Municipal Preference in Hydroelectric Relicensing: Interpretation of Section 7(a) of the Federal Power Act

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MUNICIPAL PREFERENCE IN HYDROELECTRIC RELICENSING: INTERPRETATION OF SECTION 7(a) OF THE FEDERAL POWER ACT

INTRODUCTION

Investor-owned utility companies currently hold licenses to more than 500 hydroelectric power projects valued at an estimated twenty-two billion dollars. Since 1920, many long-term licenses have been issued to private utilities to develop water power facilities on the nation's navigable waters. As these initial licenses have recently begun to expire, municipalities have sought to acquire new licenses, claiming entitlement to a preference over incumbent private utilities. This claim stems from section 7(a) of the Federal Power Act (FPA or Act) which mandates that "in issuing licenses to new licensees,"


2. Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 14 & n.22, Alabama Power Co. v. FERC, cert. denied, 103 S. Ct. 3573 (1983) [hereinafter cited as Petition]; see Moore I, supra note 1, at 10, col. 1. This estimate is based on the 1980 cost of replacing projects' aggregate developed kilowatt capacity with conventional coal generation. Petition, supra, at 14 n.22.


preference shall be given to applications of states\(^7\) and municipalities\(^8\) whose plans will serve the public interest at least as well as those of private competitors.\(^9\)

At issue is the applicability of this tie-breaking preference\(^10\) to relicensing proceedings\(^11\) in which a state or municipality challenges an
original licensee. If applicable, a state or municipality could take over an existing project by submitting a proposal as good as, but no better than, that of the expiring-license holder. The successor would need to compensate the predecessor licensee for only its “net investment” plus “severance damages,” which would approximate the cost

Cowlitz Joint Operating Agency, 25 FERC Rep. (CCH) ¶ 61,052, appeal docketed, No. 83-2231 (D.C. Cir. Nov. 29, 1983), the FERC found the incumbent private utility’s proposal superior. Id. at 61,201.

Because the FERC has had so few opportunities to evaluate applicants’ plans in the context of a relicensing contest, it may be instructive to examine the Commission’s procedures in other hydroelectric licensing proceedings. One judge has found that in issuing preliminary permits for water power projects, see infra note 141, the FERC has regularly relied on tie-breaking procedures without first adequately evaluating which proposal is best adapted. City of Dothan v. FERC, 684 F.2d 159, 166 (D.C. Cir. 1982) (Mikva, J. dissenting). In his dissent in Dothan, Judge Mikva commented, “when the tie-breaking rule is invoked in each and every case, one must conclude that FERC’s definition of a ‘tie’ is somewhat extraordinary.” Id.

11. Section 7(a) also contains provisions which give preference to states and municipalities at the initial licensing stage. 16 U.S.C. § 800(a) (1982). See infra notes 56-58 and accompanying text. The applicability of preference in initial licensings is not addressed by this Note.


The term “original licensee” is used throughout this Note to refer to the predecessor licensee in possession of an expiring or expired license, who may or may not be the first or initial licensee.


14. See 16 U.S.C. §§ 807(a), 808(a) (1982). Net investment is defined in § 3(13) of the Act, id. § 796(13), as original cost plus additions and betterments, minus amounts accumulated from earnings in excess of a fair return on the investment, such as accumulated depreciation. Id. Net investment compensation is “not to exceed the fair value of the property taken.” Id. § 807(a). At congressional hearings on the water
of construction. This cost-related amount would typically be a mere fraction of the facility's fair market value or replacement cost. If the section 7(a) preference were inapplicable, a state or municipality would prevail only by submitting the best proposal. If unsuccessful in relicensing proceedings, it could acquire a privately-developed project only by eminent domain condemnation, paying compensation at fair market value.

The few administrative and judicial interpretations of section 7(a) to date have left the status of the relicensing preference issue unclear. In the most recent decision, Pacific Power & Light Co. v. power bill, an administration spokesman explained that net investment "eliminates entirely from the price to be paid any increases in value due to lands owned by the licensee and used in connection with the license [and] any increases in value due to its water rights." Water Power: Hearings Before the House Comm. on Water Power, 65th Cong., 2d Sess. 39 (1918) (statement of O.C. Merrill, Chief Eng'r, Forest Serv.) [hereinafter cited as 1918 Hearings].

Severance damages are to compensate for "reasonable damage" to dependent property not taken, "caused by the severance therefrom of property taken." 16 U.S.C. § 807(a) (1982).


Clark-Cowlitz Joint Operating Agency, the Federal Energy Regulatory Commission (FERC or Commission) held the municipal preference inapplicable against original licensees seeking renewal. The newly-appointed commissioners thereby overruled their predecessors' decision in City of Bountiful, which had been affirmed by the


22. Although § 7(a) provides a preference for applications “by States and municipalities,” 16 U.S.C. § 800(a) (1982), for convenience this Note refers to this preference only as municipal preference. States, however, are entitled to the same preference as are municipalities. See id.


