ORAL ARGUMENT SCHEDULED FOR NOVEMBER 4, 2010

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 09-1120 and 09-1315 (consolidated)

CITY OF IDAHO FALLS, IDAHO, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 15, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

The parties are as stated in the Petitioners' brief.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands*, FERC Stats. & Reg., Regs. Preambles ¶ 31,288 (February 17, 2009) ("2009 Notice"); and

2. *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands*, 129 FERC ¶ 61,095 (October 30, 2009) ("Rehearing Order").

C. Related Cases:

By order dated April 30, 2009, this Court in *City of Idaho Falls v. FERC*, No. 09-1120, granted an emergency stay of FERC's 2009 Notice at issue in this proceeding. By order dated January 15, 2010, this Court consolidated *City of Idaho Falls v. FERC*, No. 09-1120, with the instant case. The case on review has not been before any other court. Counsel is unaware of any other related case currently pending in this or in any other court.

/s/ Judith A. Albert
Judith A. Albert
Senior Attorney

Final Brief: September 15, 2010

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GLOSSARY

1987 FERC Rule	*Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, Order No. 469, FERC Stats. & Regs., Regs. Preambles ¶ 30,741(1987)
2008 BLM Rule	*Update of Linear Right-of-Way Rent Schedule*, 73 Fed. Reg. 65,040 (Oct. 31, 2008)
APA	Administrative Procedure Act
BLM	Bureau of Land Management
CFR	Code of Federal Regulations
Commission	Federal Energy Regulatory Commission
Forest Service	United States Forest Service
FPA	Federal Power Act
JA	Joint Appendix
P	FERC order paragraph number

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 09-1120 and 09-1315 (consolidated)

CITY OF IDAHO FALLS, IDAHO, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether, before issuing its 2009 list of federal land use fees owed by licensees of hydropower projects, the Federal Energy Regulatory Commission was compelled to initiate another round of notice and comment rulemaking, when: (1) the Commission had determined in a 1987 rulemaking that fees based upon fair market values, as established by other federal agencies administering federal lands, satisfy all Federal Power Act requirements for the fees; and (2) federal agencies administering federal lands had, in their own 2008 rulemaking, updated their land

valuations to reflect current fair market values as required by a 2005 Act of Congress.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Addendum to this brief.

INTRODUCTION

The orders under review are *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands*, 126 FERC ¶ 61,126 (February 17, 2009) ("2009 Notice"), JA 3, *reh'g denied*, 129 FERC ¶ 61,095 (October 30, 2009) ("Rehearing Order"), JA 31.

This case is about annual fees that hydropower project licensees pay to use federal lands. In 1987, after a notice and comment rulemaking, the Federal Energy Regulatory Commission ("Commission" or "FERC") concluded that fees based upon fair market land values would satisfy Federal Power Act ("FPA") requirements that the fees be reasonable, recompense the United States for use of federal land, and not unduly increase consumers' electric costs. FERC issued regulations stating the fees will be based on land valuations as established and updated by the U.S. Forest Service ("Forest Service"), and will be published each year in the Federal Register.

In 2005, Congress required the Bureau of Land Management ("BLM") and the Forest Service to update their land valuations. In 2008, following a BLM

notice and comment rulemaking, the Forest Service updated its federal land values. In 2009, the Commission issued the 2009 Notice, reflecting the new Forest Service land valuations. Nine licensees (of the 246 licensees using federal lands) requested rehearing of the 2009 Notice because the land values update had resulted in increases to the fees assessed to them. The Commission rejected their arguments.

This appeal followed.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Federal Power Act Requirements

Section 10(e)(1) of the FPA, 16 U.S.C. § 803(e)(1), requires Commission hydropower licensees using federal lands to:

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

See generally City of Vanceburg v. FERC, 571 F.2d 630, 633-34, 643 (D.C. Cir. 1977) (describing fees imposed by FPA § 10(e)(1) to compensate the United States for use of its land or other property). The collected land use fees are allocated to the United States treasury (12.5 percent), the federal reclamation fund (50 percent), and the treasuries of the states in which the particular projects are located (37.5 percent). FPA § 17(a), 16 U.S.C. § 810(a).

B. Regulatory Background

The Commission has employed various methodologies to determine the charges. The Commission's guiding motivation has been to find an administratively practical methodology which results in reasonably accurate land valuations. *See Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, Order No. 469, FERC Stats. & Regs., Regs. Preambles ¶ 30,741 at 30,584 (May 14, 1987); 52 Fed. Reg. 18,201 (May 14, 1987) ("1987 FERC Rule"); Rehearing Order P 3, JA 32.

Beginning in 1938, annual charges for use of government land were based on project-by-project appraisals. That approach proved uneconomical because appraisals were costly in comparison to the value of the land involved. 1987 FERC Rule at 30,584. In 1942, the Federal Power Commission, FERC's predecessor, developed a national average value of $50 per acre, to which it applied a four percent rate of return to derive an annual land use charge of $2.00 per acre. In 1962, the Commission increased the national average land value to $60 per acre. *Id*. at P 4, JA 32.

In 1976, the Commission revisited land fees. It rejected arguments that *any* fee increase would violate the FPA requirement that the Commission seek to avoid increasing the price of power to consumers, reasoning that this interpretation

would conflict with other FPA requirements that the fees be reasonable and recompense the United States for use of its lands. *Change in Annual Charges for Use of Most Government Lands*, 56 F.P.C. 3860, 3861-62 (1976); 42 Fed. Reg. 1226 (Jan. 6, 1977). Ultimately, the Commission continued its reliance on a uniform national average land value, raised the value to $150 per acre, and adopted a fluctuating interest rate to ensure that the rate of return would remain current. *Id*. at 3869.

In 1985, the Inspector General of the Department of Energy concluded that the existing methodology resulted in an under-collection of over $15 million per year because it used outdated land values. The Inspector General also found that a wide variation in land values made a zone index preferable to a national average. 1987 FERC Rule at 30,586-87. The Inspector General recommended that the Commission: (1) base land use charges on the current fair market value of the land being used; (2) use current long-term interest rates in its calculation; and (3) replace the national average land value with state-by-state averages. *Id*. at 30,587.

