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Of Birds, Bees, and the FPC

Under the Federal Power Act, the Federal Power Commission may license hydroelectric projects only on the condition that they 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, including recreational purposes . . ." The statutory language suggests only the broadest of guidelines for the agency to decide whether to license a given project. In practice, the Commission is often forced to choose between the electric power that the project will generate and the existing non-power benefits, such as fish and scenic resources, that the project will displace.

The FPC seeks to balance the competing power and non-power considerations by a cost-benefit analysis on a case-by-case basis. But the Commission process has tended to a per se rule by which all projects with substantial power benefits receive licenses. The agency

2. Under the statutory standard, the FPC has considered a continually increasing number of factors since its inception. In 1920 the criteria were power, flood control, and navigation. The agency's procedure was also clear-cut. The FPC sent each application to the Corps of Army Engineers for comments; the Corps' recommendations were usually followed.

Since World War II, however, the agency has regularly considered the fish problem in its licensing decisions, and in the past twenty years, the FPC has begun to deal with pollution and scenic factors. Interview with Richard Solomon, General Counsel, Federal Power Commission, in Washington, D.C., Oct. 7, 1966. For agency efforts in recreational matters, see pp. 121-22 infra.

4. E.g., City of Tacoma, 10 F.P.C. 424 (1951), aff'd sub nom. Washington Dep't of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954), where the Commission licensed the project, choosing power, flood control, and navigational benefits, even though they entailed some fish losses, over retention of the stream in its natural state until economic pressures could force its full utilization. The agency attached conditions to prevent undue fish losses. In Portland Gen. Elec. Co., 10 F.P.C. 445 (1951), vacated sub nom. Oregon v. FPC, 211 F.2d 347 (9th Cir. 1954), reinstated, 349 U.S. 435 (1955), the Commission licensed and prescribed temporary measures to meet the needs of anadromous fish during construction of the project and approved permanent facilities for the fish. The agency opted for an estimated $351,000 annual excess of power benefits over power cost in preference to an annual value of $177,000 for fish using the river above the dam.

Two 1964 decisions indicate that the FPC may be reducing the priority given to power expansion. The Commission refused to issue a license in Public Utility District No. 1, 32 F.P.C. 444 (1964), where the area was already adequately served by the Bonneville Dam (although the project would have reduced rates slightly) and where fish hatcheries might have been harmed. And in Pacific Northwest Power Co., 31 F.P.C. 247 (1964), aff'd sub nom. Washington Public Power Supply System v. FPC, 363 F.2d 840 (D.C. Cir. 1966), rev'd on other grounds sub nom. Udall v. FPC, 387 U.S. 128 (1967), the Commission chose a site on the Snake River which power experts regarded as the less practical of the two available possibilities, in order to avoid interference with fish runs on the Salmon.
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has attempted to minimize harm to non-power interests by attaching
conditions to the licenses it grants,5 but with one exception, in 1953, it
has never refused to license a project with more than negligible power
benefits on strictly conservationist grounds.6

Two recent cases indicate increasing judicial concern with FPC
protection of non-power interests. In Consolidated Edison Co. (the
Scenic Hudson case), the Commission granted a license to the New
York power utility to build a pumped-storage project at Storm King
mountain.7 The project had aroused the opposition of conservationists,
who objected to the unsightly appearance of the powerhouse in the
Hudson Highlands, the overhead transmission lines that would run
through several neighboring towns, the adverse effects of fishlife at
the site, the destruction of the mountain vegetation, and the opening
of the area to industrialization. After the Commission decision, the
non-power groups appealed to the Second Circuit. The court agreed
that the FPC's licensing task involved more than simple arbitration
among contending pressure groups.

5. The FPC may not license a project that is uneconomical, but within that limitation
it may place non-power requirements in the license. Interview with Richard Solomon,
General Counsel, Federal Power Commission, in Washington, D.C., Oct. 7, 1966. This is
apparently the FPC's gloss on 16 U.S.C. §§ 797(c), 803(a) (1964); cf. Rumford Falls Power
Co. v. FPC, 355 F.2d 683 (1st Cir. 1966) (reversing and remanding on other grounds).

The Commission now generally imposes conditions which include a requirement that
the applicant provide fish, wildlife, and recreational facilities "reasonably consistent with
the primary purpose of the project." FPC, Terms and Conditions of License for Con-
structed Project Affecting Navigable Waters of the United States, Form L-3, arts. 15, 17
(1963).

Commission Carver cites a recent case to demonstrate the lengths to which the FPC now
goes to promote recreation through license conditions. In one license the agency included
a requirement that the applicant power company insert a provision in a deed transferring
reality to bind the grantee municipality to use of the land for recreational purposes. Inter-
view with John Carver, Jr., Commissioner, Federal Power Commission, in Washington,
D.C., Oct. 28, 1966. That sort of requirement has since been codified as agency policy.
18 C.F.R. § 2.7 (1967).

6. Namekagon Hydro Co., 12 F.P.C. 203 (1953), aff'd, 216 F.2d 509 (7th Cir. 1954). The
Commission decided that the unique recreational features of the river were of greater
public benefit than use of the river for water power development. The proposed project
was a minor one, with a capacity of only 1500 kilowatts; thus the decision sacrificed no
substantial power benefits. One observer has suggested that the license denial was "allowed
through the mill" to pacify a new Commissioner identified as a "birds and bees" man.
Interview with a former Commissioner of the Federal Power Commission, in Washington,
D.C., Oct. 6, 1966. The absence of similar decisions since 1953 tends to support the claim
that Namekagon represented something less than a profound alteration in Commission
policy.

