale and Swift (PP&L's brief on exceptions, at 2), Article 54 requires PP&L to amend its licenses for Yale and Swift to include conditions that are identical to Article 43. As required by Section 10(a), Article 54 is necessary, in the judgment of the Commission, to assure that the project adopted will be best adapted to a comprehensive plan for beneficial public uses of the Lewis River. See Georgia Power Company, Project No. 485, 3 FERC ¶61,039, at 61,094. 60/

60/ For the same reason, Article 54 also includes the agreement between PP&L and the Washington Departments of Fish and Game embodied in Article 51, and the need to coordinate the operation of the three developments (Article 44) raised by PP&L (I.D., at 43).

Further Adversary Relicensing Considerations

The Initial Decision herein sought to apply the generalizations in the Bountiful decision (Op. 88, at 56-62) pertaining to the Commission's "public interest" determinations in adversary relicensing proceedings. Having decided the first such proceeding to apply those generalizations, and having rejected a formal rulemaking proceeding to establish criteria for selecting licensees in such proceedings, we will enlarge upon the existing generalizations here, to establish such criteria for the evaluation of "public interest" considerations in future adversary relicensing proceedings.

First, the financial or economic impacts associated with the allocation of the benefits of the particular water resources to the customers of the one applicant or the other, are appropriately separable into short- and long-term effects, and should be so presented. Forecasted system costs, including those of the hydro-electric development being relicensed, should be compared over the short and long terms with the same costs, excluding those of that development and substituting the least expensive alternative resource that achieves comparable system reliability. Long-term impacts ordinarily should be limited in time to the anticipated term of the new license, but may include more than one time frame if the anticipated term is uncertain. Of particular importance, comparisons should be sharpened through presentations that address the same time frames and employ the same or similar analysis methods, which appropriately account for the time value of money.

Second, the goal of economic efficiency is enhanced by assigning hydropower to its highest-value use, which should be tested through (1) incremental cost and (2) rate impact presentations for the adversary applicants' systems for the short and long terms. The rate impact presentations should include parallel competitive impacts in identified retail and wholesale markets.

Third, the engineering efficiency of operating the hydro-electric development being relicensed in coordination with other such developments on the same waterway or waterways, and the adversary applicants' generating systems, should be tested through appropriate presentations that may include forecasts of heat rates, fuel consumption, reserves and other matters. The past performance of the incumbent licensee and any potential impediments for a new licensee would be relevant factors.

Fourth, the comparative equities of distributing the benefits of the particular water resources among the customers, owners or other stakeholders of one applicant or the other should be appropriately presented. One possible surrogate measure of benefits and burdens would be impacts on the relative prices of electricity.

And fifth, the allocation of the benefits of the particular water resources to the customers of the one applicant or the other should be tested for consistency with (1) specific national energy policies, which should be identified, and (2) the FPA objective of maximizing the beneficial public uses of the particular waterway or waterways through projects that are "best" adapted to such uses.

We recognize, of course, that the relevance and importance of particular considerations will vary from case to case, just as the competing applicants must recognize that the ultimate balance is a matter for the Commission's judgment.

The Commission further finds and declares:

(1) Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 15 (deleting from paragraph 15 the words "attached as Exhibits J and M to the application in No. 2791") of the Ultimate Findings and Conclusions of the Initial Decision issued herein on April 28, 1983, are hereby adopted as findings and conclusions of the Commission.

(2) Paragraphs 13, 14 and 16 of the said Ultimate Findings and Conclusions, and Appendices C and D of the said Initial Decision, are rendered moot by the Commission's action herein.

(3) The plans of Pacific Power & Light Company in Project No. 935 are better adapted than the plans of Clark-Cowlitz Joint Operating Agency in Project No. 2791, and are best adapted, to develop, conserve and utilize in the public interest the water resources of the region. Furthermore, the Commission is satisfied as to the ability of Pacific Power & Light Company to carry out such plans and, therefore, the new license for the Merwin hydro-electric development should be issued to Pacific Power & Light Company, as hereinbelow provided.

