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In this article Mr. Walker and Mr. Cox point out the interesting fact that although the Federal Power Commission has in the past generally concerned itself with power development of water, it has recently expanded its jurisdiction to exert control in the area of federal and non-federal non-power water uses. This article explains how this was a necessary and expedient move so that the agency will be able to handle the interrelated problems with more efficiency and accuracy.

## JURISDICTION OF THE FEDERAL POWER COMMISSION OVER NON-POWER WATER USES

*William R. Walker\* and William E. Cox\*\**

THE jurisdiction of the Federal Power Commission is not generally associated with non-power uses. However, recent amendment to the Federal Water Power Act,<sup>1</sup> suggest that storage for such purposes is to receive more attention in the future. New legislation and a closer scrutiny of existing provisions of the Act seem to provide the authority for the FPC to play a much larger role in the use of federal and non-federal structures for non-power water uses.

### NON-FEDERAL STRUCTURES

Prior to the passage of the Federal Water Power Act of 1920, the licensing of non-federal water resource projects on navigable rivers was handled on an individual basis by Congress. This responsibility shifted to the Federal Power Com-

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1. Ch. 285, 41 Stat. 1063 (1920), 16 U.S.C. §§ 791-823 (1964). This act was substantially amended by the Federal Power Act, ch. 368 tit. II, 49 Stat. 838 (1935) (codified in scattered sections of 16 U.S.C.).

mission with the enactment of the FWPA. The preamble to the Act sets forth its general purpose.

An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.<sup>2</sup>

The crux of the authority of the FPC is its ability to license certain activities. Section 4(e) of the Act defines this authority.

The Commission is hereby authorized and empowered . . .

(e) To issue 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 for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided. . .<sup>3</sup>

By the terms of the Act, the Commission was directed to think in terms of comprehensive plans of development. Section 10 (a) sets forth the uses for which licenses can be issued:

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 utili-

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2. *Id.* at 1063.

3. 16 U.S.C. § 797(e) (1964).

zation of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such 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.<sup>4</sup>

It was recognized in the original legislation that the Commission could not fully discharge its responsibility unless some flexibility was provided for it to act in certain situations even after a license was issued. Section 10 (c) provides that the Commission can impose additional requirements related to the protection of life, health, or property after the issuance of the license.<sup>5</sup> In recent years the Commission, aware that it is unable at the time of license issuance to solve all of the problems that subsequently may have to be met if comprehensive development is to be maintained, has imposed what may be termed limited subject open-end conditions which permit the alteration of requirements during the license terms. Typical open-end conditions relate to water releases, joint use of project reservoirs and properties by the licensee and others, installation of additional capacity, etc.

The Act does contain a prohibition against unilateral license alteration:

Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.<sup>6</sup>

Although this section imposes some limitation on the actions by the Commission during the license term, it does not preclude the Commission from imposing, at the time of license issuance, a condition reserving its ability subsequently to act. Section 6 merely requires that the ground rules be reasonably specified at the time of license issuance but does not preclude the alteration of requirements or the imposition of additional burdens during the license term if the licensee is timely appraised of this potential vulnerability.<sup>7</sup>

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4. 16 U.S.C. § 803(a) (1964).

5. 16 U.S.C. § 803(c) (1964).

6. 16 U.S.C. § 799 (1964).

7. Letter from Edward Berlin, Ass't. General Counsel of FPC, to Hon. Harley O. Staggers, Chairman, House Committee on Interstate and Foreign Commerce, June 24, 1968, 114 CONG. REC. H6708-09 (daily ed. July 16, 1968).