C. The 1987 FERC Rule

1. Adoption Of Forest Service-BLM Index

Accordingly, the Commission instituted a rulemaking to, *inter alia*, impose federal land use fees that more closely approximated the fair market value of the use of those lands. No existing index of land values conformed precisely to the

kind of land used for hydropower projects. *See* Rehearing Order P 6, JA 33. FERC proposed for comment two indices that might provide reasonable approximations: (1) an agricultural land values report published by the Department of Agriculture, which provided state-by-state average farm land and building values; and (2) a rental schedule for linear rights-of-way being developed jointly by the Forest Service and BLM. *See* 1987 FERC Rule at 30,587-89.

In the 1987 FERC Rule, the Commission (like its 1976 predecessor) rejected claims that land charges intentionally should be set low. FPA § 10(e)(1) requires licensees to pay fees "recompensing [the United States] for the use, occupancy, and enjoyment of its lands." A fair market rate is the most reasonable method of recompensing the government for the use of its lands. 1987 FERC Rule at 30,587. FERC found no merit to claims that charging fair market value for federal lands is prohibited by the FPA:

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

Id. at 30,588 (footnotes omitted).

The Commission found that a new approach to land use fees was warranted because: (1) the existing (1976) method resulted in under-collection of fees; (2)

the wide variation in land values across the country made a zone index more reasonable than a national average; and (3) a zone approach was now administratively practical because of the Forest Service-BLM index of land values. 1987 FERC Rule at 30,587; *see* Rehearing Order P 7, JA 33-34.

The Commission concluded that the Forest Service-BLM index would provide reasonable approximations for FPA land use fee purposes while the agricultural land values report would not. 1987 FERC Rule at 30,588-89. The agricultural index would "have to be adjusted to account for farm buildings, for the cleared, arable level land it represents, and for the fact that it represents private and not Federal lands." *Id*. at 30,589. Accordingly, the agricultural index would not be an efficient measure of land values for hydropower projects. *Id*.

The Commission recognized that the Forest Service-BLM methodology was "not precisely fitted to hydroelectric projects, but the zone values established by the Forest Service for linear rights-of-way [were] the best approximation available of the value of lands used for transmission line rights-of-way." *Id.* at 30,588. The methodology, which allowed different valuations for different parts of the country, was also fairer than using national averages. *Id*. at 30,589.

2. The Forest Service-BLM Index

The Forest Service-BLM rent schedule was calculated according to the following formula:

> Rental fee/acre = (zone value) x (impact adjustment) x (Treasury Security Rate) x (annual adjustment factor).

See Update of Linear Right-of-Way Rent Schedule, 73 Fed. Reg. 65,040 (Oct. 31, 2008) ("2008 BLM Rule"). "Zone value" reflected a survey of market values for the various types of land that the Forest Service and BLM allowed to be occupied by linear rights-of-way. There were eight fee zones based on the distribution of average land values by county in Puerto Rico and in each state except Alaska and Hawaii.[1] Each county was assigned to one of the eight zones, based on average land values in the county. The eight county zone values ranged from $50 to $1,000 per acre. *Id.*

"Impact adjustment" reflected differences in land-use impacts from different uses (*e.g.*, electric transmission lines were adjusted to 70 percent of the zone value, while roads and energy-related pipelines were adjusted to 80 percent of the zone value). *Id*. "Treasury Security Rate" reflected a reasonable rate of return for the use of federal lands. *Id*. at 65,041. Finally, "[t]he zone rent was adjusted annually by the change in the Gross Domestic Product, Implicit Price Deflator index." *Id.*

3. Regulation 11.2(b)

Regulation 11.2(b), promulgated by the 1987 FERC Rule, sets forth the fee requirements. *See* 18 C.F.R. § 11.2(b). Annual charges per acre for transmission

[1] Hawaii had no linear rights-of-way and rental fees in Alaska were determined on a case-by-case local market analysis.

line rights-of-way are equal to the per-acre charges established by the Forest Service-BLM rent schedule for linear rights-of-way. *Id.* Annual charges for lands used for other purposes are twice those charges. *Id*. The latter was a continuation of prior practice and recognized that transmission line rights-of-way, which can be used concurrently for other purposes, should incur lower land use charges than uses such as hydropower reservoirs. 1987 FERC Rule at 30,589.

Regulation 11.2(b) states further that:

> The Commission, by its designee the Executive Director, will update its fees schedule to reflect changes in land values established by the Forest Service. The Executive Director will publish the updated fee schedule in the Federal Register.

18 C.F.R. § 11.2(b). *See also* FPA § 10(e)(1), 16 U.S.C. § 803(e)(1) ("any such charges may be adjusted from time to time by the Commission as conditions may require").

Each year since the 1987 FERC Order, the Commission's Executive Director, in compliance with Regulation 11.2(b), has issued a fee update schedule, virtually identical to the 2009 Notice, stating that the update is based on the most recent schedule of fees prepared by the Forest Service and listing the charges for the year. The Commission has never sought comment with respect to these updates. Rehearing Order P 11, JA 36.

D. The 2008 BLM-Forest Service Update of the 1987 Schedule

"The zone values established in 1987 were never updated, although it is generally recognized that land values increased significantly in most areas from 1987 to the present." 2008 BLM Rule, 73 Fed. Reg. at 65,040. In 2005, Congress required BLM to revise the zone schedule to reflect current land values and the Secretary of Agriculture to make the same revisions for rights-of-way on National Forest System lands. *See* Section 367 of the Energy Policy Act of 2005, 42 U.S.C. § 15925.

Accordingly, BLM issued an advance notice of proposed rulemaking on April 27, 2006 and a notice of proposed rulemaking on December 11, 2007. BLM stated, *inter alia*, that it was considering using existing published information or statistical data, including certain agricultural statistics, for updating the schedule. After considering the comments received, BLM issued its update (the 2008 BLM Rule) on October 31, 2008. The Forest Service subsequently adopted the update in *Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands*, 73 Fed. Reg. 66,591 (Nov. 10, 2008).

