No. 05-1871

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FPL ENERGY MAINE HYDRO LLC,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

STATE OF MAINE,
INTERVENOR.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

JENNIFER AMERKHAIL
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, DC 20426
(202) 502-8650

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STATEMENT OF THE ISSUE

Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably exercised its discretion to stay the effectiveness of a FERC-issued license for an existing dam and reservoir project pending the conclusion of state proceedings on the project's water quality certification.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTERSTATEMENT OF JURISDICTION

FPL Energy Maine Hydro LLC ("FPL Energy") invokes this Court's jurisdiction under Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b). As explained more fully *infra* (*see* pp. 12-14), FPL Energy's case is unripe because all the Commission has done at this time is to stay FPL Energy's license, and because FPL Energy objects, at bottom, to actions (license modification or revocation) that the Commission has not yet taken. Indeed, the potential actions that concern FPL Energy may never come to pass. Additionally, FPL Energy has not demonstrated that it has suffered any concrete "injury in fact" from the Commission's limited stay orders. Without such a showing, it has failed to satisfy the constitutional requirements for standing. Accordingly, the petition for review should be dismissed.

If this appeal is not dismissed, FPL Energy's argument concerning the finality of its new license should be rejected. FPL Energy argues that its license was final when it accepted the license and is, therefore, unalterable without its consent. Br. at 42-43. FPL Energy did not raise this issue with sufficient specificity on rehearing below to the Commission to warrant judicial review by

this Court. 16 U.S.C. § 825*l*(b); s*ee also, e.g., Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 424 n.6 (1st Cir. 2001); *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006).

STATEMENT OF THE CASE

The challenged orders stay the effectiveness of the new long-term license issued to FPL Energy by the Commission for the continued operation of the Flagstaff Storage Project in Maine. While a request for rehearing of the licensing order was awaiting Commission action, the Maine agency with responsibility for determining the project's water quality certification rescinded, on appeal, the project's earlier-issued certification. At the same time it addressed the pending rehearing request, the Commission stayed the license pending completion of state court proceedings on the water quality certification.

FPL Energy protested the stay of its license, arguing that the Commission cannot give effect to Maine's action because the rescission of FPL Energy's water quality certification occurred after the one-year deadline in the Clean Water Act ("CWA"). Noting that the Maine action called into question the project's compliance with applicable water quality standards and given the resulting uncertain status of the certification, the Commission concluded that the best course of action was to stay the license pending appeal of these issues by FPL Energy in state court.

FPL Energy lost its appeals of the water quality certification decision in state courts. FPL Energy continues to operate the project pursuant to annual licenses. It now asks this Court to invalidate the Commission's orders and lift the stay on its long-term license.

STATEMENT OF FACTS

I. Statutory Background

The Commission licenses hydroelectric projects on jurisdictional waters pursuant to section 4(e) of the Federal Power Act ("FPA"), 16 U.S.C. § 797(e). FPA section 15, 16 U.S.C. § 808, sets forth the procedures for relicensing, where the Commission may issue a "new" license to an existing licensee.

Under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), the Commission may not issue a license for an activity that may result in any discharge to waters of the United States unless the certifying agency for the state in which the discharge originates has either issued water quality certification for the activity or has waived certification. Section 401(a)(1) further provides that certification is waived if the state certifying agency fails or refuses to act on a certification request within a reasonable period of time, not to exceed one year, after receipt of such request. Section 401(d) of the CWA, 33 U.S.C. § 1341(d), requires the Commission to "incorporate all state-imposed certification conditions into hydropower licenses . . . ." *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 102 (2d Cir.

1997) (overturning FERC orders that modified state-imposed certification conditions).

II. History of Flagstaff Storage Project Licenses

A. Relicensing Application and License Order

The Flagstaff Storage Project, a project consisting of a dam, a reservoir and appurtenant facilities on the Dead River in Maine, was first issued a licensed by the Commission in 1979 for a term expiring December 31, 1997. *See FPL Energy Maine Hydro LLC*, 106 FERC ¶ 62,232 at PP 3, 7 (2004), JA 106, 107 ("License Order"). The project stores water for flood control and for downstream uses, including the production of hydroelectric power. *Id*. at P 2, JA 105. On December 25, 1995, pursuant to FPA section 15, 16 U.S.C. § 808, FPL Energy's predecessor filed an application for a new license for the project. *Id*.

At the same time, FPL Energy's predecessor petitioned Maine for a water quality certification as required by section 401 of the Clean Water Act, 33 U.S.C. § 1341. This application for a water quality certification was withdrawn and simultaneously refiled every year from 1996 to 2002. Refiling of Application, JA 49 (listing dates of application filings). On November 14, 2003, the State of Maine, Department of Environmental Protection ("Maine Department") notified the Commission that it granted a Water Quality Certification ("2003 Certification") for the project that same day subject to several conditions. Maine Department

Comments at 1, JA 54. Subsequently, on December 10, 2003, the Appalachian Mountain Club ("AMC" or "Club") and three other non-profit corporations notified the Commission of their pending appeal of the Maine Department's certification order. AMC Letter at 1, JA 98.