7. 33 F.P.C. 428, rev'd sub nom. Scenic Hudson Preservation Conference v. FPC, 354
F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). Under the proposed scheme of
operation, the station would pump water from the Hudson to a reservoir in the mountains
west of the river during off-peak periods, usually at night, using electricity generated by
the company's thermal-electric plants. The stored water would return to the river during
peak periods, generating electricity as it passed through the powerhouse at the foot of the
mountain.
In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.\(^8\)

The court reversed the agency decision and remanded for further hearings to consider “the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered.”\(^9\)

In *Udall v. FPC* (the *High Mountain Sheep* case),\(^10\) decided last June, the Supreme Court reiterated and clarified the *Scenic Hudson* mandate. Here a dispute had arisen between federal and private developers of a Snake River dam site. After originally proposing no development in his recommendation to the FPC, the Secretary of the Interior reversed himself and intervened to secure development by his agency. But the FPC granted a license to Pacific Northwest Power Company, a joint venture of four private companies, holding that the record failed to show that federal development would be superior in flood control, power benefits, fish passage, navigation, or recreation. The Supreme Court disagreed. Mr. Justice Douglas concluded for the majority:

> The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the “public interest,” including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.\(^11\)

In reversing and remanding, the Court implied that the Commission might now have to deny licenses entirely where non-power considerations so dictate.

> [I]f . . . this additional dam would destroy the waterway as spawning grounds for anadromous fish . . . or seriously impair that function, the project is put in an entirely different light. The importance of salmon and steelheads in our outdoor life as well

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9. 354 F.2d at 624.


11. *Id.* at 450.
The decisions in Scenic Hudson and High Mountain Sheep demonstrate that the FPC must now take non-power interests fully into account in licensing hydroelectric projects, and consider denying applications on non-power grounds when appropriate. To winnow out the appropriate cases, however, an important underlying problem must be solved: that of insuring an adequate presentation of non-power interests to the Commission. Several factors militate against a balanced exposition. The agency itself, not unlike others, tends to involve itself with the industry it regulates. Naturally enough, the FPC wishes to support sound economic projects and a rapid expansion of the industry; unfortunately, non-power interests, unless carefully nurtured, may suffer as a result. Other governmental agencies may help, but their protection of non-power interests suffers frequently from a lack of resources and occasionally from the fact that they have hatchets of their own to sharpen. The Scenic Hudson case showed that private groups may do much to represent the public interest. But they too have their limitations. The typical conservation organization operates on an annual budget of about $350,000, and with perhaps 25 staff members. Often the office and travel expenses, combined with modest salaries, more than exhaust the treasury. By the time of the rehearing in Scenic Hudson, the conservationists had already spent almost $250,000—an astounding sum for such an organization to amass, and a feat rarely, if ever, to be repeated. At the same stage

12. Id. at 437.
13. This is not to suggest that the administrative ideal of regulation in the “public interest” is attainable, or that it is anything more than a myth concealing the fact that the agency is making value choices and policy decisions. It is merely to argue that by getting as much information as possible from non-power interests and giving them maximum procedural protection, the FPC can increase pressure on itself towards making other than the traditional choice in favor of power, to the detriment, if not to the total destruction, of non-power interests. See generally Reich, The Law of the Planned Society, 75 Yale L.J. 1227 (1966).
15. N.Y. Times, Nov. 24, 1966, at 86, col. 3. A witness for Scenic Hudson Preservation Conference at the rehearing indicated how deceptive the notion of an “inexpensive intervention” has proved to be: There are those who may think that we can well afford to oppose the Storm King project. But that is not the case. At this very moment [Nov. 14, 1966], our indebtedness possibly exceeds $100,000. What with the hearings, this indebtedness will vastly increase, without . . . any promise that these debts will ever be met. Commissioner Ross spoke in his dissenting opinion of “the poorly organized and poorly financed public.” Perhaps by this time there is some degree of organization; but I do not believe that even Commissioner Ross could imagine what a desperate financial situa-
in the proceedings, Con Edison had spent an estimated $14 million on the project. The problem of relative resources is crucial; it becomes more severe in cases that do not rise to the status of a "conservation cause celebre of national scope."10

Proper procedural and structural devices can do much to eliminate the natural tendency toward under-representation of non-power interests before the FPC. Such changes in existing practices should strengthen the potential role of each participant in the process which may protect non-power interests—the agency staff, the Commission itself, the public, and other governmental agencies. Before an exploration of the possible ways to enhance protection of non-power interests can be embarked upon, however, the present licensing process should be described as background.

I. Non-Power Interests in the Current FPC Licensing Process

Each power company seeking a project license must file with its application additional information describing the possible non-power costs or benefits of the proposed project.17 Within the past four years, the Commission has developed or amended three such exhibit requirements. Exhibit R is a recreational plan to enable the Commission to determine whether the recreational potential of the natural resources to be devoted to licensed projects will be adequately developed, consistent with power development and other public purposes, in compliance with the directive in § 10(a) of the Federal Power Act.18

...were it not for those so many who have given their time freely, who are willing to go forward upon expectation only and their conviction that this is an honorable cause, we could not be here. And even then, we have not been able to summon many of the experts that we had wished. We have simply not had the funds.


17. The licensing process begins with the filing of an application for either a license or a preliminary permit. The FPC issues the latter to enable applicants to secure the information that must accompany the license application. Which procedure the applicant will use depends on his preferential status; a non-preferred party may go the preliminary-permit route to achieve some security in light of the money he is spending to complete his application. Federal Power Act §§ 4(e)-(f), 16 U.S.C. §§ 797(e)-(i) (1964).

Non-power parties seeking to intervene to oppose a project at the preliminary-permit stage will almost invariably be told to come back when the license application is filed. But if they want a potential licensee to take action to foster their objectives, they can sometimes get the Commission to insert permit conditions at the preliminary-project stage requiring study of various non-power aspects of comprehensive development, often in consultation with the complainant or federal or state authorities in the field.