(4) The preference of Section 7(a) of the Federal Power Act favoring States and municipalities over citizens, associations of citizens, and corporations, is applicable to all relicensing proceedings, other than those in which licensees in possession of project works are applicants, in which States or municipalities, and citizens, associations of citizens, or corporations, request successor licenses for the same water resources.

The Commission orders:

(A) The Commission's Opinion No. 88 issued June 27, 1980, and Opinion No. 88-A denying rehearing, issued August 21, 1980, are hereby overruled insofar as they find and declare, contrary to Paragraph (4) of the foregoing findings and declarations, that the said preference is applicable to all relicensing proceedings in which States or municipalities, and citizens, associations of citizens, or corporations, request successor licenses for the same water resources.

(B) The Initial Decision of the administrative law judge issued April 28, 1983, is hereby reversed, and the new license for the Merwin hydro-electric development is issued to Pacific Power & Light Company as hereinbelow provided.

(C) This new license is issued to Pacific Power & Light Company (Licensee) pursuant to Part I of the Federal Power Act (Act), for a period effective the first day of the month in which this license is issued, and terminating December 11, 2009, for the continued operation and maintenance of Merwin Project No. 935, occupying navigable waters and lands of the United States, on the Lewis River in Clark and Cowlitz Counties, Washington, subject to the terms and conditions of the Act, which Act is incorporated by reference as part of this license, and subject to such rules and regulations as the Commission issues under the provisions of the Act.

(D) Project No. 935 consists of:

(1) All lands, the use and occupancy of which are necessary or appropriate for the purposes of the project, constituting the project area and enclosed by the project boundary, the project area and boundary being shown and described by certain exhibits which form part of the application for license and which are designated and described as:

<u>EXHIBIT</u>	<u>FPC No. 935-</u>	<u>SHOWING</u>
J-1	87	General Map
J-2	88	General Map
K-1	89	Detail Map
K-2	90	Detail Map
K-3	91	Detail Map
K-4	92	Detail Map
K-5	93	Detail Map
K-6	94	Detail Map
K-7	95	Detail Map
K-8	96	Detail Map
K-9	97	Detail Map
K-10	98	Detail Map
K-11	99	Detail Map
K-12	100	Detail Map
K-13	101	Detail Map
K-14	102	Detail Map
K-15	103	Detail Map
K-16	104	Detail Map

(2) Project works consisting of:

- (a) A concrete arch dam, 313 feet high above its foundation, having an arch length of 728 feet and total crest of 1,250 feet, with four taintor gates 39 feet wide and 30 feet high and one taintor gate 10 feet wide and 30 feet high;
- (b) A 4,040-acre reservoir, 14.5 miles long, with a gross storage capacity of 422,800 acre-feet and a total usable storage capacity of 264,000 acre-feet between normal maximum water surface elevation 239.6 feet and minimum water service elevation 165.0 feet;
- (c) Four penstocks 15.5 feet in diameter located within the dam; three are 150 feet long and presently in use and each contains a 17-foot diameter butterfly valve located at the downstream face of the dam; the fourth penstock is available for future extension and use;
- (d) A powerhouse, semi-outdoor type, constructed of concrete, and containing three units each connected to a vertical-shaft reaction turbine rated at 61,500 hp and a semi-outdoor, umbrella type generator rated at 45,000 kW. The powerhouse also contains a 1,000 kW station service generator, bringing the total rated capacity to 136,000 kW;
- (e) Nine single-phase 13.8/115 kV transformers;
- (f) Three approximately 900-foot-long, 115 kV transmission lines terminating at the Merwin Substation bus;
- (g) Two recreational facilities on the Merwin Reservoir, Merwin Park and Speelyai Bay Park;
- (h) Fish facilities consisting of fish collection and trapping equipment at Merwin powerhouse and fish hauling equipment;
- (i) and all other facilities and interests appurtenant to the operation of the project, which are generally shown and described by the following exhibits:

<u>EXHIBIT</u>	<u>FPC NO. 935-</u>	<u>SHOWING</u>
L-1	105	General Plan & Sections
L-2	106	Powerhouse Plan & Sections
L-3	107	Spillway Plan & Sections
L-4	108	Non Overflow Section & Thrust Block Elevations & Sections

Exhibit M - Consisting of two pages of text entitled "Description of Equipment."

