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A Long Slog: What a Ten Year Hydroelectric Relicensing Process Demonstrates About Public Participation and Administrative Regulation Theories

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A LONG SLOG: WHAT A TEN YEAR HYDROELECTRIC RELICENSING PROCESS DEMONSTRATES ABOUT PUBLIC PARTICIPATION AND ADMINISTRATIVE REGULATION THEORIES

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"The Catawba-Wateree relicensing project has been perhaps the largest, most extensive public involvement project ever undertaken in this river basin. . . . Stakeholder hours invested in meetings: 58,000." Application for New License regarding the Catawba-Wateree Project[1]

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1. Application for a New License regarding the Catawba-Wateree Project: Exhibit A, Exhibit B, Exhibit C, Exhibit D, and Exhibit H – Operations and Finance at 13–14 (FERC 2006) (P-2232-522), Submittal 20060927-0155.

I. INTRODUCTION

There aren't many ways for the average citizen to become involved in energy regulation.[2] Citizens have little input into any utility docket process; moreover, because the process is so difficult for the average citizen to understand, there is little oversight provided by the public in regular, everyday utility matters.[3] However, one place where citizens have become more involved in regulatory matters is in dockets before the federal government, specifically nuclear and hydroelectric relicensing proceedings.[4]

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2. Citizens do not feel like they have much input; the majority of their utilities are monopolies. For the utility dockets that affect citizens the most by changing their bills through rate cases, riders and the like, they find out about changes after the fact through a mailer in their monthly bill. As a commentator in the New York Times put it recently: "Unfortunately, in most markets around the country, electricity is still one of the few areas where we have virtually no choice over our supplier. Imagine you want to buy a G.M. car, but you were told you can buy only a Toyota. You'd be outraged — yet this is how almost all Americans are forced to procure their electricity." Ben Ho, *The Conservative Case for Solar Subsidies*, N.Y. TIMES (Jan. 5, 2016), http://mobile.nytimes.com/2016/01/05/opinion/the-conservative-case-for-solar-subsidies.html?_r=1. Stranded costs – and a regulatory monopoly – serve as a barrier to entry for new firms. Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 765 (2004) ("Specifically, a number of distinguished commentators have argued that sunk costs can serve as a potent barrier to entry. In particular, many large-scale infrastructure industries, such as transportation and energy, are noncontestable."). This regulatory structure requires citizens in thirty-four states to purchase electricity from non-competitive firms. *Current State of Electricity Deregulation in the U.S.*, ELECTRIC CHOICE (Oct. 27, 2014), https://www.electricchoice.com/blog/electricity-deregulation-states-2014/.

3. While some particularly tenacious and informed citizens may be able to provide input into something like a utility's integrated resource plan, these do not occur annually in most states and still transpire within a process anathema to citizen input. *See*, *e.g.*, Integrated Resource Plan Otter Tail Power Company, ND PU-13-887 (1 filing, which indicates no comments were received). Others show minimal participation: Duke Energy Carolinas IRP, South Carolina 2016-10-E (3 filings); Cheyenne Light Wyoming 13439 (4 comments); South Carolina Electric and Gas Company's IRP 2014-9-E (5 filings).

4. The agencies actually want public participation. *See Public Meetings & Involvement*, U.S. NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/public-involve/open/public-participation.html (last visited Oct. 31, 2016). Unlike the South Carolina IRP figures noted above, NRC had already received forty-four comments on license

Some theories of administrative regulation would find the increased participation a positive, while others discount the public interest potentially present in regulators' actions.[5] Finding that an empirical study of citizen input into these proceedings may enlighten whether "enhanced" public participation actually leads to a potentially better outcome for the public, this article proceeds in four parts. First, three theories of administrative regulation are summarized, followed by an overview of the consultation process required for hydroelectric licensing. Analyzing the Catawba-Wateree relicensing as a case study, this article outlines the "enhanced" process used by Duke Energy and looks at two quantifiable measures to attempt to determine which administrative regulation theory is most represented practically in at least one hydropower relicensing: first, an analysis of the attendance of various stakeholder group meetings; and second, an analysis of the groups who participated in the stakeholder meetings but did not, in the end, sign on to the agreement which came out of the process.[6] The piece finishes with an analysis of whether the general interests of the public were served by this "enhanced" process and what can, therefore, be gleaned from the administrative regulation theories.[7] The conclusion indicates how this analysis is relevant to other hydroelectric systems.

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applications for Virgil C. Summer Nuclear Station Units 2 and 3, Docket NRC-2008-0441. https://www.regulations.gov/docket?D=NRC-2008-0441. FERC provides a guide to the public on how to get involved in hydropower relicensing efforts. *Hydropower Licensing – Get Involved*, FEDERAL ENERGY REGULATORY COMM'N, http://www.ferc.gov/resources/guides/hydropower/hydro-guide.pdf (last visited Oct. 31, 2016).

5. *See infra* Section II.

6. *See infra* Section IV.

7. I recognize that other lenses could be used to analyze this data, specifically theories of public participation in notice and comment rulemaking. *See, e.g.*, Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77 (2013). However, that discussion is beyond the scope of this article.

II. ADMINISTRATIVE REGULATION THEORIES AND ENERGY

Commentators have advocated that outcomes in administrative regulation in the energy sphere can be explained using different theories, although none have addressed hydropower specifically. Starting with the dominant public choice theory,[8] this article then explores the public interest theory and the civic republican theory, because these two are often used in the environmental context and have, to a lesser degree, also been used to explain energy regulation outcomes.[9]

A. Public Choice Theory

Public choice theory generally argues that "agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public."[10]

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8. Mark C. Niles, *Punctuated Equilibrium: A Model for Administrative Evolution*, 44 J. MARSHALL L. REV. 353, 356 (2011). For energy-specific work, *see, e.g.*, Matthew Wansley, *Virtuous Capture*, 67 ADMIN. L. REV. 419 (2015); Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TUL. L. REV. 379 (2009); Albert L. Danielsen & Paul H. Rubin, *An Empirical Investigation of Voting on Energy Issues*, 31 PUB. CHOICE 121, 123–28 (1977) (public choice explanation of variables affecting voting on energy-related bills in 94th Congress).

9. *See*, *e.g.*, Gregg A. Jarrell, *The Demand for State Regulation of the Electric Utility Industry*, 21 J. LAW & ECON. 269 (1978) (public interest); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014) (public interest); John S. Moot, *Economic Theories of Regulation and Electricity Restructuring*, 25 ENERGY L. J. 273 (2004) (public interest); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (civic republican theories); Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L. J. 749 (1999) (discussing both public choice and civic republican theories).

10. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998).

Theorizing that regulatory decision-making is similar to market decision-making, regulatory goods are demanded by those who stand to gain from them.[11] Only the state can supply these goods, as the state is the sole regulator.[12] The market works by private actors, motivated by economic interest, trading with legislators, motivated by private political interest, on the other side.[13] Therefore, "the regulatory interests of the individual voter (or the consumer) are dominated by the regulatory interests of organized subgroups of the citizenry because the latter have incentives to influence regulatory decision making which the former lacks."[14] Moreover, because utilities are typically a monopoly, individual consumers or citizens have no practicable opportunity to exit the regulatory market.[15]

In this theory, legislators do not protect the broad interests of citizens because interested groups "who are informed because they have an especially high demand for regulatory goods do monitor legislators, punishing those who consistently fail to provide such goods and rewarding those who provide favorable regulation."[16] Diffuse groups "will always be less well-funded than industry groups,"[17] leading to a continued state where citizens' general interests are not protected.[18] Additionally, regulatory decisions will

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11. Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 346 n.27 (1974) ("The government has a monopoly of the sale of regulation . . . ."); Croley, *supra* note 10, at 35 (listing that these regulatory goods can include "direct cash subsidies, controls over entry into a market, such as tariffs, controls over the substitutes and complements of economic goods, and price controls.").

12. Croley, *supra* note 10, at 35.

13. *Id.*

14. *Id.*

15. *Id.* at 37.

16. *Id.* at 38.

17. Josh Eagle, *Complex and Murky Spatial Planning*, 28 J. LAND USE & ENVTL. L. 35, 47 (2012).

18. GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 137, 140 (1975) (Public choice theory, however, could be contradicted if "for a given regulatory

rarely be reexamined once made.[19] So, once a favorable regulatory outcome is procured, this state continues for a significant period of time.

There are plenty of recent examples of where the public choice theory seems to play out in the energy context: an emergency rate increase for Mississippi Power Co. customers to pay for continued cost increases and overruns at the Kemper County coal facility;[20] the Ohio public utility commission considering guaranteeing a profit for unprofitable generating plants by allowing a regulated arm of one utility to purchase all output from its unregulated arm;[21] and fixed cost increases in Wisconsin and other states.[22] In all these examples, it is questionable that ratepayers' general

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policy, [it was] found the group with larger benefits and lower costs of political action [was] dominated by another group with lesser benefits and higher costs of political action.").

19. Croley, *supra* note 10, at 37.

20. A less recent one is the exemption of hydraulic fracturing from the Safe Drinking Water Act, which continues to have serious implications for the general citizenry. MARY TIEMANN & ADAM VANN, CONG. RESEARCH SERV., R41760, HYDRAULIC FRACTURING AND SAFE DRINKING WATER ACT REGULATORY ISSUES 21–22 (2015), CONGRESSIONAL RESEARCH SERVICE, *Hydraulic Fracturing and Safe Drinking Water Act Regulatory* Issues, FAS.ORG (July 13, 2015) https://www.fas.org/sgp/crs/misc/R41760.pdf; Doug Walker, *PSC grants new Kemper rate hike for Mississippi Power*, WDAM (Aug. 13, 2015, 11:20 AM), http://www.wdam.com/story/29779701/psc-grants-new-kemper-rate-hike-for-mississippi-power.

21. Dan Gearino, *Deal in Works on Profit Guarantees for Ohio Plants of AEP, FirstEnergy?*, THE COLUMBUS DISPATCH (Nov. 18, 2015), http://www.dispatch.com/content/stories/business/2015/11/17/1117-power-profit-guarantees.html.

22. Kari Lydersen, *Amid Debate Over Fairness, Wisconsin Remains Outlier on Fixed Charges*, MIDWEST ENERGY NEWS (Nov. 23, 2015), http://midwestenergynews.com/2015/11/23/amid-debate-over-fairness-wisconsin-remains-outlier-on-fixed-charges/.

interests are at the forefront, but it certainly can be argued that well organized profit interests are receiving regulatory benefits.

Proponents of public choice theory often argue for increased market reliance and less government regulation on grounds that the market could operate more efficiently.[23] It is also possible to see how, in each of these instances, market forces may have provided a better outcome for the individual ratepayer: a Mississippi electric co-op, given the opportunity to not purchase electricity from the Kemper facility as a result of schedule overruns, opted out of purchasing any power from the facility and, instead, contracted for wind generation for its ratepayers at a significantly lower cost.[24] Unfortunately for them, Mississippi Power's general customer base does not have the same option.[25] In the Ohio case, all economic analyses, except the impacted utilities, indicate that ratepayers would pay less for generation over the eight years if all generation was simply purchased from the PJM market.[26] As for the fixed cost increases, these are primarily occurring in states that have vertically-integrated utilities, not in states where competition exists.[27] In deregulated markets, customers are not seeing the

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23. *See, e.g.*, Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 88 (1969).

24. Daniel Cusick, *CARBON CAPTURE: Electric power association pulls out of deal with flagship Southern Co. coal project*, E&E NEWS, http://www.eenews.net/stories/1060019000 (last updated May 22, 2015, 4:12 PM).

