CC28

**OPPOSITION TO H.R. 4402**

City Manager Glaves apprised the Council that Legislation has been introduced in the U. S. Congress (H.R. 4402 and S 2710) which will remove the preference clause from the Federal Power Act. The Federal Power Act, enacted in 1920, authorizes the federal government to issue licenses, for up to 50 years, for the construction and operation of hydroelectric projects using federal waters. The law provides that state and municipally owned applicants are preferred over other applicants in the competition for such licenses, if other relevant public interest factor are equal.

The public preference policy of the Federal Power Act has been reaffirmed by congress more than 30 times since its enactment in 1920, despite the continuous opposition by the private utility industry.

The current effort to amend the Federal Power Act is fueled by huge amounts of money from the private utilities. The municipally owned utilities throughout the state of California, recognizing difficulty of counteracting this well financed campaign and of the need to get the municipals side of the issue before the public, have banded together with a plan to hire a public relations firm to aid in the information campaign. In allocating the costs of the effort, the City of Lodi share will be $6,578.00.

If the multi-million dollar campaign undertaken by the private utilities is successful, the financial impact on the citizens of the City of Lodi can be quite substantial in future years. Our efforts today to protect these long established rights of our citizens is worthy of City Council consideration.

Following discussion, on motion of Council Member Reid, Hinchman second, Council approved a Special Allocation in the amount of $6,578.00 to join the municipally owned utilities throughout the State of California to hire a public relations firm to aid in an information campaign in opposition to H. R. 4402.

Pg296

# COUNCIL COMMUNICATION

| | | |
|---|---|---|
| **TO** THE CITY COUNCIL<br>**FROM** THE CITY MANAGER'S OFFICE | **DATE**<br>November 2, 1984 | **NO.** |

**SUBJECT** PRESENTATION RE OPPOSITION TO H. R. 4402

Legislation has been introduced in the U. S. Congress (H.R. 4402 and S 2710) which will remove the preference clause from the Federal Power Act. The Federal Power Act, enacted in 1920, authorizes the federal government to issue licenses, for up to 50 years, for the construction and operation of hydroelectric projects using federal waters. The law provides that state and municipally owned applicants are preferred over other applicants in the competition for such licenses, if other relevant public interest factor are equal.

The public preference policy of the Federal Power Act has been reaffirmed by congress more than 30 times since its enactment in 1920, despite the continuous opposition by the private utility industry.

The current effort to amend the Federal Power Act is fueled by huge amounts of money from the private utilities. The municipally owned utilities throughout the state of California, recognizing difficulty of counteracting this well financed campaign and of the need to get the municipals side of the issue before the public, have banded together with a plan to hire a public relations firm to aid in the information campaign. In allocating the costs of the effort, the City of Lodi share will be $6,578.00.

If the multi-million dollar campaign undertaken by the private utilities is successful, the financial impact on the citizens of the City of Lodi can be quite substantial in future years. Our efforts today to protect these long established rights of our citizens is worthy of City Council consideration.

Henry Glaves
City Manager

# The Public Preference In Hydro Relicensing

# 20 Questions Answered

*EDITOR'S NOTE: A precept of national electric power policy—the right of consumer-owned electric systems to compete with investor-owned utilities whose licenses to operate hydroelectric facilities are expiring—is under sharp attack in Congress and the Federal Energy Regulatory Commission. The 20 questions and answers below present the case for maintaining competition in relicensing of hydroelectric projects.*

**Question: What is meant by the "public preference"?**
Public preference is a term which describes a long-standing federal policy that "prefers" public control and use of public resources, such as rivers and streams, for generation of electricity. The policy favors publicly owned, nonprofit electric utilities over profit-making, investor-owned utilities ("IOUs") in the use of these resources. The policy has been included in more than 30 statutes going back as far as 1906.

**Q: How does public preference work in licensing of hydroelectric projects?**
The Federal Power Act, passed by Congress in 1920, authorized the Federal Power Commission (now the Federal Energy Regulatory Commission) to issue licenses for up to 50 years for construction and operation of hydroelectric projects using federal waters. During consideration of the act Congress consistently rejected the proposition that licenses to use this public resource should be perpetual. The law provides that, when a publicly owned utility and an IOU compete for a license, and when their license applications are equally good, the publicly owned utility is to be preferred over the IOU when the license is issued.