Exhibit R - Consisting of thirty-two pages of text (with photographs) entitled "Recreation"; four appended permits designated Appendix A (six pages plus Exhibits A and B), Appendix B (eight pages plus Exhibit A), Appendix C (four pages) and Appendix D (two pages plus the related application, supervisor's report and Exhibit A); and the following exhibits:

<u>EXHIBIT</u>	<u>FPC No. 935-</u>	<u>SHOWING</u>
R-1	109	Recreation Plan
R-2	110	Recreation Plan
R-3	111	Lake Merwin Park Recreation Plan
R-4	112	Woodland Park Recreation Plan
R-5	113	Speelyai Bay Park Recreation Plan

Also consisting of revised pages 30 and 31, and a proposed site development plan for Crescent Bay designated Appendix E (nine pages).

(3) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection with the project, located within or outside the project boundary, as approved by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(E) Exhibits J, K, L, M, and R, designated in Ordering Paragraph (D) above, are approved and made a part of the license.

(F) This license is also subject to the terms and conditions set forth in Form L-5 (Revised October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions designated as Articles 1 through 37, published at 54 F.P.C. 1832, are incorporated herein by reference and made a part hereof, and subject to the following special conditions set forth herein as additional articles:

Article 38. Prior to commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee

shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historic work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 39. The Licensee shall consult and cooperate with the U.S. Fish and Wildlife Service, the Washington State Departments of Game, Ecology and Fisheries, the U.S. National Marine Fisheries Service, and the National Park Service of the Department of the Interior, and other appropriate agencies for the protection and development of the environmental resources and values of the project area. The Commission reserves the right to require changes in the project works or operations that may be necessary to protect and enhance those resources and values.

Article 40. The Licensee shall pay the United States the following annual charges, effective the first day of the month in which this license is issued:

- (a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 182,000 horsepower.
- (b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of 138.18 acres of its lands, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 41. In cooperation with the Washington State Department of Ecology, and in compliance with federal, state, and local regulations, the Licensee shall plan and provide for the collection, storage, and disposal of solid wastes generated through public use of project lands and waters, and, within one year from the date of issuance of this order, shall file with the Commission a solid waste management plan that has been approved by the Washington State Department of Ecology. This plan shall

include: (a) the location of solid waste receptacles to be provided at public use areas, including campgrounds, picnicking areas, and similar areas; (b) schedules for collection from those receptacles; (c) provisions for including in the plan any additional public use areas as they are developed; and (d) the locations of disposal sites and methods of disposal.

Article 42. (a) In accordance with the provisions of this article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State and local health and safety requirements. Before granting permission for the construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that

the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modifications of those standards, guidelines, or procedures.

(c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kv or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least seventy-five feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than fifty total acres of project lands for each project development are conveyed

under this clause (d)(7) in any calendar year. At least forty-five days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any Federal or State agency official consulted, and any federal or State approvals required for the proposed use. Unless the Director, within forty-five days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraphs (c) or (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude the land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 43. The Licensee shall provide not less than 70,000 acre-feet of storage space in the Merwin, Yale and Swift hydro-electric developments for flood control on the Lewis River, beginning withdrawal by September 20 and reaching not less than 70,000 acre-feet by November 1 of each year, and retaining such space through April 1 and permitting gradual filling by April 30 of the following year, according to the following schedule:

DATE	MINIMUM STORAGE SPACE (ACRE-FEET)
September 20	0
October 10	35,000
November 1 - April 1	70,000
April 15	35,000
April 30	0

Periodically, the Licensee shall review the Standard Operating Procedure Manual (Lewis River Projects -- High Runoff Operation) with the Corps of Engineers and shall revise Section 3.3 thereof or the procedures of said section when deemed necessary by the Licensee and the Corps of Engineers, and shall promptly file any such changes with the Commission.

Article 44. The Licensee shall coordinate the hydraulic and electrical operations of the Merwin, Yale, Swift No. 1 and Swift No. 2 hydro-electric projects so as to maximize the total production of electrical capacity and energy from all of the Lewis River hydro-electric plants while meeting the obligations of the Licensee for flood control and other beneficial public uses.

