

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Gustavus Electric Company

Project No. 11659-003

ORDER DENYING REHEARING

(Issued March 24, 2005)

1. This order denies a request for rehearing filed by several intervenors of the October 29, 2004 Order issuing an original license to Gustavus Electric Company (Gustavus) for the 800-kilowatt (kW) Falls Creek Project No. 11659.¹ This order is in the public interest because it will give an isolated community access to a reliable source of energy at a stable price.

I. Background

2. The Falls Creek Project is to be located on Falls Creek, also known as the Kahtaheena River. The project site is about five miles east of the town of Gustavus, Alaska. The project lands are currently within Glacier Bay National Park and Preserve (GBNPP) and are designated as part of the National Wilderness Preservation System.

3. The Commission cannot ordinarily issue a license for a project located in a national park. In 1998, however, Congress enacted the Glacier Bay National Park Boundary Adjustment Act of 1998 (Boundary Act).² The Boundary Act provides that if the conditions therein are satisfied, and the project meets the requirements of the FPA, the Commission may issue a license for the project. The Boundary Act requires the Commission to make certain findings prior to the issuance of a license, some of which are subject to concurrence by the Governor of Alaska (Governor), the Secretary of the Interior (Secretary), or both.

¹ 109 FERC ¶ 61,105.

² Public Law 105-317 (Oct. 30, 1998).

4. The Boundary Act also provides for a land exchange, in which a parcel of land within GBNPP that is currently designated as National Wilderness System land would be conveyed to Alaska. Within this parcel are the lands on which the project facilities would be located. The Commission is to identify, with the concurrence of the Secretary of the Interior (Secretary) and Alaska, the minimum amount of land necessary for the construction and operation of a hydroelectric project. For its part, Alaska would convey to the United States certain state-owned lands for inclusion in the National Park System. The lands to be conveyed to the United States from Alaska and vice versa are to be determined by mutual agreement of the Secretary of the Interior and Alaska. In order to ensure that the amount of land within the National Wilderness System is not diminished, the Boundary Act also requires the Secretary, upon consummation of the land exchange, to designate certain other federal lands as wilderness lands.

5. The land exchange may occur only if the Commission concludes, with the Secretary's concurrence, that construction and operation of the project on the lands to be transferred to Alaska: (1) will not adversely impact the purposes and values of GBNPP as constituted following the land exchange; and (2) will comply with the requirements of the National Historic Preservation Act (NHPA).³ In addition, the land exchange may only occur if the Commission concludes that construction and operation of the project can be accomplished in an economically feasible manner. The Secretary's concurrence is not required for this conclusion.⁴

6. The Boundary Act requires the National Park Service (NPS) to be a joint lead agency for the development of any environmental documents prepared for the project under the National Environmental Policy Act of 1969 (NEPA).⁵ The environmental documents must consider the impacts from licensing and any land exchange necessary to authorize the project.

7. Issuance of a license, like the land exchange, is conditioned on the Commission finding, with the Secretary's concurrence, that the project will not adversely impact the purposes and values of GBNPP, as constituted following the land exchange.

³ 16 U.S.C. §§470-470w-6; Boundary Act sections 2(c)(1)(A) and (B).

⁴ Section 2(c)(1)(C).

⁵ 42 U.S.C. § 4321, *et seq.*

8. Gustavus filed a license application in 2001. The final EIS was issued in July 2004. In August 2004, we issued a Notice of Determination and of Proposed License Conditions⁶ in which we made the findings required by the Boundary Act in order to issue a license. The Governor and the Secretary filed the necessary concurrences in September 2004. The license was issued in October 2004. A timely request for rehearing was filed by several parties.⁷ We refer to them collectively as Sierra Club.

II. Discussion

A. Impacts to Glacier Bay National Park and Preserve

9. Sierra Club disputes the Commission's finding that the project will not adversely impact the purposes and values of GBNPP, as constituted following the land exchange. It states that one purpose of GBNPP is to be a sanctuary for fish and wildlife.⁸ It claims that the project will adversely affect this purpose because the access road to the project dam and powerhouse will permit foot access to lands within the project boundary and hunting, all-terrain vehicle (ATV), and helicopter access to exchange lands managed by Alaska that are adjacent to GBNPP. It states that these activities will spill over into GBNPP, increasing disturbance to wildlife and potentially reducing their populations, and that other spillover effects may include increased poaching, disruption of wildlife migration, and a reduction in the availability of Dolly Varden char to foraging animals.⁹

10. As we stated in the license order,¹⁰ the EIS acknowledged these potential impacts but found that there would be no adverse impact on GBNPP's purposes and values because most of the effects would occur on project or state-managed lands rather than

⁶ *Gustavus Electric Company*, 108 FERC ¶ 61,198.

⁷ The parties requesting rehearing are Sierra Club, the Wilderness Society, American Rivers, Hoonah Indian Association, Glacier Bay's Bear Track Inn, Thomas L. Mills, Sr., Patrick G. Mills, Sophie McKinley, and Diane McKinley.