**'Rep. Shelby's bill (H.R. 4402) would eliminate competition in relicensing.'**

In other words, the preference only comes into play as a "tie-breaker." The Federal Energy Regulatory Commission (FERC), in the 1980 *Bountiful* case, interpreted the law as providing a similar public preference when such projects are relicensed upon the expiration of the original license. The 11th Circuit Court of Appeals, in 1982, agreed, and the Supreme Court refused to review the case.

**Q: What is the current controversy over the public preference all about?**
Hydroelectric project licenses began expiring in 1970. The IOUs would like Congress to change the law, reversing the *Bountiful* decision, so public preference would *not* apply in the *re*licensing of these projects.

Recently, this legal issue became much murkier. *Bountiful* was the first case raising the issue of preference in relicensing. All parties, including the publicly owned utilities and IOUs, agreed to resolve that issue. Even the IOUs thought it was settled after all of their appeals were exhausted. However, in a recent case involving the Merwin Dam on the Lewis River in Washington, the commission refused to follow its decision in the *Bountiful* case and, in fact, expressly overruled *Bountiful*.

The publicly owned utilities have appealed this decision. And the IOUs — apparently worried that this appeal will be successful — are seeking legislation which would eliminate, once and for all, the preference in relicensing. Instead, the IOUs want Congress in effect to guarantee them a perpetual license for use of these public resources, a position Congress expressly rejected in 1920.

**Q: Has legislation been introduced?**
Yes. On Nov. 16, 1983, Congressman Richard C. Shelby of Alabama introduced a bill (H.R. 4402) that would amend the Federal Power Act to eliminate public preference in relicensing. In fact, the bill goes much further. It provides that the new license *shall automatically be issued* to the current license holder *unless* the project will not meet federal standards in such areas as flood control and navigational benefits. Most utilities can easily satisfy these standards, thus Shelby's bill *would eliminate competition entirely*. The bill would preclude publicly owned utilities from proposing plans that would better use public water resources.

**Q: Why did Congress establish the public preference in the first place?**
Preference was included in the act for many reasons. Congress was concerned about monopoly control in the utility industry, and wanted to provide opportunities for local communities to establish their own utility systems as an alternative. Congress was also concerned about private monopoly control of a public resource. Finally, Congress felt public resources should be used directly by the public, without passing through the tollgate of a profit-making utility.

These policies apply with equal force today. In fact, Congress has repeatedly included the preference principle in other statutes involving electric power, including the Tennessee Valley Authority Act of 1933, the Rural Electrification Administration Act of 1936, the Reclamation Act of 1939, the Flood Control Act of 1944, the Rivers and Harbors Act of 1945 and the flood Control Act of 1962.

98TH CONGRESS
1ST SESSION

# H. R. 4402

To amend the Federal Power Act to provide for more protection to electric consumers.

---

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 16, 1983

Mr SHELBY (for himself, Mr PASHAYAN, Mr. COELHO, Mr MOORHEAD, Mr BEVILL, Mr. EDWARDS of Alabama, Mr. DOWDY of Mississippi, Mr SHUMWAY, Mr CARR, Mrs. BOXER, Mr BOSCO, Mr HAWKINS, Mr MARTINEZ, Mr PANETTA, Mr HARTNETT, Mr CHAPPIE, Mr DREIER of California, Mr DIXON, Mrs VUCANOVICH, Mr BONIOR of Michigan, Mr. NIELSON of Utah, Mr. FLIPPO, Mr FAZIO, Mr LEWIS of California, Mr. ROYBAL, Mr. CRAIG, Mr. DAVIS, Mr DYMALLY, Mr. BARNARD, Mr. ERDREICH, Mr. LEVINE of California, Mr. LEHMAN of California, Mr LOTT, Mr. WAXMAN, Mr PATTERSON, Mr. ALBOSTA, Mr. LAGOMARSINO, Mr. REID, Mr. BERMAN, Mr. BADHAM, Mr ANDERSON, Mr. TORRES, Mr. LOWERY of California, Mr. TRAXLER, and Mr. THOMAS of California) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

# A BILL

To amend the Federal Power Act to provide for more protection to electric consumers.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Electric Consumers Protection Act of 1983".