Article 45. The Licensee shall submit for approval of the Director, Office of Electric Power Regulation, within 180 days from the date of issuance of this license, a Probable Maximum Precipitation (PMP) study for the Lewis River at Merwin Dam. The study shall incorporate the estimates of PMP as appropriate from the U.S. Weather Bureau Hydrometeorological Report No. 43. The study as submitted shall include sufficient data to permit an independent evaluation of all assumptions and parameters including, but not limited to: PMP values and precipitation losses and excesses for each sub-area of the watershed in the controlling PMP and its accompanying sequential storm; calibration of the runoff and stream course models with historic floods; the reservoir levels at the beginning of the PMP inflow and the reservoir rule curve and operation manual followed in routing the PMP.

Article 46. The Licensee shall submit for approval of the Director, Office of Electric Power Regulation, within eighteen months from the date of issuance of this license, a structural evaluation of the arch, thrust block, spillway, and non-overflow sections of Merwin Dam under normal operating, Probable Maximum Flood and Maximum Credible Earthquake loading conditions. The study as submitted shall include all parameters, assumptions, and physical properties used in the analysis in order to permit an independent evaluation by FERC staff.

Article 47. The Licensee shall provide recreational facilities, in accordance with Exhibit R of the Application for Relicense, for optimum public utilization of the project recreational resources. In developing, modifying or abandoning recreational facilities and management policies relating to recreation, the Licensee shall consult with the National Park Service of the Department of the Interior, the Washington Interagency Committee for Outdoor Recreation, the Washington State Parks and Recreation Commission and other appropriate federal, state and local government agencies, and entities.

Article 48. The Licensee shall carry out the Wildlife Habitat Management Plan set forth in Exhibit E-18 of the hearing record on relicense, as the plan may from time to time be amended, modified or expanded by agreement among the Licensee, the U.S. Fish and Wildlife Service and the Washington Department of Game.

Article 49. For the purpose of maintenance and enhancement of the native fall chinook run downstream of Merwin Dam, the Merwin Project will be operated to provide regulation of discharges from the Lewis River system of reservoirs and plants as follows:

Part I. December 8 to March 1

- A. Minimum flow of 1,500 cfs will be maintained.
- B. Merwin power plant may be loaded at a rate that will cause the water to rise gradually but will not exceed one foot per hour as measured at the USGS Ariel gage located about one-half mile below the Merwin powerhouse. Unloading the Merwin power plant will be gradual but will not exceed one and one-half feet per hour stage change at the Ariel gage.

Part II. March 1 through May 31 (refilling period)

- A. When the March 1 forecast indicates the runoff volume at Merwin during March, April and May will be equal to or more than 460,000 DSF, then the minimum flow will be 2,700 cfs. If the March 1 forecast is for a total runoff of less than 460,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 460,000 DSF and a minimum flow of 1,000 cfs if the volume runoff forecast is for 340,000 DSF. At no time will the minimum flow below Merwin be less than 1,000 cfs in March.
- B. When the April 1 forecast indicates the runoff volume at Merwin during April and May will be equal to or more than 340,000 DSF, then the minimum flow will be 2,700 cfs. If the April 1 forecast is for a total runoff of less than 340,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 340,000 DSF and a minimum flow of 1,300 cfs if the volume runoff forecast is for 270,000 DSF. At no time will the minimum flow below Merwin be less than 1,300 cfs in April.

- C. When the May 1 forecast indicates the runoff volume at Merwin during May will be equal to or more than 175,000 DSP, then the minimum flow will be 2,700 cfs. If the May 1 forecast is for a total runoff of less than 175,000 DSP, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 175,000 DSP and a minimum flow of 1,650 cfs if the volume runoff forecast is for 145,000 DSP. At no time will the minimum flow below Merwin be less than 1,650 cfs in May.

Part III. June and July Operation

During these months a minimum flow at Merwin of 2,500 cfs for June, 2,000 cfs from July 1-15 and 1,500 cfs from July 16-31, will be maintained as long as natural flow at Merwin is equal to or greater than 2,000 cfs in June, 1,600 cfs from July 1-15, and 1,400 cfs from July 16-31. When the natural flow is less than these amounts, the minimum flow at Merwin will be equal to the natural flow, except that at no time will the minimum flow be less than 1,650 cfs in June and 1,200 cfs in July.