The case of *Rumford Falls Power Company v. FPC*<sup>8</sup> is one of the few examples, if not the only one, where an open-end condition has been challenged. The question in this case was not an absence of authority on the part of the Commission but was based on the ground of vagueness regarding an open-end clause inserted into a license by the FPC to test whether it could require applicants for hydroelectric power licenses to accept the following conditions before receiving the license:

- (1) [T]hat any person, corporation, or government agency may apply to the Commission for permission to make joint use of the licensee's facilities;
- (2) That the Commission may grant such right of use if it would be in the interest of proper utilization and comprehensive development of the waterway; and
- (3) that if such permission is granted the licensee shall receive reasonable compensation, amounting at least to reimbursement for any damages or expenses which the joint use causes it to incur.<sup>9</sup>

On review the First Circuit Court found that Article 31 (the contested open-end clause) was unclear in a number of respects, and it remanded "for clarification, either by a revision of the article itself, or by way of an opinion responsive to the questions . . . raised . . ."<sup>10</sup> The first question raised by the court was, "Does a person, in order to apply for joint use of a reservoir or other property in a license project, have to possess necessary state water rights?"<sup>11</sup> The answer to this question is of prime concern to those seeking to make joint use of such project facilities. The Commission responded in an opinion issued pursuant to the *Rumford Falls Case*:

Article 31 contemplates that when water rights needed for a joint use are owned by some entity other than the licensee or by the licensee for non-project uses, such as for industrial processing, the joint user secure the necessary water rights under state law or interstate compact. The article does not require,

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8. 355 F.2d 683 (1st Cir. 1966).

9. Sax, *Licenses—Restricting Private Rights in Public Resources*, 7 NATURAL RESOURCES J. 339 (1967).

10. *Rumford Falls Power Company v. FPC*, 355 F.2d 683, 688 (1st Cir. 1966).

11. *Rumford Falls Power Co., Op. No. 465-A*, at 2 (F.P.C. Sept. 9, 1966).

however, that in every case the person must have the rights *before* he files the application or the Commission acts on it. If the joint user has the capacity to obtain the rights and the intention to do so, it may be sufficient that he so aver. This makes it possible for the applicant to proceed simultaneously in securing permission to make joint use of project property and in obtaining necessary water rights. It also resolves the difficulty, which an applicant may face in some states, of having to be able to put the water to beneficial use before being able to obtain rights in it. If the Commission were to grant an application to make joint use before the applicant had the necessary water rights, the grant would be made subject to his perfecting these rights.<sup>12</sup>

The Commission states that the party obtaining such rights would not have the benefit of eminent domain but must proceed under state law.<sup>13</sup>

The second question was concerned with whether project property could be used by public agencies only. The Commission replied:

It appears from its context in the Act that the phrase 'beneficial public use' does not mean that the uses must be by public agencies . . . . In our view, a joint use is a public use if it has a public benefit, and it has a public benefit if it is consistent with a comprehensive plan for development of the water . . . .<sup>14</sup>

The third question dealt with was whether the joint use could adversely effect the power licensee and the fourth with compensation. The Commission answered in the affirmative with respect to permitting an adverse use and deleted a clause in Article 31 which had provided that the joint use must be "consistent with the primary objective of the project."<sup>15</sup> With regard to compensation, the Commission stated the intention that the licensee at least be able to recover any damages or expenses which the joint use causes him to incur. The Commission indicated that in some circumstances, it might be

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12. *Id.*

13. *Id.* at 3.

14. *Id.*

15. *Id.* at 4.

appropriate for a joint user to make a payment in addition to damages or expenses incurred by the licensee.<sup>16</sup>

Section 15 of the Federal Water Power Act was amended August 3, 1968.<sup>17</sup> It appears to codify the substantive content of Article 31 which was the subject of litigation in the *Rumford Falls* case. The amendment reads in part as follows:

In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State Commission, after notice to each State Commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, *may license all or part of the project works for nonpower use* [emphasis added].<sup>18</sup>

The interpretation to be given this new amendment is probably reflected in the Commission's opinion issued pursuant to the *Rumford Falls* case and discussed above.

It thus appears that in the case of new licenses or the renewal of old ones that non-power uses may well be incorporated into the new agreements. The role or impact of the FPC in these very important areas of water resource development will probably expand.

#### FEDERAL STRUCTURES

Section 4(e) of the Federal Water Power Act, set out earlier in the article, seems by the repetition of the phrase "for the purpose of" to establish two situations in which the FPC can legally issue licenses. The FPC has jurisdiction to issue licenses (1) for power projects constructed in navigable waters of the United States or on public lands and (2) for the purpose of utilizing the surplus water or water power from any Government dam.

