

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**No. 06-71944**

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**FALL RIVER RURAL ELECTRIC COOPERATIVE, INC.,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION  
WASHINGTON, D.C. 20426**

**MAY 15, 2007**

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**STATEMENT OF THE ISSUE**

Whether the Federal Energy Regulatory Commission (Commission or FERC) properly dismissed an application for a hydroelectric license because the proposed license would have required substantial alteration to the project works, and potentially on the operation, of an already-existing hydroelectric license, without the existing licensee's consent, in violation of section 6 of the Federal Power Act (FPA), 16 U.S.C. § 799.

## STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

### STATEMENT OF THE CASE

#### I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns the Commission's rejection of an application for a hydroelectric license by petitioner, Fall River Rural Electric Cooperative, Inc. (Fall River), for a project to be constructed at the already-existing Hebgen Dam, located on the Madison River in Gallatin County, Montana. The Hebgen Dam is part of the Missouri-Madison Hydroelectric Project, which is licensed to PP&L Montana, LLC (PP&L).

The Commission dismissed Fall River's license application on the ground that the proposed project would substantially alter PP&L's existing licensed project works (*i.e.*, physical structure) without PP&L's consent, in violation of FPA section 6. Order Dismissing License Application and Denying Request for Abeyance, *Fall River Rural Electric Cooperative, Inc.*, 111 FERC ¶ 62,333 (2005), Petitioner's Excerpts of Record (PER) 584 (Dismissal Order). Fall River filed a request for rehearing of that decision, which the Commission denied. Order Denying Rehearing, *Fall River Rural Electric Cooperative, Inc.*, 114 FERC ¶ 61,152 (2006), PER 632 (Rehearing Order). In the Rehearing Order, the

Commission concluded that Fall River’s proposed project would result in a substantial alteration of not only Hegben Dam’s physical structure, but also potentially of PP&L’s project operations.

## **II. STATEMENT OF FACTS**

### **A. Statutory and Regulatory Background**

#### **1. The Role of FPA Section 6 in the Licensing Process**

Under the FPA, the Commission is authorized to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. FPA Section 4(e), 16 U.S.C. § 797(e). In deciding whether to issue a license, the Commission is required, “in addition to the power and development purposes for which licenses are issued,” to “give equal consideration to” the purposes of energy conservation, fish and wildlife protection, protection of recreational opportunities, and preservation of other aspects of environmental quality. *Id.*

“[T]he FPA was designed to insure that the licenses granted by FERC promote secure licensee expectations.” *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983) (*PG&E*). To this end, section 6 of the Act charges that a license “may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter and may be altered or surrendered only upon mutual agreement between the licensee and the Commission . . . .” 16 U.S.C.

§ 799.

“Correspondingly,” the court observed in *PG&E*, section 10(a) of the Act “authorizes FERC to require licensee modifications only ‘before approval.’” *PG&E*, 720 F.2d at 83 (quoting 16 U.S.C. § 803(a)). Also, section 10(b) restricts the licensee’s ability unilaterally to make “a substantial alteration or addition” in a licensed project, except in an emergency, “without the prior approval of the Commission.” 16 U.S.C. § 803(b).<sup>1</sup>

Thus, under these FPA provisions, “FERC’s power to limit license agreements and to reserve the right to require future alterations enables the Commission to accord section 6 the scope its terms indicate without unreasonably undermining the FPA’s broader purpose set out in section 10(a).” *PG&E*, 720 F.2d at 84. However, a licensee’s right to secure expectations is not unlimited, and section 6 “incorporate[s] some common sense limits.” *Id.* at 89. Accordingly, *PG&E* held that “section 6 admits a de minimis exception” limiting the scope of the provision’s protection only to “substantial alterations.” *Id.* at 89-90 & n.32; *see also id.* at 89 & n.31.

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<sup>1</sup> Additionally, a project modification can be made during the life of the license if it contains a “reopener clause,” which gives the licensee’s consent to any future modifications to project facilities or operations that may be required by the Commission. *See, e.g., California v. Federal Power Comm’n*, 345 F.2d 917 (9th Cir. 1965). While Fall River unsuccessfully argued below that reopener clauses in PP&L’s existing license supported its position, *see* Rehearing Order PP 27-28, PER 641, it does not make this argument before the Court.

Section 6 permits the Commission, therefore, without the consent of the existing licensee, to allow “such small encroachments on a license, comparable in their adverse impact to variations in conditions that investors might expect from other causes, such as, for example, annual fluctuations in water supply,” that do not interfere with the existing licensee’s expectations. *Id.* at 90. *See also Central Nebraska Public Power & Irrigation District*, 52 FERC ¶ 61,339 at 62,348-49 (1990) (“Section 6 was not meant to be a bar to the licensing of new projects where they might minimally interfere with existing projects”).

Since the *PG&E* decision, the Commission has developed a body of case law concerning whether an alteration in an existing project is substantial for FPA section 6 purposes. *See* Rehearing Order PP 11-12 & nn.12-21 (citing numerous cases), PER 635-636.