24. Id.


The overruling of *Bountiful* in *Pacific Power*, however, appears to have been dictum because the Commission never reached the tie-breaker threshold, and therefore had no reason to rule on the applicability of § 7(a)’s tie-breaking preference. See *Pacific Power*, 25 FERC Rep. (CCH) at 61,224 (Sheldon, Comm’r, concurring in part and dissenting in part). Whereas *Bountiful* decided the legal issue of § 7(a)’s applicability to relicensings, see *Bountiful*, 37 Pub. Util. Rep. 4th (PUR) at 349, *Pacific Power* was limited to deciding the factual issue of an applicant’s entitlement to preference, see *Pacific Power*, 25 FERC Rep. (CCH) at 61,176. It is argued, therefore, that in adjudicating the factual question in *Pacific Power*, the FERC should have been bound by its legal holding in *Bountiful*, as affirmed by the 11th Circuit. See Rehearing Application, supra, at 88-90; Rehearing Request, supra, at 10-12; Joint Application, supra, at 24-32. Furthermore, no party in *Pacific Power* asked the FERC to overrule *Bountiful* or to reconsider the legal question of § 7(a)’s applicability in relicensings, see *Bountiful*, 37 Pub. Util. Rep. 4th (PUR) at 349 & nn.12, 14, and the *Bountiful* Commission declared that pending relicensing applications “should go forward in the light of this declaratory order.” *Id.* at 381. This presumption of finality was echoed by the 11th Circuit in its affirmance of *Bountiful*. Alabama Power Co. v. FERC, 685 F.2d 1311 (11th Cir. 1982), cert. denied, 103 S. Ct. 3573 (1983), overruled, *Pacific Power & Light Co. v. Clark-Cowlitz Joint Operating Agency*, 25 FERC Rep. (CCH) ¶ 61,052, appeal docketed, No. 83-2231 (D.C. Cir. Nov. 29, 1983). In the three years between *Bountiful* and *Pacific Power*, there was no change in the statute or in other factors which might warrant a reversal of the law. *Pacific Power*, 25 FERC Rep. (CCH) at 61,224 (Sheldon, Comm’r, concurring in part and dissenting in part); Rehearing Application, supra, at 90. The only change was in the composition...
presented the third position on the relicensing issue that the politically-appointed bipartisan Commission has taken since 1967.27

Because hydroelectric project licenses will expire with increasing frequency in the next decade,28 a definitive determination must be made as to the applicability of section 7(a) to relicensings involving original licensees.29 Billions of dollars weigh in the balance,30 as mu-


29. See Petition, supra note 2, at 12-13; Edison Electric Institute, supra note 28, at 16; Nowak, Cochran & Leitch, supra note 3, at 10, col. 1; see also FERC Restates Position, supra note 25, at 36 (quoting John Vance, Pacific Gas & Elec. Co.) ("Relicensing is expensive and consumers cannot depend upon the decisions of a changing commission.").

municipalities with plans as well adapted as those of incumbent licensees stand to acquire sources of relatively inexpensive power for far less than the current cost of developing such facilities.

This Note analyzes section 7(a) within the framework of traditional principles of statutory construction. It reviews the background, purposes and pertinent provisions of the FPA. The language of the Act is analyzed and found to include a limited relicensing preference for municipalities, applicable only when the original licensee is not competing for a new license. Examination of the legislative history finds it inconclusive, yet suggests a congressional intent consistent with the language of limited preference. This Note concludes that section 7(a) does not give municipalities a relicensing preference over incumbent private utilities when both of their plans are equally well adapted to serve the public interest.

I. THE FEDERAL POWER ACT

A. Purposes

The FPA, originally enacted as the Federal Water Power Act of 1920, terminated the controversy between private power interests seeking rapid development of hydroelectric power, and anti-monopoly conservationists opposing unregulated "giveaways" of government lands. Because public capital at the time was insufficient to finance

31. See Petition, supra note 2, at 16; Thorpe, supra note 4, at 17, col. 4; Wall St. J., May 2, 1983, at 20, col. 4; Moore I, supra note 1, at 10, col. 2.


dam construction, the Wilson administration sought to encourage private investors to develop the nation's water power resources. Private development under the FPA was conditioned, however, to protect the public interest.

In enacting the FPA, Congress sought to ensure an abundant supply of economical electric power, while seeking to maintain a proper regard for the conservation of natural resources. The Act established national policy to promote the widespread development of water power, while providing for comprehensive federal control over the use of navigable waters. To these ends, Congress created the Federal Power Commission (FPC)—now the FERC—to coordinate the ad-


41. See supra note 21.
ministration of water power regulation previously divided among three federal agencies.42

B. Provisions

The FERC is comprised of five members, appointed by the President with the advice and consent of the Senate.43 The Commission is empowered to issue licenses,44 not to exceed fifty years,45 for the construction, operation, and maintenance of dams and other works for the development of water power.46

When faced with competition for licenses, the Commission is required to consider the public interest, and license the project it judges "best adapted to a comprehensive plan for improving or developing . . . 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, including recreational purposes."47 The FERC may demand the modification of an applicant's proposal before approval.48

42. Montana Power Co. v. FPC, 445 F.2d 739, 750 (D.C. Cir. 1970) (en banc), cert. denied, 400 U.S. 1013 (1971); see H.R. Rep. No. 61, supra note 34, at 5 (quoting report of D.F. Houston, Secretary of Agriculture); H.R. Rep. No. 715, supra note 34, at 29 (letters of Feb. 27, 1918 from Secretaries of War, the Interior & Agriculture to Rep. Sims); 1918 Hearings, supra note 14, at 25 (statement of O.C. Merrill, Chief Eng'r, Forest Serv.). Prior to creation of the FPC, water power development was administered as follows: The Department of Agriculture regulated hydro sites in national forests; the Department of the Interior oversaw Indian reservations and public lands; and the War Department controlled navigable waters. Montana Power, 445 F.2d at 750; 1977 FPC Final Ann. Rep. 6; see 56 Cong. Rec. 9110 (1918) (remarks of Rep. Sims).

