



FERC Revises License Term Policy for Hydropower Projects

OCTOBER 19, 2017

[Sharon White](#) and [Robert Conrad](#)

On October 19, 2017, the Federal Energy Regulatory Commission (FERC) issued a [policy statement](#) revising its longstanding policy on establishing the length of license terms for hydroelectric projects. The policy statement establishes a default license term of 40 years for original and new licenses for hydropower projects located at non-federal dams, with certain exceptions discussed below. The revised license term policy ends FERC's longstanding practice of setting the length of the license term between 30 and 50 years based on the amount of redevelopment, new construction, new capacity and environmental mitigation and enhancement measures required under the license. The policy statement appears to leave unchanged FERC's longstanding practice of granting 50-year terms for new and original licenses for projects located at federal dams.

BACKGROUND

For original licenses, Section 6 of the Federal Power Act (FPA) extends broad authority to FERC to establish license terms of up to 50 years. FPA Section 15(e) grants FERC similar discretion when relicensing projects, but requires new license terms to be for 30- to 50-years. For the past few decades prior to the October 19 policy statement, FERC exercised that discretion under its longstanding policy for assigning license terms, which varied slightly for original and new licenses.

For original licenses, FERC's policy had been to grant a 50-year license term at projects that entail construction of a new dam and for projects at federal dams. For unconstructed projects located at a non-federal dam, FERC established a policy that set the license term based on FERC's qualitative assessment of construction, mitigation, enhancement, and other investments required under the license. Under this longstanding policy, FERC granted 30-year license terms for projects with little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures.

For new licenses issued at relicensing, FERC's longstanding policy followed this same incremental 30-, 40-, or 50-year license term approach based on its qualitative assessment of investment required under the license. Moreover, FERC's license term policy provided for 50-year license terms for new licenses for projects at federal dams.

Over the years, licensees and developers challenged FERC's license term policy, arguing that it discouraged new and continued hydropower investment and relicensing settlements. For example, the policy gave no credit in a new license term for environmental or developmental improvements under the prior license, no matter how substantial or costly. Instead, the policy encouraged licensees to wait until relicensing to propose such measures. The policy also did not give credit in the new license term for expenditures on obligations under a relicensing settlement agreement that a licensee commenced before FERC issues a new license, or for project-related environmental obligations conducted through off-license agreements. The policy did not give credit in the new license term for lost power, foregone water storage, or loss of power value due to environmental restrictions in the new license and instead focused solely on capital or other expenditures. Lastly, FERC did not always honor license term agreements among the parties to relicensing settlement agreements.

On November 17, 2016, FERC issued a Notice of Inquiry seeking comments on whether and, if so, how it should revise its policy for establishing the length of original and new licenses for hydroelectric projects. In response, FERC received over 40 comments from licensees, resource agencies, environmental and recreation groups, and individuals. Van Ness Feldman authored [comments](#) on behalf of a coalition of

industry trade associations and hydropower licensees, advocating for a 50-year default license term for new and original licenses. In the alternative, the coalition asserted that FERC should adopt a 40-year default license term policy with credit (up to 10 additional years) for early action measures performed during the previous license term, and defer to license term provisions included in relicensing settlement agreements.

FERC'S POLICY STATEMENT

FERC's October 19 policy statement generally establishes a default license term of 40 years for original and new licenses at non-federal dams. However, FERC will consider a longer or shorter term under three circumstances. First, FERC may adjust a license term as necessary to coordinate license terms for projects in the same river basin. Second, FERC will defer to a license term explicitly agreed upon in a comprehensive licensing settlement agreement, provided such term does not conflict with the coordination of other license terms in the same river basin. Third, at an applicant's request and provided it is consistent with coordinating license terms within a basin, FERC will consider a longer license term based on significant measures expected to be required under the new license or voluntary measures implemented during the prior license term. The policy statement provides guidance on measures that may warrant a longer license term, including construction of pumped storage facilities, fish passage facilities, fish hatcheries, substantial recreation facilities, dams, and powerhouses. Maintenance measures and measures taken to support the licensing process do not qualify.

The new policy will apply to all licenses issued following publication of the policy statement in the *Federal Register*. FERC encourages applicants with pending applications to specifically request a longer term if justified based on their circumstances. FERC will not, however, entertain applications to amend existing licenses to extend their license terms on the basis of the new license term policy. Under its current policy, FERC will only grant a license extension if the licensee proposes development, environmental, and/or recreation enhancements through a license amendment application, or, in more limited circumstances, to coordinate with the license expiration date of other projects in the same river basin or in other unique circumstances.

Implications

Although it does not accommodate all the concerns with the license term policy raised by the commenters, FERC's revised policy is a marked improvement over its prior policy in several respects. Between 2016 and 2030, over 500 projects will begin the relicensing process. A default 40-year term, as opposed to the prior minimum term of 30 years, affords a licensee needed time to recoup the costs to implement a new license, which often includes new capital and maintenance costs, foregone energy and capacity, reduced flexibility of project operations, and increased continuous flow releases. It also defers the high costs of the next round of relicensing, which can be in the tens of millions of dollars. The revised policy also could incentivize capacity upgrades and new resource protection measures during the license term, which were not credited in the new license term under FERC's previous policy. The new policy also should strengthen FERC's policy of encouraging settlements in licensing proceedings.

However, the revised policy is somewhat troubling in emphasizing the coordination of license terms in a river basin as a reason to override agreement on an agreed-upon term in a comprehensive settlement agreement, or to shorten the license term for a project that would otherwise have justified a 40-year or 50-year term based on project improvements. In addition, the revised policy leaves several unanswered questions. Because the revised policy by its terms applies only to projects at non-federal dams, it appears that FERC will retain its existing policy of granting a 50-year license term for projects at federal dams. For projects that entail construction of a new dam, which received 50-year terms under the prior policy, it appears that at least initially such projects will be subject to the new 40-year default term, although as a practical matter most of these projects are likely to qualify for a longer term based on a settlement agreement or the considerable investment required for new project construction.

For more information

Van Ness Feldman's hydroelectric and public land and natural resources practices provide comprehensive legal, policy, and business advisory services for the full range of issues affecting these matters. Van Ness Feldman's decades of experience cover every aspect of these matters, ranging from transactions and land use planning to licensing, permitting, regulatory compliance and litigation. If you would like additional information on FERC's policy statement, please contact any member of our [hydroelectric](#) practice.

Follow us on Twitter [@VanNessFeldman](#).

© 2017 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.