Exhibit K, which limits project boundaries to 200 feet around the installation, has been amended to exempt lands "necessary or appropriate for recreation purposes, for which it is recognized that additional project area will generally be required . . . ." The Commission's Exhibit K language is merely permissive but may encourage applicants to expand their recreational facilities as they come to recognize the attendant public-relations benefits. Finally, Exhibit S requires the applicant to "report on the effect, if any, of the project upon the fish and wildlife resources in the project area or in other areas affected by the project and proposals for measures considered to conserve and, if practicable, to enhance fish and wildlife resources affected by the project." 

Primary responsibility for handling the license application rests with an assigned staff counsel, who identifies the relevant issues and prepares the agency case. The non-power exhibits go to the Section of Recreation, Fish and Wildlife in the Division of Licensed Projects. There a staff headed by a fishery biologist assisted by three recreation resource specialists evaluates the applicant's recreational plans and the project's likely effects on fish and game to determine whether the proposed installation complies with Commission requirements. The staff then weighs the cost of the non-power facilities against the benefits they will confer. Finally, the Section forwards its recommendations to the Applications Section of the Bureau of Power for consideration in the Bureau memorandum.

19. 18 C.F.R. § 4.41 (1967). In promulgating the Exhibit K amendment, the FPC issued an accompanying policy statement designed to promote recreational development at existing and future licensed projects. 36 Fed. Reg. 16,197-98 (1965). Along with the statement, the agency gave out a "Report on Criteria and Standards for Outdoor Recreation Development at Hydroelectric Projects," which it encouraged licensees and future applicants to use in order to obtain full utilization of project lands and waters consistent with area outdoor recreation needs for the present and immediate future.


21. 31 Fed. Reg. 8780 (1966). The Exhibit requires the applicant to cooperate with state and federal fish agencies before he files his application, so that they will have time to deal with the forms once they come in.

22. A copy goes to the Bureau of Outdoor Recreation of the Department of Interior, as well as to the FPC regional office, which makes an on-site inspection for engineering and recreation purposes. If local interests are involved in the application, copies are also sent to the appropriate county or city. Interview with Richard Solomon, General Counsel, Federal Power Commission, in Washington, D.C., Oct. 7, 1966.

23. This program is still in its infancy. The Section Chief joined the Commission in March, 1963, as a fishery biologist and was made head of the Section in July, 1965, when it was formed. The recreational staff came into being in June, 1965. Interview with Forrest Hauck, Chief, Section of Recreation, Fish and Wildlife, Federal Power Commission, in Washington, D.C., Oct. 7, 1966.

During the investigation, the agency attorney and the applicant attempt to settle differences by negotiation before the formal hearing. The applicant is likely to comply with modifications recommended by the staff, since the counsel's later support may be crucial in determining whether the Commission will grant the license. If the applicant yields far enough at the preliminary stage, he may be able to reduce the hearing, if one is held, to a pure formality.

Since neither the Administrative Procedure Act nor the Federal Power Act requires a hearing, the decision whether to have one rests with Commission discretion. If the Commission decides to hold a hearing, it issues a "hearing order" outlining the scope of the proceeding and setting a deadline for petitions to intervene. The Federal Power Act permits the Commission to admit as a party any interested state, state commission, municipality, representative of consumers, security holders or competitors, or "any other person whose participation in the proceeding may be in the public interest." The FPC generally recognizes the right of organizations representing non-power interests to intervene in licensing cases.

The staff counsel and the parties have already submitted their direct evidence in the form of prepared testimony and exhibits before the hearing opens. The staff position in the case, as it evolves to its final form in the briefs submitted after the hearing, emerges from discussion among all the FPC personnel working on the case. But the staff counsel, speaking as the primary authority within the agency, is independent of the professional and technical staff in the Bureau of Power. At the hearing, the Section of Recreation, Fish, and Wildlife occupies a rather peripheral position. Its chief may participate as a witness; he usually sits in on relevant sessions; and during the hearing he may advise the staff counsel on technical matters.

25. Administrative Procedure Act §§ 5, 9, 10 U.S.C. §§ 1004, 1008 (1964). The Federal Power Act § 4, 16 U.S.C. § 797 (1964), the licensing authorization, contains no explicit requirement of a hearing prior to a licensing decision, nor does any other provision of the Act. The Regulations that the FPC has promulgated under the Act state that a "hearing upon an application may be ordered by the Commission, in its discretion, either upon its own motion or upon the motion of any party in interest." 18 C.F.R. § 4.32 (1967).

26. The usual practice is to avoid specifying the issues in the hearing order, on the theory that any saving in time from a detailed ruling would be offset by elaborate pleadings forcing a return of the entire case to the Commission for decision on the scope of the proceedings. Interview with Richard Solomon, General Counsel, Federal Power Commission, in Washington, D.C., Oct. 7, 1966.


28. The Section Chief was not a witness in the original Consolidated Edison hearing, but observed the proceedings and advised the Commission. In the rehearing he served as a witness for the staff. The prepared testimony indicates that he did more than generally review exhibits and comments; he also observed fish hatchery operations and hydraulic
After the conclusion of the hearing and the submission of briefs by staff counsel and parties, the hearing examiner makes an initial decision. The case then goes before the agency, a five-man body consisting of the chairman and four commissioners. Oral argument is heard only when a majority of the Commission so orders. Relying on the sittings of their personal assistants and the Office of Special Assistants, as well as advice from any experts not previously involved, they arrive at a decision and announce an order in the case.

II. Commission and Staff Initiative

A. The Commission: Practice and Potential

The FPC can initiate protection of non-power interests in several ways. First, it can further encourage the applicants themselves to promote recreation and protect fish and wildlife by requiring them to include more non-power materials with their applications. Along these lines, the Commission in 1967 proclaimed "its intention to consider air-pollution and conservation factors in all of the various licensing and other actions that it takes." To implement this new policy, the agency should require applicants to submit an aesthetics exhibit and an air pollution exhibit whenever relevant. Such exhibits can help the applicant. For example, in the Scenic Hudson case Con Edison could demonstrate the inconspicuousness of an underground plant and transmission lines, as well as the mitigating effect on Manhattan air pollution stemming from the company's new ability to close down thermal plants in the New York City area.