To update the linear right-of-way fee zone values, BLM adopted the Census of Agriculture ("Census"), published every five years by the National Agricultural Statistics Service. 2008 BLM Rule, 73 Fed. Reg. at 65,043. The Census provides average per acre values by county or other geographical area for each state,

reporting the land values individually for cropland, woodland, pastureland, and an "other" category. 2008 BLM Rule, 73 Fed. Reg. at 65,043.

BLM found that: (1) lands administered by the BLM and the Forest Service are similar to the Census lands; (2) other Federal and state agencies regularly use the Census data when they need average per acre land values for a state or county; and (3) Congress had specifically endorsed use of this data in a formula for determining rent for organized camps on national lands. *Id.* BLM reduced the Census values by 20 percent to reflect the fact that BLM/Forest Service lands do not include irrigated cropland and land encumbered by buildings. *Id*. at 65,043-44.

II. This Case

A. 2009 Notice

In January 2009, the Commission sent letters to all licensees explaining that the Forest Service had revised its fee schedule in response to direction from Congress, and that consequently federal land use fees would increase substantially for many projects. Rehearing Order P 16, JA 37. The 2009 Notice issued on February 17, 2009. "In calculating the 2009 fees, the Commission used the same methodology that it has used for the past 21 years: it took the land values published by Forest Service and BLM, used the information in its files showing federal acreage occupied by individual projects, and applied the values for the counties in which individual projects were located, doubling the values for acreage

occupied by non-transmission line portions of hydropower projects." Rehearing Order P 17, JA 37.

Licensees requested rehearing or, in the alternative, stay of the 2009 Notice.[2] Their overarching legal argument was that the 2009 Notice amounted to a rulemaking, improperly issued without notice and opportunity to comment. Licensees urged the Commission to vacate the 2009 Notice, rescind any bills already issued pursuant to the Notice, and issue new bills pursuant to the notice issued in 2008. *See* Rehearing Request at 1-2, 27, JA 4-5, 30.

B. Rehearing Order

The Commission denied rehearing, finding Licensees' rehearing request inappropriate for two reasons. Rehearing Order P 20-23, JA 38-40. First, their primary quarrel was with BLM's new land valuations. Those valuations issued after a notice and comment proceeding. Licensees did not suggest a lack of notice or other deficiency, and one of them, in fact, had participated in the proceeding. *Id.* P 21, JA 39. The Commission concluded that the 2009 Notice "cannot serve as a vehicle for an attack on the now-final actions of other agencies." *Id.*

[2] The licensees requesting rehearing were City of Idaho Falls, Idaho; City of Tacoma, Washington; El Dorado Irrigation District; PacifiCorp; Portland General Electric Company; Public Utility District No. 1 of Chelan County, Washington; Puget Sound Energy; Sacramento Municipal Utility District; Southeast Alaska Power Agency; and Turlock Irrigation District. Southeast Alaska Power Agency did not join in this appeal.

Second, Licensees' rehearing request inappropriately sought to challenge the 1987 FERC Rule and Regulation 11.2(b). Regulation 11.2(b) requires the Commission to update the land use fees "to reflect changes in land values" established by BLM and the Forest Service. No party appealed the rule when it issued, and it has been final for over two decades. Rehearing Order P 22, JA 39. If Licensees now object to the Regulation's reliance on Forest Service land value updates, the proper recourse is to petition the Commission for a new rulemaking. *Id.* P 23, JA 39-40.

Despite the rehearing request's procedural shortcomings, the Commission also addressed its merits. The Commission rejected Licensees' notion that the 2009 Notice could be characterized as a rulemaking requiring notice and comment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. The Notice merely implemented Regulation 11.2(b) for 2009, complied with the Regulation's requirement that land use fees reflect Forest Service updates to land values, and created no new law, rights, or duties. *Id*. P 25-30, JA 40-43.

The Commission also rejected Licensees' argument that, because the Commission rejected an agricultural index in 1987 while BLM adopted a (different) agricultural index in 2008, the 2009 Notice constituted a change in Commission policy. *Id*. P 33, JA 44. The Commission's policy is to rely on land values as updated by BLM and the Forest Service. Accordingly, a change in the

BLM/Forest Service index does not constitute a change in that policy. Rehearing Order P 33, JA 44. The Commission also observed that the question whether the new BLM/Forest Service methodology was suitable for valuation of lands used for hydropower purposes was not properly before it, but that, in any case, the data now being used by BLM and the Forest Service are not the same as that addressed in the 1987 FERC Rule. *Id.* P 36, JA 45.

The Commission also found that it had not improperly delegated the establishment of land use fees to other agencies. Reliance on the BLM index, like reliance on other data prepared by another entity (such as the frequently used Consumer Price Index), does not amount to improper delegation. *Id*. P 37, JA 45.

C. Motion For Stay

On April 14, 2009, Licensees moved for a stay with this Court. On April 30, 2009, the Court issued an order staying the 2009 Notice only with regard to the nine licensees who had requested the stay. The Court's action mooted the group's request for an administrative stay. On May 13, 2009, the Commission issued interim bills to these nine licensees using the previous year's charges. *Id.* P 19, JA 38.

SUMMARY OF ARGUMENT

The 1987 FERC Rule was a notice and comment rulemaking. It promulgated Regulation 11.2(b), which required the Commission to issue notice of, and hydropower project licensees to pay, annual charges based upon land valuations as updated by the Forest Service. The 2009 Notice issued to comply with those requirements. It did not create new law, rights, or duties. Accordingly, it was not a rulemaking and did not require a new round of notice and comment.

That BLM, at the behest of Congress, updated its valuations of federal lands for the first time in more than twenty years, did not turn the 2009 Notice into a rulemaking, nor did BLM's use of an agricultural index (when the Commission had rejected use of a different agricultural index 21 years earlier). Regulation 11.2(b) requires annual fee notices to rely on land values as updated by BLM/Forest Service and that is what the 2009 Notice did. In any case, the data BLM used in its 2008 update are different from the data rejected by the Commission in 1987 and contain adjustments to avoid over-valuations.