## **2. The Preliminary Permit Procedure**

Because the planning, construction and operation of hydroelectric projects are costly and complicated endeavors, section 4(f) of the FPA, 16 U.S.C. § 797(f), authorizes the Commission to issue preliminary permits in order to motivate applicants “to gather information necessary for licensing,” and “to encourage [them] to invest time and money in proposals for development.” *National Wildlife Federation v. FERC*, 801 F.2d 1505, 1508 & n.7 (9th Cir. 1986).

Under section 5 of the Act, 16 U.S.C. § 798, the recipient of a preliminary

permit maintains priority for a license against potential rivals for the term of the permit (not to exceed three years). However, “[u]nlike a license, a permit does not entitle its holder to construct a hydroelectric facility.” *City of Orrville v. FERC*, 147 F.3d 979, 982 n.1 (D.C. Cir. 1998) (citation omitted). Rather, a “permit merely secures the permittee’s place at the front of the line of potential applicants for the project license while it gathers the data necessary to support its application.” *Id.* (citations omitted); *see also Town of Summersville v. FERC*, 780 F.2d 1034, 1038 (D.C. Cir. 1986) (“A preliminary permit is issued to enable a permittee to study an inchoate project that may be licensed in the *future*. A license application . . . is an assessment of the *present* legality and feasibility of a definite project”) (emphasis in original).

## **B. The Proceedings Before The Commission**

The Hebgen Dam is one of nine developments that comprise the existing Missouri-Madison Hydroelectric Project, for which the Commission granted a license (as Project 2188) to PP&L in 2000. *PP&L Montana LLC*, 92 FERC ¶ 61,261 (2000) (*PP&L Montana*).

As part of the Missouri-Madison project, the Hebgen Dam functions as a facility to store and regulate water for the Missouri-Madison project’s eight downstream developments, as well as for another project, the Canyon Ferry Hydroelectric Project. *See PP&L Montana*, 92 FERC at 61,830, 61,840. Under

the conditions required by the Project 2188 license, the maximum pool elevation of the Hebgen reservoir is to be lowered a specified amount during the period from September to March, so that water flow is increased to the Madison River downstream. *Id.* at 61,837. The intent of this condition is to preserve the Madison River's status as an outstanding fishery resource.

On February 6, 2001, Fall River filed with the Commission an application for a preliminary permit to study the feasibility of the proposed Hebgen Dam Hydroelectric Project, which would utilize the project works of the existing Hebgen Dam. PER 1. As Fall River's application indicated, "the project would be located on the Hebgen Dam which is owned by [PP&L] and currently under FERC License #2188." *Id.* 4. Fall River intended to use the existing dam, but modifying the intake structure and conduit, and adding a powerhouse with an installed capacity of 6.7 megawatts.

On June 25, 2001, the Commission's Division of Hydropower Administration and Compliance, acting pursuant to delegated authority, issued a preliminary permit to Fall River to study the proposed project. *Fall River Rural Electric Cooperative, Inc.*, 95 FERC ¶ 62,265 (2001), PER 18.<sup>2</sup> The order noted Fall River's assurance that the proposed modifications and additions "will not

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<sup>2</sup> The order was amended on July 2, 2001, to correct the name of the applicant. PER 22.



impact” the existing project. *Id.*

On May 27, 2004, Fall River filed with the Commission a license application for its Hebgen Dam project. PER 23. The application proposed to add a powerhouse with a turbine to the Hebgen Dam, in order to transmit electricity to a substation owned by the company near Grayling, Montana. Fall River intended to employ the currently unused openings in the dam intake, as well as an existing conduit, to feed its powerhouse. In order to accomplish this, however, Fall River proposed to steel-line and pressure grout the conduit, as well as bifurcate it at a new valve house. *See* PER 44. The valve house would then channel the flow of water through a new 40-foot-long, 10-foot-wide penstock to the powerhouse. *Id.* Fall River further indicated that it would build the new powerhouse approximately 80 feet downstream from the toe of the dam, and lay a 25 kilovolt underground transmission line 9.5 miles long to connect the powerhouse to the Grayling substation. *Id.*

On July 7, 2004, Commission staff sent a letter to Fall River requesting further information concerning the license application. PER 560. Noting that Fall River proposed to use the flow releases from the Hebgen Dam governed by PP&L’s Project 2188 license, and to modify the already-licensed project works, the staff advised that “[w]ithout PPL’s consent to your proposed modifications . . . your application would be precluded by the requirements of FPA Section 6 and

therefore would be subject to rejection under 18 C.F.R. § 4.32 (e) (2).” *Id.*

Based on Fall River’s representation that it was in the process of negotiating an agreement with PP&L concerning the use of the existing project, the staff advised that it would continue to process the application. However, the staff ordered Fall River to file “additional information” within 30 days “showing that PP&L has not ruled out an agreement to the modifications of its Project No. 2188.” *Id.* 561.

During the remainder of 2004 and the beginning of 2005, Fall River notified the Commission a number of times that its negotiations with PP&L were continuing. *See* PER 562, 563, 564, 567. Additionally, on April 13, 2005, the Commission’s Office of Energy Projects held a technical conference concerning the license application, at which Fall River indicated that once an agreement could be reached concerning compensation to be made to PP&L for the physical alteration of its project, the parties could then turn to reaching an agreement concerning operational issues. *See* PER 572-573.