A second area of initiative available to the Commission is increased supervision of the legal staff to insure its uniformly aggressive protection of non-power interests in the preparation of each case. Because of the rule against ex parte communications, the Commission can exercise no direct control over the staff on the issues they discuss, the studies they request, and the positions they take. Instead, the Commission operations, and reviewed preliminary reports of studies made by a private biological research company.

31. The applicant would undertake the studies, involving, in the case of aesthetics, geological surveys and architectural studies of traditional and landscape varieties. The applicant should try to preserve the natural beauty of the area by making projects inconspicuous, if that is appropriate, and by refurbishing any natural aspects he damages during construction. In addition, the applicant could include plans for beautification of areas in the project vicinity that need rehabilitation.
32. 18 C.F.R. § 1.4(d) (1963).
mission must resort to manipulation of the hearing order to guide the
staff presentation. The present broad open-ended order should be
retained: limiting the scope of the hearing would prejudge the case
to the extent that it precluded investigation of potentially decisive
issues. But the Commission should also specify issues for considera-
tion which it feels the staff might otherwise neglect.  

If the initial hearing-order effort to guide the staff counsel toward
affirmative protection of non-power interests is ineffective and the
hearing record reaches the FPC with a gap, the Commission should
remand to force the staff to present additional evidence. However, the
agency has rarely remanded for further consideration of non-power
factors. Such a failure represents both a neglected opportunity to
oversee the staff and a prejudgment of the application, since ex hypo-
thesi the conservation evidence that the Commission must ex-
amine before granting the license is not all in yet. In the first round
of Scenic Hudson, the Commission refused to remand when it initially
granted Con Edison its license; instead, after awarding the license it
returned the case to the examiner “for the introduction of additional
evidence in regard solely to the overhead transmission facilities beyond
Nelsonville and the design of the fish protective facilities of the
project.” The narrowness of the remand order precluded inquiry into
both the cost of underground transmission lines from the project site
to Nelsonville and the question whether, given the nature of the
installation, any fish protective facilities could be adequate. The result
was a decision made with crucial gaps in the record. On appeal before
the Second Circuit, the Commission argued that the license grant
followed by limited remand was a frequently-followed agency proce-
dure. The court was unimpressed; it held that the inquiry into under-
ground transmission was inadequate and ordered the Commission to
“take the whole fisheries question into consideration before deciding
whether the Storm King project is licensed.”

The agency followed a somewhat similar course in High Mountain
Sheep, with strikingly similar results. After the hearing had closed and

33. The Commission cannot know prior to the hearing what issues will be relevant, or
even crucial, to the final determination. Therefore, in listing issues for investigation, it
should refrain from setting boundaries or implying that the staff fulfills its function once
it deals with the specified questions.
34. According to Commissioner Bagge, only one such remand has occurred during his
tenure, and that decision dealt with gas conservation in a natural gas case. Interview with
Carl Bagge, Commissioner, Federal Power Commission, in Washington, D.C., Oct. 7,
1966.
36. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 624 (2d Cir. 1965).
the examiner had rendered his decision, the Secretary of the Interior petitioned to intervene to demonstrate the preferability of federal to private development. The FPC limited intervention by the Secretary to filing exceptions to the initial decision and participating in oral argument, and then opted for private development. The Secretary petitioned for a rehearing, asking that the record be opened to permit him to correct the evidentiary deficiencies concerning the desirability of federal development. The Commission granted the rehearing but did not reopen the record, and it shortly reaffirmed its original decision. The Supreme Court held that such a procedure violated the agency's statutory responsibility to disapprove private, municipal, and state applications when it finds that the United States itself should undertake development.

The issue of federal development has never been explored in this record. The applicants introduced no evidence addressed to that question; and the Commission denied the Secretary an opportunity to do so though his application was timely. The issue was of course briefed and argued; yet no factual inquiry was undertaken. . . . The Commission by its ruling on the applications of the Secretary to intervene and to reopen precluded it from having the informed judgment that [the statute] commands.37

The judicial responses in the Supreme Court and Second Circuit suggest that henceforth in cases where staff counsel and the parties have failed to build a complete record on the non-power issues, the Commission should remand to fill the gaps before awarding the license, rather than grant a license and then re-open the record for hearings on the non-power issues. Since the Commission must weigh power benefits against conservationist losses in deciding whether to grant a license, its balancing operation is bound to be unsatisfactory when it lacks adequate evidence to place on the non-power side of the scales. In some cases—such as with high dams, where no devices presently exist to protect the fish life—the Commission faces a stark either-or choice.38 Here the failure to require adequate non-power evidence on the record can mean only that the agency has answered its basic question before it formally got around to asking it; remanding for non-

38. In Hell's Canyon, for example, technology has not yet solved this problem. Interview with Joseph Swidler, former Chairman, Federal Power Commission, In Washington, D.C., Oct. 27, 1966. But the agency may deal with such problems by recourse to fish hatcheries and transportation of fingerlings around the dams.
power evidence after granting the license is no more than a crust thrown to the conservationist elements.

Thus, by deciding to license before completing the record in *Scenic Hudson*, the agency came close to making irrebuttable presumptions that fish could be protected after completion of the project, and that the cost of underground transmission lines automatically outweighed aesthetic considerations. In *High Mountain Sheep*, the Commission acted similarly by refusing to reopen the record after its initial licensing and thereby precluding the Interior Secretary from substantiating his arguments with evidence. Such presumptions may eliminate the inconvenience of an open-ended remand with the basic license question still unresolved; but they also engender defective decisions and re-remands required by appellate court reversals of the Commission.