Finally, Licensees had (and still have) remedies. They could have objected to the Commission's 1987 issuance of Regulation 11.2(b) requiring reliance on Forest Service land valuation updates. They could have participated in BLM's 2006-2008 rulemaking to challenge BLM's update methodology or petitioned the Commission to modify its regulations. Their recourse now, if they believe that the

Commission should no longer rely on valuations by the federal land management agencies, or that their federal lands should be valued differently from other federal lands, or that their fees should no longer be based on fair market value, or that Regulation 11.2(b) should be modified for some other reason, is to request a rulemaking.

ARGUMENT

I. Standard Of Review

Commission orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *see also, e.g.*, *National Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004); *Washington Gas Light Co. v. FERC*, 532 F.3d 928, 930 (D.C. Cir. 2008) (citations omitted). Under this deferential standard, the Court affirms the Commission's orders so long as the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

The Court also gives substantial deference to an agency's interpretation of its own regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *St. Marks Place Housing Co. v. U.S. Dept. of Housing & Urban Develop.*, 610 F.3d 75, 82 (D.C. Cir. 2010). The Court will defer to the agency's interpretation of

its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997); *see also Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (same).

Licensees' argument (*e.g.*, Br. 31 n.10) that the Commission's interpretation of its own regulations is not entitled to substantial deference is wrong. Licensees make numerous references to the Commission's "post-hoc rationalizations," and cite *Auer v. Robbins*, 519 U.S. 452, 461 (1996), for the proposition that an agency is not entitled to deference in interpreting its own rules when the interpretation is post-hoc rationalization. "Post-hoc rationalization," however, refers to statements of agency litigating counsel that "are wholly unsupported by regulations, rulings, or administrative practices." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988); *accord Auer*, 519 U.S. at 461 (citing *Bowen* and finding no post-hoc rationalization where an interpretation "reflect[ed] the agency's fair and considered judgment on the matter in question"). Here, the Rehearing Order represents the Commission's (not counsel's) "fair and considered judgment." Consequently, the Commission's reasonable interpretation of its regulation - - here, its 2009 implementation of Regulation 11.2(b) -- is entitled to substantial deference.

II. The 2009 Notice Did Not Require Notice And Comment

A. The 1987 FERC Rule Created A "Binding Norm"

At bottom, Licensees' complaint is that they will have to pay substantially higher fees now that the valuations of the federal lands they occupy have been updated for the first time in 20 years.[3] It is unsurprising, however, that land values have increased during that period. Assessing higher fees when land values have increased is fair and complies with: (1) the FPA § 10(e)(1) requirement that licensees "recompense the United States" for land use; (2) the decades-long FERC interpretation that "recompense" means fair market compensation; and (3) the 1987 regulation requiring fees to reflect land values as updated by the Forest Service. *See* discussion *supra* at 6; Rehearing Order P 9-10, JA 34-35.

In any event, Licensees now contend (Br. 25) that the 2009 Notice was flawed because it created a "binding norm" without notice and comment. The "binding norm," however, is Regulation 11.2(b), the propriety of which no one has challenged. That regulation, the product of the Commission's 1987 rulemaking,

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[3] It is noteworthy, however, that the largest increase cited in Licensees' rehearing request was for Portland General Electric's Clackamas Project No. 2195, where the fees will increase from $137,431 in 2008 to approximately $1,054,441 in 2009. Rehearing Request p. 18, JA 21. Portland General's website shows an average retail customer base of 815,869 in Oregon, so that the land fee increase should add a little more than one dollar to each customer's total bill for 2009. Also noteworthy is the fact, recognized by the Commission, that as a result of the 2009 Notice "[o]ther licensees, typically in the eastern part of the country, had their charges reduced." Rehearing Order P 17 n.27, JA 37.

binds the Commission to set fees reflecting updated land values and to issue annual notices listing those fees. The Commission, as well as Licensees, is bound by Regulation 11.2(b) in the absence of a new rulemaking. *See* Rehearing Order P 33, JA 44; *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) ("It is axiomatic that an agency must adhere to its own regulations.").

All of the Petitioners were FERC licensees at the time of the 1987 FERC rulemaking and two – Sacramento Municipal Utility District and Public Utility District No. 1 of Chelan County, Washington – participated in the 1987 rulemaking. Rehearing Order P 38 n.64, JA 46. All presumably have been paying bills pursuant to the regulation's requirements each year since 1987. Licensees, however, did not request the Commission to modify Regulation 11.2(b) to remove either the annual notice requirement or the requirement that fees reflect updated land valuations. Consequently, Regulation 11.2(b) remains the binding norm. *Id.* P 33, JA 44.

B. The 2009 Notice Issued Pursuant To Regulation 11.2(b)

A court will look at the substance and effect of an agency's pronouncement in determining whether the agency used appropriate procedures. *Id.* P 25 n.38, JA 40 (citing *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980)). Regulation 11.2(b) requires the Executive Director to issue annually a Notice listing the fees based on land values as updated by the federal land

management agencies. FERC's Executive Director and the 2009 Notice did precisely as the regulation requires. As the notice did nothing more than announce fees updated as prescribed in Regulation 11.2(b), it was not a rulemaking and required no notice or comment. *See* Rehearing Order P 25-26, 29-30, JA 40-43.

Neither Regulation 11.2(b) nor the 1987 FERC Rule made any exception for changes in the underlying land valuation methodology. *Id*. P 26-27, JA 40-41. To the contrary, Regulation 11.2(b) "specifically contemplates that the values provided by the other agency may change, and provides that the Commission will adopt values based on those changed values." *Id*. P 30, JA 43; *see also* 18 C.F.R. § 11.2(b) (FERC-ordered land use charges are "subject to adjustments as conditions may warrant," including updates "to reflect changes in land values established by the Forest Service").

That the 2009 Notice was procedural is supported by the fact that it "was not styled as a proposed rule, an instant final rule, or a rule of any kind." Rehearing Order P 25, JA 40. The notice entitled its action as a "Final rule; update of Federal land use fees," but the "Final rule" designation "stemmed from the fact that the annual updates implement regulations established by the 1987 final rule, and cannot by itself transform a simple update, required by our regulations, into a rulemaking proceeding." *Id*. Additionally, the notice was issued by FERC's

Executive Director, who has no authority to conduct rulemakings. *Id*. P 26, JA 40-41.