On April 29, 2005, PP&L sent a letter to Fall River (with a copy to FERC),<sup>3</sup> indicating that Fall River’s “economic counterproposal” with respect to “add[ing] generation at our Hebgen facility . . . is simply not acceptable to PP&L [.]” PER

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<sup>3</sup> The letter was to Fall River’s agent, Northwest Power Services, Inc. For convenience, we will simply refer to Fall River.

577. In light of the parties having failed to come to an agreement after an “extended period” of discussion, PP&L concluded that it was “not interested in proceeding any further with negotiations.” *Id.*

This letter was followed by a letter to the Commission by Fall River on May 4, 2005, acknowledging that its negotiations with PP&L “have come to a stalemate,” but insisting that it would continue to work with PP&L for a Site Use Agreement allowing the development of the proposed project. PER 578-79. Fall River requested that the Commission either continue to process its application or, in the alternative, “hold the licensing process in abeyance until such time” that the parties have resolved their differences. *Id.* 579.

However, on June 15, 2005, PP&L filed a response to Fall River’s letter, reiterating that the parties had not been able to come to a financial agreement, confirming the termination of negotiations announced in its previous letter, and advising that it did not intend to resume negotiations. PER 582.

### **C. The Commission’s Decision**

On June 28, 2005, the Director of the Commission’s Division of Hydropower Licensing (acting for the Commission pursuant to delegated authority) issued an order dismissing Fall River’s license application. Under section 6 of the FPA, the Director explained, “if Fall River’s proposed development requires an alteration of [PP&L’s] license,” its application must be

dismissed. Dismissal Order at 4, PER 587.

The Director determined that Fall River's proposed license would substantially alter PP&L's licensed project works by modifying the Hebgen Dam's existing intake structure, bifurcating and relining the dam's existing outlet conduit, and installing at the bifurcation point "a penstock extending to a new powerhouse to be constructed 80 feet downstream from the tow of the Hebgen Dam." *Id.* Such modifications by a new license to an existing project, the Director concluded, would "require the licensee's consent under Section 6 of the FPA." *Id.* at 4 & n.5, PER 587 (footnote omitted) (citing *Niagara Mohawk Power Corp.*, 29 FERC ¶ 61,005 at 61,010 (1984) (*Niagara Mohawk*)). Because PP&L had not so consented, the Director dismissed Fall River's application.

The Director also rejected Fall River's proposal to hold the Hebgen project proposal in abeyance pending the resolution of its differences with PP&L, in view of PP&L's stated intention not to engage in further negotiations. Dismissal Order at 5, PER 588. However, the Director noted that the "dismissal is without prejudice to Fall River re-filing its application, in the event it is able to obtain [PP&L's] consent for use of the Hebgen Development." *Id.* at 4, PER 587.

Fall River filed a timely request for rehearing with the Commission, alleging that the Dismissal Order was not based on substantial evidence, was inconsistent with the Commission's FPA section 6 precedent, and did not contain a reasoned

explanation for the dismissal.<sup>4</sup>

On February 16, 2006, the Commission denied Fall River's request for rehearing. At the outset, the Rehearing Order reviewed the Commission's precedent concerning the degree of encroachment on an existing project that would render an alteration "substantial" under FPA section 6. Rehearing Order PP 12-13, PER 636-637. In this regard, the Commission noted the similarity of the effect of Fall River's proposal on PP&L's license to that denied on section 6 grounds in *Niagara Mohawk*. *Id.* PP 13-14, PER 636-637.

Indeed, the Commission concluded, "[t]he proposed project requires alterations of the existing project's facilities that are much greater than the kind of physical alterations the Commission has previously found to be substantial . . . ." *Id.* P 15, PER 637. In this regard, the Rehearing Order emphasized that Fall River's proposal would alter the existing Hebgen Dam project works in numerous ways:

The proposed project here involves installation of new gates and screens on the intake tower, excavation of a large area of the dam in order to reconfigure and reline the outlet conduit, and installation of a valve house and a new penstock at the dam. Although construction activity will be temporary, the physical changes to the existing structures are not minor.

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<sup>4</sup> Fall River made several additional arguments on rehearing that it does not pursue on appeal.

*Id.* P 15, PER 637.

Fall River's intended construction of the proposed project, the Commission further explained, would "require PP&L to enter into an agreement with Fall River regarding coordination of activities, and responsibility for operation and maintenance of jointly used facilities." Rehearing Order P 15, PER 637. While "[s]uch obligations may not be insurmountable," the agency noted, "neither are they insubstantial." *Id.*

The Commission went on to find that, in addition to "significant alterations" to PP&L's project works, Fall River's "joint use of the intake structure and conduit, as well as operation of [its] penstock and powerhouse, could significantly interfere with [PP&L]'s ability to operate its project. . . ." Rehearing Order PP 16-17, PER 638. These operational problems included the potential to compromise PP&L's ability to meet its license conditions concerning flow requirements and dissolved oxygen levels, as well as possibly requiring new action by PP&L to prevent fish entrainment. *Id.* PP 18-20, PER 638-639. "The potential for such joint-use operational problems," the Commission concluded, "would be a substantial alteration of the existing license and therefore requires the consent of the existing licensee." *Id.* P 21, PER 639.