Part IV. Plateau Operation (March 1 - July 31)

- A. The period of plateau operation may be modified if the need (abundance of fish) so indicates, as determined jointly by the Washington Departments of Fisheries and Game and the Merwin licensee.
- B. Daily fluctuation in flows below Merwin will be restricted by providing flow plateaus (periods of near-steady discharge). Each plateau will be of as long a duration as possible when in effect, but flow plateaus can be changed as a result of changes in natural flow or power demand on the Lewis River power system. Reductions in the number of generating units on the line during the period of plateau operation will be held to as few as possible, with a target level of no more than twelve during this period.
- C. In changing a flow plateau on the rising stage, the Merwin plant may be loaded to provide a gradual rise as measured at the USGS gage of not more than one (1) foot per hour. On the falling stage the following limitations prevail: (a) for plateau operation of flows above 6,000 cfs the fall should be at a gradual rate of not more than 750 cfs per hour; (b) for plateau

operation above 3,000 cfs but less than 6,000 cfs the fall should be at a gradual rate of not more than 500 cfs per hour; (c) for plateau operation for flows below 3,000 cfs the fall should be at a gradual rate not to exceed 300 cfs per hour, and limited to only one change in any 24-hour period.

Part V. August 1 through October 15

- A. Minimum flow of 1,200 cfs will be maintained.
- B. Same as "A" of Part I.

Part VI. October 16 through December 7

- A. During the period October 16 through October 31, the minimum flow will be 2,700 cfs.
- B. During the period November 1 through November 15, the minimum flow will be the lesser of: (1) natural flow at Merwin plus 2,000 cfs from storage; or (2) 4,200 cfs.
- C. During the period November 16 through December 7, the minimum flow will be the lesser of: (1) natural flow at Merwin plus 2,000 cfs from storage; or (2) 5,400 cfs.
- D. The minimum flow requirements of Part VI.C. will be terminated at an earlier date by the Washington Department of Fisheries if salmon spawning or other conditions so warrant, and if such termination is requested by the Merwin licensee.
- E. Same as "B" of Part I.

Part VII.

- A. As used herein, the term "natural flow" shall mean, on any day, the average of the natural flow of the Lewis River at Merwin during an immediately preceding three-day period.
- B. It is expected that from time to time temporary modification of the above regulations may be warranted. Such changes would be made if mutually agreed to by the Licensee, the State of Washington Departments of Fisheries and Game and the National Marine Fisheries Service.
- C. Biological and in-stream flow studies necessary to determine the flow requirements of the Lewis River for the enhancement of the fishery resource below Merwin

Dam are incomplete as of November 1982. When such studies are complete, or by December 31, 1984, this Article shall be reviewed by the Washington Departments of Fisheries and Game together with the Licensee to determine whether or not any modification should be made to the flow regulation below Merwin in the interest of more closely matching such flow regulation to the respective needs of the fishery resource, recreation and power.

Article 50. The Licensee shall make the following provisions for anadromous fish other than fall Chinook:

Spring Chinook Salmon: The Licensee shall pay all expenses for the annual hatchery production of approximately 250,000 juvenile spring Chinook (to produce 12,800 adult fish). This production will take place in existing hatcheries.

Coho Salmon: The Licensee shall pay all expenses for the annual hatchery production of approximately 2,100,000 juveniles (to produce 71,000 adult fish). This production will take place in existing hatcheries.

Steelhead and Sea-Run Cutthroat Trout: The Licensee shall construct and pay all operating and maintenance expenses of a hatchery to produce annually approximately 250,000 juvenile steelhead (about 41,600 pounds) and approximately 25,000 juvenile sea-run cutthroat trout (up to 6,250 pounds).

Article 51. The Licensee shall provide, and shall pay costs of operation and maintenance of, such facilities that must be provided or modified to provide for the following resident fisheries:

Merwin: Annual release of 150,000 juvenile coho salmon at 50 fish per pound and 150,000 juvenile coho salmon at 20 fish per pound.