⁸ Rehearing request at 5. See Report of the Senate Committee on Energy and Natural Resources together with additional views to accompany H.R. 39, at 137.

⁹ Rehearing request at 4-6, *citing* EIS at 4-123 to 4-128.

¹⁰ 109 FERC ¶ 61,105 at P 21-22.

GBNPP lands. Spillover impacts would not substantially diminish the value of wildlife populations and habitats within the GBNPP because they would be short-term and localized.¹¹

11. Sierra Club also argues that GBNPP's value as a fish sanctuary will be impaired by impacts on Dolly Varden char resident in Falls Creek. It cites the fact that the license does not require upstream fish passage, asserts that the fish screen required by the license may not be 100 percent effective, and states that there is a risk that the project could reduce the genetic diversity of Dolly Varden char within GBNPP.¹²

12. First, the Boundary Act clearly requires a finding that the project will not adversely impact the purposes and values of GBNPP *as constituted after the consummation of the land exchange*. When that occurs, all of Falls Creek remaining within GBNPP will be upstream of the project boundary. The Dolly Varden char in that reach of the stream are already isolated from upstream movement of Dolly Varden char found below the impassable Upper Falls.¹³ The only Dolly Varden char likely to be affected by the project are those within the bypassed reach, and the EIS finds that it is improbable that operation of the project under the required flows will result in the loss of any unique genetic traits associated with those fish.¹⁴ The license moreover retains the authority of Interior to require upstream fish passage, should that prove necessary,¹⁵ and the Commission retains authority through the standard form fish and wildlife reopening provision to require fish passage or any other measures, should they become necessary, to ensure that the project does not harm the Dolly Varden fishery in the portion of Falls Creek that will remain within GBNPP.

¹¹ EIS at 4-128.

¹² Rehearing request at 7, *citing* EIS at 4-103 and 4-107.

¹³ EIS at 3-33.

¹⁴ The license also includes several conditions to protect Dolly Varden char in Falls Creek. *See* 109 FERC ¶ 61,105 at P 81, n. 122.

¹⁵ License Article 425, 109 FERC ¶ 61,105 at 61,478.

13. The EIS also found that the project will not adversely impact the visual resources or soundscape of GBNPP.¹⁶ Sierra Club states that this finding turns on the expectation that the riparian corridor of Falls Creek will be exchanged to Alaska and the assumption that project works will not be visible from non-exchanged GBNPP lands. It asserts that this assumption is incorrect because at certain times of the year visitors to the boundary of GBNPP in the project vicinity would see the bypassed reach and lower falls diminished by the amount of water diverted to the project penstock, and would be able to hear noise from rock quarries, ATVs, or helicopters on exchange lands.¹⁷ We disagree. Because of the density of the surrounding forest, the only evidence of the project visible from the boundary of GBNPP will be a short segment of the access road.¹⁸ Moreover, the area in question is accessible to very few people because of steep slopes, dense vegetation, and the absence of trails.¹⁹

14. The possibility that a quarry, ATV traffic, or helicopter noise from lands exchanged to Alaska will be audible on GBNPP lands following the land exchange should not materially change the soundscape of the GBNPP in that area. The lands bordering the GBNPP in the project area are currently open to ATV traffic and helicopter flight, so visitors to the area can already hear such noises. The land exchange will simply move the GBNPP boundary eastward a few hundred feet, making noises audible to the few visitors to this area from a slightly different location.

B. National Historic Preservation Act

15. The Commission and NPS found, and the Secretary concurred, that the project will not affect any historic or cultural sites eligible for the National Register of Historic

¹⁶ EIS at 4-158 and 4-160 to 4-162 (visual resources) and at 4-144, 4-146, and 4-147 (soundscape).

¹⁷ Rehearing request at 8, *citing* EIS at 6-21.

¹⁸ EIS at 4-150.

¹⁹ *See* EIS at maps at A-9, -10, -16, and -17. As the license order notes, each year only a handful of people visit the uplands from which the access road would be visible. 109 FERC ¶ 61,105 at P 26.

Places.²⁰ That finding was based on the EIS' determination that Falls Creek does not qualify as a Native American traditional cultural property because there are no songs, stories, or crests²¹ associated with it.²²

16. Sierra Club asserts that consultation was inadequate in this regard because the EIS does not document whether the Hoonah Indian Association (Hoonah), individual Indian allottees, or Interior's Bureau of Indian Affairs (BIA) were asked specifically whether there are songs, stories, or crests associated with Falls Creek.²³ The GBNPP Superintendent formally notified, provided information to, and requested the participation of Hoonah and other potentially interested Native Alaskan groups in 1999. Gustavus' consultants also personally contacted and interviewed knowledgeable persons with Hoonah and heirs associated with the Mills and McKinley allotments in 2001. In addition, NPS staff members contacted allotment holders who do not reside in the area to request information. Finally, the GBNPP Superintendent met semi-annually with Hoonah to provide updates and discuss issues, including cultural resources concerns.²⁴ All of these potentially interested entities were also invited to participate in the license application proceeding, which included public meetings in Gustavus and Hoonah,

²⁰ 108 FERC ¶ 61,198 at P 28-29; 109 FERC ¶ 61,105 at P 18.