The Commission denied Fall River's contention that the Dismissal Order had erred by relying on the sporadic nature of its negotiations with PP&L. Rather,

the agency determined, the Dismissal Order “relies on the only relevant communications in this regard, the letters from [PP&L] stating that it does not intend to continue negotiations with Fall River regarding the proposed project.” Rehearing Order P 22, PER 639 (footnote omitted).

The Rehearing Order also rejected Fall River’s contention that the dismissal of its application did not run afoul of the intent of FPA section 6 to protect license investors, as Fall River claimed that its project would have no impact on PP&L’s revenues. In the agency’s view, however, the “legitimate expectations of licensees” protected by section 6 were not so limited (Rehearing Order P 15, PER 640):

Those expectations encompass more than protection against alterations that would diminish revenues; they include protection against significant interference “with operations already licensed, whether the interference will adversely affect the prior licensee’s physical plant, its ‘project works,’ or its supplies of water.”

*Id.* & n.35 (quoting *PG&E*, 720 F.2d at 83 & n.31).

Finally, the Commission considered Fall River’s argument that, if FPA section 6 were applicable, the agency should have denied Fall River’s preliminary permit application. However, as the agency explained, “a permit is issued with the recognition that, at the preliminary permit stage, the plan of the applicants must be considered to be both flexible and speculative.” Rehearing Order P 26 & n. 37, PER 640 (citing *City of Dothan, Ala. v. FERC*, 684 F.2d 159, 165 (D.C. Cir.

1982)). Thus, the Commission's policy is to issue a preliminary permit "unless a permanent legal barrier precludes the issuance of a license." *Id.* (footnote omitted). Here, the agency observed, while no such barrier existed during negotiations between Fall River and PP&L, Fall River was certainly on notice after it had filed for and received a preliminary permit, of the possibility that its later license application would be denied absent its failure to secure PP&L's consent. *Id.*

This appeal followed.



## **SUMMARY OF ARGUMENT**

The Commission's decision that Fall River's license application should be dismissed on the grounds that it would substantially alter both the project works and the potential operation of PP&L's Hebgen Dam is fully supported by substantial evidence and should be sustained by the Court.

The Commission determined that Fall River intended to modify the actual physical structure of PP&L's Hebgen Dam in several major particulars is directly based on representations contained in Fall River's license application, as well as other specific items in the record. Furthermore, the agency reasonably concluded that Fall River's project could cause a substantial alteration in PP&L's project operations, which are governed by certain conditions contained in PP&L's existing license. While the latter finding is based primarily based on predictions about potential impact of Fall River's project on the Hebgen Dam's aquatic environment, the Court should defer to the agency's scientific predictions within its area of special competence.

The Commission's decision to dismiss Fall River's application was also fully in accord with agency and judicial precedent concerning the degree and kind of alterations that are substantial for section 6 purposes. Indeed, there is no case in which the Commission has allowed physical changes to an existing project of the magnitude proposed here, absent the consent of the existing licensee.

Finally, the agency's decision was fully consistent with its grant of a preliminary permit to Fall River, as the existing licensee did not expressly deny its consent to the proposal until after Fall River had filed its license application.

## ARGUMENT

### I. STANDARD OF REVIEW

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews FERC orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g., City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). The Commission’s policy assessments are owed “great deference.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000); *see also, e.g., Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (“We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious, or manifestly contrary to statute”). The Commission’s interpretation of hydroelectric licenses it issues is similarly entitled to deference. *See City of Seattle v. FERC*, 923 F.2d 713, 716 (9th Cir. 1991) (citing *PG&E*, 720 F.2d at 84).

The Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b). Substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC’s] findings.” *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) (quoting *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985)) (alteration in original); *see also Sierra Pac. Power Co.*

v. *FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) (Commission’s “conclusions on conflicting engineering and economic issues” must be upheld “so long as its judgment is reasonable and based on the evidence”) (citation omitted).

Finally, “[i]n determining whether an agency’s action is arbitrary or capricious,” the Court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1097 (9th Cir. 2003) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998)) (internal quotation marks and citation omitted).

## **II. THE COMMISSION’S DECISION THAT SECTION 6 OF THE FEDERAL POWER ACT REQUIRED DISMISSAL OF FALL RIVER’S LICENSE APPLICATION WAS A REASONABLE EXERCISE OF THE AGENCY’S STATUTORY AUTHORITY**

### **A. The Commission’s Decision Is Supported By Substantial Evidence.**

As the Commission explained on rehearing, “[t]he degree of encroachment that makes an alteration ‘substantial’” for purposes of section 6 of the FPA “is a case-specific determination, based on consideration of: (1) physical alterations to existing project works; and (2) impacts on the operation of the project.” Rehearing Order P 12 & n.16 (citing *Universal Electric Power Corp.*, 92 FERC ¶ 61,242 at 61,768 (2000), and *Gas and Electric Department of the City of Holyoke*, 21 FERC ¶ 61,357 at 61,927 (1982)), PER 636.

Here, the Commission's decision that FPA section 6 required rejection of Fall River's license application, in the absence of PP&L's consent, was based on two independent findings. First, the agency concluded that Fall River's license would require substantial alterations to the existing project's physical facilities. Rehearing Order P 15, PER 637. Second, it determined that the proposed license could result in a substantial alteration in PP&L's ability to operate its project consistent with its license conditions. *Id.* P 17, PER 638. Each of these findings by the Commission is amply supported by substantial evidence.

