

**BEFORE THE UNITED STATES
FEDERAL ENERGY REGULATORY COMMISSION**

Policy Statement on Conditioned Licenses)
For Hydrokinetic Projects) Docket No. PL08-1-1000

**COMMENTS OF THE OCEAN RENEWABLE ENERGY COALITION (OREC)
ON POLICY STATEMENT ON CONDITIONED
LICENSES FOR HYDROKINETIC PROJECTS**

I. INTRODUCTION

The Ocean Renewable Energy Coalition (OREC) is the national trade association for marine renewables in the United States, with a mission to advance and promote the commercialization of marine and hydrokinetic technologies such wave, tidal and offshore wind. As OREC has emphasized on multiple occasions, we appreciate the Commission’s support for exciting new wave, tidal and hydrokinetic technologies and the Commission’s continuous efforts to expedite the regulatory process so that our nation can realize the benefit of these sources of clean, renewable and emission-free energy. In these comments, OREC offers its support for the Commission’s proposed conditional license process, which along with the Commission’s pilot process, offers another tool to get projects into the water so that the industry, resource agencies and the public can gain operational data and information about project impacts.

At the same time, we also use this opportunity to raise some questions about the Commission’s conditional license process. Moreover, we ask the Commission to engage in vigorous oversight of the conditional license process to

allay any concerns expressed by stakeholders and to guard against abuse by developers who file for conditional licenses without any intention of developing the site. With appropriate oversight and safeguards in place, OREC believes that the conditional license will move the industry forward.

II. COMMENTS

A. The Conditional License Proposal

1. Background: Other Proposals

The Commission's conditional license proposal grows out of its efforts to ease regulatory hurdles to deployment of new wave and tidal technologies. The Commission is currently considering comments on a staff proposal for a pilot licensing project, that would be available for experimental or demonstration projects of 5 MW or less which are removable or easily shut down. The Commission envisioned that the pilot process would allow developers to site demonstration projects within a year or less. However, the Commission acknowledged that the success of the pilot process depends upon the cooperation of the state and federal agencies with jurisdiction to issue other authorizations necessary to license a project (*e.g.*, authorizations under the Coastal Zone Management Act or Section 404 (dredge/fill permit) under the Clean Water Act).

Recognizing the limitations created by other agencies on the Commission's ability to act, OREC urged the Commission to enter into MOUs with other agencies or create a "hydrokinetic liaison" who could provide support and serve as a clearinghouse of information on the licensing process to other

agencies. The Commission is still considering OREC's comments, and developing a final position on the staff final proposal.

2. The Conditional License

The Commission's conditional license circumvents the problem of delays caused by other agencies through issuance of a license that is conditioned upon receipt of approval from other agencies. As OREC understands the conditional license, the Commission will process all of the information that it receives, conduct environmental review, and make necessary statutory findings under Section 10 to support issuance of the license. The conditional order will also provide that construction may not commence until all necessary state and federal authorizations have been received.

The Commission explains that a conditional license will improve the finance-ability of a project and will allow developers to move ahead with non-construction activities, such as development of plans and consultation with stakeholders. (Commission Order at ¶12). According to the Commission, the conditional license terms will be final and subject to rehearing and binding on the licensees. *Id.*

B. Initial Comments

1. Benefits of the Conditional License

With appropriate safeguards and additional Commission action to increase cooperation by other agencies, a conditional license provides developers a valuable tool for moving forward with wave, tidal and hydrokinetic projects. OREC agrees that grant of a license, even a conditional license, will

greatly improve the prospects for attracting private capital. At the same time, it bears noting that investors may have some concerns about financing a conditional license, because of uncertainty relating to the time required for other state and federal agencies to grant necessary authorizations. In short, a conditional license is no substitute for continued efforts by the Commission to secure cooperation of other agencies and encourage them to act expeditiously to grant necessary authorizations.

OREC believes that Sections 4 and 10 of the Federal Power Act give the Commission wide latitude over administration of its licensing program. The Commission currently has the authority to issue conditional licenses, five year licenses and any other type of license that will maximize best comprehensive use of waterway as provided in Section 10 of the FPA. Contrary to the position of several commentors, the Administrative Procedure Act (APA) does not require the Commission to engage in the formalities of rulemaking in issuing policy statements, which merely interpret the Commission's existing practices on license issuances. *See* 5 U.S.C. § 553(b)(3) (exempting policy statements from rulemaking formalities under APA).

2. Need For Safeguards

While OREC supports the general concept of the conditional license, we are concerned that issuance of a conditional license might bind a developer to engage in costly planning to comply with the license terms, without any guarantee that a "firm" license will ever issue. A developer might have trouble

coming up with funding for planning and stakeholder activities because uncertainty about the ultimate issuance of the license would also complicate a developers' ability to obtain financing to comply with the terms of the conditional license. At the same time, according to the Commission's policy statement, the non-construction requirements of the license are binding and take effect immediately, and thus, would impose on developers an obligation to comply with license terms or face penalties or revocation. To avoid putting developers in a position of spending money to comply with the terms of a conditional license, when a full license might never issue, the Commission should clarify that developers are not obligated to initiate compliance with conditional license terms where other agencies have not yet granted necessary authorizations. Of course, the developer would still retain the option of moving forward if it had sufficient funding or believed that it stood a good chance of receiving other agency authorizations in a timely manner.