44. Id. § 797(e); Hydro Resources, supra note 1, at xxxii.
45. 16 U.S.C. § 799 (1982); Hydro Resources, supra note 1, at xxxii.
47. 16 U.S.C. § 803(a) (1982); see Udall v. FPC, 387 U.S. 428, 450 (1967); Citizens for Allergan County, Inc. v. FPC, 414 F.2d 1125, 1130 (D.C. Cir. 1969); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 612 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966); Pacific Power & Light Co. v. FPC, 333 F.2d 689, 692 (9th Cir. 1964), cert. denied, 379 U.S. 969 (1965); Namekagon Hydro Co. v. FPC, 216 F.2d 509, 512 (7th Cir. 1954); Pacific Power & Light Co. v. Clark-Cowlitz Joint Operating Agency, 25 FERC Rep. (CCH) ¶ 61,052, at 61,176, appeal docketed, No. 83-2231 (D.C. Cir. Nov. 29, 1983); 1969 Hearing, supra note 3, at 5 (statement of Lee C. White, Chairman, FPC); 1918 Hearings, supra note 14, at 95 (statement of
The Act provides several mechanisms for government entities to acquire hydroelectric projects under license to private parties. The United States or any state or municipality may use its power of eminent domain to take over licensed facilities at any time. The appropriating authority must pay "just compensation"—an amount approximating fair market value. At the expiration of a license, the United States may automatically acquire private power facilities by compensating the incumbent for only its "net investment" plus "severance damages." While the federal government has an absolute right to recapture licensed projects at expiration, a state or municipality seeking to obtain an expiring license must enter the normal application process. Then, if its plan is deemed best adapted to serve the public interest, the state or municipality will prevail. In such a case, the state or municipality need compensate the original licensee for only its "net investment" and "severance damages." By asserting that the section 7(a) preference is applicable to all relicensings, however, the public power interests seek to prevail when their proposal is as good as, but no better than, that of other applicants, including the predecessor licensee.

C. Preference Provision

Should the Commission judge that no plan is "best adapted" to serve the public interest, the Act stipulates how ties are to be broken in certain circumstances. Section 7(a) specifies three situations in which preference must be given to a state or municipality, provided its proposal is judged "equally well adapted . . . to conserve and utilize

O.C. Merrill, Chief Eng'r, Forest Serv.); Hydro Resources, supra note 1, at xxxii; cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-80 (1969) (FCC required to consider public interest in issuing and renewing broadcast licenses).

48. 16 U.S.C. §§ 800(a), 803(a) (1982); see Holyoke Water Power Co., 8 F.P.C. 471, 488 (1949); Petition, supra note 2, at 19.


55. See infra notes 62-94 and accompanying text.
in the public interest the water resources of the region.”56 The first two situations—“[i]n issuing preliminary permits hereunder or licenses where no preliminary permit has been issued”57—pertain only to initial licensings.58 The third situation involves relicensings: “in issuing licenses to new licensees under section [15 hereof.]”59 The meaning of this third clause, particularly the term “new licensees,” is the crux of the current relicensing controversy because incumbent private utilities claim that municipal preference was not meant to be applicable against them as original—not new—licensees.60

II. TEXTUAL ANALYSIS OF SECTION 7(A)

A. Language of Section 7(a)

Private and public utilities have accorded different meanings61 to the clause, “in issuing licenses to new licensees under section [15 hereof] the Commission shall give preference to applications therefor

57. Id.  
59. 16 U.S.C. § 800(a) (1982). Section 15, id. § 808, is entitled “New licenses and renewals.” Id.
by States and municipalities.”62 Private power interests define “new licensees” as other than original licensees.63 Public power interests interpret the phrase to refer to any licensee under a new license.64

The municipalities’ definition of “new licensees” as “any licensees” reduces the term “new” to mere surplusage and thereby fails to give significance and effect to Congress’ language.65 The public power


interests contend, however, that the term "new" has significance because it distinguishes long-term licensees from temporary annual licensees—to which preference would not apply. Without this modifier, they argue, these two categories of licensees might be confused.

This argument is illogical. Had Congress intended to distinguish long-term licensees from temporary annual licensees, it presumably would have used a more precise qualifying term such as "long-term" or "non-annual" licensees. By using the modifier "new," the legislators apparently intended to distinguish "new licensees" from "original licensees" in possession of expiring licenses.

The municipalities contend, however, that even accepting the private utilities' definition, preference would still be applicable in all competitive relicensings. Because the prefatory phrase, "in issuing licenses," refers to a decisional process and should not be restricted to the ministerial act of issuance, it is argued that section 7(a) should be read to mean "in considering applications of new licensees." Under


68. Joint Application, supra note 26, at 12 n.5; see 16 U.S.C. § 800(a) (1982).


70. Although FERC regulations define a "new license" as "any license . . . except an annual license," 18 C.F.R. § 4.50(b)(7) (1983), it does not follow that the term "new licensee" had to be used to specify any licensee except an annual licensee. Moreover, the term "licensee" is not defined in FERC regulations nor in the FPA.


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this reading, the preference would apply whenever a potential "new licensee" is among the applicants under consideration—that is, in every competitive relicensing situation.