*The short title of Congressman Richard C. Shelby's (D-Ala.) H.R.4402 makes it sound like a consumer protection bill. However, its passage would forbid competition for expiring hydro licenses—a sure way to increase monopoly and decrease consumer influence over electric rates.*

**Q: Why has Congress included the public preference in these statutes?**

Public preference promotes healthy competition between publicly owned utilities and IOUs. The IOUs are, on the whole, much larger than their nonprofit counterparts. But publicly owned utilities have always filled an essential need. Healthy nonprofit utilities provide a "yardstick" by which performance and rates of private, monopolistic IOUs can be measured.

Competition between publicly owned utilities and IOUs tends to improve service and reduce rates for all utility customers. Preference also enhances the ability of local communities to have some control and independence in electric service. Preference enables direct, democratic control of public resources. Preference also allows publicly owned resources to be used directly for public benefit without private profit and thus maximizes the return to the public from the use of public resources. This basic reason for enactment of the public preference remains valid today.

Moreover, Congress should retain public preference because it represents a bargain struck between Congress and the IOUs back in 1920. Over the 50-year term of a license, an IOU receives a handsome return on its investment in the rent-free public water resource. The IOUs recognized in 1920 that they would have to compete against publicly owned utilities upon expiration of their licenses, with a tie going to the nonprofit utility. Now the IOUs are trying to change the rules.

**Q: How do you know the IOUs always expected that the public preference would apply in relicensing?**

The IOUs themselves stated that public preference would apply in relicensing. Here, for instance, is what John Britton, the vice president and general manager of the Pacific Gas & Electric Co., said in 1918, during a hearing on the Federal Power Act:

"I think that at the [end of the license period], 50 years from now, we will find that the government will be very glad to take it over for the purpose of turning it over to a municipality . . . I do believe that most of these plants erected under these licenses, where they are applicable to a growing community, will be taken over by municipalities and operated by them and not by the lessees."

**Q. Maybe the IOUs said that, but times have changed. Hydroelectric power is cheap, and IOUs are bigger than publicly owned utilities. Doesn't the "greatest good for the greatest number" require keeping the projects in the hands of the IOUs?**

That is the IOUs' basic argument. They claim because they are larger, they should have the cheap electric power. But their argument goes against the most basic precepts of our nation's policy of electricity management — namely, that a pluralistic, diverse mixture of publicly, privately and cooperatively owned electric utilities provides yardsticks and competition that keep rates in line and service satisfactory.

The IOUs are indeed bigger, and getting bigger all the time: in 1920 (when the Federal Power Act was passed) there were 4,000 IOUs, but today there are only about 200. Carried to its logical extreme, the IOUs' argument would suggest the fairest way of distributing benefits of hydroelectric power is with *one*, national, privately owned electric utility. The result would be the loss of the competitive mixture of utilities in this country.

The relicensing preference, it is important to remember, is simply one of many preference provisions for public utilities in marketing and distribution of electricity. The "bigger is better" argument would require elimination of all of these preference provisions, including that for electricity marketing. The result: the end of public power as a cost-effective, consumer-oriented competitor.

**Q: That sounds okay in the abstract. But how much are IOU rates going to rise if the publicly owned utilities get their way?**
First the publicly owned utility applicant must demonstrate that its plans for the new license are at least as good as the plans of the original licensee. Only then will preference apply and the license be issued to the publicly owned utility. When that occurs, the question of rate impact will vary from project to project and utility to utility.

**'IOUs claim because they are larger they should have the cheap electric power.'**

There are no studies which demonstrate reliably that the transfer of a license from an IOU to a publicly owned utility would have any significant impact on the rates of the private utilities' customers. Moreover, because — as the IOUs themselves emphasize — they are so large, the effect on rates per customer of the transfer of a project is likely to be extremely small. And whatever the impacts might be, they would be insignificant compared to the long-term impacts of other factors such as inflation, fuel costs, demand for electricity and prudent utility management. No rate increase whatsoever would be necessary if the IOUs reduced their rates of return on investment — which are now at extraordinarily high levels — by even the slightest amounts.