3. Other Questions

Below, we summarize some of the other questions raised by the conditional license. These questions include:

- 1. Can a conditional license be transferred pursuant to Section 8 of the Federal Power Act (FPA), and if so, will the Commission put in place any safeguards to limit applicants' ability to license sites and "flip" them to another entity?**

In adopting its “strict scrutiny” policy on preliminary permits, the Commission acknowledged that heightened scrutiny, in combination with the Section 5 prohibition on transfer of permits would adequately guard against site banking. A conditional license, however, can be transferred under Section 8 of the FPA, thereby raising the question of whether entities can apply for and obtain conditional licenses without any intention of ever developing the project, and then “flip” them to another entity? A conditional license is easier to obtain than a full blown license, because in theory, a developer does not need to do more than merely initiate the process of applying for state and federal permits, and put off any work on these applications until after the FERC process is completed. Thus, the conditional process may invite speculators or entities without the financial ability or intent to complete the project.

The Commission’s existing regulations on licensing require the developer to include a statement of intent to license a project. OREC expects that the Commission will enforce these regulations and closely review proposals to transfer conditional licenses if its adopts a conditional license process.

2. Will the issuance of a conventional license start the “clock” for the two year commencement of construction deadline under Section 13 of the FPA, and if so, how can applicants comply with the commencement of construction deadline where delays by other agencies prevent the licensee from commencing construction?

Section 13 of the FPA requires licensees to commence construction within two years from the date of issuance of the license. A conditional license does not authorize construction. But does a conditional license start the clock on commencement of construction? The problem is worse for pilot project licenses, which are only expected to last for five years, a period which could be consumed by obtaining other necessary authorizations.

Developers should not be forced into a catch-22, where they receive a conditional license license, but cannot commence construction in time to meet the requirements of Section 13 or deploy the project within the five year term of the pilot license because of delays by other agencies. To avoid this problem, the Commission must stay the effective date of a conditional license, to alleviate developers of the obligation to start construction or comply with other license terms until they receive necessary authorizations from other agencies.

On the other side of the coin, the Commission must monitor progress in obtaining necessary approvals to avoid site banking. A developer could obtain a conditional license and intentionally delay the process for obtaining state and federal authorizations, either to “sit on a site” or buy itself more time to develop technology. Even where a conditional license is issued, the Commission must require developers and state and federal agencies to demonstrate that progress is being made towards issuance of necessary authorizations.

3. How does the Commission reconcile its statement that a “conditional license constitutes a final order” with the First Circuit’s decision in *City of*

***Falls River v. FERC*, 2007 U.S. App. LEXIS 25146 (October 26, 2007), holding that a conditional approval of an LNG facility is not a final order ripe for judicial review?**

A recent First Circuit decision, *City of Falls River v. FERC*, *supra*, involved an intervenor's challenge to a conditional license for an LNG issued by the Commission. The grant of the final license rested on issuance of approvals from two federal agencies. The First Circuit rejected the challenge as "not ripe," finding that "the project may never well go forward because of it is conditioned on approval of other agencies." The First Circuit held that intervenors were free to challenge the license if and when a final license issued.

In the present order, the Commission found that a conditional license is binding, final order and that licensees must adhere to the terms of the license. On the surface, the Commission's order appears inconsistent with the First Circuit's decision in *City of Falls River*, where the court suggested that a conditional license is not a final order. Resolution of the finality issue is significant, because it has implications for financing as well as a developer's obligation to comply with the conditional license terms. The Commission should reconcile its decision in light of the *City of Falls River* ruling.

3. How will the issuance of a conditional license that encompasses lands on the OCS affect the Mineral Management Service's proposal to allow siting of test facilities on the OCS?

As the Commission is aware, MMS has issued a notice seeking nominations for sites for test facilities on the OCS, and asking developers to comment on certain policies related to deployment of wave and tidal projects. How will issuance of the conditional license impact the MMS rule? Will a grant of a conditional license that encompasses OCS lands preclude a competitor from siting a test facility within the project boundaries of the conditional license? Or is MMS free to grant access to OCS lands as it sees fit, irrespective of whether they are encompassed within a conditional license.

In addition, MMS has indicated that it is unlikely to issue regulations for leasing lands on the OCS for commercial (i.e., non test) facilities for at least two more years. Typically, a FERC license (Article 5) gives a developer five years to acquire necessary property rights for a project. But if MMS does not have a process in place for acquiring those rights, what will happen to the conditional license?

4. Must an applicant accept a conditional license, or will it have the option of seeking a firm license?

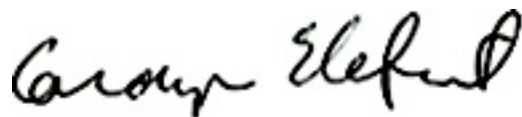
The Commission's proposal is not clear as to whether all developers must apply for a conditional license, or whether they can choose to apply for a firm license. And must a developer announce intent to seek a conditional license at the outset of the process – or can it decide on a conditional license down the line? Finally, does the conditional license apply only to demonstration projects, or to all license proposals by wave, tidal and hydrokinetic developers? The

Commission should clarify what procedures are available to wave and tidal developers seeking a project license.

III. CONCLUSION

Again, OREC appreciates the Commission's efforts to consider a wide range of approaches to expedite development and commercialization of wave and tidal technologies. A conditional license offers yet another innovative approach to help meet the goal of commercialization, and for that, the Commission deserves praise. Ultimately, the success of the marine renewables industry depends upon the willingness of other state and federal agencies and stakeholders to follow the Commission's example, and explore new approaches to reducing barriers to deployment of test facilities so that our nation can realize the benefits of building a marine renewables industry in the United States.

Respectfully submitted,

A handwritten signature in black ink that reads "Carolyn Elefant". The signature is written in a cursive, flowing style.

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