25. Mississippi Power is a vertically-integrated utility, and Mississippi doesn't have customer choice. *Company Overview of Mississippi Power Co.*, BLOOMBERG, http://www.bloomberg.com/research/Stocks/private/snapshot.asp?privcapId=3170623 (last visited Oct. 31, 2016). Therefore, if you are in Mississippi Power's territory, you can't buy your electricity from someone else.

26. "PJM Interconnection is a regional transmission organization (RTO) that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia" as well as operating a competitive wholesale market covering the same territory. *Who We Are*, PJM, http://www.pjm.com/about-pjm/who-we-are.aspx (last visited Oct. 31, 2016).

27. This map shows where fixed charge proposals occurred in 2015, which largely overlaps where there is no retail choice. *The Year in Utility Rate Cases: Mandatory Fee Hikes Retreat as Consumer Voices Pick up Steam*, NATIONAL RESOURCE DEFENSE COUNCIL (Dec. 18,

same magnitude—nor the same rate—of fixed service costs increasing.[28] The public interest theory differs from the public choice theory in that it sees situations in which the general public could benefit.

B. Public Interest Theory

Public interest theory suggests that in addition to motivated interest groups, regulators themselves have interests which can align with the public good around issues in which the public has a strong interest. The theory

> concentrates on the general public's ability to monitor regulatory decisionmakers. Where regulatory decision makers operate under conditions of significant public scrutiny, the public interest theory holds that regulatory outcomes tend to reflect general interest. Where, on the other hand, the relevant decisionmakers operate without any oversight, they tend to deliver regulatory benefits to well organized interest groups at the public's expense.[29]

Challenging the public choice theory, public interest theory argues that "regulatory outcomes ameliorate market failures," and

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2015), https://www.nrdc.org/experts/samantha-williams/year-utility-rate-cases-mandatory-fee-hikes-retreat-consumer-voices-pick; *Electric Industry Structure and Regulation*, PENN. STATE COLLEGE OF EARTH AND MINERAL SCIENCES, https://www.e-education.psu.edu/eme801/node/529 (last visited Sept. 28, 2016); *Keeping the Lights on in Competitive Retail Areas: MISO Moves Forward with Three year Forward Auction*, MISO MATTERS (Aug. 31, 2016), http://www.misomatters.org/2016/08/keeping-the-lights-on-in-competitive-retail-areas-miso-moves-forward-with-three-year-forward-auction. MISO only has retail choice in Illinois and parts of Michigan.

28. NATIONAL RESOURCE DEFENSE COUNCIL, *supra* note 27.

29. Croley, *supra* note 10, at 5.

that regulation *sometimes* is in the general interest.[30] The public interest theory recognizes that members of the public—even those interested in any given regulatory topic—have other competing interests.[31] Therefore, their participation and stake in regulation is limited.[32] Special interest groups, on the other hand, are more interested in the regulatory outcome, and therefore are more active in regulatory decision-making.[33] Regulators act for self-preservation, furthering special interests when that enables self-preservation, and furthering general interests when those policies enjoy broad public support.[34]

Citizens also, in many cases, have little motivation to monitor regulators, because such monitoring would require significant investments in time, information, and organization, whereas special interests have much more incentive to monitor regulators.[35] "The citizenry's obstacles to monitoring afford opportunities for regulators to pursue narrow-interest policies to the detriment of the citizenry's general interests."[36] The difference between the theories, however, is when there is a "republican moment": when the public "temporarily overcomes" that clout that organized interests typically have over regulatory decisions.[37] At those times, in issues with significant public interest where the citizenry is

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30. *Id.* at 66.

31. *Id.*

32. *Id.* ("Members of the citizenry want, first, regulatory outcomes that satisfy their preferences, and, second, the opportunity to pursue all of their other goals. In other words, members of the citizenry seek what they consider to be desirable regulatory policies, but their pursuit of desirable regulatory policies competes with their pursuit of other goals. Their stake in regulatory policymaking is thus limited.").

33. *Id.*

34. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 177–81 (1990).

35. Croley, *supra* note 10, at 68.

36. *Id.*

37. Sarah Tran, *Cyber-Republicanism*, 55 WM. & MARY L. REV. 383, 388 (2013).

"especially cognizant," regulators favor advancing general interests, as that serves their self-interest the most.[38]

Public interest theory holds that how well regulatory outcomes correct market failures is of primary importance.[39] Therefore, the entire point of regulation is to "protect the public from such evils as monopoly behavior, 'destructive' competition, the abuse of private economic power, or the effects of externalities."[40] However, the public interest theory "currently suffers from a lack of supporting empirical evidence," as the evidence put forth by proponents focuses on deregulation, rather than affirmative regulation.[41] One recent example that might support a public interest theory of regulation, at least broadly, is the situation with coal ash ponds in North Carolina. There was little oversight for decades, but once the public became "especially cognizant" of the issue with the Dan River spill,[42] regulatory decisions have been, if

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38. Croley, *supra* note 10, at 69.

39. Levine & Forrence, *supra* note 34, at 168.

40. *Id.*

41. Croley, *supra* note 10, at 74–75.

42. On Feb. 2, 2014, a pipe at Duke Energy's Dan River coal plant near Eden, North Carolina, ruptured, sending coal ash from an unlined pit into the river. An estimated 39,000 tons of ash fouled 70 miles of the Dan River. The failure was caused by the collapse of a corrugated metal stormwater pipe that ran under the ash ponds. *See Duke Energy Dan River Coal Ash Spill Updates: What We Know, What We Need To Know*, CATAWBA RIVERKEEPER (2016), http://www.catawbariverkeeper.org/issues/coal-ash-1/duke-energy-dan-river-coal-ash-spill-what-do-we-currently-know-what-do-we-need-to-know; *See also* Matthew Burns, *Two years later, NC fines Duke for coal ash spill*, WRAL (Feb. 9, 2016), http://www.wral.com/two-years-later-nc-fines-duke-for-coal-ash-spill/15342212/. As far back as 1986, Duke consultants had noted that the pipe was made of corrugated metal, which deteriorated with age. In 2007, consultants also suggested a video inspection of the pipe, which also was not done. *See* Bruce Henderson, *N.C. fines Duke Energy $6.6 million for Dan River spill*, CHARLOTTE OBSERVER (Feb. 9, 2016), http://www.charlotteobserver.com/news/local/article59277098.html.

not completely in the public interest, at least arguably more so.[43] Even with the higher level of citizen involvement with an issue in the public spotlight, the public interest theory does not contemplate the level of participation of the public in the civic republican theory.

C. Civic Republican Theory

The civic republican theory posits that "government decisions are a product of deliberation that respects and reflects the values of all members of society" and that regulatory decision-making is about the identification of shared regulatory values.[44] Judgments – and, therefore, regulatory decisions – are made "following a process of dialogue and deliberation among all interested parties, during the course of which those parties settle upon a decision roughly constituting a consensus about the appropriate course of regulatory action, given all concerns."[45] Unfortunately, the theory is ambiguous about who, exactly, must participate in the regulatory process,[46] but the stated goal is to reflect the values of

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43. The North Carolina Department of Environmental Quality fined Duke for violations related to the Dan River spill, with the Secretary of DEQ noting that "[t]he state is holding Duke Energy accountable so that it and others understand there are consequences to breaking the law." *See* Henderson, *supra* note 42. The North Carolina Legislature also passed the Coal Ash Management Act of 2014, requiring Duke Energy to phase out wet storage of coal ash. *See Coal Ash Management Act of 2014*, SIERRA CLUB NORTH CAROLINA CHAPTER (Aug. 21, 2014), http://nc.sierraclub.org/article/coal-ash-management-act-2014. However, with the passage of time and less focus from citizens, the North Carolina Legislature passed a bill in 2016, which was signed by Governor McCrory, that allows Duke Energy to leave seven unlined coal ash pits in place, rather than cleaning them up. *See* Samantha Page, *New North Carolina Bill Allows Duke Energy to Dodge Coal Ash Cleanup Again*, THINK PROGRESS (July 1, 2016), http://thinkprogress.org/climate/2016/07/01/3794935/duke-doesnt-have-to-clean-up-its-ash/; *See also Drinking Water Protect'n/Coal Ash Cleanup Act*, NORTH CAROLINA GENERAL ASSEMBLY (July 14, 2016), http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=H630.

44. Seidenfeld, *supra* note 9, at 1514.

45. Croley, *supra* note 10, at 77.

46. *Id.*

all members of society and reach consensus on the common good.[47] Unlike the public choice or public interest theories, the civic republican theory implies that, rather than coming in with fixed positions, the outcomes desired by those participating in regulatory decision-making mature during the process and that those participants all are somewhat public-minded.[48]

Proponents of the civic republican theory want to dilute special interest influence by encouraging widespread public participation in policymaking.[49] This input should include the participation of "representatives of less concentrated concerns."[50] This goal could be accomplished by engaging the public in many ways, and then having the agency rely to a greater extent on this information. By allowing for broader participation, the civic republican theory hopes to disallow concentrated groups from obtaining favorable regulation.[51] This broad public participation also aligns with theories regarding what is good about a regulatory state and administrative decision-making.[52]

Notably, each of these three theories would predict a different regulatory outcome for a hydropower regulatory process. Public choice would suggest that the hydropower applicant would be able to heavily influence the process and obtain license

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47. Seidenfeld, *supra* note 9, at 1514.

48. Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 272, 282 (1986).

49. Croley, *supra* note 10, at 80.

50. Steve Kelman, *Adversary and Cooperationist Institutions for Conflict Resolution in Public Policy Making*, 11 J. POL'Y ANAL. & MGMT. 178, 195 (1982).

51. Croley, *supra* note 10, at 80–81.

52. Seidenfeld, *supra* note 9, at 1515 ("[H]aving administrative agencies set government policy provides the best hope . . . for deliberative decisionmaking informed by the values of the entire policy.").

conditions not necessarily in the common good, but which would serve the applicant well. Public interest would indicate that this influence could happen, excepting a "republican moment" or regulators acting in what they feel is the public good, even without heavy scrutiny. Finally, civic republicanism would argue for the maximum public participation possible, with consensus reached for the common good during the process of deliberations among all parties and with all options available to be considered. The licensing process itself does not indicate which will occur, as there is sufficient latitude in the process for any one of these to occur.

III. THE FERC HYDROELECTRIC LICENSING PROCESS

Under the Federal Power Act,[53] the Federal Energy Regulatory Commission (FERC) "has the exclusive authority to license most nonfederal hydropower projects on navigable waterways . . ."[54] The FERC may issue a new license for up to fifty years, and a relicense for between thirty to fifty years.[55] In making the decision about the license, the FERC "must give equal consideration to developmental and environmental values."[56] The FERC must include conditions in the license to adequately protect (or mitigate damage to) fish and other wildlife.[57] During the term of the license, the FERC monitors compliance with the license conditions; failure to comply with the license conditions can lead to civil penalties or rescission of the license.[58] At the end of any license, the FERC may issue another

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53. 16 U.S.C. §§ 791–1791(a) (repealed 1935).

54. FED. ENERGY REGULATORY COMM'N., 1-1, HANDBOOK FOR HYDROELECTRIC PROJECT LICENSING AND 5 MW EXEMPTIONS FROM LICENSING (2004), http://www.ferc.gov/industries/hydropower/gen-info/handbooks/licensing_handbook.pdf.

55. *Id.*

56. "Environmental values include: fish and wildlife resources, including their spawning grounds and habitat, visual resources, cultural resources, recreational opportunities, and other aspects of environmental quality. Developmental values include power generation, irrigation, flood control, and water supply." *Id.* at 1-2.

57. *Id.* at 1-4.

