

76. In brief, the IHC proposal provides for the Commission staff to approve with any necessary modifications a proposed information-gathering and study plan developed by the applicant in consultation with interested parties. Parties other than Federal or state agencies with mandatory conditioning authority under FPA Sections 4(e) and 18, or state or Tribal water quality certification agencies, as well as the applicant, would be bound by the decision. Agencies and tribes with conditioning authority would be able to dispute the decision with respect to studies pertaining to the exercise of their authorities.

77. The dispute would be submitted to a panel consisting of a person nominated by the Commission staff, a person nominated by the agency or tribe referring the dispute, and a third person with the appropriate technical qualifications selected by the other two panel members from a list of such persons maintained by the Commission. The panel would review the request with reference to the study criteria discussed above. There would be an opportunity for other participants to submit information. If the panel concluded that the study request satisfied the criteria, it would recommend to the Director that the applicant be required to conduct the study. The Director would review the recommendation pursuant to the study criteria and, unless he disagreed with the panel's conclusions, would direct the applicant to do the study. This process would be available when the applicant's study plan is first considered and if disputes arise during periodic status reviews. Several commenters indicated that the IHC proposed dispute resolution process appears to be reasonable, subject to various suggested modifications.<sup>97</sup> One frequent comment was that whatever dispute resolution mechanism is adopted, basic fairness requires that it be available to every participant that has a dispute with an applicant.<sup>98</sup>

78. Various commenters oppose the panel approach, or aspects of it, for different reasons. Some state that it would be costly, unwieldy, or take too long, and that the Commission has sufficient in-house expertise to resolve

study disputes.<sup>99</sup> PG&E is concerned that the panelists would not be directly involved in the proceeding and thus lack familiarity with the complexities of individual cases. Some object to the absence of the applicant from the panel, because it has expertise and will bear the cost of whatever studies are required.<sup>100</sup> EEI and others suggest that a panel would diminish the Commission's authority by placing too much decisional input into the hands of an entity in which the Commission has a minority role.<sup>101</sup> GLIFWC is concerned that a panel format might result in inconsistent resolution of disputes concerning the same or similar issues, and suggests that consistency could be ensured by having one neutral third party serve on multiple panels concerned with the same or similar issues. CDWR recommends that any panel have the applicant and resource agency or Tribe as the disputants, with the Commission staff acting as the third party.

79. Licensees further assert that if the licensee must be excluded from the panel, then it should in any event be afforded a role in the process. Suggestions in this regard include provisions for informal dispute resolution before a panel is convened,<sup>102</sup> the panel convening a technical conference,<sup>103</sup> and an opportunity for review and comment on the recommendation of any advisory panel before the Director resolves the issue.<sup>104</sup>

80. A few commenters object to the Commission resolving study disputes. Some states and HRC aver that deference to the expertise of state agencies requesting studies is appropriate, and that disputes over studies requested by agencies with mandatory conditioning authority should be resolved by those agencies.<sup>105</sup> States also emphasize that they are not bound by Commission decisions with respect to information needs in support of water quality certification, and if the result of a dispute resolution process at the Commission was not favorable, they would use their own processes to deny the certification or otherwise ensure that

they receive the requested data.<sup>106</sup> The Menominee Tribe states that the Commission staff lacks impartiality and, recommends with GLIFWC that the panel's recommendation be binding on the Commission staff as well as other parties. Wisconsin DNR recommends development of a dispute resolution mechanism in which the Commission staff acts as a facilitator.

81. There is also no consensus on whether dispute resolution should be mandatory, and whether the result should be binding. Some licensee commenters would require stakeholders to refer an issue in dispute during pre-filing consultation, and if they failed to do so, would not be able to make the study recommendation or raise the dispute after the application is filed.<sup>107</sup> Other commenters appear to support continuation of dispute referral as optional.<sup>108</sup>

82. Some commenters would make the result of the process binding.<sup>109</sup> NHA and NRG would make participation mandatory, which NHA explains would provide a needed incentive for parties to become involved during pre-filing consultation, but would make the result advisory.<sup>110</sup> Under HRC's collaborative process proposal, the participants would negotiate their own case-specific dispute resolution procedures with respect to study requests and various other aspects of the process, such as a plan and schedule for processing the application, as well as the contents of a draft license application, NEPA document, and mitigation and enhancement measures. HRC would have study disputes ultimately resolved by a panel which closely resembles the panel we are proposing.

83. We conclude that in order to be effective, a dispute resolution process should be timely, impartial, transparently based on a thorough consideration of the applicable facts and

<sup>106</sup> California, Oregon, Michigan DNR, Washington, NYSDEC.

<sup>107</sup> This concept is frequently expressed in terms of there being a ban on post-application information requests, or a rebuttable presumption against them, or that they be allowable only under extraordinary circumstances. EEI, Idaho Power, NHA, Xcel.

<sup>108</sup> PG&E. NHA's dispute resolution proposal would appear to be voluntary but, if it was invoked, would in effect be binding on requesters because they could not later revisit the issue except in extraordinary circumstances. It would not appear to be binding on the applicant.

<sup>109</sup> SCE, EEI, PG&E, Van Ness, Snohomish.

<sup>110</sup> NHA, NRG. Only a few commenters focused on the NRG dispute resolution process. In general, they approved that the process would be open to all participants, but expressed concern that criteria for dispute resolution were not defined, and that its advisory nature would result in no clear resolution. EEI, PG&E, Van Ness, Snohomish.

<sup>97</sup> NYSDEC, Van Ness, Duke, CRITFC, NYRU, GLIFWC, BRB-LST, WPPD, Michigan DNR, California.

<sup>98</sup> SCE, Kleinschmidt, WPPD, SCE, Skancke, AMC, EEI, PG&E, NYRU, Van Ness, Oregon, VANR, Southern, Idaho Power, ADK. NHA's proposal is that only applicants, agencies, and tribes be able to initiate dispute resolution, but that any party could participate.

<sup>99</sup> SCE, Kleinschmidt, Southern, Idaho Power, EEI, NHA. SCE adds that if the Commission lacks internal expertise with respect to a particular issue, it can obtain it by contract.

<sup>100</sup> Duke, Xcel, Kleinschmidt, Wausau, Georgia Power, WE Energies, Skancke, CDWR, Idaho Power.

<sup>101</sup> Wausau, FPL.

<sup>102</sup> NYSDEC.

<sup>103</sup> Duke, AEP, Van Ness.

<sup>104</sup> Duke.

<sup>105</sup> California, Oregon, Michigan DNR, Washington, HRC.