

134 FERC ¶ 61,111  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Chapter I

[Docket No. RM11-6-000]

Annual Charges for Use of Government Lands

(Issued February 17, 2011)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Inquiry (NOI).

SUMMARY: The Federal Energy Regulatory Commission (Commission) is inviting comments on its procedures with respect to the assessment of annual charges for the use of government lands. This Notice of Inquiry will assist the Commission in identifying options to consider in determining the methodology to be used to calculate rental rates for use of government lands under Part 11 of the Commission's regulations.

DATES: Comments on this NOI are due on [insert date 60 days after publication in the **FEDERAL REGISTER**].

ADDRESSES: You may submit comments on the Notice of Inquiry, identified by Docket No. RM11-6-000, by one of the following methods:

- **Electronic Submission**: Documents created electronically using word processing software should be filed in native applications or print-to-PDF format, and not in a scanned format, at <http://www.ferc.gov/docs-filing/efiling.asp>.
- **Mail/Hand Delivery**: Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy

Regulatory Commission, Secretary of the Commission, 888 First Street, NE,  
Washington, DC 20426. These requirements can be found on the Commission's  
website, see, e.g., the "Quick Reference Guide for Paper Submissions," available  
at <http://www.ferc.gov/docs-filing/efiling.asp>, or via phone from FERC Online  
Support at 202-502-6652 or toll-free at 1-866-208-3676.

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SUPPLEMENTARY INFORMATION:

134 FERC ¶ 61,111  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Annual Charges for Use of Government Lands

Docket No. RM11-6-000

NOTICE OF INQUIRY

(Issued February 17, 2011)

1. The Federal Energy Regulatory Commission is issuing this Notice of Inquiry to seek comments on its procedures with respect to the assessment of annual charges for the use of government lands by hydropower projects. In particular, the Commission is interested in identifying administratively practical methods for assessing reasonable annual charges that compensate the United States for the use of its lands.

**I. Background**

2. Section 10(e)(1) of the Federal Power Act (FPA)<sup>1</sup> requires Commission hydropower licensees using federal lands to:

pay to the United States reasonable annual charges in an amount to be fixed by the Commission . . . for recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property . . . and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require . . . .

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<sup>1</sup> 16 U.S.C. § 803(e)(1) (2006). Section 10(e)(1) also requires licensees to reimburse the United States for the costs of the administration of Part I of the FPA. Those charges are calculated and billed separately from the land use charges, and are not the subject of this Notice of Inquiry.

In other words, where hydropower licensees use and occupy federal lands for project purposes, they must compensate the United States through payment of an annual fee, to be established by the Commission.<sup>2</sup>

3. The Commission has employed various methodologies to determine the charges. The touchstone has been to find an administratively practical methodology which results in reasonably accurate land valuations.

4. Beginning in 1938, annual charges for use of government land were based on project-by-project appraisals.<sup>3</sup> That proved uneconomical because the cost of conducting individual appraisals was in excess of the value of the land involved.<sup>4</sup> In 1942, the Commission's predecessor, the Federal Power Commission (FPC), developed a national average value of \$50 per acre, to which it applied a four percent rate of return to derive an annual land use charge of \$2.00 per acre.<sup>5</sup> The FPC had determined that a national average was superior to regional or state land values because use of the national average would simplify the administrative task of Commission staff and reduce the costs

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<sup>2</sup> Pursuant to FPA section 17(a), 16 U.S.C. § 810(a) (2006), the fees collected for use of government lands are allocated as follows: 12.5 percent is paid into the treasury of the United States, 50 percent is paid into the federal reclamation fund, and 37.5 percent is paid into the treasuries of the states in which particular projects are located. No part of the fees is used to fund the Commission's operations.