Although a policy of remanding before licensing should prevent decisions based on incomplete records, it will not alone ensure forceful staff representation of non-power interests. Where habits in presenting cases have worn deeply over the years into well-rutted grooves, staff inertia may be difficult to uproot. To the extent that participation by conservationist intervenors increases, agency lawyers may be tempted to rely on such third parties to fill in the record gaps they have left open.

The *ex parte* rules limit direct communications between the Commission and staff, but much can be done within the bounds of propriety to encourage staff advocacy of non-power interests. One commissioner has suggested that the memoranda that “flow all over the place” keep everybody informed of the Commission's views. More formally, the Commission may promulgate “housekeeping” rules or instruct the General Counsel to inform staff counsel that they are expected to present a complete affirmative non-power case, regardless of the presence or vigor of intervenors. In addition, the Commission can authorize the hearing examiners to require staff counsel and parties to present additional evidence on non-power issues.

A third opportunity for Commission initiative in protecting non-power interests lies in the area of river basin planning. In 1963, to

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39. The Commission could remand as a sanction against the staff in cases where intervenors had already entered to fill gaps in the record. But the procedure would be inefficient, and the non-power parties, who have already borne the burden of presenting their case, would receive little benefit.
41. 18 C.F.R. § 1.20(j) (1967).
discharge its statutory responsibility for ensuring that its licensing activities will “advance the development of the Nation’s river basins on the most effective and comprehensive basis,” the FPC started a program of water resource appraisals for hydroelectric licensing. By 1965 the Commission had completed Planning Status Reports for nearly 40 per cent of the country’s river basins; for the rest it lacked sufficient information to determine whether present and potential projects are compatible with a comprehensive plan for development of the basin’s resources. Where adequate plans are not available for basins the Commission must deal with in coming years, the agency itself prepares the basin studies. What test the FPC currently uses to determine the “adequacy” of existing plans is unclear, but the test should thoroughly canvass non-power aspects. Where non-FPC plans have given insufficient consideration to conservationist aspects dictating that development should be limited or prevented, the FPC should formulate appropriate plans.

In addition, the Commission should consider each application in the context of all other potential development of the basin. In Scenic Hudson, it was common knowledge that the Central Hudson Power Company was planning to apply for a project in the Highlands, but the Commission declined to consider other potential development in the area when it passed on the Con Edison application.

B. The Staff: Initiative, Evaluation and Coordination

1. Staff Counsel. Because of the severe handicaps under which conservationist groups operate, the staff counsel must protect non-power interests more actively than he now does if they are to receive consistent and effective representation. By virtue of his position as

42. 1965 FPC ANN. REP. 80.

43. Several other avenues are available for Commission initiative in the protection of non-power interests. Chairman White has enumerated several tasks the agency has undertaken or is contemplating: (1) a “priorities system” for authorizing “superior uses,” e.g., a reservoir for strictly recreational purposes with compensation to licensees suffering loss; (2) research on placing transmission lines underground and finding better locations for them, with supporting testimony on behalf of enabling legislation before the Senate Commerce Committee; (3) similar testimony on air-pollution legislation, primarily in connection with the natural-gas jurisdiction of the agency; (4) testimony on legislation concerning the location of steam plants on rivers and the thermal impact on fish ecology of the river. Interview with Lee White, Chairman, Federal Power Commission, in Washington, D.C., Oct. 28, 1966.

Commissioner Ross adds that the “recapture” provisions of the Federal Power Act provide an opportunity for furthering non-power goals, because the power companies must show a high degree of social responsibility if they are to be relicensed rather than see their projects taken over by the government. Interview with Charles Ross, Commissioner, Federal Power Commission, in Washington, D.C., Oct. 28, 1966.
chief coordinator in the early stages of license application and as agency spokesman at the formal hearing, the staff lawyer plays a central role. His non-power responsibilities should commence at the informal negotiations, where he has great leverage to draw concessions from the applicant.

After the decisions in *Scenic Hudson* and *High Mountain Sheep*, it is clear that staff counsel cannot leave the non-power parties to make their own case at the hearing. The Commission cannot comply with the appellate courts' instructions to provide active and affirmative protection for third-party interests if agency counsel leave the presentation of non-power materials to the happenstance of third-party intervention. And if the applicant and conservationist intervenors offer conflicting evidence, it is imperative that the staff counsel clearly present his own conclusions and supporting evidence to the hearing examiner.4

2. *Non-Power Staff.* The biggest problem for the Section of Recreation, Fish, and Wildlife is its small size and meager budget. One commissioner admits that the Section appropriation is small, but argues that other areas have higher priorities; another would limit expansion, because he wants to keep the Section "taut," and therefore "effective."46 A third commissioner thinks that with some expansion the Section could force the applicant power companies to do much of the work through the exhibit requirements; the power companies usually have the computer facilities—which the Commission lacks—to run the necessary cost-benefit analyses on the non-power issues.47 The disadvantages of such reliance upon the "private sector" are ob-

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4. The prepared testimony submitted by staff counsel prior to the *Scenic Hudson* rehearing failed to reflect the spirit of the remand. The staff case contained evidence on alternatives to the Storm King project, but very little testimony on the wider range of non-power questions involved in the application. The agency's non-power testimony came from the Commission's own fish expert and an air pollution expert from the Public Health Service. Left untouched were many of the geological, aesthetic, and other non-power issues raised by *Scenic Hudson*'s witnesses. F. Hauck, Prepared Testimony before the FPC, Oct. 19, 1966 (on file in Yale Law Library; to be incorporated in Record, Consolidated Edison Co., 33 F.P.C. 428 (1959)). Still, counsel arguably acted within the letter of the remand, since the Second Circuit had not specified the latter issues for further inquiry. The staff counsel demonstrated his leaning toward traditional power interests early in the rehearing when, in response to several objections by the attorney for one of the conservationist organizations, he remarked that the utilities "have to have real temerity these days in view of the opposition of the Sierra Club." N.Y. Times, Dec. 9, 1966, at 36, col. 4.


vious: the Commission must depend on the applicant to produce an impartial study that the Section may later want to use to modify or even defeat the license request.