58. *Id.*

relicense, the federal government may take over the project, or the project can be decommissioned.[59]

The hydroelectric licensing process used by the FERC has changed over the years. Since 1997, applicants had the choice between two potential regulatory licensing processes: the Traditional Licensing Process and the Alternative Licensing Process.[60] In 2005, the FERC changed approach again, implementing the Integrated Licensing Process as the preferred option.[61] This article will discuss the traditional licensing process, as that is what was used in the Catawba-Wateree license

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59. *Id.* at 1-1.

60. *See Uncertainty? for sure*, WATER POWER MAGAZINE (Nov. 16, 2001), http://www.waterpowermagazine.com/features/featureuncertainty-for-sure/. Factors that impact which process the applicant uses include: the availability and skill of staff; timing; whether the license is offered competitively or whether it is a relicensing of an existing system; if there are high profile issues; and whether settlement of most issues is a realistic possibility. *Id.* Interestingly, I have been unable to find a tabulation of how many applicants chose each of these options.

61. The Traditional or Alternative Licensing approaches were in use until 2005. *Licensing Processes*, FED. ENERGY REGULATORY COMM'N (May 7, 2015), http://www.ferc.gov/industries/hydropower/gen-info/licensing/licen-pro.asp. Starting in 2005, the Federal Energy Regulatory Commission required the use of an Integrated Licensing Process ("ILP") for all original, new or subsequent licenses. *Id.* The ILP was intended to provide "a predictable, efficient, and timely licensing process" that includes the "[i]ntegration of other stakeholder permitting process needs . . . ." *Integrated Licensing Process (ILP),* FED. ENERGY REGULATORY COMM'N (Mar. 3, 2015), http://www.ferc.gov/industries/hydropower/gen-info/licensing/ilp.asp. A relicensing is considered a "subsequent" license. *Licensing Processes,* FED. ENERGY REGULATORY COMM'N (May 7, 2015), http://www.ferc.gov/industries/hydropower/gen-info/licensing/licen-pro.asp. Commission approval is now required to use either the Traditional or the Alternative Licensing Process, rather than the Integrated Licensing Process. *Id.* Interestingly, at least one law firm has found that the ILP "can provide some level of comfort that an overzealous stakeholder will be limited in their ability to hold up the relicensing process." Laura Cowan, *The Three Relicensing Processes: Kleinschmidt's Experience and Recommendations to Licensees*, KLEINSCHMIDT GROUP 5, http://www.kleinschmidtgroup.com/files/8113/9721/9442/The_Three_Relicensing_Processes_-_KAs_Experience_and_Recommendations_to_Licensees_-_LJC.pdf.

renewal.[62] While the traditional process was used, applicants like Duke Energy often "enhanced" the traditional licensing process, and those enhancements are also highlighted.[63]

A. Traditional Licensing Process

The traditional process minimizes public interaction and pre-filing costs while also giving the applicant "more opportunity to shape the process and tell its story."[64] In the Traditional Licensing Process ("TLP"), the applicant completes a three-stage consultation process with a variety of stakeholders prior to filing an application for an operating license.[65] To start the process, the applicant develops a document which includes the following about the hydroelectric project: detailed maps; the general engineering design; a summary of the existing operations and any proposed changes; identification of the affected environment and proposed mitigation measures; streamflow information; study descriptions and proposed methodologies; and a notice to fish and wildlife agencies, if the applicant is requesting a new dam or diversion.[66]

This document must be provided to federal agencies, tribes, state agencies, and members of the public.[67] While not specifying

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62. While the Catawba-Wateree license was not submitted until 2006, Duke Energy submitted an intent to relicense in 2003, and chose the traditional licensing process at that point. *See* FED. ENERGY REGULATORY COMM'N, COMPREHENSIVE RELICENSING AGREEMENT EXPLANATORY STATEMENT FOR THE CATAWBA-WATEREE HYDRO PROJECT P-2232, http://www.psc.sc.gov/Documents/Allowable%20Ex%20Parte%20Briefings/Ex_Parte_Briefing_Materials_05-29-2009_6CRA.pdf. Therefore, Duke Energy was not required to use the ILP even though the application was submitted after 2005.

63. WATER POWER MAGAZINE, *supra* note 60.

64. *Id.*

65. *Licensing Processes*, FED. ENERGY REGULATORY COMM'N (May 7, 2015), http://www.ferc.gov/industries/hydropower/gen-info/licensing/licen-pro.asp.

66. 18 C.F.R. §§ 16.8(b)(2)(i – vii), 4.301(a)(1 – 2) (2016).

67.

> Before it files any application for an original, new, or subsequent license under this part, a potential applicant must consult with the relevant

how the information must be conveyed to the public, the rule requires that a "licensee must make the information . . . reasonably available to the public for inspection and reproduction . . . until the date any relicensing proceeding for the project is terminated."[68] Then, between thirty and sixty days after the document is provided, the applicant must hold a joint meeting, including a site visit with everyone in the group who wishes to participate.[69] The FERC's rules specifically allow that members of the public are invited to attend and participate fully, including expressing views on any resource issues that should be addressed in the licensing process.[70] After the joint meeting, everyone involved, including the

> Federal, state, and interstate resource agencies, including as appropriate the National Marine Fisheries Service, the United States Fish and Wildlife Service, Bureau of Indian Affairs, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate state water resource management agencies, the certifying agency or Indian tribe under Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341(c)(1)), the agency that administers the Coastal Zone Management Act, 16 U.S.C. § 1451–1465, any Indian tribe that may be affected by the project, and members of the public. A potential license applicant must file a notification of intent to file a license application pursuant to § 5.5 and a pre-application document pursuant to the provisions of § 5.6.

Id. § 5.1(d)(1). *See also id.* § 5.6(a)(1) (listing in more detail those who the applicant may be required to consult with).

68. *Id.* § 16.7(b). Practically, the FERC publishes all information, by docket, on its website. Specifically, for the Catawba-Wateree relicensing, the information was available at the Public Library of Charlotte and Mecklenburg County, 310 N. Tryon Street, Charlotte, NC 28202. Application for a New License regarding the Catawba-Wateree Project at 91 (FERC 2006) (P-2232-522), Submittal 20030722-0302.

69. *Id.* § 16.8.

70. *Id.* However, the applicant has the ability to exclude the public from any site visit held in conjunction with the joint meeting. *Id.*

general public, has sixty days to submit comments to the applicant.[71] However, the comments are to be structured around the studies necessary for the hydroelectric application to be complete.[72] The first stage of the consultation process is complete when the written comments are provided or sixty days after the joint meeting, whichever comes first.[73]

During the second stage of the consultation process, the required studies are performed, the results complied, and those results provided to interested parties.[74] Those interested parties are requested to review the studies and provide written comments.[75] Agencies, tribes, and members of the public then have ninety days to provide written comments.[76] If "substantive disagreement" exists between the applicant and an interested party "regarding resource impacts or its proposed protection, mitigation, or enhancement measures," the applicant consults with the "disagreeing" party and others "with similar or related areas of interest, expertise, or responsibility" and holds at least one joint meeting with those parties "to attempt to reach agreement . . ."[77] If

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71. *Id.* § (b)(5).

72. *Id.* Should an applicant and agency, tribe, or member of the public disagree regarding the need to conduct a study, the applicant, agency, tribe, or member of the public must request referral of the dispute to the Director of the Office of Energy Projects for resolution. If the applicant disagrees and the study is maintained by the FERC and the applicant does not request the matter go to dispute resolution, the applicant will be required to complete the study or their application will be found deficient. If an agency, tribe, or member of the public does not request dispute resolution, they will be barred from using the lack of the study as a reason to reject the license later in the licensing process. *Id.* § (b)(6).

73. *Id.* § (b)(7).

74. FED. ENERGY REGULATORY COMM'N, *supra* note 65. (Second Stage Applicant completes reasonable and necessary studies; Applicant provides draft application and study results to resource agencies and tribes; Resource agencies and tribes comment on draft application; and Applicant conducts meeting if substantive disagreements exist.).

75. 18 C.F.R. § 16.8 (c)(4). The results do not have to go through formal peer review.

76. *Id.* § 16.8 (c)(5).

77. *Id.* § (c)(6).

agreement is reached, that consensus is memorialized in a written document; if disagreements persist, the applicant must describe the disagreement, including why the applicant disagrees with the position of the interested party, and include that in its application to the FERC.[78] The second stage then ends either when ninety days has passed after the study results are provided or after the last joint meeting based on substantive disagreements concludes.[79]

The third stage of consultation begins with the applicant filing the application for a license.[80] That application must also be submitted to agencies, tribes, and interested members of the public.[81] The application must include descriptions of any disagreements discovered during stage two.[82] Additionally, an applicant can submit any consensus documents agreed to during stage two as a settlement to the FERC.[83] The FERC then conducts an independent environmental analysis under NEPA,[84] establishes conditions of the new license, and decides whether to issue the new license.[85] The FERC is not bound by the consensus agreements

78. *Id.* § (c)(7–8).

79. *Id.* § (c)(10)(i–ii).

80. *Id.* § (d)(1).

81. *Id.* § (d)(2).

82. 18 C.F.R. § 16.8(f)(3).

83. Application for a New License regarding the Catawba-Wateree Project at 91 (FERC 2006) (P-2232-522), Submittal 20061116-0145.

84. The NEPA process typically takes between 2 and 7 years. *See Hydropower Licensing*, NORTHWEST HYDROELECTRIC ASS'N (2013), http://www.nwhydro.org/wp-content/uploads/resources/laws_regulations/hydropower_licensing.htm. This NEPA process includes the standard processes for public input.

85. *See* Federal Energy Regulatory Commission, Preparing Environmental Documents: Guidelines for Applicants, Contractors, and Staff (2008),

from earlier stages, but instead can implement conditions it determines are in the public interest.[86]

B. The "Enhanced" or "Hybrid" Process

While existing nowhere in regulations and not technically recognized by the FERC as a licensing process, an "enhanced" process has come to be commonly used by applicants for hydroelectric relicensing.[87] The enhanced process is "a traditional, three-stage process with some sort of enhanced stakeholder consultation - but neither NEPA scoping nor a NEPA document . . ."[88] This lack of a formal NEPA document is one specific reason why applicants would choose to undertake an "enhanced" TLP rather than one of the other regulatory paths available – while the FERC will still assess the project under NEPA, that requirement does not fall to the applicant.[89] Therefore, while the "enhanced" process is not part of the formal environmental assessment, the applicant has the ability to understand what aspects of the relicensing are important or contentious and may come up during the NEPA process. This "enhanced" process provides the ability for the applicant to negotiate with groups before formally submitting the license application. The "enhanced" process ends with a settlement agreement that can become part of the application to the FERC, indicating agreement for the proposed license conditions contained therein.[90] "The key to success of a hybrid process is to demonstrate

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http://www.ferc.gov/industries/hydropower/gen-info/guidelines/eaguide.pdf; *See also* Federal Energy Regulatory Commission, *supra* note 4.

86. 18 C.F.R. § 16.13.

87. *The Relicensing Process*, AMERICAN WHITEWATER, http://www.americanwhitewater.org/content/Wiki/stewardship:relicensing_overview#hybrid (last visited Sept. 28, 2016).