<sup>3</sup> See Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges, Order No. 469, FERC Stats. & Regs. ¶ 30,741, at 30,584 (1987).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

associated with yearly land use charge determinations.<sup>6</sup> The FPC recognized that regional or state averages had the advantage of greater localization, but concluded that any speculative improvement in land value accuracy would not be significant enough to outweigh the obvious administrative economies accruing when a single nationwide figure is used as the basis for annual charges.<sup>7</sup>

5. In 1962, the FPC increased the national average land value to \$60 per acre, and in 1976 to \$150 per acre. In 1976, the FPC also adopted a fluctuating interest rate to ensure that the rate of return would remain current.<sup>8</sup>

6. In 1985, the Inspector General of the Department of Energy concluded that the Commission's existing methodology resulted in an under-collection of over \$15 million per year because it used outdated land values. The Inspector General also found that the wide variation in land values made the use of a zone index preferable to a national average. The Inspector General recommended that the Commission: (1) base land use charges on the current fair market value of the land being used; (2) use current long-term interest rates in its calculations; and (3) replace the national average land value with state-by-state averages.<sup>9</sup>

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<sup>6</sup> Order Prescribing Amendment to Section 11.21 of the Regulations Under the Federal Power Act, Order No. 560, 56 F.P.C. 3860 (1976).

<sup>7</sup> *Id.*

<sup>8</sup> Order No. 469, FERC Stats. & Regs. ¶ 30,741 at 30,584. This rate was based on a fluctuating rate used by the United States Water Resources Council, based primarily upon the average yield of long-term United States interest-bearing securities.

<sup>9</sup> See Assessment of Charges under the Hydroelectric Program, DOE/IG Report No. 0219 (September 3, 1986); see also More Efforts Needed to Recover Costs and

7. In response, the Commission instituted a rulemaking for several purposes, including to impose federal land use fees that better approximated the fair market value of the use of those lands. In the Notice of Proposed Rulemaking, the Commission noted that it had found no existing index of land values that accurately reflected current economic conditions and conformed precisely to the context of land used for hydropower projects.<sup>10</sup> The Commission stated that it was considering several proposals for assessing land use charges, including: (1) using, with modifications, the “Agricultural Land Values and Market Outlook and Situation Report,” published by the Department of Agriculture, which provided state-by-state average farm land and building values; (2) conducting individual appraisals; or (3) using fees based on a licensed project’s gross income or on its power generation.<sup>11</sup> In a subsequent notice requesting supplemental comments, the Commission posited another alternative that had recently become available: basing land use fees on a rental schedule for linear rights-of-way being developed jointly by the U.S. Department of Agriculture’s Forest Service and the U.S. Department of Interior’s Bureau of Land Management (BLM).<sup>12</sup> The Commission explained that, although the rental schedule concerned linear rights-of-way, it might be more representative of the value of

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Increase Hydropower Charges, U.S. General Accounting Office Report No. RCED-87-12 (November 1986).

<sup>10</sup> Billing Procedure Revisions – Annual Charges Methodology for Assessing Federal Land Use Charges, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,423, at 33,281 (1985).

<sup>11</sup> *Id.*

<sup>12</sup> 52 Fed. Reg. 82 (Jan. 2, 1987).

land used for hydropower projects than valuation of farm lands or any other then currently-published information.<sup>13</sup>

8. In its final rule, the Commission explained that its existing methodology had resulted in under-collection of land use charges and was no longer reasonable because it used outdated land values, that the wide variation in land values across the country made use of a zone index preferable to a national average, and that its previous decision not to use such an index because of the burden on the Commission to determine the value of Forest Service lands was no longer an issue because the Forest Service and BLM had begun promulgating an index setting forth those values.<sup>14</sup> The Commission agreed with the majority of commenters that the BLM-Forest Service index more accurately reflected typical hydropower project lands, and so decided to use that index rather than the farm values index.<sup>15</sup>

9. The Commission explained that the BLM-Forest Service methodology was based on a survey of the various types of lands that the Forest Service has allowed to be occupied by linear rights-of-way. The schedule was divided into regional zones, and provided per acre rental fees listed by state and county.<sup>16</sup> The Commission decided to continue its past practice of doubling the linear right-of-way fee in order to establish the annual fees for the use of federal lands for project works other than transmission lines

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<sup>13</sup> *Id.*

<sup>14</sup> Order No. 469, FERC Stats. & Regs. at 30,584.

<sup>15</sup> *Id.* at 30,589.