Aside from the power companies, the Section can turn only to the other governmental agencies, state and federal, with which the Fish and Wildlife Coordination Act requires it to consult. Reliance on the United States Fish and Wildlife Service in the Department of Interior is the most frequent; it also raises the most problems. The exhibits coming in to the Section go to the Assistant Secretary of the Interior for Water Resources; they then pass through the relevant Interior agencies where, according to one former Interior staff member, they receive little, if any, coordinated attention.

Even if the Section’s passive role—heavy reliance on other agencies to spot detailed issues, and exclusive reliance on them for the necessary studies—is appropriate, the staff still needs more people to identify important questions and to evaluate the broad non-power information theoretically coming to the Commission. The FPC should expand the Section, perhaps to include a city planner for the emerging problems of transmission lines in populated areas, a geologist to study project effects on natural formations, an air-pollution specialist to analyze mitigating effects of comprehensive plans, and a regional and river-basin planner to co-ordinate conservationist efforts.

With a larger staff in each of the areas, the Section could function more aggressively by initiating and supervising relevant studies conducted independently by FPC-designated research organizations and financed by the applicant. The Section might thereby develop standards and criteria for other non-power areas at a practicable cost to the Commission.

III. Maximizing Public Participation

Although the conservationist groups lack money and manpower, particularly in comparison with the power companies, the Commis-
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sion can do much to redress the existing imbalance of private forces. The agency should re-examine its contacts with the public, with a view toward facilitating participation by private non-power groups in the licensing process.

A. Intervention

The Federal Power Act permits liberal intervention, and the FPC generally recognizes the right of organizations representing non-power interests to intervene in licensing cases. In the Scenic Hudson case, though, even while the agency was admitting some organizations that had filed petitions more than a year after the formal deadline had elapsed, it excluded fish groups whose evidence the court of appeals later thought would be crucial. Since the reversal, the Commission has taken no chances: it has thrown its doors open to groups filing too late in the original hearing, and to others now seeking to intervene for the first time.

The Commission could formalize its liberalized intervention policy by promulgating a rule that it will admit as a matter of right specified types of non-power interest groups such as conservation and recreational organizations. Codifying present policy will leave it less susceptible than will unwritten guidelines to later change after a turnover in personnel. The new policy should have only a minimal impact upon administrative efficiency: the cost of intervention is sufficiently great to deter would-be participants except in the few cases that already have great notoriety; and even there, as the proceedings drag on, the number of third-party representatives tends to diminish sharply.

B. Notice

Once the Commission receives a license application, the Federal Power Act requires it to publish notice in a local newspaper once a week for four weeks. In Scenic Hudson the agency complied with the letter of the law, giving statutory notice four times in one month in

51. See 354 F.2d 608, 623-24 (2d Cir. 1965).
52. FPC, Order Fixing Hearing on Remand, Jan. 25, 1966 (on file in Yale Law Library; to be incorporated in Record, Consolidated Edison Co., 53 F.P.C. 428 (1965)). By the rehearing in November, 1966, the agency had admitted more than eighty parties. The range of interests represented was also great, including counties, towns, individuals, gun clubs, labor unions, national and local conservation groups, and a chamber of commerce.
53. In late January, 1967, the conservation interests were represented at the rehearing by only three attorneys; the length of the hearing was attributable to its thoroughness, rather than to the number of parties involved. The rehearing had opened the preceding November with more than fifty lawyers in attendance.
the *Independent Republican of Goshen* (N.Y.).

Not surprisingly, few of the conservation organizations learned of the Con Edison application by perusing the notice columns of the *Goshen Republican*. One of the founders of the Scenic Hudson Preservation Conference reports that he first heard of the Storm King project from an undisclosed party—perhaps an insider at the FPC—who telephoned to tell him of the license bid and impending hearing. After the Second Circuit reversed the agency's initial decision, the Commission mended its ways: to its roster of once-a-week-for-four-weeks newspapers, it added *The New York Times* and the *Putnam County Courier* (Carmel, N.Y.).

The FPC's recourse to a Manhattan daily shows that the Commission does not regard the statute as a barrier to expanded notice. By the same token, the Commission should cease to regard the statutory standard as a goal. It is a minimal demand on the agency that it inform the groups the statute recognizes as interested parties of the pendency of an application.

Conservation organizations and other non-power groups operating on a regional or national level are unlikely to receive notice from either local or metropolitan newspapers. For them the *Federal Register*, spewing forth its daily mass of undigested materials, is also useless. The appropriate solution is a permanent FPC mailing list of individuals and organizations interested in licensing determinations. The agency already has one, but its existence is not well known. Broader listing will secure conservationists an initial notice of license applications, with details of project size, location, and facilities. If interested, the recipient will request listing on a mailing circular for the given project. The proposed solution achieves widespread notice at an early stage.

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55. FPC, Presiding Examiner's Initial Decision Upon Application for a License for a Hydroelectric Project, July 31, 1964, at 2 (on file in Yale Law Library; to be incorporated in Record, Consolidated Edison Co., 33 F.P.C. 428 (1965)).

56. The founder then made contact with Washington counsel, who filed a petition to intervene some nine months after the deadline had passed. Although the Commission did not permit late entry, Scenic Hudson's tardiness put it at a distinct disadvantage in preparing its case. Interview with Dr. Walter Boardman, former Executive Director, Nature Conservancy, in Washington, D.C., Oct. 27, 1966.

57. Proof of Publication of Notice of Application Amendment, Aug. 1, 1966 (on file in Yale Law Library; to be incorporated in Record, Consolidated Edison Co., 33 F.P.C. 428 (1965)).