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16. *Id.* at 5.

17. Act of August 3, 1968, Pub. L. No. 90-451, § 3, 82 Stat. 616; 16 U.S.C. § 808 (Supp. IV, 1965-68).

18. *Id.*

The second purpose, "to issue licenses to citizens of the United States . . . for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided,"<sup>19</sup> suggests that the FPC may issue a license for purposes other than power development. Thus the FPC may have the authority to issue licenses to use surplus water for non-power purposes.

Section 10(a), which conditions the issuance of licenses as provided for in section 4(e), is of interest with respect to the question concerning the purposes for which licenses may be issued.

[T]he project adopted . . . shall be such a sin 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*, [emphasis added] . . .<sup>20</sup>

The language "and for other beneficial public uses" merits particular attention. Beneficial public use covers a broad area, an area which logically cannot be restricted to water power development. The courts have to a large extent ignored the language in question with regard to this interpretation. Section 4(e) has been considered by the courts on several occasions, but primarily with reference to provisions other than those dealing with surplus water.<sup>21</sup>

The same situation prevails to some extent when examining the legislative history of the Act. The Hearings before the Water Power Committee concerning this Act<sup>22</sup> give no definite interpretation of the language in question. However, certain discussions concerning the scope of the licensing authority of the FPC provide some information. Although not specifically concerning the use of surplus water from Govern-

19. 16 U.S.C. § 797(e) (1964).

20. 16 U.S.C. § 803(a) (1964).

21. *See, e.g.*, Udall v. FPC, 387 U.S. 428 (1967); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 639 (1961); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *City of Tacoma v. Taxpayers*, 357 U.S. 320, 324 (1958); *FPC v. Oregon*, 349 U.S. 435, 442 (1955); *Chapman v. FPC*, 345 U.S. 153, 169 (1953). For further examples see cases cited within the above cases.

22. *Hearings on Water Power before the House Committee on Water Power*, 65th Cong. 2d. Sess. (1918).

ment dams, the following conversation between Mr. Lever, a member of the Water Power Committee and Mr. Merrill, a member of the Department of Agriculture who was instrumental in writing the bill, is of interest:

**MR. LEVER.** Let us find out from Mr. Merrill just what the situation in the bill is. After the water has been utilized for power purposes, have you the power in this bill to fix in the terms of the license what shall be done with the water?

**MR. MERRILL.** I think we would have this authority under the bill. We would have authority to fix conditions in the license that the water power should be developed in such a manner that if the licensee himself did not utilize the water that passed his plant for irrigation, his use should not interfere with anybody else taking it and using it for that purpose; and under the provisions of subparagraph (a) of section 10, the commission would have authority, in considering licenses or application for licenses, to require that all the uses of that water be considered and the relation of the different uses to water-power development before granting a license for a water power.

**MR. LEVER.** In other words, the conditions of your license will be such that you will not only use this water for navigation or water-power development, but in the language of the bill, for 'other beneficial public use'?

**MR. MERRILL.** Yes; and they can take into consideration any beneficial public use.<sup>23</sup>

At another point in the hearings, Mr. Raker, a member of the Water Power Committee who was avidly interested in including irrigation in the proposed bill, and David F. Houston, Secretary of Agriculture, discuss the phrase "and other beneficial public uses" which appears in 10(a) of FWPA.<sup>24</sup>

**MR. RAKER.** Well, now this brings me to the next question, on page 14, section 10, subdivision A: . . . .

Now, such an examination and analysis of any particular territory would take in every conceivable use that could be made of the project or scheme, namely, for navigation, preventing floods, water-

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23. *Id.* at 96.

24. 16 U.S.C. § 803(a) (1964).

power development, irrigation, and *any other matter* that may be connected with it, and they all ought to be considered in adopting a scheme, should they not [emphasis added] ?