C. At Most, The 2009 Notice Could Be Characterized As An Interpretive Rule

Even if the 2009 Notice could be considered a rulemaking, it would properly be characterized as an interpretive rule. Rehearing Order P 28, JA 41. Interpretive rules are exempt from APA notice and comment requirements. 5 U.S.C. § 553(b)(3)(A). An interpretive rule "only 'reminds' affected parties of existing duties," while in a legislative rule "the agency intends to create new law, rights, or duties." *See* Rehearing Order P 28, JA 41 (citing *General Motors Corp. v. Ruckelhaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)); *see also* Rehearing Order P 28 n.44, JA 41- 42 (citing cases). Moreover, the fact that an interpretive rule might have a substantial financial impact does not itself create a need for notice and comment. *See id*. P 28 n.46, JA 42 (citing, *inter alia*, *Central Texas Telephone Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (noting court's rejection of "substantial impact" test in determining whether a rule is interpretative or legislative)).

The 2009 Notice created no new law, rights, or duties. "It simply informed licensees of the updated land use fees which, as they have been for over two decades, were based on the BLM-Forest Service land valuations. As it has done since 1987, the Commission took the figures provided by the Forest Service and

BLM and published the results in the Federal Register, to put licensees on notice as to how their annual charges bills would be calculated." Rehearing Order P 29, JA 42. Accordingly, notice and comment were not required.

D. Licensees' Contrary Arguments Lack Merit

1. The 2009 Notice Imposed No New Requirement

Licensees contend (Br. 25-26) that the 2009 Notice required notice and comment because it creates a binding norm, has general applicability, and defines obligations through prescription of rates. As demonstrated above, however, the generally applicable, binding norm was established by the 1987 FERC Rule when it promulgated Regulation 11.2(b). The 2009 Notice simply complied with the Regulation's requirements that a notice issue annually and state fees based upon land values as updated by the Forest Service. Rehearing Order P 25-26, JA 40.

The cases Licensees cite (Br. 26-27) do not support a finding that notice and comment were required here. In *Nat'l Association of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009), and *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987), the Court distinguished between a legislative rule (which is binding) and a general policy statement (which is not). *See Nat'l Association*, 569 F.3d at 426 (stating standards for distinguishing between statement of policy and binding rule subject to notice and comment); *Cmty Nutrition*, 818 F.2d at 946 (agency contended its actions constituted nonbinding statements of policy). The

Commission, however, has never argued that the 2009 Notice was a policy statement. The Notice is properly characterized as either a procedural issuance to comply with Regulation 11.2(b) or an interpretive rule. Rehearing Order P 25-30, JA 40- 43. Either way, the Notice did not require notice and comment. *See id*. P 28, JA 41; *id*. nn.42-45, JA 41- 42 (citing cases).

Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980), if relevant at all, supports the Commission. Legislative rules "narrowly constrict the discretion of agency officials by largely determining the issue addressed." *Batterton*, 648 F.2d at 702. Regulation 11.2(b) "narrowly constricts" the Commission by requiring it to base land fees on land values updated by the federal land management agencies and to publish the fees annually in the Federal Register. *See* Rehearing Order P 33, JA 44. The 2009 Notice merely implemented those requirements.

CropLife Am. v. EPA, 329 F.3d 876, 878 (D.C. Cir. 2003), held that an EPA press announcement of a moratorium on use of third-party human test data, when EPA had previously made clear that it would consider such data, was a binding regulation and should have been subject to notice and comment. In contrast, Regulation 11.2(b) states that the Commission will rely on land values updated by the Forest Service, and that is exactly what the Commission did in the 2009 Notice.

Licensees cite other cases (Br. 26-27) for the proposition that fee schedules are often rules for APA purposes. *See, e.g*. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002) (rejecting Department of Agriculture argument that a payment-in-kind program for sugar was not a rule requiring notice and comment). Here, the Commission did promulgate a rule -- Regulation 11.2(b) -- after notice and comment. The 2009 Notice issued to comply with that rule.

Licensees also contend (Br. 27-28) that the 2009 Notice is a rule for APA purposes because it was published in the Federal Register and the Code of Federal Regulations. Licensees did not make this argument in their rehearing request. Accordingly, the issue is jurisdictionally barred. FPA §§ 313(a) and (b), 16 U.S.C. § 825*l*(a) and (b); *see, e.g*., *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34-35 (D.C. Cir. 1992) ("Under the FPA's judicial review provision, 16 U.S.C. § 825*l*(b), parties seeking review of FERC's orders . . . must themselves raise in [the rehearing] petition all of the objections urged on appeal. Neither FERC nor this court has authority to waive these statutory requirements.").

In any event, Licensees' argument lacks merit. Licensees (Br. 28) cite *Wilderness Society v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006), for the proposition that CFR publication provides evidence that "an action is a rule intended to create legally binding regulations of general applicability, rather than a

mere general policy statement." The Commission however, has never argued that the 2009 Notice was a policy statement. Licensees' argument, moreover, overlooks the fact that the 2009 Notice implements (or interprets) a binding regulation. Accordingly, it is unsurprising that the fee schedule set forth in the Notice is, like Regulation 11.2(b) itself, generally applicable and binding.

2. The 2009 Notice Cannot Be A Legislative Rule

Licensees argue (Br. 34-35) that the 2009 Notice was a legislative rule because it is irreconcilable with the 1987 FERC Rule and creates new and binding obligations for the future. Regulation 11.2(b), however, requires issuance of a notice of fees based upon updated land values. The 2009 Notice is entirely consistent with these requirements. It did not "create" a binding obligation; it implemented for 2009 the binding obligations created by the Federal Power Act (which requires licensees to pay to use federal lands) and by Regulation 11.2(b) (which requires payments based upon fair market values of the lands as updated by the Forest Service).

This Court's *Batterton* decision (discussed at length at Br. 35-36) is distinguishable. There, the Department of Labor, without notice and comment, developed a new procedure to adjust unemployment statistics used in a jobs program. This Court found Labor's selection of a statistical methodology within the APA's broad definition of a rule, thus requiring notice and comment. Here, in

contrast, two rulemakings already have been conducted: the 1987 FERC rulemaking (establishing that fees would rely on land values as updated by the Forest Service), and the 2008 Forest Service/BLM rulemaking (updating the land values). Accordingly, *Batterton* is not analogous.