### **1. Substantial Alteration To The Project Works**

The Dismissal Order set out the extensive physical changes that Fall River proposed to make to PP&L's existing project works:

Fall River proposes to modify PPL Montana's existing intake structure by inserting new gates and screens in two presently-closed intake openings. Also, Fall River would bifurcate PPL Montana's outlet conduit by incorporating a new concrete valve house into the outlet conduit and would install at the bifurcation point a penstock extending to a new powerhouse to be constructed 80 feet downstream from the toe of the Hebgen Dam. Fall River's installation of its valve house to bifurcate the Hebgen outlet conduit (50 to 60 feet back from the end of the conduit) will require extensive excavation of the earth fill covering the conduit.

*Id.* P 4, PER 587; *see also* Rehearing Order P 15, PER 637.

The Commission's description of the physical alterations Fall River proposed to make to PP&L's Hebgen Dam simply restates Fall River's own description in its license application. *See* License Application, Exhibit A,

“Proposed Modifications and New Facilities,” pages A-3 - A-4, PER 44-45;  
License Application, Outlet Conduit Analysis 1-2, PER 300-301.

Faced with this irrefutable evidence, Fall River nonetheless maintains that the Commission’s description is “materially inaccurate in several important respects.” Pet. Br. 35. Thus, Fall River insists, it “did not propose to install screens on the intake tower, because Montana Fish, Wildlife and Parks (Montana) has stated that screens are not necessary.” *Id.* (citing PER 517, 548). However, Fall River’s license application originally did propose, as the agency indicated, that trash racks on the intake structure “will . . . be replaced with screens.” License Application, Outlet Conduit Analysis at 2, PER 301. As the license application was processed, the question was raised whether *additional* screens would be necessary to prevent fish entrainment, and further study likely would have been required on this issue had the license application process continued. *See* Summary of Technical Conference at 3, PER 574. While Montana’s May 10, 2004, letter (PER 548) cited by petitioner opines that additional screens may be unnecessary, this alone does not render the Commission’s statement “materially inaccurate.”<sup>5</sup>

Similarly, Fall River condemns the Commission’s description of the

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<sup>5</sup> The other referenced record citation (PER 517) is an earlier Montana memorandum which does not mention screens, but indicates that Fall River’s proposed “hydro retrofit” of Hebgen Dam will likely have “little impact on the fishery” in the Madison River and adjoining Earthquake Lake.

applicant's plans "to 'reconfigure' the outlet conduit" as "a gross exaggeration." Pet. Br. 36 (citing PER 44). However, the page cited by Fall River, License Application, Exhibit A at A-3, explains that, because PP&L's outlet conduit is not designed to withstand the full reservoir pressure which will be required for power generation by Fall River's project, "[t]he outlet conduit will therefore be lined with a steel liner and pressure grouted to accommodate the pressure head of the power plant." *Id.* Additionally, Fall River represented to the Commission:

The outlet conduit will be bifurcated at a point approximately 50 to 60 feet upstream of the outlet terminus and a 10-foot diameter steel penstock will be installed to direct the stream from the outlet conduit to the powerhouse turbine generator system. The bifurcation and insulation [sic] valves will be located within a new concrete valve house located near the outlet conduit upstream of the powerhouse.

*Id.*

Fall River's own statement that the outlet conduit will be relined, grouted and bifurcated, reveals that the Commission did not exaggerate by describing Fall River's plan as one to "reconfigure" the conduit.

More importantly, Fall River's focus on isolated elements of its proposal emphasizes relative minutiae at the expense of the overall picture of the impact of its project on PP&L's existing dam. There is no dispute that Fall River intended to replace PP&L's existing intake gates, add two new gates, bifurcate the outlet conduit, add a valve house, and extend the outlet to its new powerhouse and turbine. *See* License Application, Outlet Conduit Analysis at 2, PER 301. This

record evidence of physical alteration is not a “mere scintilla,” but rather sufficient “relevant evidence as a reasonable mind might accept as adequate to support” the Commission’s conclusion that Fall River’s proposal would substantially alter the project works covered by PPL’s existing license. *Golden Northwest Aluminum, Inc. v. Bonneville Power Administration*, \_\_\_ F.3d \_\_\_, slip op. at 4915 (9th Cir. No. 03-73426 May 3, 2007) (quoting *Pub. Power Council v. Bonneville Power*, 442 F.3d 1204, 1209 (9th Cir. 2006), and *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In sum, the Commission’s finding that the impact of Fall River’s proposal on the Hebgen Dam’s project works would result in a significant physical alteration to PP&L’s existing license is based on substantial evidence and should thus be sustained by this Court.

## **2. Significant Interference with Project Operations**

As an additional ground for rejecting Fall River’s license application under FPA section 6, the Commission found that Fall River’s use of PP&L’s intake structure and conduit, and operation of its new penstock and powerhouse, “could significantly interfere with PP&L’s ability to operate its project.” Rehearing Order PP 16-17, PER 638. This determination by the Commission is also supported by the record and should be sustained.



The Commission concluded that Fall River’s proposal could pose a serious threat to PP&L’s project operations by its possible effect on flow releases and dissolved oxygen levels. Rehearing Order PP 18-20, PER 638-639. Because these “joint-use operational problems” involved important provisions of PP&L’s existing license, particularly the conditions with respect to flow requirements, the Commission concluded that they amounted to a substantial alteration under section 6. *Id.* P 21, PER 639.