SECRETARY HOUSTON. It is not improbable that in some cases power developments might involve flood control and the other matters you suggest. In many cases they would not. Probably in the majority of cases they would only remotely relate to the broader water-power plans contemplated under the Newlands bill. Of course, if they should, then clearly they ought to be handled in close cooperation with the commission created for the general purpose.<sup>25</sup>

These excerpts from the Hearings before the Committee on Water Power resulted primarily from attempts to insure that the use of water for irrigation received protection against unreasonable interference from utilization of water for power development. Also, the use of water impounded in private hydroelectric projects was involved rather than the use of surplus water from Government dams. Yet these quotations indicate that the Federal Power Commission can give consideration to non-power as well as power related water uses in the issuance of licenses.

In further support of the interpretation that section 4(e) encompasses the licensing of surplus water for non-power water uses, reference is made to an Act passed by the 65th Congress "making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes."<sup>26</sup> Section 18 is relevant.

That a commission, to be known as the Waterways Commission, . . . is hereby created and authorized . . . to bring into coordination and cooperation the engineering, scientific, and constructive services, bureaus, boards, and commissions of the several governmental departments of the United States and commissions created by Congress that relate to study, development, or control of waterways and water resources and subjects related thereto, or to the development and regulation of interstate and foreign commerce, with a view to uniting such services in investi-

25. *Hearings on Water Power, supra* note 22, at p. 678.

26. Act of August 8, 1917, ch. 49, 40 Stat. 250.

gating, with respect to all watersheds in the United States, questions relating to the development, improvement, regulation, and control of navigation as a part of interstate and foreign commerce, including therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses . . . .<sup>27</sup>

It is interesting to note that section 18 was specifically repealed by section 29 of the Federal Water Power Act. It must be presumed that the FWPA was intended to assume at least partial jurisdiction over problems originally intended to be dealt with by section 18 of the aforementioned Act, hence providing a plausible reason for repealing this section even before it had time to take effect. As indicated by the language of section 18, it was concerned with a variety of non-power water uses as well as utilization of water power.

The hearings concerning the FWPA indicate that the FPC was not intended to assume complete jurisdiction over all matters covered by the repealed section 18. However, certain discussions during the FWPA hearings which concern section 18 provide more evidence that the scope of the FPC authority encompasses more than the licensing for water power and therefore includes some of the intended jurisdiction of section 18. The statements of Franklin K. Lane, Secretary of the Interior, are pertinent at this time.

SECRETARY LANE. You know that Congress passed a bill authorizing the establishment of a commission which was to take up that whole question of the utilization of our waters and conservation of our forests and this commission itself would, under your intention, I presume, supersede that commission, would it not?

MR. RAKER. It seems to me that in all schemes we should provide for what is the highest use that is going to be made of this development. If the commission is granted in broad terms power to seek all uses

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27. *Id.*, § 18, at 269.

that can be made of the water, then you have the power and can utilize it. If the commission does not actually do the work they can utilize the information obtained from the commission already established in getting at the highest use that can be had of the water. Do you not believe it would be a good thing to enlarge its power in way of taking in the whole subject rather than to curtail their power?

SECRETARY LANE. Well, I do not know whether this commission ought to supplant the other commission that was proposed and take in the whole study of the waters of the country or not. It strikes me that is a little broader power than these three men ought to have.

MR. RAKER. Well, we ought by some means to provide for the highest utilization, and this commission in locating the project should have the benefit of all information touching what may be for the best possible use of the water. That is your view, is it not?

SECRETARY LANE. Yes; . . . .<sup>28</sup>

#### CONCLUSION

It appears that the jurisdiction of the FPC has been expanded to include non-power water uses as well as water power development. A recent amendment authorizes the issuance of licenses for the use of private hydroelectric power project facilities for non-power purposes. Although the issue regarding the licensing of the use of surplus water from Government dams for non-power uses remains unresolved, there is evidence to support this interpretation of section 4(e) of the FWPA. In the language "*or for the purpose of utilizing the surplus water or water power from any Government dam, [emphasis added]*"<sup>29</sup> can be seen a new purpose, apparently different from the development and utilization of water power. This interpretation seems consistent with both the language of section 4(e) itself and the provisions established in section 10(a) of the Act. It supplies a logical reason for repealing the heretofore discussed section 18 and is in keeping with the general discussions found in the Congressional Hearing records.

28. *Hearings on Water Power, supra* note 22, at 459-60.

29. 16 U.S.C. § 797(e) (1964).