Licensees also object (Br. 37-40) that the 2009 Notice cannot be an interpretive rule because it does not explain or clarify a statute, rule, or prior order. However, as discussed *supra* at 21, an interpretive rule may just "remind affected parties of existing duties." *General Motors Corp. v. Ruckelshaus*, 742 F.2d at 1565; *see* Rehearing Order P 28, JA 41. Here, the 2009 Notice simply reminded FERC licensees of their existing obligation under Regulation 11.2(b) to pay annual charges, based on land values now updated by BLM and the Forest Service.

III. The Commission's Regulations Require Land Use Fees To Be Based On Land Values As Updated By The Federal Land Management Agencies

A. Licensees' Objection To Increased Land Valuations By BLM And Forest Service Is No Basis For Challenging FERC's Notice Of Land Use Charges

Licensees assert (Br. 29-30) that since BLM changed its valuation method when it updated the federal land values, FERC must be characterized as having changed its methodology as well. However, the Commission's regulations explicitly state that FERC will base annual charges for the use of government lands on the BLM-Forest Service index, "updating [the] fees schedule to reflect changes in land values established by [those agencies]." Rehearing Order P 22, JA 39; 18

C.F.R. § 11.2(b). The Commission obeyed these regulations when it issued the 2009 Notice, exactly as it had done each year for the 21 previous years. Rehearing Order P 22, JA 39.

Licensees' real quarrel is with the increased valuations promulgated by BLM and the Forest Service. *Id.* P 21, JA 38; *but see also id*. P 17 n. 27, JA 37 (valuations decreased for other licensees). BLM's rulemaking to bring the valuations of federal lands to current levels, as Congress required in the Energy Policy Act of 2005, commenced in 2006 and finished in 2008. Licensees do not claim that they were not on notice of that proceeding or that they failed to appreciate the significance of that proceeding. *Id.* P 21, JA 39. If Licensees did not believe that the valuation methodology proposed and adopted by BLM would accurately reflect current values of federal lands, they could have participated in that proceeding. If Licensees were concerned that the updates would result in higher land use fees, they also could have petitioned the Commission for a rulemaking prior to issuance of the February 2009 Notice. *Id*. P 23, JA 40; *see also id*. P 23 n.36, JA 40 (Licensees "were on notice of the procedures the Commission intended to follow" when they received letters in early January 2009 of the BLM/Forest Service updates and the resulting possible increases in their annual charges).

Licensees may still petition for rulemaking if they believe that the Commission should now abandon its long-standing policy of basing land use fees on fair market value, or that the federal lands they use are somehow different from other federal lands and therefore should be valued differently. *See* Rehearing Order P 23, JA 40-41. Licensees have done none of these things. Instead, Licensees requested the Commission to vacate the 2009 Notice and to re-issue bills for federal lands use pursuant to the fee schedule that was in place prior to the 2009 Notice. *See* Rehearing Request p. 27, JA 30. As discussed above, bills issued on such a basis, by failing to comply with the BLM and Forest Service valuations, would not have complied with Regulation 11.2(b).

Attacking the 2009 Notice, which implemented a valid, lawful, long-standing regulation exactly as the regulation required and exactly as the regulation has been implemented every year for more than 20 years, is not an appropriate remedy. "As stated by the courts, '[w]here a plaintiff is challenging the validity of a[n existing] regulation, the rule of exhaustion normally requires that the plaintiff petition the agency for rulemaking.'" Rehearing Order P 23, JA 39 (quoting and citing cases). That the Commission chose not to convert a simple annual update proceeding into a broader, generic reexamination of its land use valuation methodology (relying on the valuations of other federal lands agencies), at the instigation of the small minority of licensees adversely affected by the update, is

hardly a basis for reversal. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 230-31 (1991) (agency need not confront every issue, even related issues, all in the same proceeding).

Licensees assert (Br. 30 n.2) that "FERC's justification for finding that its methodology has not changed is based entirely on its clerical process for preparing the annual charges bills." That characterization is neither fair nor accurate. The Commission's justification is that its regulation requires bills to reflect land values as updated by the federal land management agencies. That requirement is a substantive one, and requires a rulemaking before considering "a fundamental change in the Commission's annual charges calculations, in a manner inconsistent with section 11.2 of [FERC's] regulations." Rehearing Order P 33, JA 44.

B. The Commission's Interpretation Of Its Regulation Is Reasonable

Licensees contend (Br. 30-33, 40) that: (1) the Commission's construction of the regulation is plainly erroneous; (2) the 1987 FERC Rule rejected an agricultural index as a basis for land valuation while the 2008 BLM Rule relies on an agricultural index; and (3) the Commission's construction of the regulation "as a permanent adoption of whatever [the Forest Service] decides to do in the future is unreasonable" and an abdication of its FPA responsibilities. Licensees are in error on all counts.

1. Language Of Regulation 11.2(b)

Contrary to Licensees' argument, the Commission's interpretation is entirely consistent with the language of the regulation. The regulation explicitly states that the fees schedule will "reflect changes in land values established by the Forest Service." There is no language limiting how the Forest Service (or BLM) may value federal lands. The 2009 Notice, which all parties agree reflects changes that the BLM and Forest Service made to land valuations, is entirely consistent with the regulation's language.

Licensees' argument (Br. 34-36), that the 2009 Notice is irreconcilable with the 1987 FERC Rule, similarly lacks merit. The 1987 FERC Rule found that fees based on land values satisfy the FPA and promulgated Regulation 11.2(b) requiring fees to rely on land values as updated by the Forest Service. The 2009 Notice is entirely consistent with these findings. *See* discussion *supra* at 6-7, 8-9.

The cases Licensees cite are inapposite. Licensees cite *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), and *Paralyzed Veterans v. D.C. Area*, 117 F.3d 579, 586 (D.C. Cir. 1997), for the proposition that an agency must hold a rulemaking before it can change its interpretation of a regulation. However, the Commission has made no such interpretive change here.