²¹ Crests are stylized representations, typically appearing on a totem pole, that belong to a family and recount a myth or legend connected to the family, or a story from the life of a person honored by the pole. The most common crests of the Pacific Northwest include the eagle, raven, thunderbird, bear, beaver, wolf, killer whale, and frog.

²² EIS at 3-58.

²³ Rehearing request at 10. BIA reported that the foundation of a historic period cabin or stable is located on land added to the Mills allotment in 1998. Sierra Club suggests that NPS' consultation regarding historical or cultural sites was defective because it failed to ask the Mills allottees the purpose of this building. The foundation remains are not, however, located on GBNPP lands or exchange lands and would not be affected by the project. Moreover, the Mills allottees declined permission to investigate the site. EIS at 3-58.

²⁴ See EIS at 3-58 and 3-59.

Alaska, and comments were filed by Hoonah and allottees Thomas L. and Patrick G. Mills, Sophie and Diane McKinley, and Priscilla Mooney.²⁵ None of these entities have asserted that there are songs, stories, or crests associated with Falls Creek.

17. Sierra Club also alleges that we violated the NHPA by failing to “provide leadership in the preservation....of historic resources” and to administer federally controlled historic resources “in a spirit of stewardship for the inspiration and benefit of present and future generations....”²⁶ In this regard, it states that the United States has ratified the Convention Concerning Protection of the World Cultural and Natural Heritage (1972 Convention),²⁷ that the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization has designated GBNPP as a World Heritage Site pursuant to the 1972 Convention,²⁸ and that section 401 of the NHPA²⁹ requires the Secretary, in cooperation with the Advisory Counsel and others, to direct and coordinate the United States’ participation in the 1972 Convention.

18. Sierra Club states that removal from GBNPP of the lands within the project boundary is inconsistent with those lands’ status as a feature of a World Heritage Site. Specifically, it asserts that the Falls Creek riparian corridor is uniquely valuable as

²⁵ See 109 FERC ¶ 61,105 at P 14 and EIS, Exhibit D at D-271 to D-273.

²⁶ Rehearing request at 10. NHPA section 2, 16 U.S.C. § 470-1, states, in pertinent part, that it is the policy of the federal government to:

(2) provide leadership in the preservation of prehistoric and historic resources of the United States and of the international community of nations and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments;

(3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;

²⁷ Approved by the U.S. Senate October 26, 1973.

²⁸ Citing World Heritage Committee, *Sixteenth Session Report* (December 14, 1992).

²⁹ 16 U.S.C. § 470a-1(a).

wilderness because of the attractions of two waterfalls and old growth timber, and because it is one of five creeks in GBNPP not to have been recently glaciated, with the result that it has unusual geological forms and unique invertebrate species.³⁰

19. The Boundary Act reflects Congress' conclusion that the land exchange could take place without diminution of the National Wilderness System, including its cultural resources, and that the specific standards for the issuance of a license for this project it established would adequately protect the environment. The generally-expressed requirements of NHPA section 2 to provide leadership in the preservation of historic resources and to administer such resources for the benefit of present and future generations are not inconsistent with these specific statutory provisions affecting the same resources.

C. Economic Feasibility

20. Sierra Club also contests our finding that the project is economically feasible. In brief, the EIS analyzed economic feasibility by comparing the cost of generation from the project over a 30-year period to the cost of equivalent generation from a diesel-fueled facility, which is the most likely alternative form of generation. In that analysis, the project has a positive economic benefit if it costs less to construct and operate than equivalent diesel generation.

21. The analysis contains several variables, including Gustavus' system load growth, general inflation rates, diesel fuel inflation rates, diesel generation maintenance costs, interest, and the potential availability of grant money to defray capital costs. Each variable was assigned a range of values, with the middle value representing staff's conclusion regarding the most likely value for that variable. The net economic benefit of the project was calculated for each value in the range for each variable in terms of present value, first year of positive annual net benefit, and the first year of cumulative positive net benefit.³¹

22. The analysis showed that without GBNPP included in the system load, the project could have a positive or negative net benefit depending on the assumptions made for each value and, based on the middle value for all variables, the project has a positive net benefit relative to diesel generation nine years following the commencement of operation (2016), and a cumulative net benefit exceeding diesel generation 18 years after operations

³⁰ Rehearing request at 12.

³¹ EIS pp. 6-23 to 6-31 and Appendix E, at E-1 to E-21.

begin (2025).³² With GBNPP included in Gustavus' load, the net benefit ranges improve, with the mid-range estimate showing a cost advantage relative to diesel generation first appearing two years following commencement of operation (2009), and a cumulative positive net benefit appearing four years after project operations commence (2011).³³ These results indicate that the project is economically feasible.