<sup>16</sup> *Id.* at 30,588.

(e.g., dams, powerhouse, and reservoirs) because lands used for transmission line rights-of-way would remain available for multiple uses, while other federal lands occupied by hydropower project works would not.<sup>17</sup>

10. The Commission found no merit to claims that charging fair market value for federal lands is prohibited by the FPA:

All increases in charges will result in some impact on consumers. The statutory provision bars the Commission from assessing unreasonable charges that would be passed along to consumers. Reasonable annual charges are those that are proportionate to the value of the benefit conferred. Therefore, a fair market approach is consistent with the dictates of the Act. Furthermore, as land values have not been adjusted in over ten years, an adjustment upwards is warranted and overdue.<sup>18</sup>

The Commission stated that “the Forest Service index is the best approximation of reasonable land charges” and explained that “the Forest Service index will be adopted and published each year by the Commission.”<sup>19</sup>

11. The Commission rejected the proposal to use the agricultural lands value index published by the U.S. Department of Agriculture, which used a state-by-state average value per acre of farm land and buildings. The Commission concluded that the agricultural index would require such major adjustments that it would not be an efficient measure of land value for hydropower projects.<sup>20</sup> The Commission also rejected using a

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<sup>17</sup> *See id.* at 30,588-89.

<sup>18</sup> *Id.* (footnotes omitted). The Commission also rejected arguments that it should intentionally set low land charges based on the public benefits provided by hydropower projects.

<sup>19</sup> *Id.* at 30,591.

<sup>20</sup> *Id.* at 30,589.

fee based on the percentage of gross sales or a rate per kilowatt hour. The Commission concluded that a percentage of gross sales fee or flat rate is not a reasonable method because it would charge a royalty as though the federal land being used was producing power, which overlooks the fact that power output is the result of many factors (e.g., water rights, head, project structures), and not just the acreage of the federal land involved.<sup>21</sup> Finally, the Commission rejected the proposal to use individual project appraisals, concluding that the FPC had abandoned the appraisal method in 1942, and again after reconsideration in 1976, because the cost of individual project appraisals was excessive compared to the value of the federal land at issue. Thus, the Commission concluded that individual appraisals would be too costly and result in time-consuming litigation.<sup>22</sup>

12. Based on these findings, the Commission promulgated a regulation stating, *inter alia*, that annual charges for the use of government lands would be set on the basis of the schedule of rental fees for linear rights-of-way (the BLM-Forest Service schedule); that annual charges for government lands occupied by project transmission lines would be based directly on the schedule, while charges for lands used for other project purposes would be twice the charges set forth in the schedule; and that the Commission, by its designee the Executive Director, would update its fees schedule to reflect changes in land values established by the Forest Service.<sup>23</sup>

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<sup>21</sup> *Id.* at 30,589-90.

<sup>22</sup> *Id.* at 30,590.

<sup>23</sup> *See* 18 C.F.R. § 11.2(b) (2010).

13. From 1987 until 2008, BLM and the Forest Service did not change the 1987 linear right-of-way schedule, other than to make an adjustment to the fees each year to account for inflation. Likewise, the only change in the Commission's implementation of its annual charges during this period was an annual fee update schedule to reflect the inflation adjustment.<sup>24</sup> In 2005, Congress passed the Energy Policy Act of 2005 that required BLM "to update [the schedule] to revise the per acre rental fee zone value schedule by State, county, and type of linear right-of-way use to reflect current values of land in each zone."<sup>25</sup> Congress further ordered that "the Secretary of Agriculture shall make the same revision for linear rights-of-way . . . on National Forest System land."

14. On April 27, 2006, BLM issued an advance notice of proposed rulemaking proposing to update the fee schedule.<sup>26</sup> BLM stated that it was considering using existing published information or statistical data, such as information published by the National Agricultural Statistic Service (NASS), for updating the schedule. On December 11, 2007, BLM issued a proposed rule updating the rental fee schedule,<sup>27</sup> and on October 31, 2008, it issued a final rule.<sup>28</sup> The rule based the updated fee on the NASS information, as BLM had proposed. BLM noted that the four commenters who had

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<sup>24</sup> See, e.g., Update of the Federal Energy Regulatory Commission's Fee Schedule for Annual Charges for the Use of Government Lands, 73 Fed. Reg. 3626 (January 22, 2008), FERC Stats. & Regs. ¶ 31,262 (2008)

<sup>25</sup> 42 U.S.C. § 15925 (2006).