**Q: But won't IOUs have to spend a lot of money for new power plants to take the place of hydroelectric projects?**
No. Although this is one of the IOUs' favorite arguments, it is at odds with the facts. Most publicly owned utilities now competing for new licenses for existing projects do not have sufficient generating capacity themselves and, as a result, have to purchase a considerable amount of wholesale power from IOUs. If the licenses are transferred, they will buy less power from the IOUs, or none at all. If they end up having more power than they actually need, then they can sell it back to the IOUs on a wholesale basis. The IOUs' argument implies that, once the licenses for the projects are transferred, generating power somehow disappears or evaporates. That, of course, is not the case. The owner may change, but the level of electricity production will remain the same.

Moreover, because IOUs now have much unused capacity, loss of hydroelectric capacity would not affect them for many years. Last year, 39 percent of the IOUs' generating capacity was never used, even on the hottest or coldest day of the year. A utility needs some reserve margin, but 39 percent is far more than necessary. It would be many years before most IOUs would have to pay for new power plants to replace projects which may be transferred to publicly owned utilities.

**Q: Is it true, as the IOUs claim, that these projects are essential for maintaining their integrated, coordinated system of electricity production.**
No. It is not at all unusual for more than one utility to own and operate power plants on the same river. For example, seven power plants on the mid-Columbia River are owned by four different utilities. In addition, no disruption of service could result from license transfer — which it most likely would not — the FERC is prohibited by law from transferring the project's ownership.

This issue was raised by Pacific Power & Light Co. (PP&L) in the first competitive relicensing proceeding to come before the commission. PP&L and the municipal applicant, the Clark/Cowlitz Joint Operating Agency, had both applied for a new license to operate Merwin Dam on the Lewis River in Washington.

PP&L was the original licensee for the Merwin project and held licenses to two other projects on the Lewis River. PP&L argued it must receive the new license for Merwin in order to ensure integrated and coordinated operation of all projects. The

**'Nonprofit utilities pay local in-lieu taxes which, in 1982, amounted to 6.9 percent of gross revenues—more than the 6.1 percent IOUs paid.'**

FERC administrative law judge strongly objected to PP&L's "veiled threats of noncooperation and noncoordination." "Resistance to coordinated operations" with the publicly owned applicant "may doom the chances of ever achieving a somewhat coordinated operation of the Lewis River Project." Such a result, the administrative law judge concluded, would undermine the basis purposes of Congress in passing the 1920 act.

**Q: If there were not a public preference provision, would the publicly owned utilities be competing for these licenses?**
No. Without public preference, the chances

**'The IOUs' argument implies that, once the licenses for the projects are transferred, generating power somehow disappears or evaporates.'**

that a publicly owned utility could succeed in obtaining a new license for an existing project licensed to an IOU would be very slim. It simply would not pay for nonprofit utilities — most of which are small and do not have the sort of cash available to the IOUs — to spend the money to compete for these licenses. Of course, if Congressman Shelby's bill were enacted, publicly-owned utilities would be precluded from competing for these licenses.

**Q. Is it important that we ensure that publicly owned utilities will be able to compete?**
Yes. Without competition for these projects, *all* electricity consumers — those served by both IOUs and publicly owned utilities — would lose. Competition for new licenses in and of itself is very healthy.

For example, when Pacific Gas & Electric Co. asked the FERC for a new license for the Rock Creek-Cresta Project on the Feather River in California, it told the commission there was no basis for spending any money to improve the project. Later, a competing application was filed by the Sacramento Municipal Utility District (SMUD) and several other California municipalities. SMUD studied the project and determined the project's generation could be significantly increased without adverse environmental impacts. PG&E then took another look at the project. Its conclusion: to file an "amended" license application incorporating many of SMUD's proposals.

Elimination of public preference would make such competition unlikely or, under Congressman Shelby's bill, nonexistent.

**Q. Won't the transfer of ownership result in loss of tax revenues in towns and cities in which these projects are located?**
This is another pet argument of the IOUs, but it, too, does not wash. IOUs pay very little money in local and state taxes — only 6.1 percent of their gross revenues in 1982.

Nonprofit utilities, on the other hand, while technically tax-exempt, pay "in lieu" taxes which, in 1982, amounted to 6.9 percent of gross revenues — more than the IOUs. As new owners of the projects, local publicly owned utilities will continue making such payments.

**Q: What effect will a change of ownership have on the environment?**

There certainly will not be any adverse effect. The projects will continue to function as they have in the past, with the same capacity. The only change will be in the ownership of these facilities.