There is no dispute that PPL’s Project 2188 license contains significant conditions concerning water flow at the Hebgen Dam. One of these requirements is an annual drawdown of the Hebgen Lake, “to stabilize aquatic habitat in the Madison River in order to enhance trout spawning success downstream” of the lake. *PP&L*, 92 FERC at 61,837; *see id.* at 61,846 (specifying continuous minimum flow on the Madison River downstream from the Hebgen Dam, limiting changes in the dam’s outflow to less than 10 percent per day annually, and requiring drawdown of Hebgen Reservoir annually between September and March). Furthermore, PP&L has the duty to monitor dissolved oxygen levels at the Hebgen Development, also to protect the aquatic habitat. *See PP&L*, 92 FERC at 61,849.

Unable to fault the Rehearing Order’s reliance on the terms of PP&L’s license and supporting Environmental Impact Statement, *see* Rehearing Order P 20

nn.28-29, PER 638, Fall River attacks the Commission's concern about potential interference with PP&L's project operation as a "litany of speculation" that "does not rise to the level of supportable factual conclusions." Pet. Br. 37.

Fall River ignores, however, that the Commission's broad responsibility under the Federal Power Act "for the adequate protection, mitigation, and enhancement of fish and wildlife . . .," 16 U.S.C. § 803(a), often requires the agency to rely on predictions concerning the environmental impact of the hydroelectric projects it licenses. Indeed, the Court has recognized that, with respect to such agency predictions "within its special expertise at the frontiers of science, we must be at our most deferential." *Forest Guardians*, 329 F.3d at 1099 (quoting *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 531, 1539-40 (9th Cir. 1993), and *Baltimore Gas & Elec. Co v. NRDC*, 462 U.S. 87, 103 (1983) (internal quotation marks omitted)) (Court deferred to United States Forest Service prediction concerning overgrazing by ungulates).

Fall River also takes issue with certain of the factual predicates of the Commission's predictions. The Commission indicated that while under PP&L's license the flow from the conduit drops into the tailwater below, reaerating any low dissolved oxygen caused by water withdrawn from the reservoir, Fall River proposed to divert the flow of water during construction. Rehearing Order P 19, PER 638. This action could potentially impair PP&L's ability to meet its flow

requirements, should circumstances interfere with the operation of the six manually-operated gates at the dam. *Id.* Furthermore, the flow requirements in PP&L's license are a necessary element in maintaining water quality and other habitat characteristics. Rehearing Order P 18, PER 638. Fall River argues that FERC's conclusion "is directly refuted by the record," which demonstrates that no significant changes are anticipated in the dissolved oxygen level as long as the diversion occurs "before the reservoir is stratified," *i.e.*, during the summer months, when the water maintains the same temperature at different levels. Pet. Br. 38 (quoting PER 103-104) (internal quotations omitted). Fall River asserts that its construction schedule will take this into account by proceeding with this phase during the spring or fall. *See* License Application, Exhibit E at E-32, PER 106.

However, Fall River's assurances do not vitiate the legitimacy of the Commission's concern. Fall River's application estimates an eight-month construction period, for three months of which the water will be diverted. *See* License Application Exhibit E at E-32, PER 107; *see also* Rehearing Order P 18, PER 638. Far from "directly refuting" the Commission's concern about impact of the diversion on dissolved oxygen levels, Fall River's application itself indicates that "the full potential" of the effect of construction on dissolved oxygen levels "needs to be addressed" with further studies. License Application Exhibit E at E-31, PER 106. And construction estimates are, of course, subject to slippage. As

maintenance of the dissolved oxygen level is a significant condition of PP&L's license, the Commission reasonably considered this potential operational problem for PP&L's existing license as a significant alteration.

Moreover, the Commission's concern about water quality effects was not limited to the period during which the project would be constructed. The Commission concluded that redirecting flow from a release at the surface of the tailwater to a subsurface release through a turbine, as contemplated by Fall River for its project operation, could reduce or eliminate reaeration of low dissolved oxygen water withdrawn from deep portions of the Hebgen reservoir during the term of any new license issued. *See* Rehearing Order P 19, PER 638. Because the water temperature does stratify during the summer, during that period water in the deeper portions of the reservoir has a lower temperature and dissolved oxygen level. Therefore, a decrease in the tailwater dissolved oxygen levels may be expected seasonally with the project as proposed, unless the Commission requires specific mitigation measures.<sup>6</sup>

Similarly, Fall River complains that while the Rehearing Order opines that finer fish screens might be necessitated by its proposal (which could lead to flow

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<sup>6</sup> The Supreme Court has recently emphasized the impact that releasing water through turbines can have on dissolved oxygen levels and thus on aquatic habitat. *See S.D. Warren Co. v. Maine Board of Environmental Protection*, 126 S.Ct. 1843, 1853 (2006).