58. As a start, the FPC should publish notice in every issue of relevant local papers, even if they appear more frequently than once a week. Notice given over a four-week period should suffice to inform local residents if published in a daily paper, but the Commission should resort to longer periods to insure equivalent exposure where publication is less frequent than daily. Since citizens of the immediate area may not be the only ones interested in the proceedings, notice must also reach interested parties in other areas through publication in widely circulating newspapers of the region.
stage, with no burden on the Commission to keep people informed who have no interest in a particular proceeding. At the same time, it gives interested parties access to further information without delaying what is already a slow and cumbersome process.

The costs of expanded newspaper notice and a national mailing list are not significant in themselves. The reforms can be counted on to increase long-run efficiency. By insuring effective and early notice, they should minimize late interventions and consequent delay, and by ensuring the airing of all relevant issues, reduce the likelihood of a remand by the Commission or a reversal by an appellate court.

C. Negotiation

The informal pre-hearing conferences between staff and applicant may lead to agreement on relevant non-power issues in the absence of conservationist advocates, who get their day in court only at a pro forma hearing where the major questions have already been settled. The FPC should therefore allow non-power organizations a role as early as possible in the proceedings, and preferably in the informal negotiations. A standing committee, representing the relevant national organizations, would best serve the purpose. The committee could join as a matter of right in the bargaining process at its inception, with its primary function the prevention of adverse concessions by the staff before interested groups have a chance to form and intervene. The committee would have no veto power, because nothing is formally decided at this stage; instead, it would serve as a third party in the process to whom the others might pay attention, if only because continued presence in the same room makes compatibility a prerequisite of survival. The committee device, of course, in no way lessens the need for the formal hearing. Existing organizations should still have the opportunity to present their diverse and often divergent views in the proceedings.

D. Clarifying the Rule Book

The Scenic Hudson experience demonstrated that non-power groups share a profound and widespread ignorance of the FPC process. One

59. It would serve no purpose to grant the committee a veto power, since neither the hearing examiner nor the Commission is involved at the pre-hearing stage. In addition, staff attorneys and applicants could easily evade such a veto power by recourse to tact or secret agreements.

60. The protest letters received by the Commission indicate the extent of the ignorance. Hundreds of letters merely opposed the grant of a license to Con Edison, without indicating a desire to play a further role in the proceeding. Those few indicating a desire for
Washington, D.C., conservationist who spoke to the major conservationist organizations concluded that they were all “babes in the woods” when it came to understanding the agency’s ground rules.\(^61\) Traditionally they reacted to projects like Storm King by writing their congressmen, the Secretary of the Interior, and the FPC, unaware that other avenues were open to them for protest.

The Commission practice in responding to a letter from someone obviously interested in the case is to inform the writer of his statutory right to intervene.\(^62\) But the form answer to general objections does not call attention to the right. The agency’s replies to inquiries and protests in *Scenic Hudson* ranged from a variety of form letters to semi-personalized responses, all assuring the addressee that the Commission was aware of its function and was considering all the relevant factors. In answering specific questions about the right to take part in the proceedings and how to go about it, the Commission frequently mailed a copy of its highly technical *Rules of Practice and Procedure*, referring the reader to relevant sections on intervention. In all cases the agency roused itself only to minimal efforts, volunteering no information not specifically requested and speaking in the complicated language of its rule book. None of these practices is calculated to endear the Commission to either outside groups seeking useful information or appellate judges reviewing license grants.

The FPC can begin reform by explaining rights under the rules and statutes to all who write in with objections.\(^63\) The explanation could come in the form of a manual or handbook complete enough to inform the inquirer of the options open to him and intelligible enough for him to understand it.

E. *Protest Letters*

Protest letters present a further ground for criticism of FPC practice. The Commission senses their relevance but treats them haphazardly,

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\(^61\) Interview with Dr. Walter Boardman, former Executive Director, Nature Conservancy, in Washington, D.C., Oct. 27, 1966.


\(^63\) This information could also be sent to the individuals and organizations on the permanent mailing lists. See p. 132 supra.
and it has neither officially recognized nor explained their significance. Some of the commissioners see some of the letters—the ones fortuitously addressed to them; none of the commissioners sees all the mail, or even a random sample. To avoid such an unsystematic gauging of public sentiment, the agency should either adhere strictly to the letter of its rule against ex parte communications, or should regularize the procedure by putting the letters in the record. The latter course might provide a relatively reliable measure of the public pulse as well as help to maximize public participation.

The anomalous handling of the mail is underscored by the current practice of allowing “statements of position” at the hearing. The statements become part of the record, although they are neither given under oath nor subject to cross-examination. The only difference between the statement and the simple protest letter is that the former costs more: its author must either deliver it personally at the hearing or hire a lawyer to read it for him.

F. Conduct of Hearing

Conservationist intervenors, as well as license applicants, are handicapped by the current practice under which the staff counsel presents his position for the first time in the brief he submits at the close of the hearing, when it is too late for the parties to present witnesses in rebuttal. To allow all participants a fair opportunity to meet the arguments of each of the others, the present procedure should be revised to require timely presentation of the agency’s views of the problems that require full canvassing.