Licensees' argument (Br. 31), that Regulation 11.2(b) contemplates only an inflation adjustment, was not raised on rehearing and is thus jurisdictionally barred

(*see* discussion *supra* at 24). In any case, it is without merit. The inflation adjustment is an annual adjustment to the rents, not to the land values. *See* discussion *supra* at 8.

2. Agricultural Index

Licensees' argument, that the 1987 FERC Rule rejected an agricultural index while the 2008 BLM Rule adopted one, misses the point. The 2009 Notice was extremely limited. *See* Rehearing Order P 33, JA 44. It did nothing more than issue a list of fees reflecting land values updated by the federal land management agencies, as it was required to do by Regulation 11.2(b). As the Commission found, the change in BLM methodology might be a reason for the Commission to revisit Regulation 11.2(b), but it was not a change in the regulation itself. To the contrary:

> If the Commission were to have decided that the manner in which BLM and the Forest Service calculated the most recent index made it inappropriate for use as the basis for the Commission's establishment of annual fees and turned to another manner for valuing the use of federal lands, that would have required notice and comment rulemaking, because it would have represented a fundamental change in the Commission's annual charges calculations, in a manner inconsistent with [Regulation 11.2(b)].

Rehearing Order P 33, JA 44.

Licensees also overstate the significance of the Commission's 1987 rejection of the agricultural land value index then available. *Id*. P 34, JA 44. "[T]he data now being used by BLM and the Forest Service is not the same as that which the

Commission found in [its 1987 Rule] to be inappropriate: the data takes account of a variety of land uses, and BLM and the Forest Service are making certain adjustments to the [Census] data to avoid overvaluing the lands." *Id.* P 36, JA 45; *see also id*. P 35, JA 44 (describing BLM's modifications to the Census data).

Moreover, as the Commission found, the question of whether the new BLM methodology results in a reasonably accurate valuation of federal land for hydropower purposes was not before the Commission in this proceeding. Accordingly, the Commission did not reach any conclusive determination on that issue. *Id.* P 36, JA 45. It only had to determine now that the 2009 Notice issued as required by Regulation 11.2(b).

3. Permanent Adoption Of Whatever The Forest Service Decides

Licensees' assertion (Br. 32, 40-43) that the Commission has abdicated its statutory duties by "permanently adopting whatever [the Forest Service] decides to do in the future" is inaccurate. The Commission has delegated no statutory responsibilities. The Commission (in 1987 and earlier in 1976) found that FPA fee requirements were satisfied by fees that reflect fair market value. *See supra* at 4-6 (discussing earlier land fee proceedings). The Commission adopted the BLM/Forest Service index as the basis for reflecting fair market value. Licensees' "logic dictates that any affirmative choice by an agency to rely on data prepared by another entity that is subsequently updated (such as the frequently-used Consumer

Price Index) is an improper delegation or calls for re-evaluation every time the index being relied upon is updated." Rehearing Order P 37, JA 46.

In the instant case, Licensees were on notice in 1987 that the land fees would reflect updates to land values, in 2005 that Congress had ordered updates, and again in 2006 that BLM would update the land values. Licensees could have participated in the BLM rulemaking if they thought that BLM's new methodology would not reflect land values accurately. They could have petitioned the Commission for a rulemaking if they thought that BLM's methodology did not accurately reflect the value of their particular lands, or that the Commission's methodology should be changed for some reason. *See id.* P 20-23, JA 38-40. Licensees did neither.

For their part, Licensees contend (Br. 41) that *City of Tacoma v. FERC*, 331 F.3d 106 (D.C. Cir. 2003), requires the Commission to determine whether the 2009 fees comply with the FPA. However, the Commission determined in 1987 that fees based upon fair market values comply with FPA requirements. *See* Rehearing Order P 37, JA 45-46. The 2009 fees were based on current fair market values. Accordingly, no new justification was required. *See id*. P 33, JA 44.

C. The Rehearing Order Addressed The Concerns Of Dissenting Commissioner Moeller

Licensees' contention (Br. 43-44) that the Commission failed to address Commissioner Moeller's dissent is without merit. In the first place, Commissioner

Moeller did not dissent from any particularized majority findings, including that: (1) the 2009 Notice is not a rulemaking; (2) the Notice simply informed licensees of the updated land use fees which, like land use fees each year since 1987, were based on BLM-Forest Service land valuations; (3) even assuming the Notice could be deemed a rulemaking, it would be characterized properly as an interpretive, rather than legislative, rule; and (4) the data now being used by BLM and the Forest Service are not the same as that which the Commission found inappropriate for use in the 1987 FERC Rule.

Second, the dissent concludes that "the Commission should have opened a notice of inquiry or other rulemaking process." The Commission recognized, *see* Rehearing Order P 23, 33, JA 39, 44, that it could have initiated such a generic re-evaluation of land use charges, but simply chose not to do so in the context of its annual update. Rulemaking was not the remedy Licensees requested. They asked the Commission to rescind bills based on the 2009 Notice and to issue new bills based on the 2008 fee schedule on the theory that this is what Regulation 11.2(b) required. Rehearing Request at 27, JA 30. The Commission properly rejected that request on both procedural and substantive grounds. Rehearing Order P 20-24, JA 38-40.

CONCLUSION

For the reasons stated, the petition for review should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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Final Brief: September 15, 2010

City of Idaho Falls, Idaho, et al. v. FERC **Docket No. RM09-6**
D.C. Cir. Nos. 09-1120 & 09-1315 (consolidated)

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 7,915 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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ADDENDUM
Statutes & Regulation

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Section 10(e)(1) of the Federal Power Act, 16 U.S.C. § 803(e)(1) provides as follows:

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: Provided, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or

municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: Provided however, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

Section 313(a)&(b) of the Federal Power Act, 16 U.S.C. §§ 825*l*(a)&(b) provides as follows:

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be

considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

18 C.F.R. § 11.2(b), provides as follows:

costs of administration of the hydropower regulatory program. For every project with an annual charge determined to be above the maximum charge, that project's annual charge will be set at the maximum charge, and any amount above the maximum charge will be reapportioned to the remaining projects. The reapportionment will be computed using the method outlined in paragraphs (c) and (d) of this section (but excluding any project whose annual charge is already set at the maximum amount). This procedure will be repeated until no project's annual charge exceeds the maximum charge.