88. WATER POWER MAGAZINE, *supra* note 60.

89. NORTHWEST HYDROELECTRIC ASS'N, *supra* note 84.

90. For a partial list of hydroelectric relicenses that have resulted in settlements, *see* HYDROPOWER REFORM COALITION, *Settlement Agreements* app. C (2016),

with a comprehensive settlement agreement that the package of resource measures captured in the agreement is best adapted to address competing resource goals and is in the public interest."[91] However, as one environmental group noted regarding "enhanced" relicensing, "the licensee has no requirement to collaborate fairly or honor informal agreements" made during an "enhanced" process.[92]

The "enhanced" process allows for more data on public participation to be developed during the process than a traditional licensing process, as more data is developed than simply comments into the NEPA process. Allowing an empirical analysis not often available in energy regulation, the data from the "enhanced" process can be analyzed to determine whether the additional public participation actually resulted in a regulatory outcome that potentially provided for the common good. A very recent relicensing, the Catwaba-Wateree, provides that opportunity to study an "enhanced" relicensing process.

IV. THE CATAWBA-WATEREE RELICENSING

Consisting of thirteen hydroelectric power plants on eleven lakes spanning nine counties in North Carolina and five counties in South Carolina, the Catawba-Wateree system occupies more than 200 river miles.[93] In addition to providing more than 800 MW of hydropower, the reservoirs also provide cooling water to over

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http://www.hydroreform.org/hydroguide/hydropower-licensing/citizen-toolkit-for-effective-participation/Appendix_C.

91. INT'L WATER POWER & DAM CONSTR., *supra* note 60.

92. AMERICAN WHITEWATER, *supra* note 87.

93. *About the Catawba-Wateree*, DUKE ENERGY, http://www.duke-energy.com/catawba-wateree-relicensing/about-cw.asp (last visited Sept. 28, 2016).

7,700 MW of fossil-fuel and nuclear generation.[94] The Catawba-Wateree was first licensed by the Federal Power Commission on September 17, 1958.[95]

Duke Energy Carolinas ("Duke") submitted its intent to file a relicensing application for the Catawba-Wateree hydroelectric system on July 21, 2003.[96] This notice did not include any information about which relicensing process Duke intended to use.[97] Many stakeholders were understandably interested in the licensing application process; the Catawba-Wateree system provides drinking water for nearly two million people, and more than ten million use the system for recreation each year.[98] Additionally, NASA scientists have hypothesized that water scarcity will be coming to the Southeast, and rainfall in the Catawba River basin has already dropped ten percent in the last fifty years.[99] Potential controversies included flood management, water quality, recreational opportunities, land conservation, migratory fish and endangered species, and minimum flows.[100]

Duke completed the consultation steps required under the FERC's Traditional Licensing Process and filed its application for

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94. *Duke Energy's new Catawba-Wateree operating license highlights the benefits of cooperation*, DUKE ENERGY (Nov. 25, 2015), http://news.duke-energy.com/releases/duke-energy-s-new-catawba-wateree-operating-license-highlights-the-benefits-of-cooperation-between-the-company-and-communities.

95. Order Issuing License, 20 F.P.C. 360 (1958).

96. Application for a New License for the Catawba-Wateree Hydroelectric Project, (FERC 2003) (P-2232-522), Submittal 20030210 [hereinafter Duke Power Notice].

97. *Id.*

98. DUKE ENERGY, *supra* note 94.

99. Bruce Henderson, *NASA scientist: Southeast faces a scarcity of water*, CHARLOTTE OBSERVER (Dec. 2, 2015), http://www.charlotteobserver.com/news/local/article47457280.html.

100. *See, e.g.*, Application for a New License Regarding the Catawba-Wateree Project at 109, (FERC 2006) (P-2232-522), Submittal 20060927-0548 (listing major issues of concern). *See also id.* at 100 ("the environmental, recreational, and cultural needs of the north Mecklenburg community are not fulfilled . . . .").

relicensing on August 29, 2006.[101] The application noted that Duke used an "enhanced" Traditional Licensing Process; that its existing license for the Catawba-Wateree system was set to expire on August 31, 2008; and that Duke was requesting a new license to continue operation for fifty years.[102]

While not specific to the Catawba-Wateree relicensing, Duke has stated that "enhancing the FERC's relicensing processes to promote stakeholder involvement provides benefits to the relicensing process. Further, enhanced stakeholder participation in hydroelectric project re-licensing can result in relicensing agreements among many stakeholder organizations."[103] Therefore, the company seems to feel that the "enhanced" process is the best way for it to interact with its stakeholders. However, other possible explanations for using the process do exist. Less altruistically, it is possible that using the "enhanced" process was a good way to "look collaborative" while balancing to get to an outcome that Duke could live with. More cynically, it could appear to take others' interests into account, knowing that while the relicensing process was going on it could continue to operate as it always had.[104] Also, if the settlement agreement at the end of the process was insufficient, the stakeholder process would simply delay the issuance of the

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101. *See* Application for a New License Regarding the Catawba-Wateree Project at 8, (FERC 2006) (P-2232-522), Submittal 20060927-0155 [hereinafter Application, Submittal 20060927-0155].

102. *Id.*

103. *Relicensing Agreements*, DUKE ENERGY, https://www.duke-energy.com/keowee-toxaway-relicensing/relicensing-agreements.asp (last visited Feb. 12, 2016).

104. Stakeholders also seemed to recognize this as a possibility. One pointed out that "ILP and Alternative Licensing Process (ALP) both call for collaboration, but the Traditional Licensing Process (TLP) hybrid allows Duke not to have to follow certain collaborative rules and still reap the benefits a collaborative provides." Application for a New License regarding the Catawba-Wateree Project at 98–99, (FERC 2006) (P-2232-522), Submittal 20060927-0555.

relicense, but that would also delay any new environmental mitigation that Duke would have to undertake.[105]

Whatever the reason, the "enhanced" process meant that, instead of using only the consultation process required (which Duke termed the "regulatory" track), Duke also met, in parallel, with stakeholders to develop a consensus that could be used as the basis for license conditions that could be submitted to the FERC, demonstrating additional stakeholder buy-in (and ensuring the groups who signed would not sue).[106] Duke called this second track the "stakeholder" track.[107] The "regulatory" track and the "stakeholder" track had many common participants who regularly exchanged information.[108]

A. The Regulatory Track

In the "regulatory" track, Duke completed stage one in July 2003, and moved into stage two in August, 2003.[109] Taking three years to complete stage two, Duke completed twenty-seven studies to meet regulatory requirements.[110] The "stakeholder" track then merged into the "regulatory" track when the agreed-upon provisions of the stakeholder agreement were incorporated into the

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105. A discussion of the corporate use of due process – where a regulated entity uses a public process to guide agency decision making that should be in the public interest – is also beyond the scope of this article. *See, e.g.*, Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006).

106. Application, Submittal 20060927-0155, *supra* note 101, at 15–22.

107. *Id.* at 15.

108. *Id.* at 56.

109. *Id.* at 16.

110. *Id.* at 17. Duke had many other requests, which it did not study; it stated that "[o]ther requests (a) did not ask for a study per se but for an outcome; (b) expressed an interest that could be raised in stakeholder negotiations; (c) related to an activity that is already a current practice of the Licensee; (d) related to relicensing activities that are administered by the FERC; (e) made certain study methodology or relicensing process requests or (f) did not meet one of the preceding four study criteria." *Id.* at 57.

license application.[111] Stage three began when Duke filed its new license application in August of 2006, and was completed when the FERC issued Duke its new operating license on November 25, 2015.[112]

B. The Stakeholder Track

In an attempt to obtain consensus during the relicensing process, Duke worked with over 160 stakeholders representing eighty-five organizations.[113] The goals of the stakeholder process were to provide stakeholders with: "1) opportunities for discovery, information sharing and education; 2) a direct role in developing, reviewing and discussing the studies necessary to support the license application; 3) a direct role in negotiating agreements that resolve the issues and balance the interests relative to the New License for the Project; and 4) measures to inform the public about the topics being addressed in the process."[114] More succinctly, the goal "was to reach a mutually acceptable agreement on all interests related to the project."[115] While federal agencies provided input into the process and did attend some meetings, none formally took part in the process.[116]

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111. Application, Submittal 20060927-0155, *supra* note 101, at 56.

112. DUKE ENERGY, *supra* note 94.

113. Application, Submittal 20060927-0155, *supra* note 101, at 7; DUKE ENERGY, *supra* note 94.

114. *See* Application for a New License regarding the Catawba-Wateree Project at 5, (FERC 2006) (P-2232-522), Submittal 20060927-0545.

115. *Collaborative relicensing*, INT'L WATER POWER & DAM CONSTR. (Oct. 9, 2006), http://www.waterpowermagazine.com/features/featurecollaborative-relicensing/.

116. The U.S. Fish and Wildlife Service's decision not to sign on was especially discussed given the potential impact a future Biological Opinion could have on the operation of the dams. USFWS did not sign because "the charter, as written, compromises the agencies' statutory authority." Application for a New License: Stakeholder Process and Consultation at

Those involved in the stakeholder process started out expressing individual interests they wanted to secure during the relicensing; for Duke, the primary interest was "to maintain generating flexibility" as well as operational flexibility to use the system to generate electricity for peak periods.[117] After all the interests were discussed, an initial draft of an agreement was circulated and negotiations started. Multiple suggestions by stakeholders during the drafting process regarding their interests were dismissed with little discussion as something Duke was not prepared to agree to.[118] Stakeholders also noted that Duke

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98, (FERC 2006) (P-2232-522), Submittal 20060927-0555. Duke surmised that the agencies' decision not to sign was, in fact, a way to attempt to pressure them into a different licensing arrangement. *Id.* ("He surmised that perhaps DOl's decision was an attempt to try and push Duke toward an Integrated Licensing Process (ILP)."); Catawba-Wateree Project Application for a New License: Stakeholder Process and Consultation at 13, (FERC 2006) (P-2232-522), Submittal 20060927-0608 ("Lineberger explained that, in his opinion, the USFWS's decision seems to be based entirely on the fact that they would prefer this to be an ILP rather than a TLP and that this is a different directive than the one that the USFWS had during the Nantahala Area relicensing. [A stakeholder] disagreed and indicated that perhaps the reason the USFWS was unwilling to sign/agree to the charter had more to do with the fact that Duke was unwilling to give up their authority.").

117. Catawba-Wateree Project Application for a New License: Stakeholder Process and Consultation at 81, (FERC 2009) (P-2232-522), Submittal 20060927-0576 ("Additionally, Duke Power wants to retain the operational flexibility of peaking.") [hereinafter Application, Submittal 20060927-0576].

118. These primarily focused on flow conditions, including maximum flows. Catawba-Wateree Project Application for a New License: Stakeholder Process and Consultation at 99 (FERC 2006) (P-2232-522), Submittal 20060927-0575 ("Blackburn continued by explaining that Duke Power is not prepared to agree to something that will limit them to a maximum flow . . ." when discussing wade fishing interests); speed-no-load or bypass flows, Catawba-Wateree Project Application for a New License: Stakeholder Process and Consultation at 16, (FERC 2006) (P-2232-522), Submittal 20060927-0605 [hereinafter Stakeholder, Submittal 20060927-0605]; a flow regime that recognizes when there is more water and provides it for diadromous fish in those cases. *Id.* at 17–18 ("Lineberger stated that the language included in Section 4 of the current draft AlP is all Duke Power is willing to do."); flow passage, Catawba-Wateree Project Application for a New License: Stakeholder Process and Consultation at 66, (FERC 2006) (P-2232-522), Submittal 20060927-0565 (". . . Duke Power has agreed to operations and costs associated with fish passage however they have not agreed to flow passage." and that a stakeholder ". . . would like to see that aspect of fish passages and flows addressed"); and that Duke was "not going to put money to something else" if one recreational project it agreed to fell through, even though other stakeholders felt that there were other

"control[led] the negotiations," that "the ultimate power lies in Duke's hands,"[119] that they did not feel ownership of the negotiated document,[120] that "the public will be subject to Duke Power's whims,"[121] and that they believed the process was rigged and geared in Duke's favor.[122] When one stakeholder asked how Duke formulated tradeoffs, the response was that Duke determined them using "1) Duke's interests 2) those interests affecting Duke's interests and 3) study results."[123] Trust was further undermined

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priorities the money could be used for. Catawba-Wateree Project Application for a New License: Stakeholder Process and Consultation at 134, (FERC 2006) (P-2232-522), Submittal 20060927-0602 [hereinafter Application, Submittal 20060927-0602]. Even the USFWS asked "if Duke is interested in additional flows . . . that would provide for other habitat values not addressed in the AlP. Lineberger said he believes flows in the current AlP provide the best balance and Duke is not interested in additional flows . . ." Catawba-Wateree Project Application for a New License: Stakeholder Process and Consultation at 19, (FERC 2006) (P-2232-522), Submittal 20060927-0605.