23. Sierra Club contends that the above-described analysis does not provide substantial evidence for various reasons. First, it contends that in order to be found economically feasible, the project must, in addition to showing a net economic benefit over time relative to alternative sources of power, also provide a return on investment commensurate with risks³⁴ and satisfy the standards of the Alaska Regulatory Commission of Alaska (RCA) for determining if a utility expense is useful or prudent for ratemaking purposes.³⁵ Sierra Club similarly faults the Commission for failing to show that the RCA would approve rates sufficient to recover Gustavus' costs³⁶ and that Gustavus' investment in the project will not overburden its finances.³⁷

24. The term "economically feasible" is not defined in the Boundary Act. Congress gave this Commission the discretion to establish the criteria applicable to the economic feasibility determination. Our responsibility here is not to establish electric rates but to determine whether or not to issue a license for a term of 50 years. Congress recognized the uncertainty of making cost and load projects over such a lengthy term by requiring the license to prohibit Gustavus from commencing construction until the Commission has approved a financing plan, and we have so provided.³⁸

³² See EIS Tables 6.1-2 and 6.1-3; EIS at 6-28.

³³ Table 6.1-3, EIS p.6-28. The Alaska Energy Authority performed an independent analysis and concluded that the Project would realize a cumulative net benefit of about \$2.5 million over a 30-year period with GBNPP load. Comments on draft EIS at 2 and attachment thereto.

³⁴ Attachment 1 to rehearing request (Cutter Declaration, Nov. 29, 2004) at 7-9.

³⁵ Rehearing request at 14; Cutter Declaration at 12-14.

³⁶ Cutter Declaration at 8-12.

³⁷ Cutter Declaration at 14-19.

³⁸ Section 3(c)(1) and license article 400, 109 FERC ¶ 61,105 at 61,168.

D. Need for Power

25. Sierra Club continues to contend that the project is unlikely to be needed for many years to come because Gustavus already has redundant diesel generating capability.³⁹ Our finding that Gustavus has shown a need for project power rests in part on the value of the project as a hedge against the risks to an isolated community not connected to any transmission grid from failure of diesel generating units and volatility in diesel fuel prices.⁴⁰ Sierra Club discounts these risks on the basis that other isolated communities in Alaska also rely on diesel generators.⁴¹ The mere fact that other communities also rely on diesel generators is irrelevant to Gustavus' situation. Sierra Club has provided no evidence concerning the existing or projected loads of these communities, their existing or planned diesel generation resources, or the potential for hydropower to serve their needs. There is, therefore, no basis for thinking that their situations might be analogous to Gustavus'.

26. Sierra Club also suggests in this connection that we should have conducted additional probability analyses to determine with more certainty when Gustavus' existing diesel generators are likely to fail and to determine the optimum size and timing of investment in new generating resources.⁴² Here, we are considering the potential needs and resources of an isolated electric system in a harsh climate over a fifty-year license term. In this context, we think such analyses have very limited value and that it is prudent to err in favor of assuming that additional or replacement generation resources are likely to be required sooner rather than later.⁴³

³⁹ Rehearing request at 13-14.

⁴⁰ EIS at 1-2 to 1-11.

⁴¹ Exhibit 1 to rehearing request, Cutter Declaration at 3.

⁴² Exhibit 1 to rehearing request, Cutter Declaration at 2

⁴³ Sierra Club also suggests that our need for power finding was based on acceptance of Gustavus' assertion that hydropower will cost less than diesel generation, causing demand to rise. Cutter Declaration at 3-4. In fact, we merely set forth Gustavus' argument in this regard. The license order makes clear that our need for power finding is based on the likelihood that load will grow, albeit at an indeterminate rate, failure of diesel units for one reason or another is likely to occur over time, and diesel fuel prices are volatile. 109 FERC ¶ 61,105 at P 40.

27. In response to Sierra Club's assertion that any additional need for power should be met by, among other things, conservation measures, the license order states that the high cost of electricity in Gustavus likely results in significant conservation and there is nothing in the record indicating that additional conservation opportunities could have a substantial negative impact on load growth.⁴⁴ On rehearing, Sierra Club responds that studies and energy audits by the Alaska Energy Authority (AEA) at other rural Alaska towns have shown potential savings of up to 30 percent, and that an AEA audit of Gustavus community buildings estimated savings from two buildings alone of over 4,000 kWh per year. It adds that studies have shown that significant factors leading to sub-optimal investment in conservation (lack of interest, knowledge, or technical expertise, high up-front costs, and benefits to the utility or society not seen by customers) can be overcome by a utility conservation program.⁴⁵

28. The EIS does not suggest that there is no additional opportunity for energy conservation. It finds that the high cost of energy in Gustavus and reductions in a state subsidy program for certain residential consumers have probably already caused consumers to use basic conservation measures and that further conservation measures cannot replace all or a major portion of the diesel generation.⁴⁶

E. Reasonable Alternatives

29. The EIS considered and found not to warrant detailed consideration various forms of renewable energy technologies other than hydropower, such as windmills, tidal turbines, and fuel cells.⁴⁷ The license order further explained why these potential alternatives do not merit consideration as reasonable alternatives.⁴⁸

30. Sierra Club asserts that in rejecting its arguments in this regard, we improperly placed the burden of proof on intervenors opposed to the project. Our responsibility to ensure that our findings are supported by substantial evidence in the record does not

⁴⁴ 109 FERC ¶ 61,105 at P 41.

