HYDROPOWER REFORM COALITION

Putting water, wildlife, and people back in rivers

March 26, 2021

Via electronic filing

Kimberly D. Bose
Secretary,
Federal Energy Regulatory Commission
888 First Street N.E.
Washington, D.C. 20426

Re: Docket RM21-9-000: Financial Assurances Measures for Hydroelectric Projects

Dear Secretary Bose:

The Hydropower Reform Coalition provides these comments in response to the "Notice of Inquiry: Financial Assurance Measures for Hydroelectric Projects," 86 Fed. Reg. 7081 (Jan. 26, 2021) (NOI).

Founded in 1992, the Hydropower Reform Coalition is a national association of more than 160 conservation and recreation organizations. The Coalition and our members are dedicated to protecting and restoring rivers affected by hydropower projects, ensuring public access to these lands and waters, and reforming the federal licensing process to ensure public participation and to improve the quality of the resulting decisions. Our combined membership represents more than 1.5 million people across the nation.

Until recently, most licenses and other authorizations were issued to public utilities that sold power under rates guaranteed to cover their costs for operation, maintenance, and retirement. No longer. Public utilities and merchant generators alike are not guaranteed to recover all costs in competitive power markets. The Commission now faces "increasing numbers of projects that are non-operational or out of compliance with their license conditions ..." due to inability to pay for such compliance. NOI, para. 8. The Commission recognizes that its enforcement authorities "may not result in necessary license compliance." *Id.* at para. 9. And inadequate fiscal capacity results in

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"threats to public safety and environmental resources," particularly when projects are abandoned. *Id.* at para. 10.

We recommend that the Commission revise its practices to require financial assurances in all licenses for hydroelectric projects. This is based on statutory requirements.

Under Section 10(b) of the Federal Power Act, each licensee must construct project works as authorized and then avoid any alteration "not in conformity with the approved plans…." Under Section 10(c), a licensee must "…maintain project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power …." It must "establish and maintain adequate depreciation reserves" for "all necessary renewals and replacements." *Id.* Under Section 10(d), a licensee must also establish "amortization reserves" and maintain them until the termination of the license. Lastly, under Section 10(c), a licensee is responsible to address any damages caused by its project. In sum, the statute requires that a licensee must have fiscal capacity for license compliance. This capacity is not limited to power revenues and must include "reserves," which are contingent mechanisms to address responsibilities for project maintenance and any license surrender.

We now address key questions in the NOI.

> ***Should a financial assurance requirement be included in original licenses and/or on relicense? If on relicense, should such a requirement be included in both new licenses for major projects and subsequent licenses for minor projects? Should the Commission also require financial assurance requirements in other authorizations, such as all exemptions, amendment requests, and transfers? NOI, para. 11.***

Each license should include a condition requiring financial assurances that comply with Federal Power Act section 10, including depreciation and amortization reserves. These statutory requirements apply to all forms of license and exemptions. This condition should be included on issuance or transfer.

As recognized in the NOI, assurances are mechanisms other than power revenues to fund license compliance. These include insurance, bonds, and other contingent mechanisms. Each assurance amounts to a contractual commitment by a third party (such as the insurer or surety) to backstop the licensee with respect to an event within the scope of coverage. There are literally dozens of insurance and bond types available to cover various risks associated with generation assets. Coverage is available for: equipment breakdown, environmental damages (such as unexpected hazardous waste

contamination), closure obligations, decommissioning upon license surrender; and many other events addressed by the NOI. Insurance policies and bonds often overlap with respect to such coverages. Each licensee should develop an integrated plan of financial assurances tailored to the risks associated with each project. Assurances should be subject to the Commission's approval upon issuance or transfer of the license.

Should the Commission reopen licenses to impose financial assurance measures? Should the Commission require licensees to reaffirm or recertify that they have adequate financial assurance instruments every few years during their license term? If so, how often during a license term should the Commission require licensees to demonstrate that they still have adequate finances? Should the Commission require licensees to notify the Commission if the circumstances underlying their financial assurance instruments have changed? NOI, para. 11.