119. Application for a New License regarding the Catawba-Wateree Project at 15, (FERC 2006) (P-2232-522), Submittal 20060927-0587.

120. Application for a New License regarding the Catawba-Wateree Project at 98, (FERC 2006) (P-2232-522), Submittal 20060927-0610.

121. Application for a New License regarding the Catawba-Wateree Project at 96, (FERC 2006) (P-2232-522), Submittal 20060927-0574.

122. Application for a New License regarding the Catawba-Wateree Project at 123, (FERC 2006) (P-2232-522), Submittal 20060927-0604. ("Several stakeholders commented on their belief that this process is uneven and it is geared in Duke's favor." "In response to [a stakeholder's] accusation that [the facilitator] is giving an unfair advantage towards to Duke in this process by stating that some issues are irresolvable, [one of the facilitators] explained that his business interests don't allow him to ignore stakeholders because of [the facilitator's] involvement in other relicensings and dealings with others in the hydro industry.").

123. Application for a New License regarding the Catawba-Wateree Project at 97, (FERC 2006) (P-2232-522), Submittal 20060927-0612. Duke also admitted to stakeholders that there would be data from studies that they would not be willing to share. *Id.* Application for a New License regarding the Catawba-Wateree Project at 23, (FERC 2006) (P-2232-522), Submittal 20060927-0566. ("[A stakeholder] asked if Duke anticipates that there will be data from the studies that Duke would not want to make public, like Indian sites or things that

during the negotiations by the sale of property by a Duke Energy subsidiary that had been listed as a priority for conservation by multiple parties.[124]

Realizing that some stakeholders would be interested in only certain issues or certain geographies, Duke determined it would be more expedient to break the Catawba-Wateree geography into distinct segments and focus certain teams on each.[125] Six teams were formed on this basis: two state relicensing teams, who had responsibility for all the interests in each state, and four advisory groups, focused on a smaller part of the entire project.[126] Interested members of the public had to apply to become part of one of the teams.[127]

After the teams were formed, decision-making within the teams was very structured. After discussion on an item, consensus was identified.[128] If there was doubt that consensus existed, any team member could request that consensus be tested.[129] Testing

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impact Duke's profits or costs. Johnson replied that Duke will be presenting economic values to the group but some things are trade secrets and will not be made public.").

124. Crescent Resources, a subsidiary of Duke Energy, contracted for the sale of the Singleton tract to a developer while negotiations around its conservation were ongoing in the Catawba-Wateree stakeholder process. The 3,500-acre tract represented nearly five miles of contiguous, undeveloped shoreline on Lake Wateree. Duke refused to stop the transaction, even though that specific tract had been identified in the South Carolina land conservation negotiations. Stakeholders felt this "short-circuited" the negotiation process, especially since land conservation was a top priority for many taking part in the process, and that it was hard to find the motivation to continue since the supply of land for conservation had significantly decreased. Duke's response was that this is "corporate reality." Application for a New License regarding the Catawba-Wateree Project at 63–64, (FERC 2006) (P-2232-522), Submittal 20060927-0612.

125. Application for a New License regarding the Catawba-Wateree Project at 3, (FERC 2006) (P-2232-522), Submittal 20060927-0545.

126. *Id.* at 5.

127. *Id.* at 3–4.

128. *Id.* at 16.

129. *Id.* at 17.

consisted of each team member indicating his or her concurrence on a five point scale: 1) endorsement; 2) endorsement with minor point of contention; 3) agreement with minor reservations; 4) stand aside with major reservations; or 5) block.[130] If, for any item, a team member suggested that he or she strongly disagreed and could not support the agreement if a particular provision was a part of it, that team member was expected to leave the stakeholder process entirely.[131] This scale and formal voting allowed team members to clarify how much agreement existed on any given point.[132] If significant disagreement existed at the end of the process, those disagreeing were given "500 words or less" to specify why they had major reservations or were dissenting from the final document.[133]

To get to the consensus document, Duke indicates that six stakeholder teams met a total of 315 times.[134] The two state relicensing teams, the North Carolina State Relicensing Team ("NCSRT") and the South Carolina State Relicensing Team ("SCSRT"), met forty-one and forty-two times, respectively, between July, 2003, and July, 2006.[135] The four advisory teams met

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130. *Id.* at 18.

131. Application for a New License regarding the Catawba-Wateree Project at 9, (FERC 2006) (P-2232-522), Submittal 20060927-0545. "Stand aside with major reservations" also had two sub-parts that a team member was expected to choose between: a) do not have sufficient information; and b) formal disagreement, but will not block. *Id.*

132. *Id.*

133. *Id.* at 10.

134. *See id.* at 14. Duke has provided attendance records for 221 meetings, which are analyzed here. *See infra* Appendix. The other meetings may have been resource committee meetings, study team meetings, or ad hoc committee meetings, but it is unclear based on the relicensing documents what the other 94 meetings are. No other attendance records were provided in the relicensing documents other than those analyzed here.

135. *See* Application for a New License regarding the Catawba-Wateree Project at 14, (FERC 2006) (P-2232-522), Submittal 20060927-0545.

similarly frequently.[136] The NC Foothills Advisory Group ("Foothills AG") met thirty-four times over the three-year period; the NC Metro Advisory Group ("Metro AG") met thirty-five times; the SC Piedmont Advisory Group ("Piedmont AG") met thirty-five times; and the SC Lower Catawba Advisory Group ("Lower Catawba AG") thirty-four times.[137]

The question then becomes: How many meetings are too many?[138] For citizens taking part in the process—unlike Duke employees or the employees of federal or state agencies—the time spent in meetings is often uncompensated.[139] While motivations to participate in the process were not recorded, it would seem that many of these citizens or groups felt that, at least at the beginning, there was a potential for the process to lead to a favorable regulatory outcome. Attendance can be seen as a proxy for several measures, including stakeholder motivation, the potential amount of public oversight, and the amount of collective deliberation which occurred in the process. Those team members who do not feel invested in the process, who do not feel that the process incorporated their points of view, or addressed their concerns were likely to attend fewer meetings because the meetings would be viewed as simply a waste of time. Lower attendance could also occur if team members realized that any eventual regulatory outcome that reflected their goals was unlikely or if participants did not feel that each meeting was impactful—e.g., if it would not be possible to get enough out of the process by attending only every third meeting.

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136. *See id.*

137. *See id.*

138. It was apparently recognized that the frequency and number of meetings was taking a toll, noting at one point that, when attempting to schedule an additional meeting, ". . . teleconferencing was something that could certainly be done realizing that it is difficult for people to attend the meetings." Application for a New License regarding the Catawba-Wateree Project at 12, (FERC 2006) (P-2232-522), Submittal 20060927-0579.

139. Transcript, at 16, In the Matter of: Catawba-Wateree Relicensing Project, (FERC 2007) (P-2232-522), Issuance 20070326-4037.

In order to analyze participation, I have examined the attendance records for each of the six teams, breaking the participants into three groups: 1) Duke employees; 2) the employees of federal and state agencies, including members of the Catawba nation and local governments, commissions and authorities; and 3) other stakeholders. The "other" group includes interested citizens, neighboring landowners, homeowners' associations, environmental and recreational groups, and businesses with an interest in the relicensing process.[140] A FERC representative was not a team member of any team.[141]

1. NCSRT

The NCSRT consisted of two Duke employees, ten members representing federal or state agencies or Indian tribes, and four representing other stakeholder groups.[142] Looking at attendance across the entire series of forty-one meetings, the Duke employees averaged 96.4% attendance; officials averaged 45.9% attendance; and other stakeholders averaged 70.7% attendance.[143]

2. SCSRT

The SCSRT consisted of two Duke employees, ten members representing federal or state agencies or Indian tribes, and seven representing other stakeholder groups.[144] Looking at attendance

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140. *See infra* Appendix.

141. *See* Application for a New License regarding the Catawba-Wateree Project at 11, (FERC 2006) (P-2232-522), Submittal 20060927-0545.

142. This comes from counting the members on the attendance sheets. *See infra* Appendix.

143. This comes from calculating the attendance based on the attendance sheets. *See infra* Appendix.

144. *See* Application for a New License regarding the Catawba-Wateree Project (FERC 2006) (P-2232-522), Submittal 20060927-0545.

across the entire series of forty-two meetings, the Duke employees averaged 96.4% attendance; officials averaged 56.2% attendance; and other stakeholders averaged 53.7% attendance.[145]

3. Foothills

The Foothills AG consisted of four Duke employees; twenty-one members representing federal, state, county or local governments, or Indian tribes; and nineteen members representing other stakeholder groups. For the thirty-four meetings, Duke employees averaged 78.7% attendance; officials averaged 45.5% attendance; and other stakeholders averaged 60.2% attendance.[146]

4. Metro

The Metro AG consisted of three Duke employees; twenty-two members representing federal, state, county or local governments, or Indian tribes; and thirteen members representing other stakeholder groups. For the thirty-five meetings, the Duke employees averaged 78.1% attendance; officials averaged 52.9% attendance; and other members averaged 48.8% attendance.[147]

5. Piedmont

The Piedmont AG consisted of four Duke employees; sixteen members representing federal, state, county or local governments, or Indian tribes; and eleven members representing other stakeholder groups.[148] For the thirty-five meetings, the Duke employees averaged 65.0% attendance; the officials averaged

145. *See infra* Appendix.

146. *See infra* Appendix.

147. *See infra* Appendix.

148. *See infra* Appendix.

36.8% attendance; and those representing other stakeholder groups averaged 58.7% attendance.[149]

6. Lower Catawba

The Lower Catawba AG consisted of four Duke employees; ten members representing federal, state, county or local governments, or Indian tribes; and nineteen members representing other stakeholder groups.[150] For the thirty-four meetings, the Duke employees averaged 69.1% attendance; the officials averaged 47.1% attendance; and other stakeholders averaged 60.7% attendance.[151]

	NCSRT	SCSRT	Foothills	Metro	Piedmont	Lower Catawba
Duke	96%	96%	79%	78%	65%	69%
Officials	46%	56%	46%	53%	37%	47%
Others	71%	54%	60%	49%	59%	61%

Analyzing these groups, Duke's average attendance is higher than the other groups in a statistically significant way. Statistically, there is no difference between the participation of the officials and other groups. Noteworthy is that members of the public participated as much—and, in some cases, more—than federal, state, or tribal officials. This seems to suggest, at a minimum, that public interest was at least as strong as "official" interest.

149. *See infra* Appendix.

150. *See infra* Appendix.

151. *See infra* Appendix.

C. The CRA – Where the Two Tracks Come Back Together

To gauge consensus while the agreement was being drafted, several confidential all-team assessments—where individuals could indicate how they would vote if the draft agreement were to be signed at that moment—were completed. The first, with results reported on September 15, 2005, indicated that out of a total of thirty-eight participants, twelve (or almost 32%) ranked the agreement a five, meaning they would not support it.[152] An additional 16, or 42%, ranked it a four, indicating that they had serious reservations about the draft.[153] Therefore, the first time they were asked about progress on a final agreement, a full 74% either had serious reservations or were just saying "no."