This argument, as well, is tenuous. Had Congress intended the preference to be applicable in all relicensings, there would have been no need to use the limiting phrase "to new licensees."73 The statute simply could have read, "in issuing licenses under Section 15."74 Such language would have been consistent with that of the other two municipal preference situations listed in section 7(a)—"[i]n issuing preliminary permits hereunder or licenses where no preliminary permit has been issued"75—neither of which is confined to specific types of potential licensees. By specifying "new licensees," therefore, it is likely that Congress intended to restrict preference to relicensings involving a particular class.76 Moreover, accepting the interpretation that preference was meant to be applicable in every competitive relicensing ignores the provision's limiting language and thus fails to give significance and effect to every word of the statute.77

The distinction between "new licensees" and "original licensees" appears repeatedly in the FPA as well as in its legislative history.78 Because terms of a statute should be interpreted consistently, unless clear evidence exists that Congress intended otherwise,79 the meaning

73. A legislature is presumed to have used no superfluous words. Wilderness Soc'y v. Morton, 479 F.2d 842, 856 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973); see United States v. Menasche, 348 U.S. 528, 538-39 (1955); 2A C. Sands, supra note 62, § 46.06.
75. 16 U.S.C. § 800(a) (1982).
76. See Initial Brief, supra note 60, at 13.
77. See supra note 73 and accompanying text.
78. Petition, supra note 2, at 24; see, e.g., 16 U.S.C. § 807(a) (1982) ("new licensee" issued new license on condition that it pay compensation to, and assume contracts of, "original licensee"); id. § 815 (if new license not issued to "original licensee," then "new licensee" shall fulfill all existing contracts to furnish power); H.R. Rep. No. 61, supra note 34, at 8 (at expiration, new license may be issued to "original licensee" or to "new licensee"); H.R. Rep. No. 715, supra note 34, at 18 (same); 1918 Hearings, supra note 14, at 30 (statement of O.C. Merrill, Chief Eng'r, Forest Serv.) ("new licensee" must buy out "original licensee").
79. See United States v. Cooper, 312 U.S. 600, 606-07 (1941); Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932); Firestone v. Howerton, 671 F.2d 317, 320 & n.6 (9th Cir. 1982); United States v. Nunez, 573 F.2d 789, 771 (2d Cir.) (quoting Lewellyn v. Harbison, 31 F.2d 740, 742 (3d Cir. 1929)), cert. denied, 436 U.S. 930 (1978); Strachan Shipping Co. v. Davis, 571 F.2d 968, 974 (5th Cir. 1978); Curry v. Block, 541 F. Supp. 506, 518 (S.D. Ga. 1982); 2A C. Sands, supra note 61, § 46.05, at 56; see also Northerross v. Board of Educ., 412 U.S. 427, 428 (1973) (per curiam) (similarity of language indicates different statutes should be interpreted consistently).
of "new licensees" should be the same in section 7(a) as elsewhere in the Act. In every section in which it appears, the term "new licensees" intentionally excludes "original licensees." Consistent interpretation is especially appropriate in the case of section 7(a) because the "new licensees" phrase therein is explicitly cross-referenced to section 15 which covers relicensings. Specifically, section 15(a) authorizes the Commission "at the expiration of the original license, . . . to issue a new license to the original licensee [or] to a new licensee." In this context, the "original licensee" is the holder of the expiring license seeking renewal, and a "new licensee" is any other applicant vying for the new license. Carrying this mutually-exclusive meaning back to section 7(a), municipal preference would be applicable only in issuing licenses to applicants other than original licensees.

Municipalities may contend, however, that the meaning of "new licensees" in section 15(a) cannot be read into section 7(a) because the contexts of usage are different. "New licensees" is used in section 15(a) to distinguish successor licensees from predecessors, in the context particularly because titles enacted in tandem to function together; Strachan Shipping Co. v. Davis, 571 F.2d 968, 974 (5th Cir. 1978) (phrase "knowledge of injury" interpreted consistently throughout Longshoremen's and Harbor Workers' Compensation Act); American Family Life Assurance Co. v. Planned Mktg. Assocs., 369 F. Supp. 1141, 1146 (E.D. Va. 1974) (phrase "business of insurance" presumed to have identical meaning in different parts of McCarran-Ferguson Act).


81. Petition, supra note 2, at 22. See supra note 78 and accompanying text.


84. Id. § 808(a).

85. Pacific Power & Light Co. v. Clark-Cowlitz Joint Operating Agency, 25 FERC Rep. (CCH) ¶ 61,052, at 61,179, appeal docketed, No. 83-2231 (D.C. Cir. Nov. 29, 1984); see H.R. Rep. No. 715, supra note 34, at 18; Initial Brief, supra note 60, at 8. This distinction is further evidenced by later language in § 15(a) which stipulates that a "new license" for a project covered by an original license "shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such [compensation], and assume such contracts as the United States is required to do in the manner specified in section [14 hereof]." 16 U.S.C. § 808(a) (1982). Because the payment of compensation and the assumption of contracts are not conditions that an incumbent would have to meet before its license is renewed, the reference to "new licensee" necessarily excludes an original licensee in possession of an expiring license.

text of successive license terms. It is used in section 7(a), they claim, to
distinguish potential recipients of long-term licenses from recipients of
annual licenses.87

Use of the modifier "new" with "licensees" in section 7(a), however,
was not meant to distinguish long-term from annual licensees because
Congress presumably would have chosen more precise language had it
intended such a distinction.88 Moreover, the municipalities' interpre-
tation would result in inconsistent use of the term "new licensees."89
Therefore, although the contexts of sections 7(a) and 15(a) may not be
identical, there is no basis to conclude that Congress intended "new
licensees" to have different meanings in the two sections.90 Addi-
tionally, "new licensees" was used consistently throughout the legislative
history to the exclusion of "original licensees."91 As a result, it is
unlikely that Congress intended "new licensees" to have a meaning in
section 7(a) different from that elsewhere in the Act and its legislative
history.