The Commission should integrate financial assurances into its periodic inspections of projects for physical safety under 18 C.F.R. Part 12. Further, it should integrate them into existing reporting requirements. Under 18 C.F.R. § 12.12, each licensee must maintain financial and other records as specified in Part 125. Under 18 C.F.R. § 125.3, such records include "insurance policies in force, showing coverage, premiums paid, and expiration dates," as well as revenues, expenses, book value of project works, and depreciation. Under 18 C.F.R. § 141.400, the Commission requires major licensees to report detailed information, including information related to financial assurances, on a quarterly basis. The Commission should establish a universal reporting obligation for financial assurances, with an appropriately scaled-back schedule and level of detail for non-major licensees.

The Commission has the authority to reopen any existing license as necessary to protect public safety and the environment against risks associated with license non-compliance or abandonment. It should use that authority where the licensee does not demonstrate that it holds financial assurances expressly required by Section 10 or otherwise does not maintain the necessary fiscal capacity.

Should the Commission require licensees to obtain bonds as a financial assurance mechanism? NOI, para. 13(i).

The NOI asks the same question with respect to insurance. We recommend that the Commission require each licensee to develop an integrated plan of financial assurances appropriate for its project, including responsibilities and risks related to license termination. The plan should include those assurances (which may be bonds, insurance, or both) that cost-effectively address such risks.

If so, how should the Commission determine the amount of the bond or what factors should the Commission consider when determining the bond amount? NOI, para. 13(ii).

The NOI asks the same question with respect to insurance. We recommend that the amount of coverage provided by assurances be proportional to the risks associated with a given project. The Commission uses probabilistic modeling with respect to the risk of dam failure. Similarly, insurers and sureties use such methods to forecast other risks associated with a generation asset, including the eventual need for retirement or replacement. That probabilistic analysis drives scope, exclusions, and premium for any assurance that may be provided. The amount of coverage should be based on risk analysis specific to a given project. Of course, the analysis should be on the record (except for Critical Energy Infrastructure Information) and subject to public comment.

Are bonds within the resources of all licensees, including those of small hydroelectric projects. Could the Commission mitigate these expenses? NOI, para. 13(iii).

Under Federal Power Act section 10, each licensee must have the fiscal capacity, including financial assurances, necessary for license compliance. It would be imprudent for any licensee to own and operate a project without commercial general liability insurance, which backstops power revenues with respect to events such as injury to a third party on project lands. And other insurance policies, or bonds, are also available at reasonable premiums to cover other events. The all-in cost of financial assurances for a given project will be a function of many variables, including the probable continuity of power revenues, the licensee's record of insurance claims, estimated risks associated with the condition of a project, level of protection associated with such risks, and exclusions.

The Commission should resolve how much coverage is enough for a project, based on the record of risks associated with that project. The Commission plainly has discretion and flexibility with respect to the specifics of the assurances appropriate for a given project, subject to the statutory limits that it may not tolerate risk-shifting from the licensee to the public, and further may not contribute to the cost of such assurances.

Should the Commission establish an industry-wide trust or fund as a financial assurance mechanism? NOI, para. 14(i).

The Coalition supports such a mechanism as a backstop to the financial assurances that each licensee must secure to comply with its obligations under Federal Power Act section 10. We request that the Commission undertake and publish an analysis of authority under existing statutes to establish such a mechanism.

Conclusion

The NOI raises the possibility of a significant revision in the Commission's practices with respect to fiscal capacity. We support the intention to reexamine how to supplement power revenues to assure such capacity, which is necessary to comply with Section 10 of the Federal Power Act. And while this may seem like a brave new world, the NOI describes practices that are commonly used for other generation assets, including wind and solar projects located on public lands. As a key next step, we recommend the Commission convene a workshop where insurers and sureties testify regarding their practices for various generation assets. Their testimony should address the probabilistic methods used to establish the premiums, coverages, and other terms of such financial assurances. Owners of generation assets, including licensees for hydropower projects and other stakeholders, should also testify with respect to specific experience in such assurances. Looking ahead, the Commission has existing authority to modernize its practices with respect to financial assurances at all projects, regardless of license status.

Thank you for the opportunity to comment on this issue. For further information, please contact Thomas O'Keefe at okeefe@americanwhitewater.org or Richard Roos-Collins at rrcollins@waterpowerlaw.com.

Respectfully submitted,

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