Duke attempted to respond to the feedback in the draft assessment, finding that 7% of the issues raised by stakeholders were irrelevant to the draft; that changes in the draft were not needed to address 30% of the concerns; and that Duke could accept suggested draft changes in 4% of the cases.[154] Perhaps admitting the limitations of the process, Duke admitted, for 19% of the issues raised, it did not believe that the issue would get resolved as part of the stakeholder process.[155] Examples given of the 19% that Duke didn't expect to be resolved include more stable lake levels, limiting lake drawdowns, guaranteeing water quantity or quality, banning or capping inter-basin transfers, adding buffers to the area regulated by the FERC license, dredging, and large-scale land conservation.[156] Moreover, for the majority of issues raised—40%—Duke indicated that it was willing to continue negotiating around

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152. Application for a New License regarding the Catawba-Wateree Project at 16 (FERC 2006) (P-2232-522), Submittal 20060927-0564; *See also infra* Appendix.

153. Application for New License regarding Catawba-Wateree Project, P-2232–522, Submittal 20060927-0564 at 16 (FERC Aug. 29, 2006); *See infra* Appendix.

154. Application for a New License regarding the Catawba-Wateree Project at 71–73 (FERC 2006) (P-2232-522), Submittal 20060927-0554; *See also infra* Appendix.

155. *Id.*

156. *Id.*

the suggested changes.[157] Examples of this group that could still be negotiated include downstream flow warning horns, permanent conservation easements, cultural resource improvements, land conservation, a "better balance of flows vs. lake levels vs. generation vs. water supplies," and modifying or replacing hydro units to meet flow and dissolved oxygen requirements.[158]

After making changes, another poll was taken to determine if clarifications and changes made to the draft had resulted in more favorable feelings from stakeholders.[159] The results were similar; out of forty-one participants in the assessment, thirteen (again, almost 32%) still ranked the draft document a five.[160] An additional sixteen, or 39%, ranked it a four.[161] The revisions, then, had led to basically no change in stakeholder sentiment.

While these assessments were done anonymously, making it impossible to tell how those of different stakeholder groups ranked the draft document, the anonymity obviously changed once the agreement was finalized, which occurred in two steps.[162] First, all stakeholders were asked—using the same five point scale—to rate the finalized agreement.[163] This agreement in principle ("AIP") was not legally binding, but would be used to develop the Comprehensive Relicensing Agreement ("CRA"), which would be

157. *Id.*

158. Application for a New License regarding the Catawba-Wateree Project at 71–73 (FERC 2006) (P-2232-522), Submittal 20060927-0594; *see infra* Appendix.

159. Application for a New License regarding the Catawba-Wateree Project at 36 (P-2232-522), Submittal 20060927-0552; *See infra* Appendix.

160. *Id.*

161. *Id.*

162. *Id.*

163. Application for a New License regarding the Catawba-Wateree Project at 100–02 (FERC 2006) (P-2232-522), Submittal 20060927-0553; *See infra* Appendix.

submitted to the FERC and would be binding.[164] Second, stakeholders were asked to sign the binding CRA. Therefore, the other measure used to analyze this relicensing is whether organizations or individuals who had participated in the process did not, in the end, sign on to the finalized agreement.[165] This analysis is completed by looking at two metrics: 1) how members ranked the agreement using the consensus scale at the time the AIP was complete; and 2) which groups did not sign onto the CRA when it was submitted to the FERC.

1. How Team Members Ranked the Agreement using the Consensus Scale

Out of a total possible 103 signatures for the AIP in April, 2006,[166] only three parties ranked it a five, meaning that they would not be willing to sign on, even listing major reservations.[167] All three fell into the "others" category above: American Rivers, the South Carolina Coastal Conservation League, and a local citizen.[168] The largest group—at forty-five out of 103, or almost 44%—ranked the AIP a four, meaning that they still had major reservations, and potentially would not sign a legally binding document unless some

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164. Some of the conditions in the CRA would be written into the new license, and would be binding in that way; others would need to be enforced based on state contract law in the state courts. *See* Application for a New License regarding the Catawba-Wateree Project at 46 (FERC 2006) (P-2232-522), Submittal 20060927-0546.

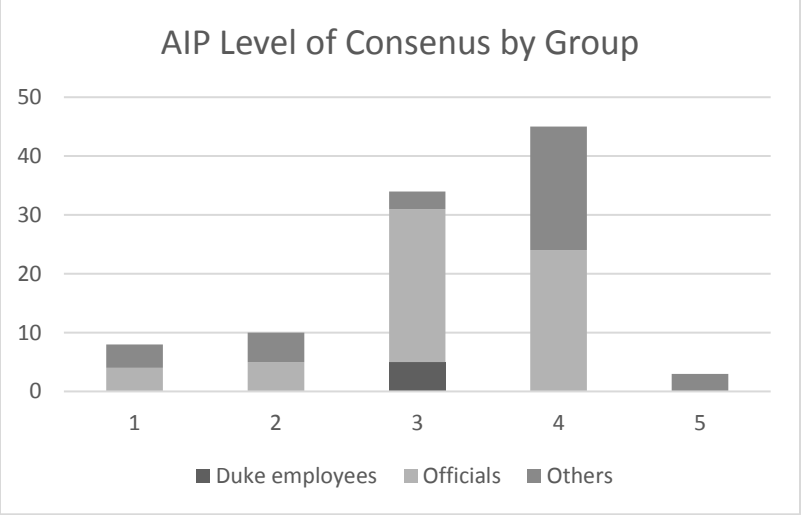
165. Application for a New License Regarding the Catawba-Wateree Project, P-2232-522, Submittal 20060927-0155 at E1–25 (FERC Aug. 29, 2006).

166. The negotiations continued between October, 2005, and April, 2006. In February, 2006, both the U.S. Fish and Wildlife Service and American Rivers jointly proposed a different flow regime, specifically aimed to address fish. Duke rejected the proposal, arguing that the "additional hydro generation impacts exceed what Duke can support." Application for a New License regarding the Catawba-Wateree Project at 27 (FERC 2006) (P-2232-522), Submittal 20060927-0617.

167. Application for a New License regarding the Catawba-Wateree Project at 100–02 (FERC 2006) (P-2232-522), Submittal 20060927-0553; *See also infra* Appendix.

168. *Id.*

of their concerns were addressed.[169] Of this group, 53% were officials of state or local governments, including the entire contingent of the South Carolina Department of Archives and History, the South Carolina Department of Natural Resources, and the South Carolina Department of Parks, Recreation, and Tourism.[170] Of the remaining 21, or 47%, all were members of the "other stakeholder" group. In fact, only fifteen members total of the "other stakeholder" group ranked the AIP either a one, two, or three. On the other hand, all Duke employees ranked the draft assessment as acceptable.[171]



169. *Id.*

170. *Id.*; *See also infra* Appendix (All representatives of South Carolina state government submitted a ranking, except the South Carolina Department of Health and Environmental Control).

171. *Id.*

After obtaining signatures from those who were willing to sign on to the AIP, the work began to attempt to address some of the major concerns and convert the language into that which could be legally binding.[172] However, rather than going smoothly, at least eleven AIP signatories—including five town or county attorneys—found it impossible to resolve "all concerns about certain incomplete or ambiguous provisions in the AIP" on the schedule that Duke wanted.[173] The group also noted that, with the AIP, "changes that were made after the final negotiation and before signing materially affected substantive interests, even though characterized as technical corrections."[174] At the end of the Stakeholder track process, seventy groups signed on to the Comprehensive Relicensing Agreement ("CRA"). [175]

2. Which Team Members Did Not Sign the CRA

According to a Duke press release, which required expansion of recreational access and new recreational amenities, this agreement also scheduled releases of additional water for recreation, water quality enhancements, a new drought management protocol, long-range water supply planning for municipal drinking water systems, additional land conservation, the expansion of aquatic habitats, the protection of endangered species, and the preservation of historic and archeological resources.[176] In order to apply this relicensing to the different

172. Application for a New License regarding the Catawba-Wateree Project (FERC 2006) (P-2232-522), Submittal 20060927-0546. (Also cited within the discussion of Purpose of the AIP).

173. Application for a New License regarding the Catawba-Wateree Project at 91 (FERC 2006) (P-2232-522), Submittal 20060927-0554.

174. *Id.* at 91–92.

175. *Id.*

176. Press Release, Duke Energy, Duke Energy's new Catawba-Wateree operating license highlights the benefits of cooperation between the company and communities (Nov. 25, 2015) (on file with author).

regulation theories, it is necessary to focus on which individuals and entities did not sign: one state agency, one town, four citizens, and seven environmental groups.[177]

After the signing of the CRA, Duke Energy submitted the application for relicensing on August 29, 2006. Duke Energy also filed a revised CRA which removed the signature lines for the individuals and entities that chose not to adopt the CRA, as well as removing any actions which had been contingent upon those individuals or entities signing.[178] The FERC would not complete the necessary environmental analysis and issue a license renewal for nine years.[179]

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177. The state agency was the South Carolina Department of Health and Environmental Control. The Town was the Town of Cornelius. The environmental groups were American Rivers, the Catawba Riverkeeper Foundation, Clean Water South Carolina, Covekeepers, the Lake James Environmental Groups, the South Carolina Coastal Conservation League, and the Western North Carolina Alliance. Revised Comprehensive Relicensing Agreement and Explanatory Statement with respect to the Application for New License for the Catawba-Wateree Hydroelectric Project at 23–43 (FERC 2006) (P-2232-522), Submittal 20070118-0228. This listing of the parties was modified to remove signature lines for those entities and individuals who elected not to become parties. Revised Comprehensive Relicensing Agreement and Explanatory Statement with respect to the Application for New License for the Catawba-Wateree Hydroelectric Project at 1 (FERC 2006) (P-2232-522), Submittal 20070118-0227 [hereinafter Revised CRA, Submittal 20070118-0227]; *See also* DUKE ENERGY, *C-W Comprehensive Relicensing Agreement,* app. B, (2016), https://www.duke-energy.com/pdfs/C-W-CRA-APPENDIX-B.pdf (not listing the Town of Cornelius or these environmental groups as parties); *Catawba Relicensing (SC)*, AMERICAN WHITEWATER, https://www.americanwhitewater.org/content/Project/view/id/27/ (last visited Sept. 28, 2016).

178. *See* Revised CRA, Submittal 20070118-0227, *supra* note 177.

179. Draft Environmental Impact Statement was issued on March 6, 2009. *See* Draft Envtl. Impact Statement for Hydropower License regarding the Catawba-Wateree Hydroelectric Project (FERC 2009) (P-2232-522), Issuance 20090306-4000. The final EIS was issued on July 23, 2009. *See* Final Envtl. Impact Statement for Hydropower License regarding the Catawba-Wateree Hydroelectric Project (FERC 2009) (P-2232-522), Issuance 20090723-4001. Formal consultation on the Endangered Species Act followed. *See* U.S. NOAA Response to U.S. FERC's Request for Formal Consultation of Catawba-Wateree Project under Section 7 of the Endangered Species Act (FERC 2009) (P-2232-522), Submittal 20090910-0237. A final

During that time, the majority of the groups which had not signed onto the CRA did engage with the FERC in the relicensing, advocating for conditions which had not been implemented in the CRA.[180] The Town of Cornelius submitted extensive comments and objections to the FERC, especially around recreational opportunities, safety, and funding.[181] American Rivers,[182] the South Carolina Coastal Conservation League,[183] and Catawba Riverkeeper[184] focused on minimum instream flows, inadequate mitigation, and flow protocols for diadromous fish, while the Lake James Environmental Association advocated for adding usable water storage to Lake Norman.[185]

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biological opinion was issued on July 8, 2013. *See* The Catawba-Wateree Hydroelectric Project, Final Biological Opinion (FERC 2013) (P-2232-522), Submittal 20130708-4003.