The language of section 7(a)—although not clear and unambiguous
on its face—appears to limit the municipal preference to relicensings
not involving an original licensee. Presence of the modifying phrase "to new licensees," indicates Congress' intent to restrict the applicability of the preference to some, but not all relicensings. Such an interpretation is consistent with the use of "new licensees" elsewhere in the FPA\(^9\) and throughout its legislative history.\(^9\) For this meaning to be enforceable, however, it must not lead to absurd results.\(^9\) It is necessary, therefore, to examine the ramifications of this plain meaning.

\section*{B. Results of Enforcing Apparent Meaning}

Public power interests contend that limiting section 7(a)'s preference to relicensings not involving original licensees may lead to the following absurd results: 1) Municipalities with original licenses would lose their preference when applying for renewal;\(^95\) 2) a regulatory gap would be created;\(^96\) and 3) perpetual licenses would result.\(^97\) Analysis of these three concerns reveals that the results of enforcing the statute's apparent plain meaning will be neither absurd nor at odds with legislative intent.

\subsection*{1. Loss of Initial Preference}

If section 7(a) is inapplicable to situations involving original licensees, a municipality that acquired an original license through the FPA's initial-license preferences would not receive preference when

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92. See \textit{supra} notes 78-91 and accompanying text.
93. See \textit{infra} notes 150-51 and accompanying text.
94. See \textit{supra} note 61 and accompanying text.
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seeking renewal.\footnote{98} Public power interests assert that it is inconsistent for a municipality which is not in possession and is seeking an initial license, to receive preference, yet lose that preference when it is in possession and seeking renewal.\footnote{99} Although the municipality would not technically be preferred in relicensing, the outcome would be the same as if such a preference were applicable. The municipality, therefore, would be unseated only if a competitor were to submit a better proposal.\footnote{100} If the municipality's and challengers' plans were "equally well adapted," the incumbent municipality would prevail even without a relicensing preference because the Commission has indicated that, all other factors being equal, ties should be broken in favor of the original licensee.\footnote{101} This is based on a respect for continuity of ownership and a belief that an incumbent's demonstrated performance is more convincing than a challenger's promises.\footnote{102} Consequently, limiting relicensing preference to competitions not involving an original licensee will not lead to absurd results.

2. Regulatory Gap

The municipalities note that limiting preference to relicensings not involving original licensees would leave the Commission without guidelines for breaking ties when incumbents vie for new licenses. This regulatory gap, they contend, was not intended by Congress.\footnote{103}

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98. See supra note 95 and accompanying text.
Congress, however, left other regulatory gaps in section 7(a) that would continue to exist even if the municipalities' definitions were accepted. For example, the FPA provides no guidelines for breaking ties between private utilities or between municipal applicants. Because the legislators left regulatory gaps in both of these situations, there is little basis for contending that they intended no gap to exist in relicensing competitions between a private original licensee and a municipal challenger.

Although the Act may not cover ties involving incumbents, the Commission has indicated that it would favor original licensees. Any regulatory gap, therefore, would be filled by this policy. Thus, even assuming that a gap exists, it would not lead to results which are absurd or clearly at odds with congressional intent.

3. Perpetual Licenses

The municipalities claim that private utilities will have de facto licenses-in-perpetuity if relicensing preference is not applicable against original licensees. Presuming that incumbents would seek to renew all lucrative licenses, it is argued that a limited preference is a worthless preference because it would effectively be limited to unprofitable water power projects.

Perpetual licenses will not likely result from a limited relicensing preference because the FPA provides mechanisms to prevent such an occurrence. Federal, state, and local governments can take over private utilities' hydroelectric developments at any time by eminent domain, on payment of "just compensation." In addition, section 14(a) provides for federal recapture of any project upon license expiration. Licenses can also change hands through the normal application process: Any challenger, public or private, can prevail by submit-
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The proposal best adapted to serve the public interest. If a challenger's plan is not superior to the original licensee's, however, the latter should retain the license because of the value of continuity of ownership. A limited preference, therefore, will not lead to perpetual licenses unless government entities choose not to acquire hydroelectric facilities, and challenging applicants fail to submit superior proposals—in which case it appears preferable to retain original licensees.

Thus, enforcement of the apparent plain meaning of section 7(a) would not lead to absurd results. Nevertheless, in view of the plausible statutory interpretations put forth by the public power interests, the plain meaning is not so clear and unambiguous as to preclude an examination of the Act's legislative history.