⁴⁵ Cutter Declaration at 5-6.

⁴⁶ See EIS at 1-10.

⁴⁷ EIS at 1-6 to 1-11.

⁴⁸ 109 FERC ¶ 61,105 at P 42.

alleviate the responsibility of any party making recommendations to support those recommendations with substantial evidence.⁴⁹ In any case, the license order and the discussion below adequately dispose of the arguments on this subject.

31. Sierra Club contends that we failed to conduct an independent analysis because we relied on evidence submitted by Gustavus concerning potential alternative electricity sources, with the result that our conclusions in this regard are not based on substantial evidence. It argues that in order to avoid these alleged deficiencies we should have consulted with other government agencies and manufacturers and installers of renewable energy technologies which might have information regarding alternative energy sources for Gustavus, undertaken a field study of potential alternatives; conducted a literature search, and held an evidentiary hearing to receive expert testimony on disputed issues of fact.⁵⁰

32. We note initially that reliance by the Commission on information provided by the applicant,⁵¹ and on the opinions of its own qualified experts,⁵² is lawful, appropriate, and consistent with Commission policy.

⁴⁹ *FPL Energy Maine Hydro, LLC*, 95 FERC ¶61,016 (2001), citing *Interior v. FERC*, 952 F.2d 538, 544 (D.C. Cir. 1992).

⁵⁰ Rehearing request at 17-22, citing *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2nd Cir. 1965) (vacating license because Commission declined to admit intervenor's evidence on potential gas turbine alternative to hydroelectric development).

⁵¹ See *City of Fort Smith, Arkansas*, 44 FERC ¶61,160 at 61,517-18 (1988) ("Inherent in the regulatory process is the need to rely in large measure upon the information submitted by an applicant, which obviously has a strong interest in obtaining the approval that it is seeking. Information and analysis from such party can be relied upon by the decision-maker if it is independently confirmed. The Commission reviews and makes its independent evaluation of applications, and, by soliciting information and comments on the application from other federal, state, and local agencies, as well as the general public, obtains additional assurance that the information is correct, adequate, and generally unbiased." (citations omitted), *aff'd*, *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1485-86 (D.C. Cir. 1990).

⁵² *PacifiCorp*, 97 FERC ¶61,161 (2001), *reh'g denied*, 98 FERC ¶61,117 (2002), *aff'd*, *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071 (9th Cir. 2003).

33. Sierra Club points to the requirement of NEPA section 102(c) for action agencies to “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved,”⁵³ and asserts that we should have consulted regarding alternative forms of renewable energy with the U.S. Department of Energy (DOE), Interior’s Technical Services Center (TSC) and National Business Center (NBC), and the RCA.

34. DOE’s National Renewable Energy Laboratory (NREL) does not conduct significant research in tidal generation. It does conduct research on wind and fuels cells but, as we explained in the license order, wind energy does not appear to be a viable alternative in the Gustavus area and fuel cells are a high-cost option that would require additional infrastructure for propane storage and supply.⁵⁴ Interior’s TSC, located within the Bureau of Reclamation, provides a wide variety of engineering services to government and private organizations, with an emphasis on electric systems and water resource facilities. It does not, however, list renewable energy systems other than hydroelectricity as an area of expertise.⁵⁵ Interior’s NBC, according to its website, has nothing to do with renewable energy. Rather, it “serves as the systems manager and general purpose computing host” for Interior’s department-wide administrative automated data processing systems for such functions as budget, procurement, and personnel management.⁵⁶ The RCA regulates Gustavus’ rates, but appears to have no particular expertise regarding renewable energy.⁵⁷ The RCA also received actual notice of this proceeding,⁵⁸ but neither intervened nor commented on the draft EIS.

⁵³ 16 U.S.C. § 102(C).

⁵⁴ NREL describes fuel cells as “a promising technology for use as a source of heat and electricity for buildings,” but states that there are many challenges to overcome before that promise can be realized. (http://www.nrel.gov/clean_energy/hydrogen.html). DOE’s Office of Energy Efficiency and Renewable Energy, which is funded by NREL, identifies “cost and durability” as major challenges to fuel cell commercialization. http://www.eere.energy.gov/hydrogenandfuelcells/fuelcells/fc_challenges.html.

⁵⁵ See www.usbr.gov/pmts/tech_services.

⁵⁶ <http://www.nbc.gov/organization>.

⁵⁷ The RCA’s authorities are set for in Alaska Statutes 42.04-42.06.