<sup>26</sup> Update of Linear Right-of-Way Rental Schedule, 71 Fed. Reg. 24,836.

<sup>27</sup> Update of Linear Right-of-Way Rent Schedule, 72 Fed. Reg. 70,376.

<sup>28</sup> Update of Linear Right-of-Way Rent Schedule, 73 Fed. Reg. 65,040.

addressed the issue had supported use of the NASS data. The Forest Service subsequently adopted the BLM revisions.<sup>29</sup>

15. In January 2009, the Commission sent letters to all of its licensees, explaining that the Forest Service had revised its fee schedule in response to direction from Congress and that consequently “for many projects, the [fiscal year] 2009 federal land use charges will increase substantially.” The Commission asked licensees to confirm by county the federal acres that the Commission believed to be occupied by each project.<sup>30</sup>

16. On February 17, 2009, the Commission issued notice of the Fee Update Schedule and based the schedule, as in previous years, on the BLM’s and Forest Service’s land valuations (February 17 Notice).<sup>31</sup> Because of the BLM-Forest Service revisions, this resulted, in some cases, in significantly higher fees being assessed.<sup>32</sup> In calculating the 2009 fees, the Commission used the same methodology that it has used for the past 21 years: it took the land values published by Forest Service and BLM, used the information in its files showing federal acreage occupied by individual projects, and applied the

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<sup>29</sup> See *Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands*, 73 Fed. Reg. 66,591 (November 10, 2008). The Forest Service noted that it had given notice, in the preambles to BLM’s proposed and final rules, that it would adopt BLM’s revised fee schedule.

<sup>30</sup> See, e.g., letter to Portland General Electric Co. in Project No. 2030 (January 6, 2009).

<sup>31</sup> Update of the Federal Energy Regulatory Commission’s Fees Schedule for Annual Charges for the Use of Government Lands, 74 Fed. Reg. 8184 (February 24, 2009) FERC Stats. & Regs. ¶ 31,288 (2009).

<sup>32</sup> Other licensees, typically in the eastern part of the country, had their charges reduced.

values for the counties in which individual projects were located, doubling the values for acreage occupied by non-transmission line portions of hydropower projects.

17. On March 6, 2009, the Federal Lands Group, a group of licensees composed of both municipal and private entities, filed a request for rehearing of the February 17 Notice. The group alleged that the February 17 Notice amounted to a rulemaking, improperly issued without notice and an opportunity for comment, and that the Commission had improperly delegated its authority to set annual charges to BLM and the Forest Service. The group asked the Commission to vacate the February 17 Notice, rescind annual charge bills that had been sent out in accordance with it, and reissue bills calculated under the prior fees schedule.

18. On October 30, 2009, the Commission denied rehearing.<sup>33</sup> On December 18, 2009, the Federal Lands Group filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On January 4, 2011, the Court granted the petition for review and vacated the 2009 Update.<sup>34</sup> The Court stated that the Commission is required by the Administrative Procedure Act to seek notice and comment on the methodology used to calculate annual charges because the Commission's fee schedule is based on the Forest Service's land value index, and the Forest Service has made changes to the methodology underlying its index. We begin that process here.

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<sup>33</sup> Update of the Federal Energy Regulatory Commission's Fee Schedule for Annual Changes for the Use of Government Lands, 129 FERC ¶ 61,095 (2009).

<sup>34</sup> *City of Idaho Falls, Idaho v. FERC*, No. 09-1120, 2011 U.S. App. LEXIS 13 (D.C. Cir. Jan. 4, 2011).