maintenance problems due to clogging), Rehearing Order P 20, PER 638-639, Montana “characterized concerns about entrainment as ‘much ado about nothing.’” Pet. Br. 38 (quoting PER 517). However, while Fall River relies on an e-mail from a Montana employee, the state agency itself was less cavalier, noting that “[s]hould future monitoring indicate that entrainment is occurring and that screening would be an effective and necessary option to reduce entrainment, then screening may be required at some future time.” License Application, Exhibit E at E-128, PER 203. Furthermore, another resource agency, the United States Forest Service, indicated that entrainment studies concerning the Hebgen Reservoir had been “inconclusive,” so that “[a]dditional studies are needed prior to project construction.” *Id.* at E-125, PER 200. Indeed, Fall River’s application agrees with the Forest Service’s recommendation, conceding that “it may be safe to assume that some entrainment is taking place.” *Id.* Thus, Fall River itself indicated, at the April 13, 2005, technical conference, that it should continue monitoring for entrainment after project operation commenced, and that “[i]f operational monitoring were to detect a significant impact . . . implement mitigative measures, which could include fish screens.” R. 574.<sup>7</sup>

Once again, therefore, the evidentiary record provides sound support for the

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<sup>7</sup> We note that concerns and recommendations with respect to fish protection by other resources agencies, such as the United States Fish and Wildlife Service, would likely not be made until later in the licensing process.

Commission's concerns about the potential operational impact of Fall River's proposed project on PP&L's ongoing ability to satisfy its license conditions.

**B. The Commission's Rejection of Fall River's License Application Is Fully in Accord With Relevant Agency Precedent.**

In finding that Fall River's proposal required such substantial modifications to PP&L's existing project as to require the licensee's consent under section 6 of the FPA, the Dismissal Order particularly relied on the Commission's decision in *Niagara Mohawk*. See Dismissal Order at 4, PER 587. In the Rehearing Order, the Commission elaborated on this point, first describing the factual circumstances in several cases in which the agency had found no substantial alteration under section 6:

(1) tailwater encroachment resulting in a reduction in the existing project's generating capacity of approximately 0.3 percent;[<sup>8</sup>] (2) tailwater encroachment requiring modifications to the upstream project's fish passage facilities;[<sup>9</sup>] (3) use of water from a fish water release pipe that would not affect generation at the licensed project;[<sup>10</sup>] and (4) installation of a penstock under the existing project's power canal requiring minimal construction time and no interference with the existing project once constructed.[<sup>11</sup>]

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<sup>8</sup> See *Fluid Energy Systems, et al.*, 24 FERC ¶ 61,298 (1983), *reh'g denied*, 25 FERC ¶ 61,404 (1983) (*aff'd* in *PG&E*).

<sup>9</sup> See *P.U.D. No. 2 of Grant Co., WA*. 28 FPC 718, 720 (1962).

<sup>10</sup> See *Howard W. Blair*, 20 FERC ¶ 61,092 (1982).

<sup>11</sup> See *Weber Basin Water Conservancy District*, 50 FERC ¶ 61,409 at 62,263 n.13 (1990) (*Weber Basin*).

Rehearing Order P 12, PER 636 (footnotes omitted).

The Commission then went on to indicate examples of factual circumstances in which a proposed project was rejected pursuant to FPA section 6 because it required substantial alterations in an existing license:

Instances of substantial alterations include: (1) [*Niagara Mohawk*], involving a proposed project that would require modifications to the existing project's headgate structure, dam abutment repairs, and construction of a powerhouse and penstock that would temporarily curtail generation at the existing project; (2) construction of a new powerhouse adjacent to the existing powerhouse that would require substantial modifications to the latter, and modification of about 75 feet of the existing dam,<sup>[12]</sup> and (3) a proposed project that would require decommissioning of an existing, operating project.<sup>[13]</sup>

Rehearing Order P 13, PER 636-637 (footnotes omitted).

The Commission concluded that Fall River's proposal is more akin to those which had been found to require a substantial alteration to an existing project, including *Niagara Mohawk*, and "requires alterations of the existing project's facilities that are much greater than the kind of physical alterations the Commission has previously found to be insubstantial." Rehearing Order P 15, PER 637. Nor did the new project proposed in *Niagara Mohawk* appear to raise

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<sup>12</sup> See *JDJ Energy Co.*, 41 FERC ¶ 61,354 (1987) (*JDJ Energy*).

<sup>13</sup> See *Green Island Power Authority*, 110 FERC ¶ 61,034 at P 15 (2005), *reh'g denied*, 110 FERC ¶ 61,331 (2005).

potential environmental problems such as those identified by the Commission here.

“[I]t is well-established that an agency’s interpretation of the intended effect of its own orders is controlling unless clearly erroneous.” *Pacific Gas and Elec. v. FERC*, 464 F.3d 861, 868 (9th Cir. 2006) (quoting *Sw. Gas Corp. v. FERC*, 145 F.3d 365, 370 (D.C. Cir. 1998)). Here, the Commission’s finding that the alterations proposed by Fall River were similar to those in other substantial alteration cases, such as *Niagara Mohawk* and *JDJ Energy*, is manifestly reasonable. Like the proposals in those cases, and unlike the cases in which no substantial alteration was found, Fall River would, at the very least, significantly physically change PP&L’s existing Hebgen Dam project works, as we have described above.