⁵⁸ The RCA is on the Secretary’s mailing list for this proceeding. Entities on the Secretary’s mailing list are provided with copies of all Commission issuances in the proceeding.

35. Sierra Club previously submitted a letter from a consultant generally suggesting that tidal generation in the Gustavus area may be technically feasible, but stating that such a project would likely require storage batteries or stationary fuel cells to supplement the turbines and that costs could only be guessed at.⁵⁹ We found it unreasonable to consider such a vague and largely hypothetical discussion to be a reasonable alternative to a specific proposal with reasonably predictable costs and generation.⁶⁰

36. On rehearing, Sierra Club provides two new documents that it suggests show the reasonableness of using the tides or ocean waves to generate electricity to serve Gustavus. The first is a form letter from a company engaged in a pilot-project to develop a facility that would produce electricity by harnessing ocean waves off the coast of Rhode Island. The second item is pages from the website of an engineering firm (Wavegen) that has constructed and operates a facility in the Scottish Hebrides which harnesses strong, constant wave action against cliffs to produce a maximum of 500 kW. Like Sierra Club's previous evidence, these items amount only to speculation that the tides in the Gustavus area could be harnessed to produce electricity. That is not a reasonable alternative to those examined in the EIS.⁶¹

37. Sierra Club also contends that we have missed its point with regard to alternative forms of generation; that is, we should deny the license application because there is no immediate need to construct the project and it will not show a positive economic benefit for at least a decade. By denying Gustavus' application, we would give potential alternative forms of generation more time to mature technologically and become

⁵⁹ 109 FERC ¶ 61,105 at P 42.

⁶⁰ *Id.*

⁶¹ In any event, this new evidence has no probative value. The form letter does not indicate how much electricity would be produced, how the pilot project is funded, how long it has been in development, or that the technology has been successfully demonstrated elsewhere. Wavegen states that its facility is the only commercial wave generation facility in the British Isles and includes no data on the cost or reliability of the power. It adds that its first attempt to construct the facility was thwarted because waves destroyed the facility before it could be completed. Moreover, although there are strong tidal currents in the Gustavus area, we are not aware of any locations where continuous, powerful waves strike cliffs. Rather, the shoreline is generally low and is sheltered from the kind of open ocean waves that power the Wavegen facility.

economically competitive.⁶² We think that the possibility that an alternative form of generation may someday be technologically and economically feasible in the project area is an insufficient basis to deny a current license application.

38. In sum, we continue to see no evidence that would lead us to conclude that any technology for renewable electric energy other than hydroelectric power is a reasonable alternative for Gustavus at this time or in the reasonably foreseeable future.

39. Finally, neither the FPA nor the Administrative Procedures Act⁶³ requires the Commission to conduct field studies and, as shown above, further study of non-hydroelectric renewable energy is not appropriate here. Neither is the Commission required to hold a trial-type hearing. Such a hearing is only necessary when disputed issues of material fact cannot be resolved on the basis of written submissions.⁶⁴ We conclude that the documentary record established in this proceeding provides ample information on which to resolve the issues.

F. Trust Responsibility

40. Sierra Club next contends that the license order and the land exchange will cause adverse impacts to subsistence uses of Native Alaskans, and that those adverse impacts violate our trust responsibility to Indians. Sierra makes three arguments in this regard.

1. Alaska National Interest Lands Conservation Act

41. Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA)⁶⁵ requires the head any federal agency having primary jurisdiction over public lands in Alaska, “in determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of” such lands to “evaluate the effect of such use, occupancy,

⁶² Cutter Declaration at 6-7.

⁶³ 5 U.S.C. § 551, *et seq.*

⁶⁴ *See Sierra Association for the Environment v. FERC*, 744 F.2d 661, 663-64 (9th Cir. 1994); *Northern States Power Company*, 78 FERC ¶61,363 at 62,512 (1997) and *Public Service Co. of New Hampshire*, 75 FERC ¶61,111 at 61,380 (1996) (denying requests for trial-type hearing when requester unable to show that material facts in dispute could not be resolved on the existing record).

⁶⁵ 16 U.S.C. § 3120(a).

or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.”

42. First, it is doubtful that section 810 applies to this Commission. We do not have primary jurisdiction over any public lands in Alaska. Our FPA jurisdiction is limited to issuing licenses and exemptions for projects on such lands and, when such lands are “reservations” within the meaning of the FPA,⁶⁶ a license is subject to mandatory conditioning authority by the federal agency with primary jurisdiction over the lands.