But the process of competition for these projects does have a beneficial effect on the environment. For example, when Santa Clara, Cal., in 1979 filed a competing application for a project operated by PG&E, it proposed to replace wetlands lost when the project was initially constructed. PG&E then amended its license application to include a similar improvement. In addition, PG&E — after years of wrangling with the California Department of Fish and Game — finally agreed to implement a fish study on the river. Without competition, those environmental improvements might never have been proposed.

And, we should note, publicly owned utilities have proven themselves to be leading advocates for environmental protection among the nation's utilities. One recent example involves the controversy over how to deal with the problem of acid rain. In August 1983 the American Public Power Association recommended an emissions tax on all fossil-fuel sources to finance emission reduction. The IOUs continue to oppose efforts to combat acid rain. The pro-environmental stance of the nation's publicly owned utilities is another reason to ensure the existence of strong, healthy, publicly owned competitors of the IOUs.

**Q. Can publicly owned utilities run the projects efficiently?**

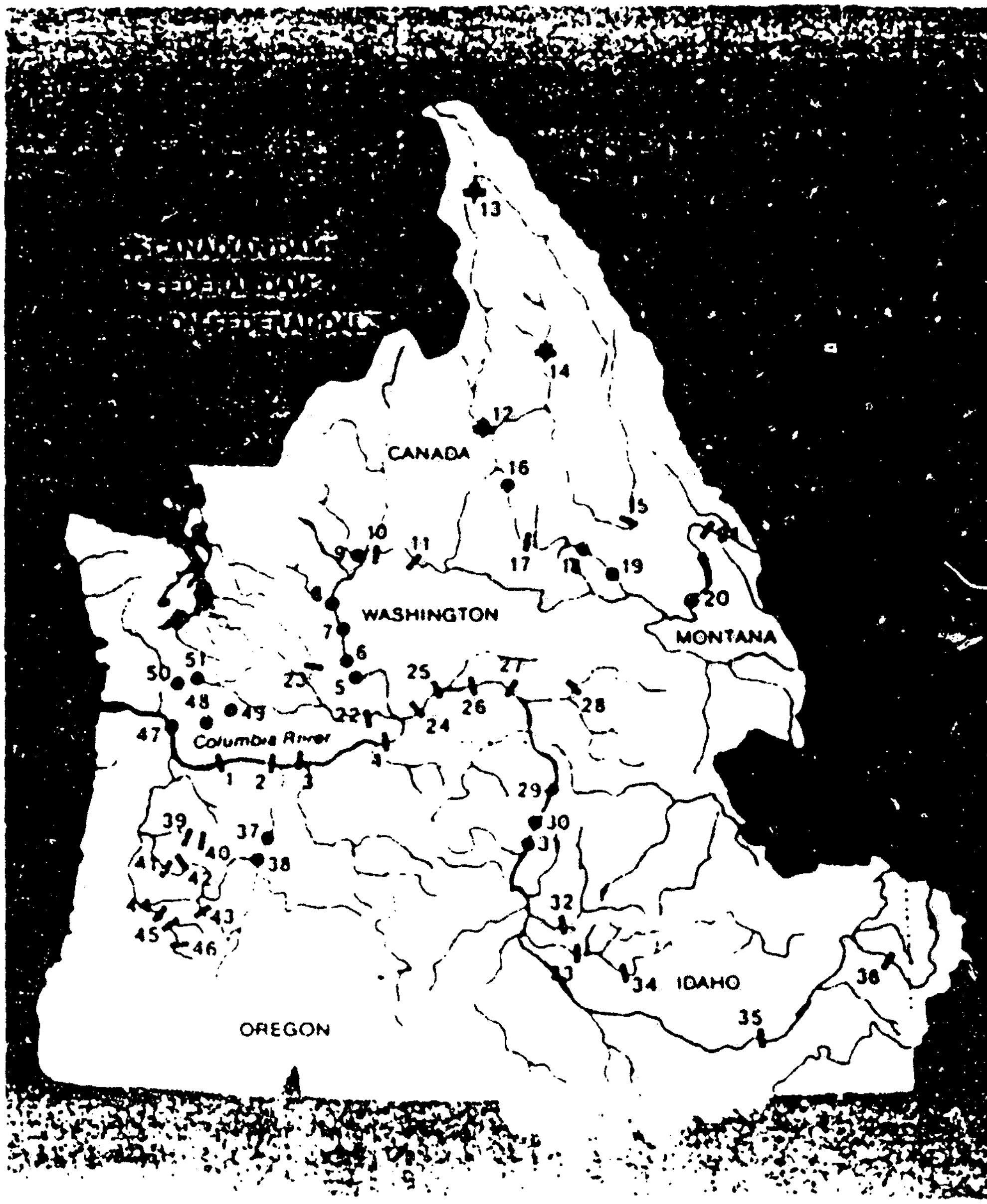
The record speaks for itself. Publicly owned utilities deliver power to their customers at average costs significantly lower than those charged by IOUs and have done so for many years. These savings to the consumer are attributable in part to the absence of a profit factor in the publicly owned utilities' charges. But they are also attributable to the fact, documented by federal government reports for the past 35 years, that the unit costs of public power managerial expenses — including administration, accounting, collection, customer service and sales expenses — are much below those of IOUs. Costs of production and distribution of electricity also are lower per kWh for publicly owned systems than for private utilities.