Yale: Protection of habitat on that portion of Cougar Creek under control of the licensee which provides spawning for resident sockeye (Kokanee) salmon.

Swift: Annual release of 1,000,000 rainbow trout fry.

Article 52. The Licensee shall, if feasible, provide one additional small boat access below Merwin, and shall take over and maintain the two existing boat-launching facilities below Merwin. The Licensee shall secure three additional bank-fishing easements below Merwin.

Article 53. The Licensee shall continue negotiations with the Washington Department of Game on their request for one full-time fishery biologist and one full-time wildlife biologist to administer and monitor the programs under Articles 48, 51 and 52. If the parties have not reached an agreement within one year from the effective date of the license, the matter shall be referred by the Licensee to the Commission for decision.

Article 54. The Licensee shall file applications promptly to amend its licenses for the Yale and Swift No. 1 hydro-electric projects to include conditions that are identical to Articles 43, 44 and 51 hereof.

Article 55. Pursuant to Section 10(d) of the Act, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One-half of the project surplus earnings, if any, accumulated under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article No. 56. The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies or affected Indian Tribes, alterations of project structures and operations to take into account to the fullest extent practicable at each relevant stage of the decisionmaking processes, the regional fish and wildlife program developed and amended pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

(G) The motion for oral argument filed by the Public Utility Commissioner of Oregon on July 5, 1983, is denied.

(H) The motion for leave to intervene out of time and for a stay of further proceedings herein, and the separate petition to initiate a generic rulemaking proceeding to declare criteria to be applied in adversary relicensing proceedings, filed by the American Paper Institute, Inc., on August 22, 1983, are denied.

(I) The motion to admit Exhibits E-94 and E-95 into the record, filed by Pacific Power & Light Company on August 24, 1983, is granted.

(J) All exceptions not granted are denied.

(K) This opinion and order will become final 30 days from the date of its issuance unless an application for rehearing is filed as provided in Section 313(a) of the Federal Power Act. The filing of such an application will not, of itself, operate as a stay of the effective date of the license issued herein. The failure of Pacific Power & Light Company to file an application for rehearing shall constitute its acceptance of the license issued herein for Project No. 935; and, in acknowledgement of such acceptance, including the terms and conditions of the license, the license shall be signed for Pacific Power & Light Company and returned to the Commission within 60 days from the date of issuance of this opinion and order.

By the Commission. Commissioner Sheldon concurred, in the result only, with a separate statement attached.
(S E A L) Commissioner Hughes dissented in part and concurred in part with a separate statement attached.

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.

Pacific Power and Light Company

Project No. 935-000

Clark-Cowlitz Joint Operating Agency

Project No. 2791-000

SHELDON, Commissioner concurring in the result only:

(Issued October 6, 1983)

I concur in the result. But I dissent from the over-ruling of Bountiful. A separate statement will issue at a later date.

Georgiana H. Sheldon
Georgiana H. Sheldon
Commissioner

September 22, 1983
September 22, 1983

HUGHES, COMMISSIONER, dissenting in part, concurring in part:

(Issued October 6, 1983)

The municipal preference issue underlying this case has evoked the sharpest disagreement among the Commission during my tenure. Among the many ironies of this dichotomy are that it involves a condition unlikely to occur often, an issue we did not need not to address to resolve this case, and an outcome that was unanimous notwithstanding this disagreement.

Thus, I dissent from the reversal of Bountiful, 1/ the discussion up to page 32 of the Commission Opinion, and Ordering Paragraph A. I concur in the decision that Pacific Power & Light (PP&L) is the applicant whose plan is better adapted, the public interest test by which the better adapted plan was chosen in this case, and the standards set out for consideration in future cases. 2/ The portions of the Commission opinion in which I concur are pages 32 to the end and Ordering Paragraphs B through K.