180. Clean Water South Carolina, Covekeepers, and the Western North Carolina Alliance did not submit comments to the FERC.

181. *See* Town of Cornelius' Comments for the Catawba-Wateree Hydro Project (FERC 2008) (P-2232-522), Submittal 20061030-5083; *See also* Town of Cornelius' Comments and Recommendations in Response to Notice of Application Ready for Environmental Analysis (FERC 2008) (P-2232-522), Submittal 20080606-5033.

182. *See* South Carolina Coastal Conservation League and American Rivers, et al., Notice of Intervention Offering Protest and Comments (FERC 2007) (P-2232-522), Submittal 20070105-5029 (flow protocols for diadromous fish) [hereinafter American Rivers, Submittal 20070105-5029]; *See also* South Carolina Coastal Conservation League, et al., Notice of Intent to Prepare an EIS and Soliciting Comments for the Catawba Wateree Hydroelectric Project (FERC 2007) (P-2232-522), Submittal 20070430-5198 (out of kind mitigation, minimum instream flows, inadequate mitigation) [hereinafter Notice of Intent to Prepare an EIS, Submittal 20070430-5198. (comments on EA, proposing alternative conditions to be included in new license).

183. *See* American Rivers, Submittal 20070105-5029, *supra* note 182; See *also* Notice of Intent to Prepare an EIS, Submittal 20080606-5134.

184. *See* Catawba Riverkeeper Found., Comments and Recommendations Regarding Notice of License Ready for Environmental Analysis (FERC 2008) (P-2232-522), Submittal 20080711-5097 (inadequate project impact mitigation, continuous stream flows).

185. *See* Lake James Envtl. Ass'n, Comments on U.S. FERC's FEIS (FERC 2009) (P-2232-522), Submittal 20090828-5025.

The South Carolina Department of Health and Environmental Control also found the CRA insufficient. After reviewing all material, the South Carolina Department of Health and Environmental Control denied Duke Energy's request for a 401 certification, finding:

> [T]he Water Quality Certification as issued does not provide sufficient flow to protect classified uses, the endangered shortnose sturgeon and adequate downstream flow of the Catawba River into South Carolina in order to provide reasonable assurance that certification requirements and water quality standards in the Catawba River in South Carolina will be met.[186]

Litigation on South Carolina's 401 certification continued until February 12, 2015, when the South Carolina Department of Health and Environmental Control issued a 401 certification to Duke Energy that had been reached through settlement negotiations.[187] The EPA also provided comments on the license

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186. *See* Coastal Conservation League's and American Rivers' Response in Opposition to Duke Energy Carolinas, LLC's Petition for Declaratory Order at 2 (FERC 2009) (P-2232-522), Submittal 20090910-5075.

187. *See* Duke Energy Carolinas, LLC, Issuance of SC WQ Certification (FERC 2015) (P-2232-522), Submittal 20150213-5244 (submitting South Carolina certification); Letter from Julia F. Youngman to Kimbery Bose regarding settlement agreement and 401 water quality certification (FERC 2015) (P-2232-522), Submittal 20150303-5040 (noting the settlement). The South Carolina 401 certification and the possibility that South Carolina had waived the possibility to provide conditions was the subject of litigation. *See* Winston & Strawn, LLP, Supplemental Information of Duke Energy Carolinas, LLC Update on South Carolina Waiver of Water Quality Certification (FERC 2012) (P-2232-522), Submittal 20121219-5031 (noting that Duke Energy had lost its appeal in the South Carolina Court of Appeals and that South Carolina had waived water quality certification); *See* Southern Envtl. Law Center, Response to Duke Update on South Carolina Water Quality Certification for the Catawba-Wateree Hydroelectric Project (FERC 2013) (P-2232-522), Submittal 20130904-5010 (noting that the South Carolina Court of Appeals reaffirmed the decision that South Carolina had not waived 401 certifications on May 1, 2013); *See also* Order Denying Petition for Declaratory Order

application, including a need for higher levels of dissolved oxygen,[188] while the National Marine Fisheries Service requested a license condition reserving the right to prescribe fishways.[189]

V. WHAT THE CATAWBA-WATEREE SHOWS ABOUT ADMINISTRATIVE REGULATION THEORIES

The FERC granted the Catawba-Wateree project a forty-year license on November 25, 2015.[190] The license term starts the first day of the month the order granting the new license is issued,[191] so the new license will be good until October, 2055. November 2015 was almost ten years after Duke felt it had, for the most part, reached consensus on the license terms with many of the stakeholders.

(FERC 2014) (P-2232-522), Issuance 20140417-3008 (providing a good summary of the 401 certification).

188. *See* U.S. EPA Region 4, Comments on the EIS for the Catawba-Wateree Hydroelectric Project at 3 (FERC 2007) (P-2232-522), Submittal 20070501-5049 (continuous minimum flows, water quality, shoreline management); *See also* U.S. EPA Region 4, Comments on the Draft EIS for the Catawba-Wateree Hydroelectric Project (FERC 2009) (P-2232-522), Submittal 20090508-5056 (indicating need for increased dissolved oxygen enhancement, including continuous monitoring, in new license).

189. *See* U.S. Dept. of Commerce NOAA, Preliminary Recommendations Pursuant to FPA Section 10(j) and Reservation of Authority to Prescribe Fish Passage (FERC 2008) (P-2232-522), Submittal 20080606-5077 (requesting the formation of a drought management advisory group, supporting instream flows in the CRA, but requesting the license include a provision for reevaluating and implementing revised instream flows, and reserving the right to prescribe fishways).

190. *See* Order Issuing New License, 153 FERC. P62,135 (FERC Nov. 25, 2015). [hereinafter Order Issuing New License].

191. *Id.*

The new license contains improved environmental conditions over the original 1958 development:[192] increased minimum flows,[193] increased recreational flows,[194] flow and reservoir elevation monitoring,[195] a flow and water quality implementation plan,[196] a water quality monitoring plan,[197] additional recreation measures,[198] federal threatened and endangered species protection

192. Duke admitted during the stakeholder process that "the existing license has very few requirements" and that Duke "has a lot of control over the release of water." Application, Submittal 20060927-0576, *supra* note 117, at 3.

193. Minimum continuous flow is the minimum amount of water that a hydro development must normally release continuously. These flow amounts include the combination of all leakage, spillage, and hydro generation from a given development. *See Comprehensive Relicensing Agreement for the Catawba-Wateree Hydro Project No. 2232*, DUKE ENERGY CAROLINAS, LLC. (Dec. 22, 2006), http://www.duke-energy.com/pdfs/relicensing/comp_relicensing_agreement.pdf [hereinafter Comprehensive Relicensing Agreement].

194. Recreational flow is the scheduled amount of water released from a hydro development to efficiently support recreational activities at the development. *Id.* Interestingly, after the grant of the new license by the FERC, Duke has requested to decrease the recreational flows agreed upon through the process, cutting the planned releases from Wylie in half. Application to Amend C-W WQCs – September 9, 2016, https://www.duke-energy.com/community/lakes/hydroelectric-relicensing/catawba.

195. *See id.*; *See also* Order Issuing New License, *supra* note 190.

196. *See* Order Issuing New License, *supra* at note 190; *See also* Comprehensive Relicensing Agreement, *supra* note 193.

197. *See* Comprehensive Relicensing Agreement, *supra* note 193*; See also* Order Issuing New License, *supra* note 190.

198. *See* Comprehensive Relicensing Agreement, *supra* note 193*; See also* Order Issuing New License, *supra* note 190.

plans,[199] the development of a low inflow protocol,[200] and a shoreline management plan.[201] The FERC license contains many provisions which are identical to the CRA. Additionally, the settlement with American Rivers, the South Carolina Coastal Conservation League, and the South Carolina Department of Health and Environmental Control required that, ten years after the flow and water quality implementation plan modifications are complete, Duke Energy "shall consult with the USFWS, the National Marine Fisheries Service, and the South Carolina Department of Natural Resources on proposed license articles for Wateree Spring Stable Flow Periods and Wateree Floodplain Inundation," with the license to be modified with the updated conditions.[202]

Without the benefit of the passage of time, it is impossible to know whether the requirements of the new license will serve the public well or not; whether the endangered species will recover without additional flow; whether adequate drinking water supplies will be maintained; whether quality of life and economic opportunities increase because of more recreation. This section does not attempt to predetermine what will occur, only what could potentially occur because of the process that was used in the relicensing effort.

Duke has stated that the "relicensing process has met as wide-ranging an array of interests as can reasonably be achieved."[203] While on its face just the sheer amount of public participation would support the civic republicanism theory, the number of stakeholders with major reservations at the end of the process belies this conclusion. Also, one of the core tenants of that theory—

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199. *See* Comprehensive Relicensing Agreement, *supra* note 193*; See also* Order Issuing New License, *supra* note 190.

200. *See* Comprehensive Relicensing Agreement, *supra* note 193*; See also* Order Issuing New License, *supra* note 190.

201. *See* Comprehensive Relicensing Agreement, *supra* note 193; *See also* Order Issuing New License, *supra* note 190.

202. *See* Order Issuing New License, *supra* note 190.

203. Collaborative relicensing, *supra* note 115.

that the preferences of those participating in regulatory decision-making processes ultimately crystallize during the very course of the decision-making process—obviously did not occur in this case; instead, some positions were crystallized at the outset and changed little, if any. Another requirement—that parties settle upon a decision roughly constituting a consensus about the appropriate course of regulatory action after having developed that opinion together—could not occur in this case because Duke was unwilling to consider cases which were acceptable to others but which would undermine its profit.[204]

Additionally, only Duke maintained the right to mandate specific license conditions as a prerequisite to act in the agreement; no other party was able to, at any point, require specific license conditions to have the agreement move forward or take effect.[205] The license was issued for a shorter time period than Duke had requested—forty years instead of fifty.[206] The company requested a rehearing before the FERC, disagreeing with the FERC's judgment that Duke's "moderate" scope of work warranted a forty-year term

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204. This is especially true of the flow proposal developed by USFWS and American Rivers. Stakeholders felt that the flows designed by Duke were insufficient for diadromous fish or fish passage, and developed an alternative to the "Mutual Gains" scenario that had been developed by Duke. Stakeholder, Submittal 20060927-0605, *supra* note 101, at 117. Duke analyzed the proposal and found that the "proposed flows cause a 10% loss in hydro generation, compared to a 7% loss in the Mutual Gains Scenario" and that "Duke Power's overall assessment" was that the proposal had "[a]dditional hydro generation impacts [that] exceed what Duke can support". *Id.* at 118–19. In the "Mutual Gains" scenario, flows for aquatic habitat had already been reduced. Application for a New License Regarding the Catawba-Wateree Project, P-2232-522, Submittal 20060927-0614, 108 (FERC Aug. 29, 2006).

205. In addition to the recreational, land conservation, and other mitigation measures which were dependent upon Duke obtaining a fifty-year license, Duke employees had noted that, should the USFWS prescribe different flows for fish, "everything in the Final Agreement will need to be re-evaluated." Stakeholder, Submittal 20060927-0605, *supra* note 118, at 17.