43. In any event, the EIS includes NPS’ evaluation of impacts to subsistence uses from disposition of GBNPP lands through the land exchange.⁶⁷ It concludes that Project impacts on subsistence resources, access, and competition will be minor.⁶⁸ Sierra Club states that the primary logic supporting this conclusion is that NPS has permanently closed all of the land that would be within the project boundary to subsistence uses, although ANILCA section 816⁶⁹ requires such closures to be temporary. Thus, it asserts, the analysis should have addressed impacts to subsistence uses not as they exist now, but as if there was no closure.⁷⁰

44. We fail to see how Sierra Club’s hypothetical baseline for analysis would compel a different conclusion. The analysis considered impacts to subsistence resources in terms of three criteria: (1) Reduction of subsistence resource populations by reductions in numbers, redistribution, or habitat loss; (2) restrictions on access; and (3) increase in competition for the resources. The project would have the same effects in this regard even if subsistence activities were occurring already on the exchange lands.⁷¹ The only

⁶⁶ Generally speaking, FPA section 3(2), 16 U.S.C. § 796(2), defines “reservation” to mean national forests, tribal lands within Indian reservations, and military reservations.

⁶⁷ EIS Appendix C.

⁶⁸ EIS Appendix C at C-6 and C-7. NPS identifies subsistence activities in the vicinity of GBNPP as “hunting, fishing, digging for clams, catching shellfish, gathering firewood, and collecting food items from berries to herring eggs.” EIS at C-5.

⁶⁹ See 16 U.S.C. § 3126.

⁷⁰ Rehearing request at 24-25.

⁷¹ EIS Appendix C at C-6 and C-7.

resource the analysis finds would experience any impact is Dolly Varden char in Falls Creek, which would experience a minor reduction in numbers.⁷² We note further that only one participant has claimed to make subsistence use of Falls Creek fish.⁷³

45. Sierra Club also states that the subsistence evaluation erroneously assumes that, in determining whether to permit the proposed disposition of public lands, the federal agency may not balance impacts to subsistence against the benefits of the disposition. It states that ANILCA sections 801 and 802⁷⁴ establish a preference for subsistence uses against development, and that the project and land exchange would negatively impact subsistence uses of the Mills and McKinley family allottees and other Alaska Natives.⁷⁵

46. These sections have no bearing on this proceeding. ANILCA section 801 is a general finding and declaration by Congress that continuation of subsistence uses by Native and rural non-Native Alaskans on “public lands” is an essential life activity and must be protected and provided for. Section 802(2) states that it is the policy of Congress that:

nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to

⁷² EIS at C-7. It is not surprising that other subsistence resources would not be materially impacted by the project. The project boundary will enclose only 200-300 acres of land.

⁷³ Declaration of Thomas Mills, Sr., attached to comments of Sierra Club, *et al.* on draft EIS, and Motion to Intervene of Thomas L. Mills and Patrick Mills, Statement of Standing at 2. Mr. Mills states in his motion to intervene that he and his family “rely on some subsistence fish from the stream.” In his declaration attached to the Draft EIS comments of Sierra Club, *et al.*, he states generally that he and his family use their allotment for subsistence uses, “including fishing, crabbing, hunting, and gathering edible, medicinal plants and other materials.” Declaration at 1.

Hoonah states that the establishment of GBNPP denied its members access to subsistence resources, but does not claim the project would have any such impacts, and does not acknowledge that the land exchange would reopen to subsistence uses lands that are currently closed. Hoonah Comments on Draft EIS at 2.

⁷⁴ 16 U.S.C. § 3101 and § 3102.

⁷⁵ Rehearing request at 25-26.

assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference over other consumptive uses.

These provisions apply to subsistence uses of “public lands.” ANILCA defines such lands, with exceptions not relevant here, as “Federal lands.” None of the land exchanged to Alaska will be federal land. Nor do these sections apply to subsistence uses of Native Allotment lands. Such lands are owned by the allottees.

47. Sierra Club has, moreover, advanced no evidence that the continued viability of any fish, wildlife, or other renewable resource will be jeopardized by the project or the land exchange. It simply asserts that activities may occur on the state’s exchange lands that could diminish the allottee’s subsistence uses.

2. Government-to-Government Consultation

48. It is the Commission’s policy to seek to address the effects of proposed projects on tribal rights and resources through consultation with Indian tribes on a government-to-government basis.⁷⁶ Sierra Club states that the EIS does not demonstrate that the Commission undertook government-to-government consultation with the Hoonah Indian Association.

49. The EIS details the consultation activities of the NPS with the Hoonah Indian Association (Hoonah),⁷⁷ individual members of Hoonah, and holders of Hoonah Tlingit Native allotments beginning in 1999 and continuing through issuance of the EIS.⁷⁸ The Commission’s consultation with Hoonah and individual allottees also began in 1999. In May of that year, the Commission held local issue-scoping meetings and a site visit. These were attended by representatives of Hoonah and individual allottees, who also later

⁷⁶ “Policy Statement on Consultation with Indian Tribes in Commission proceedings,” 18 C.F.R. § 2.1c (2004).

⁷⁷ Hoonah is a federally-recognized Indian tribe. 109 FERC ¶ 61,105 at P 57.

⁷⁸ EIS at 3-59.

submitted motions to intervene and comments in 2001. Hoonah and individual allottees also filed comments on the draft EIS in 2004.⁷⁹ In sum, this proceeding is replete with consultation with Hoonah and individual allottees.

