

Regulations.”³¹⁷ We think the statements concerning what the law requires are better made in formal orders or regulations than in guidance documents. The Commission staff stands ready to assist parties if there are questions pertaining to a particular case.

337. NHA states that guidance on formats and components of acceptable settlement agreements would be beneficial. As a general matter, the parties are the persons best able to determine what issues they wish to address in a settlement document and to organize the document. Parties may find it particularly useful to review other settlement documents and use as models those which address the same or similar matters to their proceeding and that have a format useful to them. As with other matters pertaining to settlement documents, there have been several instances in which parties have requested informal staff review of draft documents, a practice we encourage.

338. NOAA Fisheries states that the regulations should require a communications protocol and ground rules for settlement discussions, and should prohibit discussions until the record is complete. NYSDEC disagrees. We responded to NOAA Fisheries’ comment in the NOPR³¹⁸ and it advances no new facts or arguments.

339. The NOPR also explained the various means of dispute resolution available to parties to proceedings before the Commission, including the use of administrative law judges and Commission staff as facilitators, mediators, and neutrals.³¹⁹ ADK states that to succeed in these capacities, Commission staff need to be experienced in hydroelectric licensing. While prior licensing experience is unquestionably beneficial to anyone serving in one of these capacities, it is not a prerequisite. What is essential is training and experience in the relevant discipline. Our Alternative Dispute Resolution training program provides the necessary training to Commission staff.

340. We also explained in the NOPR that we include in licenses settlement agreement provisions that are beyond our authority to enforce if they are included in mandatory terms and conditions.³²⁰ Interior states that there is confusion about how such settlement

provisions are to be enforced, and that the confusion would be cleared up if each approved settlement provision the Commission can enforce was incorporated into a numbered license article, and other provisions clearly identified. Interior would like to see this done before issuance of the license order, and the parties given time to amend the settlement agreement in the light thereof.

341. In many cases, settlement agreement provisions approved by the Commission are reformatted into numbered license articles.³²¹ In other cases, however, it makes more sense from the standpoint of license administration to append the settlement agreement to the license order and include numbered license articles which require the licensee to provide plans to implement various components of the settlement agreement. This is most often the case when the settlement agreement is extremely lengthy or complex.³²²

342. In either case, if there are provisions the Commission cannot enforce, they are identified in the body of the license order.³²³ Also, as we have pointed out, the parties are free to include in their agreements other means of enforcing those provisions the Commission itself cannot enforce. Some settlement agreements, for instance, include language characterizing the agreement as a contract.

343. We think it would be inadvisable to amend the regulations to add a time period for the parties to renegotiate the settlement agreement if it contains provisions the Commission cannot enforce. As we have stated, such provisions are almost always procedural and involve the conduct of non-jurisdictional entities, and the precedent³²⁴ is clear, so there is little likelihood of the parties being surprised by such a finding. We are also aware of no case where the settling parties in a hydroelectric licensing proceeding have modified the agreement as a result of the Commission’s statement that portions of it are not enforceable by the Commission. Nevertheless, the Commission believes that there may be merit in certain cases to allowing parties a limited opportunity to renegotiate before the Commission issues a license that would not include a critical

component of a settlement, or that would include a critical settlement component in a mandatory condition, but that the Commission could not enforce. Therefore, the Commission remains open to considering this approach on a case-by-case basis.

344. Finally, we requested comments on whether the integrated process regulations should encourage potential applicants to include with their draft license application a non-binding statement of whether or not they intend to engage in settlement discussions.³²⁵ Most commenters agreed that this would be beneficial because it would confirm the applicant’s intentions with respect to settlement negotiations, which would better enable the parties to assess the prospects for settlement.³²⁶ One commenter suggested that it might also help the Commission to determine the appropriate processing schedule. HRC states that the Commission should also require any such statement to be preceded by discussions with the participants so the intentions of all parties are made clear. A few commenters responded that such encouragement would be meaningless, since it requires the applicant to do nothing, a statement of intent does not commit the applicant to anything, or because the applicant cannot unilaterally decide to conduct negotiations.³²⁷

345. We have concluded that this is a matter best left to the discretion of the potential applicant because it is likely that there will be many situations in which the potential applicant has not discussed the possibility of a settlement with the other participants when the Preliminary Licensing Proposal or draft license application is filed, or is only able to assess the prospects for settlement after receiving comments on that document.

R. Original License Applications

346. We proposed to make the integrated process applicable to original as well as new license applications, and requested comments on that proposal.³²⁸ Most of the few commenters who addressed this issue responded in the affirmative.³²⁹ NHA, California, and NOAA Fisheries state

³¹⁷ 55 FR 18026 (Mar. 23, 1981). NYSDEC indicates that generic guidance on such matters unnecessary.

³¹⁸ 68 FR at p. 14007; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,727.

³¹⁹ 68 FR at p. 14007; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,727.

³²⁰ 68 FR at p. 14008; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,728.

³²¹ See, e.g., Hudson River-Black River Regulating District, 100 FERC ¶ 61,319 (2002).

³²² See, e.g., Central Nebraska Public Power and Irrigation District and Nebraska Public Power District, 84 FERC ¶ 61,077 (1998).

³²³ See, e.g., Avista Corporation, 90 FERC ¶ 61,167 at p. 61,512 n.25 (2000).

³²⁴ Erie Boulevard Hydropower, L.P., 88 FERC ¶ 61,176 (1999).

³²⁵ 68 FR at p. 14007; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,726.

³²⁶ PG&E, Oregon, HRC, IDFG, PFMC, GLIFWC, Menominee, NCWRC, PFBC, Georgia DNR, NYSDEC.

³²⁷ NHA, Long View, NEU, Interior.

³²⁸ 68 FR at p. 14009; IV FERC Stats. & Regs. ¶ 32,568 at p. 34,729.

³²⁹ NHA, California, HRC, PFBC, PFMC, GLIFWC, Interior. NEU would, however, only apply the integrated process to projects greater than 5 MW, which is about one third of all projects.