The divisive issue is the applicability of municipal preference on relicensing of a project in competition with an incumbent non-preference licensee. The interaction between Sections 7 and 15 of the Federal Power Act poses an elegant verbal conundrum with no completely satisfying resolution. Bountiful says preference operates in that competition; today's decision says it does not. Each decision supplies a lengthy exegesis of the statutory interpretation and legislative history available to support the result. Both serve to make absolutely clear the inconclusiveness and ambiguity of those sources of wisdom. Both are subject to criticisms that they fail to provide for every possible situation, and that they rely on prior assumptions to reach artificial meanings. Both lead ultimately to logical vertigo.

1/ City of Bountiful, 11 FERC ¶ 61,337, reh. den., 12 FERC ¶ 61,179 (1980); aff'd sub nom. Alabama Power Co. v. FERC, 685 F.2d 1311 (11th Cir. 1982); cert den., ___ U.S. ___ (1983).

2/ I regard these standards as a more complete statement of the generalizations set out in Bountiful at 61,735 - 61,736. Similarly, the majority's discussion at pp. 46 - 59 in this case is within the analytical framework of these standards. I do not view them as new standards, and I believe we could have, and should have, applied them explicitly in this case.

Although today's Commission decision refers to the affirmation of Bountiful by the 11th Circuit and the denial of certiorari by the Supreme Court, it fails to mention the Commission's unusual stance of filing a petition for certiorari of the affirmation. It is hard for mere mortals to know whether, under that peculiar set of facts, this may not be a case where the denial of certiorari may mean more than it usually does. See U.S. v. Kras, 409 U.S. 434, 443 (1973) and Linzer, The Meaning of Certiorari Denials, 79 Columbia L. Rev. 1227 (1979).

Given this recent judicial history, whose binding quality is, in keeping with the underlying issue, in doubt, I find it utterly unnecessary for the Commission to reopen the question in order to decide this case unless we adopt the administrative law judge's finding that the two competing applications are equally well adapted to serve the public interest. Since none of us believes that a tie exists, and since we all agree that evaluation of economic factors is appropriate, and that an economic evaluation in this case shows PP&L to be the superior applicant, it is not necessary to retread the ground of Bountiful to decide the competitive aspect of this case. Our reversal of Bountiful is tantamount to purposely hitting ourselves in the head with a mallet: it draws considerable attention but little respect.

The majority attempts to avoid the charge that overruling Bountiful is dictum by raising the opportunity of a municipality to make its plans equally well adapted, which is an adjunct of the municipal preference provision. Slip op. p.8. If Bountiful applies, the argument runs, then the JOA should be allowed to revise its plans to match PP&L's. But, the majority's "alternative position", at Slip op. pp. 36-38, finds that the JOA had an appropriate opportunity to render its plans equally well adapted (see fn. 34) and implies also that the JOA's plan is incapable of being made as well adapted, except by so conditioning it as to make it meaningless. I fully agree that Congress did not intend to create a procedure to test an applicant's willingness to accept a completely pyrrhic victory. That case is the hypothetical described at pp. 32-35, and it appears hypothetical only in that these parties' names are not attached to the purported hypothetical facts.

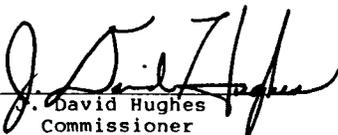
Ordinarily, neither the correction of a prior error, if such it be, nor a shift of policy reflecting the Commission's changing membership would be a matter of such intense concern or opposition. On this issue, however, ride high political and economic sentiments. Here, we are dealing with a policy, whether wise or not, which had just been judicially sanctioned. That sanction, if coupled with a decision in this case applying that policy to these facts through a discussion of the factors

discussed at pp. 46-59 and 63-64, would have brought predictability and stability to our review of contested relicensing applications. Sadly, the parties to this case and others interested in these matters, both public and private, and their paying customers, will now be exposed to a new round of appellate review, with its attendant costs and risks. ^{3/}

Only reluctantly do I suggest that we refrain from seeking what may indeed be the best view of a perplexing statutory question. But, it is also worth repeating Chief Justice Warren's observation:

Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other. [Footnote omitted]. CAB v. Delta Air Lines, 367 U.S. 316, 321 (1961).

In this matter, I would hold that the time for finality has arrived.


J. David Hughes
Commissioner

^{3/} It is also likely that legislative attention, so badly needed in other areas, will be diverted to a re-examination of this subject.

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