

ensure the filing of many applications requiring significant additional information. An applicant-proposed study plan and schedule, subject to review and comment, and appropriate dispute resolution provisions, is much more likely to ensure timeliness without sacrificing the quality of the record.

7. Settlement Agreements

159. Commenters offered very broad support for the inclusion in our regulations of specific provisions to accommodate settlement agreements, regardless of which licensing process is employed.²⁰⁴

a. Flexibility in Processing Schedules

160. One view shared by nearly all commenters is that the Commission should allow more flexibility in schedules to accommodate settlement discussions. They state that settlement agreements generally best represent the public interest because they are consensus-based, may avoid Federal/state conflicts, can reduce delays and litigation, and result in limited resources being devoted to providing environmental benefits rather than transaction costs. They indicate that the Commission's recent practice of denying requests for temporary suspension of the licensing process pending settlement negotiations is hindering settlement agreements.²⁰⁵ NHA and Oregon recommend that the licensing process provide for a 12–18 month “time-out” for settlement negotiations, based on the joint request of the parties. California urges that flexibility in this regard is necessary in order to recognize the responsibilities of Federal and state agencies with mandatory conditioning authority.

161. The Commission strongly favors settlement agreements, which provide the opportunity to eliminate the need for more lengthy proceedings if the parties reach an agreement on the issues that is compatible with the public interest and within our authority to adopt. The integrated licensing process should provide substantial encouragement to settlement agreements by helping to ensure early identification of issues and production of information useful to parties considering whether to engage in settlement negotiations. We

do not however see a need for specific provisions in our regulations to provide a “time out” or other flexibility in scheduling to accommodate settlement negotiations. General assertions to the contrary notwithstanding, we see no evidence that suspending Commission actions in the licensing process is more likely to result in a settlement agreement. Rather, our experience indicates that the prospect of near-term Commission action in the form of a draft or final NEPA document, or a license order, is more likely to spur the parties to resolve their differences. We are also concerned that suspending the licensing process to accommodate settlement negotiations may cause parties to view settlement negotiations as a means to obtain an open-ended suspension of the licensing process. We will, however, continue to consider requests for brief suspension of the Commission's processes on a case-by-case basis.

b. Timing and Conduct of Settlement Negotiations

162. HRC recommends that the Commission require the parties to a proceeding to meet at certain critical times in the process to explore interest in and opportunities for settlement. Others oppose this recommendation on the grounds that settlement negotiations require substantial commitments of time and can be costly, and that any such requirement is unnecessary because the parties will know whether and when the effort makes sense in the context of each proceeding.²⁰⁶ RAW states that settlement discussions should begin before the licensing proceeding begins. NHA suggests that appropriate junctures for such discussions are during formation of the study plan and preparation of a draft license application. NMFS recommends that settlement discussions be barred until all information requests have been satisfied.

163. We are not inclined to require parties to meet for this purpose, or to predetermine any particular point in the process where settlement should be considered. Settlement agreements have been conducted, and agreements filed, at every step in the licensing process, from the pre-filing consultation stage to after issuance of a license order. The parties themselves are in the best position to determine whether and when it makes sense to consider settlement negotiations. It may however be beneficial to encourage the applicant at the time the draft license application is filed to include with that filing a non-binding statement of whether or not it

intends to make an offer to engage in settlement negotiations.²⁰⁷ Such a provision might encourage all parties to consider whether the proceeding is in a favorable posture with regard to potential settlement negotiations. The Commission requests comments on this matter.

164. NMFS recommends that we require parties to establish ground rules and a communications protocol before settlement discussions begin. C-WRC similarly suggests that the rules should provide for stakeholder charters to accompany settlement discussions. The Commission agrees in general that settlement discussions should proceed based on mutual understandings concerning the scope of, and procedures for, negotiation. These commenters however offer no reason, and we see none, to limit the flexibility of parties to an individual proceeding with regard to the drafting of agreements, written or oral, in this connection.

165. NHA suggests that the ADR procedures established in Order No. 578²⁰⁸ may be unduly formal and that the Commission's Dispute Resolution Service (DRS) staff could serve as facilitators rather than mediators.²⁰⁹ Some commenters state that the Commission could assist settlement negotiations by providing training to stakeholders in interest-based negotiation processes²¹⁰ or by providing neutral facilitators or mediators to parties involved in negotiations.²¹¹ The Commission's dispute resolution program encompasses all of these recommendations where circumstances are appropriate. The DRS is designed to encourage the use of ADR, train the Commission staff and other parties in its use, and, where appropriate, provide staff to serve as neutral facilitators of settlement negotiations. Under this program the Commission's administrative law judges have received

²⁰⁷ Alternatively, an applicant might make such a statement when all major information-gathering and studies are completed.

²⁰⁸ Order No. 578 (1995), 60 FR 19494 (April 19, 1995), FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 31,018 (April 12, 1995).

²⁰⁹ In general, a facilitator is a person who works with the group members by providing procedural directions concerning how the group can move efficiently through the problem solving steps of the meeting and arrive at a jointly agreed-upon goal. More concisely stated, a facilitator's efforts are focused on process. A mediator also brings process skills to the group, but focuses in addition on helping the group member reach a mutually acceptable substantive resolution of the issues. This may involve working with the whole group or subsets of the group to explore interests and develop options that address the interests with the aim of reaching settlement.

²¹⁰ PacifiCorp.

²¹¹ SCE, NHA, PG&E, NCWRC, Kleinschmidt, Michigan DNR.

²⁰⁴ EEI, SCE, Oregon, Kleinschmidt, NHA, Idaho Power, HRC, Wisconsin DNR, Interior, PG&E, AmRivers, NCWRC, Xcel, NYSDEC, NMFS, CRITFC, ADF&G.

²⁰⁵ EEI, CRITFC, SCE, Oregon, Kleinschmidt, NHA, Idaho Power, HRC, Wisconsin DNR, Interior, PG&E, AmRivers, NCWRC, Xcel, NMFS, NYRU, NYSDEC, SCL, Idaho Power, CDWR, VANR, Troutman, Menominee, CTUIR, Xcel, Michigan DNR, NCWRC, WPPD, DM&GLH, Domtar, FPL, AMC, AW, California.

²⁰⁶ NHA, PG&E, CDWR, NMFS.