(g) *Commission's costs.* (1) With respect to costs incurred by the Commission, the assessment of annual charges will be based on an estimate of the costs of administration of Part I of the Federal Power Act that will be incurred during the fiscal year in which the annual charges are assessed. After the end of the fiscal year, the assessment will be recalculated based on the costs of administration that were actually incurred during that fiscal year; the actual costs will be compared to the estimated costs; and the difference between the actual and estimated costs will be carried over as an adjustment to the assessment for the subsequent fiscal year.

(2) The issuance of bills based on the administrative costs incurred by the Commission during the year in which the bill is issued will commence in 1993. The annual charge for the administrative costs that were incurred in fiscal year 1992 will be billed in 1994. At the licensee's option, the charge may be paid in three equal annual installments in fiscal years 1994, 1995, and 1996, plus any accrued interest. If the licensee elects the three-year installment plan, the Commission will accrue interest (at the most recent yield of two-year Treasury securities) on the unpaid charges and add the accrued interest to the installments billed in fiscal years 1995 and 1996.

(h) In making their annual reports to the Commission on their costs in administering Part I of the Federal Power Act, the United States Fish and Wildlife Service and the National Marine Fisheries Service are to deduct any amounts that were deposited into their Treasury accounts during that year as reimbursements for conducting studies and reviews pursuant to section 30(e) of the Federal Power Act.

(i) *Definition.* As used in paragraphs (c) and (d) of this section, *authorized installed capacity* means the lesser of the ratings of the generator or turbine units. The rating of a generator is the product of the continuous-load capacity rating of the generator in kilovolt-amperes (kVA) and the system power factor in kW/kVA. If the licensee or exemptee does not know its power factor, a factor of 1.0 kW/kVA will be used. The rating of a turbine is the product of the turbine's capacity in horsepower (hp) at best gate (maximum efficiency point) opening under the manufacturer's rated head times a conversion factor of 0.75 kW/hp. If the generator or turbine installed has a rating different from that authorized in the license or exemption, or the installed generator is rewound or otherwise modified to change its rating, or the turbine is modified to change its rating, the licensee or exemptee must apply to the Commission to amend its authorized installed capacity to reflect the change.

(j) *Transition.* For a license having the capacity of the project for annual charge purposes stated in horsepower, that capacity shall be deemed to be the capacity stated in kilowatts elsewhere in the license, including any amendments thereto.

[60 FR 15047, Mar. 22, 1995, as amended by Order 584, 60 FR 57925, Nov. 24, 1995]

§ 11.2 Use of government lands.

(a) Reasonable annual charges for recompensing the United States for the use, occupancy, and enjoyment of its lands (other than lands adjoining or pertaining to Government dams or other structures owned by the United States Government) or its other property, will be fixed by the Commission. In fixing such charges the Commission may take into consideration such factors as commercial value, the most profitable use for which the lands or other property may be suited, the beneficial purpose for which said lands or other property have been or may be

18 C.F.R. § 11.2(b), provides as follows:

used, and such other factors as the Commission may deem pertinent.

(b) Pending further order of the Commission and subject to adjustments as conditions may warrant, annual charges for the use of government lands will be payable in advance, and will be set on the basis of the schedule of rental fees for linear rights-of-way as set out in Appendix A of this part. Annual charges for transmission line rights-of-way will be equal to the per-acre charges established by the above schedule. Annual charges for other project lands will be equal to twice the charges established by the schedule. The Commission, by its designee the Executive Director, will update its fees schedule to reflect changes in land values established by the Forest Service. The Executive Director will publish the updated fee schedule in the FEDERAL REGISTER.

(c)(1) The annual land use charge payable for the nine month transition year of the implementation of this rule (1987) will be payable in three equal installments, with an installment included in the land use charges bills for 1988, 1989, and 1990.

(2) The charge for one year will equal an amount as computed under the procedures outlined in this section, or twice the previous full normal year's bill (not including the installments described in paragraph (c)(1) of this section), whichever is less.

(d) The minimum annual charge for use of Government lands under any license will be $25.

(e) No licensee under a license issued prior to August 26, 1935, shall be required to pay annual charges in an amount greater than that prescribed in such license, except as may be otherwise provided in the license.

[Order 560, 42 FR 1229, Jan. 6, 1977; 42 FR 6366, Feb. 2, 1977. Redesignated at 51 FR 24318, July 3, 1986; Order No. 469, 52 FR 18209, May 14, 1987; 53 FR 44859, Nov. 7, 1988]

§ 11.3 Use of government dams, excluding pumped storage projects.

(a) *General rule.* (1) Any licensee whose non-Federal project uses a Government dam or other structure for electric power generation and whose annual charges are not already specified in final form in the license must pay the United States an annual charge for the use of that dam or other structure as determined in accordance with this section. Payment of such annual charge is in addition to any reimbursement paid by a licensee for costs incurred by the United States as a direct result of the licensee's project development at such Government dam.

(2) Any licensee that is obligated under the terms of a license issued on or before September 16, 1986 to pay specified annual charges for the use of a Government dam must continue to pay the annual charges prescribed in the project license pending any readjustment of the annual charge for the project made pursuant to section 10(e) of the Federal Power Act.

(b) *Graduated flat rates.* Annual charges for the use of Government dams or other structures owned by the United States are 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours.

(c) *Information reporting.* (1) Except as provided in paragraph (c)(2) of this section, each licensee must file with the Commission, on or before November 1 of each year, a sworn statement showing the gross amount of energy generated during the preceding fiscal year and the amount of energy provided free of charge to the Government. The determination of the annual charge will be based on the gross energy production less the energy provided free of charge to the Government.

(2) A licensee who has filed these data under another section of part 11 or who has submitted identical data with FERC or the Energy Information Administration for the same fiscal year is not required to file the information described in paragraph (c)(1) of this section. Referenced filings should be identified by company name, date filed, docket or project number, and form, number.

(d) *Credits.* A licensee may file a request with the Director of the Office of Energy Projects for a credit for contractual payments made for construction, operation, and maintenance of a

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 15th day of September 2010, served the following upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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