IV. External Agencies

Even with increased FPC initiative on behalf of non-power interests and expanded public participation in the Commission’s processes, the

64. 18 C.F.R. § 1.4(d) (1967).
65. In addition to increasing public participation in the decision-making process, the inclusion would provide the agency with useful information. Despite its considerable insulation, the FPC is a policy-making institution which should be concerned with "reading the mail" and resorting to it to some extent in riding the political tide. The public-mail factor is not likely to be decisive in the ultimate decision, but it does aid the Commission in evaluating non-power losses by indicating public use, present and potential, of resources to be damaged or destroyed. Keeping track of the mail could also assist the agency in determining the specific license conditions needed to minimize losses. Furthermore, letters as additions to the record would help insure coverage of the relevant issues at the hearing, and thus aid both the hearing examiner and the Commission in their respective decisions whether to require further evidence and whether to remand to complete the record before licensing. The cost of such a procedure would be minimal; that of printing the letters in the record, since the parties already receive copies of the record, serving the individual letters on them would be unnecessary.
basic problem remains the agency's involvement with the industry it regulates and its natural desire to foster development of good economic projects and a rapid expansion in the industry. The Commission could use outside help in "determining without bias whether a power development should be constructed" in the first place. As Commissioner Ross has noted, "The Commission's right to condition licenses ... oftentimes obscure[s] the fundamental issue whether our national heritage of historic sites and natural beauty requires any development at all." 66

At present, external assistance consists of intervention by other agencies, primarily the Department of Interior, and the occasional use of outside expert witnesses. In the past, formal intervention by Interior has been of little value in protecting non-power interests because of the split within the Department itself between its conservation sections and the Bureau of Reclamation (often called a dam-building machine). At the FPC hearing, Interior may urge denial of the sought-for license only because Reclamation wants to build the dam itself, rather than from any conservationist instinct. As a result, the FPC views Interior as just another pressure group out to protect its own interests. However, the Supreme Court has indicated that the FPC may have to take another look at Interior as a potential representative of conservationist interests. In High Mountain Sheep, the Court has carved out a special role for the Secretary of the Interior in protecting non-power interests before the FPC.

...the Secretary by reason of § 2 of the [Anadromous Fish] Act comes to the Federal Power Commission with a special mandate from Congress, a mandate that gives him special standing to appear, to intervene, to introduce evidence on the proposed river development program, and to participate fully in the administrative proceedings.0T

Recently the Commission has come increasingly to seek expert witnesses from other agencies. In the Scenic Hudson rehearing, the agency drew on atomic-power and air-pollution authorities from the Atomic Energy Commission and the Department of Health, Education

67 397 U.S. 428, 439-40 (1967). The Court's reliance on Interior may be somewhat naive, in view of the institutionalized division of interests within that Department. A true Interior fulfillment of the High Mountain Sheep mandate would require a separation of the two major interests inside the agency to establish an effective check on FPC inclinations. Such a scheme would entitle the conservation wing to great weight as an intervenor; its argument for non-development or severe restrictions might often carry the day.
and Welfare. The Commission should expand the practice, despite the reluctance of some experts to present oral testimony which must be supported by evidence and defended under cross-examination.

The Commission should also consider other potential external checks to insure more effective non-power protection. For one thing, the agency can yield to state legislative establishment of state parks in potential power areas. Commissioner Ross suggested such an approach in the Scenic Hudson case, although he declined to recommend it as a general procedure. Chairman Swidler, however, disagreed: “Such an indefinite postponement would in effect be a denial of Con Edison’s application without a hearing and would be contrary to our obligation under the Federal Power Act to decide the case.” The present Chairman, Lee White, recognizes the absence of any express statutory bar to holding a decision in abeyance until another agency has had a chance to act, but he feels that the Commission has an obligation to render prompt decisions.

Still, nothing prevents the FPC from giving the legislatures an opportunity to express themselves, through immediate notice of applications to affected states and postponements of licensing proceedings when appropriate. The case for immediacy in license processing is almost never sound; if a site has lain dormant for over fifty years, another year or two to explore the issue will seldom prove fatal to the project.

In High Mountain Sheep, the Supreme Court has suggested that the

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68. 33 F.P.C. 428, 461 (1965) (separate opinion). Ross argued that the Commission should withhold its decision for one year to give New York an opportunity to declare the “Hudson Highlands” a state park, in which case the FPC would probably refuse to license within the area.


70. Interview with Lee White, Chairman, Federal Power Commission, in Washington, D.C., Oct. 28, 1966. During the Scenic Hudson rehearing, the Commission refused to stay the proceedings to allow for establishment of an interstate compact under the Ottinger Act, Pub. L. No. 89-605, 80 Stat. 847 (1966); the agency argued that the Act neither required nor suggested a Commission moratorium, but merely stipulated FPC consultation with the Secretary of the Interior prior to any agency action affecting the Hudson riverway. Section 1 of the Act provides:

[I]t is the sense of the Congress that Federal departments and agencies should, insofar as possible, consider the effect of projects or actions upon achievement of the objectives of this Act until the compact has been acted upon by the States and the Federal Government.

The Commission conceded that the section applied, but insisted that “consideration must be made on the merits on the basis of the hearing record in the proceeding. Postponement would serve no useful purpose in aid of that determination or in the discharge of our responsibilities under the Federal Power Act.”

FPC, Order Denying Motion for Stay, Jan. 17, 1967 (on file in Yale Law Library; to be incorporated in Record, Consolidated Edison Co., 33 F.P.C. 428 (1965)). By refusing to hold the proceeding in abeyance, the FPC of course had not eliminated the alternative of deferring completely to the state of New York by refusing to license projects on the Hudson riverway in the first place.
FPC has an affirmative duty, in some circumstances, to defer licensing pending a determination whether deferral of construction would be more in the public interest than immediate construction and whether preservation of the reaches of the river affected would be more desirable and in the public interest than the proposed development. . . . We cannot assume that the Act commands the immediate construction of as many projects as possible.\textsuperscript{71}

In all its proceedings and deliberations, the FPC would do well to reflect that river basins are a limited and irreplaceable resource, while alternative power supplies are increasing to the point that hydroelectric power may soon be obsolete. The Supreme Court in \textit{High Mountain Sheep} intimated that it regarded the advent of atomic power as justifying a decline in the rate of dam-building activity.\textsuperscript{72} Still, short of a general going-out-of-business sale, the FPC can, it is clear, do much at the procedural level to strengthen the non-power interests at stake in the hydroelectric licensing process.

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\item \textsuperscript{71} 387 U.S. 428, 449 (1967).
\item \textsuperscript{72} Id. at 444-48.
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