50. Sierra Club also charges that the EIS fails to explain how NPS coordinated with the Bureau of Indian Affairs (BIA), which Sierra Club states has the lead responsibility within DOI for consultation with Indian tribes.⁸⁰ Consultation between NPS and BIA, both agencies within the Department of the Interior, is a matter solely within that Department's control. We do note, however, that BIA was fully aware of the license proceeding and provided detailed comments on the draft EIS to NPS⁸¹ which clearly show that it was in close contact with Hoonah and individual allottees regarding, among other things, subsistence uses.

51. Sierra Club also charges that the record does not show that during consultation with Hoonah, NPS proposed or considered alternatives to the project consistent with ANILCA section 802's policy that the use of "public lands in Alaska is to cause the least adverse impact possible on rural residents who depend on subsistence uses."⁸² The lands exchanged to Alaska, on which the project is to be located will not, however, be public lands within the meaning of ANILCA. The EIS, moreover, considered the No Action (*i.e.*, no project) alternative, which would preserve the *status quo*, under which the lands to be exchanged to Alaska are closed to subsistence uses.

3. Environmental Justice

52. Sierra Club states that the EIS fails to demonstrate compliance by the Commission with Executive Order No. 12898,⁸³ which provides for federal agencies to identify and address, as appropriate, disproportionately high or adverse human health or

⁷⁹ See EIS at D-1 and D-2. As noted in the license order, opposition to the project by allottees is not unanimous. 109 FERC ¶ 61,105 at P 60.

⁸⁰ Rehearing request at 27.

⁸¹ BIA's comments to NPS are attached to Sierra Club's rehearing request.

⁸² Rehearing request at 27-28.

⁸³ Executive Order No. 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994), *reprinted at* 59 Fed. Reg. 7629 (Feb. 16, 1994) and the Council on Environmental Quality's website at <http://www.ceq.eh.doe.gov/nepa/regs/ej/ej.pdf>.

environmental effects of their programs, policies, and activities, on minority and low-income populations. Sierra Club states that the project would have disproportionate impacts on the Mills and McKinley allottees and their subsistence uses in the form of increased trespass and spillover impacts from the use of nearby areas for sport hunting, potential mineral extraction, and other activities.⁸⁴

53. The EIS finds little support for the proposition that there will be significant impacts to subsistence uses by the allottees. It finds that the project and land exchange will have only minor impacts on Dolly Varden char and no impact on other subsistence resources.⁸⁵ We have reviewed the EIS' discussion of environmental impacts that could potentially affect subsistence resources and find them to be minor.⁸⁶ The license contains, moreover, extensive conditions to prevent and mitigate for environmental impacts.⁸⁷ Finally, the land exchange will open up to allottees and others for subsistence uses approximately 1,000 acres bordering the allotments that are now closed to such uses. Under these circumstances, it is doubtful there will be a material impairment of subsistence uses by the Mills or McKinley allottees.⁸⁸

G. Public Interest Finding

54. Finally, Sierra Club disputes the license order's finding that issuance of the license is in the public interest because the project would provide a reliable source of energy at predictable prices to a community that is not interconnected to a transmission grid.⁸⁹ It asserts that the project is not in the public interest because it will not eliminate Gustavus' dependence on diesel generation, may not cost less than diesel generation or non-

⁸⁴ Rehearing request at 28.

⁸⁵ EIS at C-7.

⁸⁶ *See, e.g.*, EIS at 4-13, 4-14, 4-47, 4-54, and 4-64.

⁸⁷ Environmental protection measures required by the license are listed in the license order at 109 FERC ¶ 61,105 at P 35.

⁸⁸ While we have previously concluded that Executive Order 12898 is, by its terms, not applicable to independent regulatory agencies including the Commission, *see, e.g., Sound Energy Solutions*, 107 FERC ¶ 61,263 at P 109 (2004), we have nonetheless determined, as discussed above, that the Falls Creek Project will not have significant impacts on the allottees.

⁸⁹ *See* 109 FERC ¶ 61,105 at P 1.

hydroelectric renewable energy, and the impact on retail electric rates has not been established. It argues that in the face of these uncertainties the Commission should not permit the destruction of a unique river in an extraordinary place.⁹⁰

55. The public interest does not require the complete elimination of Gustavus' use of diesel generation and, as discussed above, it is probable that the cost of project power over time will be lower than diesel generation. We cannot factor into our public interest determination effects on retail rates when, as here, financing for the project has not been obtained and the final costs of construction are unknown. It is, moreover, the responsibility of the RCA to ensure that Gustavus' retail rates are just and reasonable and we have no reason to think the RCA will not fulfill its responsibilities in that regard. Finally, Falls Creek will not be destroyed by development of the project. As previously noted, the license contains extensive conditions to prevent and minimize environmental impacts.

The Commission orders:

Sierra Club's request for rehearing is denied.

By direction of the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

⁹⁰ Rehearing request at 30-31.