III. Legislative History

A. The Federal Water Power Act of 1920

The municipalities contend that the Wilson administration drafters wanted their bill to include priority for states and municipalities in all relicensings, and that such preference remained therein throughout consideration of the bill. Analysis of the legislative history, however, indicates that Congress did not intend so broad a preference in the enacted statute. This conclusion is reached by analyzing three critical stages in the development of the Act: 1) the bill as introduced, which may or may not have implicitly contained a preference for all relicensings; 2) the bill as first reported out of Conference Committee, which eliminated any preference that may have existed in the bill as introduced; and 3) the bill in final form, as amended by the Senate Committee on Commerce to include a limited preference for relicensings.
1. The Bill as Introduced

The administration bill, introduced January 15, 1918, provided in section 7 "[t]hat in issuing licenses," discretionary preference may be given to states and municipalities for developing power, provided their plans are "adapted to [serve] . . . the public interest." Whether this original preference provision was applicable to relicensings at all is disputed by the public and private utilities.

The public power interests contend that a municipal preference applicable to all relicensings was implicit in the broad phrase "in issuing licenses." This interpretation is not unreasonable in view of the absence of any words in the bill restricting preference to initial licensings. The municipalities' conclusion is also supported by other evidence. At the time of the bill's consideration, there was, for example, a general understanding that private licensees should not be given a right of perpetual use. Additionally, Forest Service Chief Engineer O.C. Merrill, a principal drafter of the administration bill, prepared a memorandum of the principles to be embodied in that bill, including preference for states and municipalities over original licensees seeking renewal. Furthermore, during House committee

hearings, a private-utility spokesman acknowledged that he understood the original bill to give such priority.\footnote{123}{1918 Hearings, supra note 14, at 200 (statement of E.K. Hall, Vice President, Electric Bond & Share Co.). It appears, however, that Hall may have understood municipalities to have priority over incumbents not by way of § 7(a), but only via the federal recapture provision of § 14(a), 16 U.S.C. § 807(a) (1982), see supra note 52 and accompanying text, whereby Congress can take over an expiring license for the benefit of a municipality. See 1918 Hearings, supra note 14, at 191, 406 (statement of E.K. Hall, Vice President, Electric Bond & Share Co.).}

In contrast, the Chairman of the House Committee on Water Power expressed his understanding that the administration bill did not include any relicensing preference.\footnote{124}{Id. at 457 (testimony of Rep. Sims).} Furthermore, a Committee member acknowledged that he had been unsuccessful in his effort to insert provisions in the bill favorable to municipalities.\footnote{125}{56 Cong. Rec. 9113 (1918) (remarks of Rep. Taylor).} These declarations support the private utilities' view that the bill as introduced contained a preference for only initial licensings. Their view is reinforced by the absence of any reference to relicensing preference in the lengthy statement to Congress of Merrill, the administration's principal spokesman.\footnote{126}{See 1918 Hearings, supra note 14, at 8-116 (statement of O.C. Merrill, Chief Eng'r, Forest Serv.). Despite Merrill's memorandum in support of municipal relicensing preference, see supra note 122 and accompanying text, he made no mention thereof in his 108-page statement before the House Committee on Water Power. See 1918 Hearings, supra note 14, at 8-116 (statement of O.C. Merrill, Chief Eng'r, Forest Serv.). He explained, and was repeatedly questioned about, procedures to be followed at the expiration of licenses, yet never mentioned any relicensing preference. See id. at 30-36. The only time Merrill addressed the issue of municipal preference at all during the hearings was in connection with preliminary permits and initial licenses. See id. at 55. Moreover, he proposed an amendment to the administration bill to clarify its preference provisions, but this too dealt with only preliminary permits and initial licenses. See id. at 890 (letter of May 24, 1918 from O.C. Merrill to Rep. Sims, Committee Chairman). He suggested that § 7 be amended to read: “That in issuing preliminary permits for projects or parts thereof, or licenses where no preliminary permit has been issued, the commission may in its discretion give preference to applications by States and municipalities . . . .” Id. Here again, there was no mention of preference in relicensings. By specifying these two situations, Merrill raised a negative implication that the administration bill was not meant to give preference in other situations, such as relicensings. See infra note 132 and accompanying text.} This is especially so because there is little in the way of unam-
biguous statements in the legislative history to support the municipal-
ities' contention as to meaning.\textsuperscript{128} Even if their interpretation were
correct, however, any relicensing preference that existed implicitly in
the broad language of the bill as introduced was deleted by the
Conference Committee's amendment.

2. Conference Committee Amendment

The bill as reported out of the Conference Committee, February
26, 1919,\textsuperscript{129} provided for a mandatory tie-breaking preference "in
issuing preliminary permits . . . or licenses where no preliminary
permit has been issued."\textsuperscript{130} Thus, any relicensing preference that
could have been inferred from the broad "in issuing licenses" language
of the administration bill was eliminated by amendment.\textsuperscript{131} More-
over, because the conferees specified two situations in which prefer-
ence is applicable, it may be inferred that preference is not applicable
in other situations such as relicensings.\textsuperscript{132}

The Conference Committee's report further supports the conclusion
that the amendment contained no relicensing preference. The Com-
mittee characterized its changes to section 7 as "in the interest of
clarity"\textsuperscript{133}—presumably to overcome ambiguity in the broad language

\textsuperscript{128} See Pacific Power & Light Co. v. Clark-Cowlitz Joint Operating Agency, 25
FERC Rep. (CCH) \$ 61,052, at 61,183, appeal docketed, No. 83-2231 (D.C. Cir.
Nov. 29, 1983).

\textsuperscript{129} H.R. Rep. No. 1147, 65th Cong., 3d Sess. 4 (1919) [hereinafter cited as H.R.
Rep. No. 1147].