**Q. But aren't the IOUs more experienced than publicly owned utilities?**

Absolutely not. Publicly owned utilities have a long tradition of serving the public efficiently. Many of them started business before the private companies. Santa Clara, for example, has operated utilities since 1896, 12 years longer than PG&E, its private rival for one project in California.

**Q: How do you respond to the IOUs' claim that it would be unfair to transfer the licenses after they have developed these facilities and run them successfully for so many years?**

**'It is not at all unusual for more than one utility to own and operate plants on the same river.'**




*Edison Electric Institute, trade association of the private power companies which seek to deny public power systems the right to compete for expiring hydroelectric licenses, says "municipalities' use of the water resource may not be compatible with the investor-owned utilities' uses at other projects on the same river." In fact, however, multiple ownership and integrated operation of hydro projects on the same river is not unusual. Fifty-one dams on the Columbia River and its tributaries have 13 owners—five investor-owned utilities, three public utility districts, two cities, two U.S. federal agencies and a Canadian province.*

*Map Courtesy Bonneville Power Administration*

Publicly owned utilities which receive new licenses for these projects are required to compensate the IOUs. The Federal Power Act requires payment of the net investment in the project and any severance damages.

It should also be remembered that the IOUs have made substantial profits off these projects for 50 years. Preference merely ensures publicly owned utilities have a chance to operate these projects — without making a profit off of them.

**Q: Would the pending legislation in Congress change the level of compensation?**

Yes. Congressman Shelby's bill would require the new licensee to pay the original licensee "just compensation," which would, in effect, constitute current market value. As a result, an IOU whose project license is transferred would likely receive a huge profit on the project itself, in addition to profits made over the years through the rent-free use of a public resource.

**Q: I am still not sure public preference isn't a bit "unfair." Is it really fair to take a project away from one utility and give it to another?**

Absolutely. Is it unfair for a landlord to refuse to renew a lease? A federal license to use a public resource is nothing more than a lease. There was never any guarantee that the lease would be renewed. The original licensees understood that in all probability their leases would not be renewed.

In addition, the IOUs have had the profit-making use of these public resources for 50 years or more. They knew public preference would apply to relicensing. There is nothing unfair about giving the nonprofit, publicly owned utilities a preference in obtaining new licenses.

Moreover, IOUs are cost-plus monopolies. They are guaranteed, if they operate efficiently, a profit on their investments. Even if production costs increase, their profit margin probably would not be affected.

And although private utilities claim it is "unfair" for the federal government to assist publicly owned utilities through a preference, they do not mention the direct and indirect financial assistance they receive. For instance, IOUs pay very little in federal taxes. The reason: an extraordinary array of tax breaks, including capital investment tax credits, deferral of taxes for accelerated depreciation on capital investments, the ability to issue pollution control bonds exempt from income taxes and the right to sell stock through a dividend reinvestment program whereby investors do not pay taxes on income. Some IOUs pay no taxes at all, and accumulate tax credits, despite profit-making, because of tax provisions.

That is not all. IOUs receive other benefits such as rights-of-way to construct and operate their systems across federal lands and authority to condemn private property.

Congress has been eminently generous to profit-making IOUs. Preference in relicensing is simply one way of making it possible for smaller, consumer-owned, nonprofit utilities to compete against the much larger IOUs. There is nothing the least bit "unfair" about public preference.