206. *See* Order Issuing New License 153 F.E.R.C. P62,134 (F.E.R.C. 2015).

rather than a fifty-year one.[207] However, the FERC denied the petition for a longer term, affirming that the moderate level of "environmental mitigation and enhancement measures . . . required under the new license" justified a forty-year term.[208] For those who signed the CRA, the shorter license term means that Duke is under no obligation to implement many of the provisions agreed to—including providing money to the states for land conservation and granting easements— as these were all made contingent on Duke receiving a fifty-year license.[209] This substantial difference in power—that entities and individuals gave up time to be part of the process and support the agreement, but may not get the bargained benefits—goes against the process providing substantial support for the civic republican theory to be at work in this case. This stance also seems somewhat hypocritical given that, had the relicensing process gone smoothly after Duke submitted its application in mid-2006, it is likely that a license would have been issued in mid-2008. Had a fifty-year license term been granted then, it would expire in 2058. As it is, Duke has a license which does not expire until late 2055, and they were not required to provide the additional resource enhancements or mitigation activities required by the new license from 2008 to 2015.

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207. Bruce Henderson, *Duke Energy Wants Longer Catawba License*, CHARLOTTE OBSERVER (Dec. 22, 2015), http://www.charlotteobserver.com/news/local/article51068350.html.

208. *See* Order on Rehearing and Clarification, 156 F.E.R.C. P61,010 (F.E.R.C. 2016). The FERC order opined that fifty-year terms should only be given when "extensive measures" are required, which they were not in the case of the Catawba-Wateree. *Id.* The order notes that "Duke Energy predominantly relies on cost as the basis for supporting a longer license term. However, our selection of license term is largely based on a qualitative, rather than a quantitative analysis. While estimated costs can provide some indication of the extent of required measures, costs alone are never entirely dispositive, especially where, as here, Duke Energy's cost data are not reliable." *Id.* at 5. Duke has petitioned the D.C. Circuit Court of Appeals for review. David Boraks, Duke Appeal Seeks Longer License for Catawba-Wateree, WFAE (Aug. 23, 2016), http://wfae.org/post/duke-appeal-seeks-longer-license-catawba-wateree; https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20160822-5246.

209. Bruce Henderson, *supra* note 207. While beyond the scope of this article, Duke also received a forty-year license for its hydro operations on the Yadkin River in North Carolina. *Id.* It had also requested a fifty-year term in that docket, which was denied after a rehearing. *Id.*

If wanting to ensure public involvement in the future, not providing the bargained-for items because of what amounts to a three-year difference appears to be a good way to ensure that you won't get it. There is simply no reason for individual, environmental, community, local, state, and tribal government stakeholders to give up hundreds of hours over three years and then not get promised benefits in return. Performing all bargained-for benefits—regardless of whether the license term was 30, 40, or 50 years—could go toward encouraging future participation.

It could be argued that perhaps the biggest support for claiming that the hydropower relicensing process is in the public interest doesn't have anything to do with the process itself, but simply that hydropower will continue to be produced at all. As we move into a carbon-constrained world, the continuation of the hydroelectric system means that carbon-free generation will be produced for the duration of the new license.[210] Additionally, once built, hydropower facilities are relatively cheap to operate and maintain, as electric generation goes, so there is a benefit to ratepayers.[211] However, this benefit to ratepayers seems to have occurred with no organized interest in the process: the most logical groups that would have advocated for this outcome—the state utility commissions or the public staffs—were not stakeholder team members. On the other hand, "without careful consideration and management, dams have the potential to degrade river ecosystems and the goods and services they provide to society."[212]

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210. If Duke had either not received a license or disagreed with the license terms so strongly that they decided to discontinue operations, a surrender process would have started with the FERC.

211. Interestingly, a Duke representative expressed concern "that the electric consumer is not specifically represented on any of the stakeholder teams." Application, Submittal 20060927-0602, *supra* note 118, at 147.

212. Jeffrey J. Opperman et al., *The Penobscot River, Maine, USA: A Basin-Scale Approach to Balancing Power Generation and Ecosystem Restoration*, 16 ECOLOGY & SOC'Y 7 (2011), http://www.ecologyandsociety.org/vol16/iss3/art7/main.html.

Arguably, while the management will improve, Duke stressed at every opportunity that the "Catawba-Wateree region was not a pristine landscape when the first hydroelectric stations were constructed . . . The region had suffered considerable environmental impacts from poor land management practices dating back to the arrival of European colonists."[213] Based on the South Carolina Department of Health and Environmental Control plus seven environmental groups and four citizens thinking the CRA fell so far short that they would not sign it, it seems unlikely that the process resulted in "careful consideration and management" going forward; but only time will tell.

Even the potential general benefit of continued hydropower production, however, does not lead to the conclusion that the public interest theory best describes the overall relicensing process. While some of the license conditions will no doubt reflect improvements that are in the public interest (including increased stream flows for endangered species, new protocols for drinking water supply, and increased recreation opportunities), there does not seem to be any indication that the general public—even in the area where the Catawba-Wateree licensing was taking place—are "especially cognizant" of the regulatory action, or are providing much regulatory oversight. Nor does it seem that a "republican moment" occurred at any time during the relicensing; no specific event or action prompted widespread public interest in either the process or the outcome.

Because the public interest theory espouses the view that regulation protects the public from monopolies, the abuse of private economic power, and the effects of externalities, the question when assessing the Catawba-Wateree relicensing process against this theory then becomes the extent to which the general interests of the citizens of North and South Carolina were, in fact, protected from these things during the relicensing process. While inherently a subjective assessment, the best measure is perhaps how many public officials as well as other entities and individuals were unhappy with the outcome of the process, with a majority of all those involved in the process either rejecting the AIP outright or indicating major reservations. Even after "substantive" edits made after negotiations were final apparently placated the

213. Application, Submittal 20060927-0155, *supra* note 101, at ES-1.

majority of officials, over half of the individual citizens who participated in the process chose not to sign the CRA. Additionally, the significant number of environmental groups who also chose not to sign the CRA indicates that it is unlikely that the process protected interests from the effects of the abuse of private economic power by a monopoly. As one citizen put it in a letter to the FERC:

> In the beginning, Duke Power hired the facilitators, collected the stakeholders, then squashed the air out of the process by sitting down at the table as a stakeholder . . . Then Duke collected the interest of stakeholders and themselves, picked and headed the studies, and set the agendas. Now with total control and all the interest out on the table, Duke started picking and choosing the interest they would meet. Duke's interest had little to do with what is best for the river basin, but only wanted the most signatures for the least amount of money.[214]

As some of the externalities of producing hydropower—including on endangered fish populations—are being only somewhat mitigated, the process seems to fail the public interest theory test on this measure as well. Even those who, in the end, supported the agreement, did not feel especially good about it. One small business owner who was a member of an advisory group stated:

> Five items actually escaped my desires that I felt would be highly beneficial to the public. I am not going to rehash those items. I felt like . . . as part of the process, they were compromised . . . I did not get paid for my attendance to the

214. Application for a New License Regarding the Catawba-Wateree Project (FERC 2006) (P-2232-522), Submittal 20060918-5001.

> three years of meetings. Instead, it cost me in time and lost income.[215]

Certainly not a resounding endorsement.

Based on the empirical measures analyzed, it would seem that the public choice theory does describe best what happened in this particular hydropower relicensing.[216] This "enhanced" process, while appearing to support broad public participation, may or may not—again, time will tell—have ended with better outcomes for the public. Certainly, some involved in the process did not feel that the outcome of the process was in the public interest. In fact, the NEPA process and litigation over some of the issues raised originally in the teams was one reason the license took so long to issue. There is plenty in this relicensing process to support the notion that agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public. That includes the requests of many of those who took part in the "enhanced" process, including requests for better flood control, flows to enhance habitat for endangered fish, more land conservation (especially as this would also protect water quality for drinking water supply), and infrastructure improvements. Additionally, the long license term—whether for forty years or fifty—validates that, once some regulatory decisions are made, they are very rarely revisited. The entire stakeholder process appeared designed—given the exorbitant number of meetings—to be primarily to wear other stakeholders down. However, given everything that occurred in this relicensing process, perhaps the other question—for later discussion when the environmental, economic, and regulatory outcomes of the operation of the license is better known—is whether any process would be successful in ensuring the common good, or whether any attempt at engaging stakeholders in this space is simply a charade in terms of legitimacy.

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215. Transcript of the 3/26/07 Scoping Meeting Held in Morgantown, NC at the Western Piedmont Community College re: Catawba-Wateree Relicensing Project 16 (FERC 2007) (P-2232-522), Issuance 20070326-4037.

216. And could be happening in others; Duke alone has eight hydroelectric relicensing processes occurring in the Carolinas and Indiana. Relicensing Agreements, *supra* note 103.

VI. CONCLUSION

This case study will hopefully provide insights into how—if a company or organization really wants it—to better encourage public participation in a similar process. This potential for improvement is especially important because the problem of protecting somewhat diffuse public interests doesn't only exist with the FERC relicensing process and hydroelectric dams owned and operated by investor-owned utilities; parallels exist between private investor-owned utility hydropower systems and reservoir and hydropower systems managed by the Army Corps of Engineers. Many similar issues around the impact of organized interests exist with the multiple-use paradigms used by the ACOE in managing their reservoirs, as "[c]oncentrated groups tend to fare well, or at least enjoy a significant advantage, under multiple-use governance."[217] Additionally, some similar problems with potential environmental harms also exist between Corps dam projects and investor-owned utility operated hydropower projects. Even with these challenges, more public participation in energy regulation can only be a good thing.

APPENDIX

I. Data Sources

The attendance data is provided in a series of tables in the relicensing docket (Book 10, Volume 1, Part 1). The tables, sorted by team, list the dates of team meetings along the top and individual team members' names down the side. An "X" is placed in the appropriate row/column for each person who attended a specific meeting. One table exists for each team for each year of the relicensing effort: 2003, 2004, 2005, and 2006. These all occur in P-2232-522, Submittal 20060927-0545.

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217. Josh Eagle, *supra* note 17, at 47; *See also* Victor B. Flatt & Jeremy M. Tarr, *Adaptation, Legal Resiliency, and the U.S. Army Corps of Engineers: Managing Water Supply in A Climate-Altered World*, 89 N.C. L. REV. 1499 (2011).

The two anonymous AIP assessment results are provided in the relicensing docket in meeting minutes. The assessment results provide how those scoring the AIP draft responded, both to the overall draft (the numbers used in this article), as well as how those responded scored individual sections of the AIP. These occur in P-2232-522, Submittal 20060927-0552 and 20060927-0564.

The AIP Distribution Categorization document, which lists all the organizations and individuals involved, is also included in meeting minutes. The document lists the level of consensus of the finalized AIP by organization/individual, and also summarizes the totals for each rating. This document is in P-2232-522, Submittal 20060927-0553.

These documents can be found at http://www.law.unc.edu/documents/clear/publications/longslogappendix.pdf.

II. Methodology

To analyze attendance, I first assigned each member of each team to a particular group: 1) Duke employee; 2) officials, including those of federal agencies, Indian tribes, state agencies, towns, counties, local authorities or commissions; and 3) others, which included citizens, large businesses, small businesses, homeowners's associations, environmental and recreational groups, and wildlife groups. After assigning the group, I counted attendance by all members of that group for a particular team for the entire duration of the relicensing process, and divided that by the number of people times the number of meetings to obtain the percentages of attendance for each group within each team.

The analysis of the AIP assessment results is purely based on the numbers provided in the documents; number who gave the AIP a particular score divided by the total number of responses.

The AIP Distribution was calculated similar to the attendance. After each organization/individual was assigned to their particular group (the same as used for attendance), the number who gave the AIP each level of consensus was determined.