\textsuperscript{130} Id. at 5.

\textsuperscript{131} Pacific Power & Light Co. v. Clark-Cowlitz Joint Operating Agency, 25
FERC Rep. (CCH) \$ 61,052, at 61,182, appeal docketed, No. 83-2231 (D.C. Cir.
Nov. 29, 1983).

\textsuperscript{132} The maxim "expressio unius est exclusio alterius"—the expression of one
thing is the exclusion of others—is a widely-accepted guide to statutory interpreta-
tion. 2A C. Sands, \textit{supra} note 61, \$ 47.23, at 123; \textit{see} National R.R. Passenger Corp.
applicable to the Conference Committee amendment. \textit{Cf.} Andrus v. Glover Constr.
Co., 446 U.S. 608, 616-17 (1980) (When Congress enumerated certain exceptions to
the Buy Indian Act, additional exceptions should not be implied, absent evidence of
contrary legislative intent.); Midland Telecasting Co. v. Midessa Television Co., 617
F.2d 1141, 1145 & n.7 (5th Cir.) (Explicit exemption from antitrust laws for certain
acts is evidence Congress did not intend other exemptions.), \textit{cert. denied}, 449 U.S.
954 (1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1084-85 (5th Cir.) (Express
remedy for handicapped creates a basis to conclude that implied remedies are incon-

of the administration bill. Had a relicensing preference been implicit in the original language, the legislators likely would have clarified this point by explicitly listing relicensings as one of the specific situations in which municipal preference is applicable. 134

In its 1980 City of Bountiful 135 decision, the FERC acknowledged that the Conference Committee amendment “made it appear that the municipal preference applied only to the issuance of preliminary permits and some initial licenses.” 136 The commissioners went on, however, to maintain that section 7 as amended also applied to relicensings 137 because the issuance of successor licenses comes within the phrase, “in issuing . . . licenses where no preliminary permit has been issued.” 138 In overruling Bountiful, the Commission in Pacific Power and Light Co. v. Clark-Cowlitz Joint Operating Agency 139 labeled this interpretation “too strained.” 140 Indeed, the Bountiful Commission’s reasoning stretches literal interpretation to the point of absurdity. The question whether a preliminary permit has been issued bears no relation to the issuance of successor licenses. Preliminary permits, if necessary, are issued only for proposed water power developments prior to, and in conjunction with, initial licenses. 141 It is illogical, therefore, to conclude that Congress conditioned the granting of reli-

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134. Cf. Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 109 (1980) (“If Congress had intended to exclude FOIA disclosures . . . it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.”); Zuber v. Allen, 396 U.S. 168, 185 (1969) (Had an additional price differential been intended in the Agriculture Marketing Agreement Act, Congress could have simply included it with those enumerated. “It would be perverse to assume that congressional drafters, in eliminating ambiguity from the old Act, were careless in listing their exceptions . . . .” (footnote omitted)); Harold v. United States, 634 F.2d 547, 549 (Ct. Cl. 1980) (Congress’ failure to make even an implicit reference to death benefits exception, when it could have done so explicitly, suggests that no such exception was intended.).


136. Id. at 358 (emphasis in original).

137. Id.


140. Id. at 61,182.

licensing preference on whether a preliminary permit had been issued for the project some fifty years before.

Alternatively, the public power interests claim that, although the amendment did not mention relicensings, preference theretofore remained in the bill because the Committee did not express an intent to eliminate the relicensing preference allegedly contained in the bill as introduced.\footnote{142} It appears, however, that the Committee did in fact express such an intent by specifying two licensing situations, presumably to the exclusion of all others.\footnote{143}

3. Senate Commerce Committee Amendment

The Senate Committee on Commerce later amended the bill,\footnote{144} specifying the third situation in which municipal preference was applicable: “in issuing licenses to new licensees under section 15.”\footnote{145} As a result of this amendment, the section 7 preference provision took its final form.

The Committee characterized most of its amendments as minor and for purposes of clarification.\footnote{146} This position is inconsistent with the private utilities' theory that the amendment created a limited relicensing preference—applicable only when original licensees were not competing—where no preference had existed previously.\footnote{147} That type of change would have been substantive, and presumably described as such by the Committee. If, however, the amendment to section 7(a) was merely to clarify a pre-existing preference applicable to all relicensings—as the municipalities contend\footnote{148}—it is unlikely the senators would have chosen the language they did. The use of “new licensees” implies that preference is to be applicable only in a limited number of cases, not in all relicensings.

\begin{footnotes}
\footnote{143}{See supra note 132 and accompanying text.}
\footnote{145}{S. Rep. No. 180, supra note 36, at 13 (emphasis omitted).}
\footnote{146}{Id. at 1.}
\footnote{148}{See id.}
\end{footnotes}
HYDROELECTRIC RELICENSING

It appears, therefore, that this final amendment to section 7 was Congress' first expression of intent regarding successor licenses. In enacting a provision applicable only "in issuing licenses to new licensees," the legislature indicated that relicensing preference would not be applicable against original licensees.149 This is evidenced by use of the term "new licensees" at least 137 times in the legislative history;150 each time it was used to refer to other than original licensees.151