Fall River attempts to undermine the Commission’s interpretation of its precedent by pointing out various factual differences in the cases on which the Commission relies. For example, Fall River asserts that the changes in PP&L’s project works necessitated by its proposal “are not remotely similar in scale to those proposed in *Niagara Mohawk*,” because in that case the construction would have halted the existing licensee’s generation. Pet. Br. 47. It bears mention, however, that the halting of generation in *Niagara Mohawk* would have been temporary. *See* 29 FERC at 61,010. In any event, the physical alterations proposed by Fall River are much closer in scope to those in *Niagara Mohawk* than



to alterations the Commission has found to be insubstantial, such as those in *PG&E* (tailwater encroachment resulting in a 0.3 percent generation capacity decrease) or *Weber Basin* (minimal construction time of new project, and no interference with existing project once completed).

Similarly, Fall River takes issue with the Commission's reliance on *JDJ Energy* because, unlike the instant case, the proposal there involved substantially modifying an existing powerhouse. Pet. Br. 47-48. However, the proposed alterations found to be substantial in *JDJ* (modification of the existing powerhouse to accommodate the new one, and modifying approximately 75 feet of the non-overflow section of the existing dam, *see* 41 FERC at 61,961) are, if anything, smaller in scale than those proposed by Fall River.

At bottom, Fall River's reliance upon particular facts in particular cases cannot mask the fundamental point that in no case has the Commission allowed a proposal to physically alter an existing licensee's actual project works, and to potentially upset the existing licensee's project operations, to the extent sought by Fall River, absent the consent of the licensee.

**C. The Commission's Denial of Fall River's License Application Is Legally Consistent with its Earlier Grant of Fall River's Preliminary Permit.**

In the Rehearing Order, the Commission rejected Fall River's contention that, if FPA section 6 required denial of its license application, the Commission

must have erred by issuing it a preliminary permit. Rehearing Order P 26, PER 640. As the Commission explained, because of the flexible and speculative nature of preliminary permit plans, “the Commission will issue a permit unless a permanent legal barrier precludes issuance of a license.” *Id.* & n.38 (citing *Town of Summerville, W.V. v. FERC*, 780 F.2d 1034, 1038-39 (D.C. Cir. 1986), *Kamargo Corporation, et al.*, 53 FERC ¶ 61,411 at 62,439-40, and *North Kern Water Storage District*, 16 FERC ¶ 61,082 (1981)).

At the time the Commission issued the permit to Fall River, lack of consent by the existing licensee did not present a legal barrier. In fact, Fall River concedes that it was in negotiation to secure PP&L’s consent as early as May 2002. *See* Pet. Br. 60.

Fall River nonetheless asserts before this Court that the Commission’s issuance of a preliminary permit for Fall River to investigate the feasibility of the Hebgen Dam project is inconsistent with the subsequent denial of the license application. According to Fall River, the Commission “expressly acknowledged” in granting the preliminary permit that Fall River’s proposed project would develop additional capacity at the site already licensed to PP&L, but did not raise section 6 concerns. Pet. Br. 54. Thus, Fall River maintains, section 6 should not bar its license application because “there has been no change in legal circumstances which would implicate a conflict” under that section. *Id.* 56.

Contrary to Fall River's claim, however, there had indeed been a definitive legal change between the time the Commission issued the preliminary permit and denied the license application: PP&L had terminated its negotiations with Fall River, ending the possibility that it would consent to Fall River's proposed alterations to the existing project.

Faced with this barrier, Fall River goes on to argue that the Commission somehow "arrived at its decision without considering whether PP&L in fact consented to Fall River's proposal." Pet. Br. 57. But this is nonsense, with respect to both PP&L's actions and the Commission's consideration of them. As described *supra*, PP&L had stated definitively, in its April 29, 2005, letter (PER 577) and again in its June 15, 2005, letter (PER 582), that it had terminated negotiations with Fall River concerning the proposed project. Accordingly, the Commission's Dismissal Order appropriately held that there was no consent by PP&L (Dismissal Order at 3-4, PER 586-587), and the agency confirmed this on rehearing. Rehearing Order PP 9, 26, PER 635, 639.

Fall River also argues that by failing to intervene in either the permit or license application proceedings, PP&L "implicitly consented to Fall River's proposal." Pet. Br. 57. Petitioner finds authority for this theory in *Weber Basin*, in which "FERC denied the existing licensee's late intervention and rejected its allegation that Section 6 precluded issuance of a new license." *Id.* 58. What Fall

River fails to observe, however, is that in *Weber Basin*, the Commission made its own independent assessment that the proposed project was not barred by Section 6 because it would not involve a substantial alteration of the existing licensee's project. 50 FERC at 62,263 & n.13 (penstock to be built by the new project will not interfere with the project works on operation of existing development, except during a 3-7 day construction period).

Fall River's remaining points are equally without merit. First, Fall River maintains that PP&L has never alleged that the proposed project violates section 6. Pet. Br. 59. Even if true, however, this is legally irrelevant: it is the Commission that is charged by the FPA with making such determinations, not a licensee. Second, Fall River faults the Commission for "fail[ing] to consider the consensual implications, if any, attendant to PP&L's active assistance to Fall River in preparing its license application." *Id.* However, once again, Fall River cites no precedent which would invest PP&L's negotiations with Fall River (which were certainly acknowledged by the Commission) with any legal significance for FPA section 6 purposes, and we are aware of none.

## CONCLUSION

For the reasons stated, the petition should be denied, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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