## **II. Subject of the Notice of Inquiry**

19. As recounted above, the Commission has employed various methodologies over the course of its history to determine annual charges for the use of government lands by hydropower projects. The touchstone has been to find an administratively-practical methodology, which results in reasonably accurate land valuations. In seeking this goal, the methodology has been modified on occasion in response to concerns such as the cost of administering the methodology (e.g., rejecting individual appraisals), the administrative burden on the Commission (e.g., rejecting creation of our own index), and the accurate collection of fair market value (e.g., implementing updates in response to the contention that Commission had been under-collecting). At times, however, a previously-rejected approach has been revisited and adopted (e.g., Forest Service-BLM index adopted with adjustments because Commission would not be subject to administrative burden of creating its own index). The Commission now seeks suggestions for creating an administratively-practical methodology for assessing annual charges for the use of government lands that will result in reasonably accurate land valuations. The Commission specifically seeks comment on existing indices that could be used as the basis for establishing annual land use charges, and whether particular indices are better suited for that purpose than others. We outline below the major objectives in considering a new annual charges methodology, and request that commenters address how any methodology they suggest would be consistent with each of those objectives.

**A. Uniform Applicability**

20. Any proposed methodology should be uniformly applicable to all hydropower licensees. This means that the Executive Director should be able to take the information in the Commission's files showing federal acreage occupied by individual projects, apply the adopted methodology, and create an annual charge for the use of government lands for each licensed project. This has previously been possible, for instance, from 1987 to 2008, with the use of an existing index created by the Forest Service and BLM, modified as necessary, and updated automatically by the Forest Service for inflation.

**B. Cost of Administering Collection of Annual Charges**

21. The administration of any proposed methodology must not impose exorbitant costs on the Commission. Collection of annual charges and application of the ultimate methodology should be an annual, routine ministerial process that requires reasonable, but not overly burdensome, staff effort.

**C. Methodology Not Subject to Review on an Individual Basis**

22. Any proposed methodology, once adopted, should not be subject to review on an individual case-by-case basis. Licensees will have the opportunity to challenge computational errors by the Executive Director in calculating the annual charge or the relevant county land acreage, but case-by-case challenges to the methodology would add significantly to the administrative cost and burden of collecting annual charges.

**D. Fair Market Value**

23. At times in the Commission's history, it has been determined that the Commission had not been collecting fair market value for the use of government lands, which resulted

in a substantial under-collection.<sup>35</sup> To ensure that the Commission recovers “reasonable annual charges,” any proposed methodology must reflect reasonably accurate land valuations.

**E. Avoid Increasing Price to Consumers of Power**

24. In fixing annual charges, we must seek to avoid increasing the price to consumers of power by such charges. Therefore, any proposed methodology should provide reasonable, but not excessive, compensation to the United States for the use of its lands.

**III. Comment Procedures**

25. The Commission invites interested persons to submit comments and other information on the matters, issues, and specific questions identified in this notice.

Comments are due [insert date that is 60 days from the date of publication in the **FEDERAL REGISTER**]. Comments must refer to Docket No. RM11-6-000, and must include the commenter's name, the organization it represents, if applicable, and its address.

26. To facilitate the Commission’s review of the comments, commenters are requested to provide an executive summary of their position. Commenters are requested to identify each specific question posed by the Notice of Inquiry that their discussion addresses and to use appropriate headings. Additional issues the commenters wish to raise should be identified separately. The commenters should double-space their comments.

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<sup>35</sup> See Assessment of Charges under the Hydroelectric Program, DOE/IG Report No. 0219 (September 3, 1986); see also More Efforts Needed to Recover Costs and Increase Hydropower Charges, U.S. General Accounting Office Report No. RCED-87-12 (November 1986).

27. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

28. Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC, 20426. The current requirements are specified on the Commission's website, see, e.g., the "Quick Reference Guide for Paper Submissions," available at <http://www.ferc.gov/docs-filing/efiling.asp>, or via phone from FERC Online Support at 202-502-6652 or toll-free at 1-866-208-3676.

29. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters are not required to serve copies of their comments on other commenters.

#### **IV. Document Availability**

30. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal

business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC, 20426.

31. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits) in the docket number field.

32. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact the Commission's Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov)) or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov)).

By direction of the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.