B. The 1968 Amendments

As early licenses approached expiration, Congress asked the FPC to submit recommendations to clarify FPA provisions so as to ensure "orderly and effective procedure" at expiration.152 The FPC submitted a draft bill that proposed no changes to section 7(a).153 The FPC expressly stated that its bill "does not attempt to deal with [the relicensing preference] question."154 Nevertheless, at committee hearings in both houses, FPC officials presented the agency's interpretation of the relicensing issue: 1) The new license should be issued to whichever applicant can best meet the standards of the Act;155 2) municipal preference is not applicable in a relicensing contest between the existing licensee and a challenger;156 and 3) when the original licensee and another applicant are equally matched, the new license should be issued to the original licensee.157

The final bill did not amend section 7(a), but did change other parts of section 7.158 The report of the Senate Committee on Commerce took note of the FPC's interpretation of the relicensing question and

149. See supra notes 76-77 and accompanying text.
150. Petition, supra note 2, at 24. See supra note 78 and accompanying text.
151. Petition, supra note 2, at 24.
154. 1968 House Hearings, supra note 27, at 34 (statement of Richard A. Solomon, General Counsel, FPC).
156. 1968 House Hearings, supra note 27, at 34 (statement of Richard A. Solomon, General Counsel, FPC); 1968 Senate Hearings, supra note 27, at 14 (statement of Lee C. White, Chairman, FPC).
158. Specifically, subsection (e) was added to § 7, amending procedures for federal recapture of expiring project licenses. See Pub. L. No. 90-451, 82 Stat. 616 (1968).
expressed approval thereof.\textsuperscript{159} A minority of the Committee, however, thought the report should remain silent on the issue because the meaning of section 7(a) was unclear and had never been formally interpreted by an administrative or judicial body.\textsuperscript{160} Additionally, this substantive question was beyond the scope of a bill designed merely to clarify procedure.\textsuperscript{161} The Report of the House Committee on Interstate and Foreign Commerce did not address the issue of municipal preference.\textsuperscript{162}

When Congress is made aware of the administrative interpretation of a provision and affirmatively indicates an intent not to change that meaning, the doctrine of reenactment may preclude subsequent changes in administrative interpretation.\textsuperscript{163} Committees of both houses were informed of the FPC's view that municipal preference is not applicable against original licensees. It is argued that by choosing not to amend section 7(a), Congress thereby approved of the Commission's interpretation and, in effect, reenacted section 7 consistent therewith.\textsuperscript{164}

\textsuperscript{159} See S. Rep. No. 1338, \textit{supra} note 101, at 3. The Committee noted that it heard "considerable testimony" on the relicensing preference issue and that it was "impressed" by the FPC's interpretation of § 7(a). \textit{Id.}

\textsuperscript{160} \textit{Id.} at 15.


\textsuperscript{163} United States v. Board of Comm'rs, 435 U.S. 110, 134 (1978); Association of Am. Railroads v. ICC, 564 F.2d 486, 493 (D.C. Cir. 1977); \textit{see Chemeheuvi Tribe of Indians v. FPC}, 420 U.S. 395, 410 (1975) (Court deferred to FPC's interpretation of FPA because Congress had reenacted FPA without indicating dissatisfaction with agency's interpretation); Kay v. FCC, 443 F.2d 638, 646-47 (D.C. Cir. 1970) (Congress' awareness of FCC interpretation is almost conclusive evidence of legislative approval); 2A C. Sands, \textit{supra} note 61, § 49.09, at 256-57 (When Congress reenacts a statute, aware of an administrative interpretation, that interpretation is presumptively correct.).

It is not clear, however, that the 1968 amendment of the FPA constituted such a reenactment. Although Committee members were apprised of, and some indicated approval of, the FPC interpretation, there is no evidence of a general awareness by Congress as a whole. The Supreme Court has been hesitant to presume general congressional awareness based on only a few isolated statements in committee reports. On the other hand, "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." In this instance, however, the legislators focused on questions of procedure and not on the controversial substantive issue of municipal relicensing preference. The conclusion, therefore, that section 7(a) was reenacted consistent with the FPC's interpretation may not be warranted. Nevertheless, the expression of some congressional approval and the absence of any expressed objection lends further support to the conclusion that section 7(a) is not applicable to relicensings involving original licensees.

The legislative history as a whole, although not conclusive, supports the private utilities' contention that Congress intended relicensing preference to be limited to those tie-breaking situations not involving the original licensee. The public power interests' position that a broad relicensing preference remained in the bill throughout its consideration can withstand neither the limiting language of the statute nor the legislators' repeated use of "new licensees" to refer to entities other than original licensees. In addition, the possibility that Congress reenacted section 7(a) in 1968 reinforces the conclusion that municipal


165. See supra note 159 and accompanying text.


168. See supra note 161 and accompanying text.

169. Additionally, in a congressional hearing the following year, the FPC reiterated its interpretation that municipal preference is not applicable against an original licensee. See 1969 Hearings, supra note 3, at 46 (letter of Mar. 28, 1969 from Lee C. White, Chairman, FPC to Rep. Clarence Brown, Jr.).

preference was not meant to be applicable against incumbent licensees seeking renewal.

CONCLUSION

The language of section 7(a) limits the applicability of relicensing preference to tie-breaking situations not involving original licensees. The legislative history of the FPA does not support a contrary interpretation. When challenging incumbent private utilities for successor licenses, therefore, states and municipalities should prevail only if their plans are best adapted to serve the public interest. Otherwise, the only means by which a state or municipality could acquire an existing hydroelectric project would be through the exercise of eminent domain. This would require compensation at current market value rather than at the cost-related amount required in relicensings.

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