On March 30, 2004, the Commission issued FPL Energy a new 32-year license for the project, effective March 1, 2004, and incorporated the conditions in the Maine Department's certification order into the license. License Order at Ordering Paragraphs A and D, JA 127, 129. The Commission also explained:

> This order is final unless a request for rehearing is filed within 30 days from the date of its issuance . . . . The filing of a request for rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order, except as specifically ordered by the Commission.

Id. at Ordering Paragraph G, JA 143.

B. Initial Rehearing Request and Maine Board Reversal of Maine Department's Certification Decision

The Club timely filed a request for rehearing of the License Order, noting, *inter alia*, that it and three other non-profit corporations had "successfully appealed the State of Maine 401 Water Quality Certification for this Project's Lake Management Plan on April 1, 2004." AMC Rehearing Request at 3, JA 153 (requesting amendment of the license to be included as a party for consultation on the Lake Management Plan). Thereafter, the Commission notified parties that it would act on the rehearing request "follow[ing] receipt of further information

regarding the status of the project's water quality certification." *FPL Energy Maine Hydro LLC*, Order Granting Rehearing For Further Consideration (issued May 17, 2004), JA 158 (Tolling Order).

On August 9, 2004, the Maine Department notified the Commission that, on appeal, the Maine Board of Environmental Protection ("Maine Board") had rescinded the 2003 Certification and denied FPL Energy's certification application without prejudice. Notification of Action on Appeal of Certification at 2, JA 192; *see also* FPL Energy Submission of Maine Board Order at 2, JA 162 (noting that on April 1, 2004, the Maine Board heard oral arguments and preliminarily voted to grant appeal and deny certification).

"The [Maine] Board found that the [Maine] Department had employed a new standard for assessing water quality when it used an impoundment-to-impoundment standard, which compares a storage reservoir to another storage reservoir" rather than "[t]he old standard, . . . a natural lake standard, which compares a storage reservoir to a natural lake." *FPL Energy Maine Hydro LLC v. Dep't of Envtl. Prot.*, 2007 ME 97, ¶ 6, 926 A.2d 1197, 1200 (Me. 2007) ("Maine Certification Case") (upholding Maine Board decision), *cert. denied*, 2008 U.S. LEXIS 186 (U.S. Jan. 7, 2008). Finding that use of this new legal standard was improper, the Maine Board further determined that one of two actions was necessary for FPL Energy to obtain a certification for the project. *Id*. Either FPL

Energy must conduct a use attainability analysis, a review required when a state seeks a less stringent water quality standard, or Maine must obtain approval for its new impoundment-to-impoundment standard from the Environmental Protection Agency ("EPA"). *Id.*

C. Challenged FERC Orders

The issue now before the Court arises out of the Commission's action in response to the Club's rehearing request and notification of the Maine Board's denial of FPL Energy's water quality certification. *See FPL Energy Maine Hydro LLC*, 108 FERC ¶ 61,261 (2004), JA 208-213 ("Stay Order"). On September 21, 2004, the Commission granted rehearing to the limited extent of staying effectiveness of the license pending resolution of water quality certification issues. *Id*. at PP 3, 12, JA 208-209, 212.

In the Stay Order, responding to FPL Energy's assertions in its submittal of the Maine Board's opinion, the Commission found that Maine had not waived certification by taking action on appeal more than one year after submission of the request for certification. Stay Order at P 7, JA 210. The Commission also rejected FPL Energy's assertion that FERC must ignore any action by Maine that occurred after the one-year period. *Id*. at P 8, JA 210. Instead, giving the Maine Board decision necessary legal effect, the Commission followed its precedent and stayed the new license. *Id*. at 9, JA 210-211; *see also FPL Energy Maine Hydro LLC*,

111 FERC ¶ 61,104 at P3 (2005), JA 244 ("Rehearing Order") (summarizing action in Stay Order as FERC choosing "the better course of action" between invalidating and staying the new license). Although the Commission did not modify the license to account for the Maine Board's rescission of the 2003 Certification, the Commission expressly reserved its "authority to modify the new license as necessary to incorporate the conditions to any new certification that is issued." *Id*. at P 12, JA 212; *see also id*. at P 10, JA 211 (finding that license was not final and FERC has authority to unilaterally amend it until it becomes final).

On April 19, 2005, in the second order on review here, the Commission denied FPL Energy's request for rehearing of the Stay Order. Rehearing Order at PP 6-11, JA 245-247 (rejecting assertion that Maine Department waived certification by failing to act within one year), PP 12-13, JA 247-248 (rejecting interpretation of court precedent as requiring FERC to disregard the Maine Board's rescission of certification), PP 14-15, JA 248-249 (providing additional FERC precedent on stay of licenses), and PP 17-25, JA 249-253 (rejecting argument that project does not require certification because it will not result in a discharge).

D. Status of State Water Quality Certification Litigation

After the Maine Board rescinded the 2003 Certification, FPL Energy appealed the decision to the Superior Court of Maine, Kennebec County. *See Maine Certification Case*, 2007 ME 97, ¶ 8, 926 A.2d at 1200. On May 26, 2006,

a little more than a year after the Commission's order staying FPL Energy's new license, the Superior Court affirmed the Maine Board. *Id*. FPL Energy took a subsequent appeal and the Maine Supreme Court upheld the Superior Court's decision (affirming the Maine Board's decision). *Id*. at ¶ 43, 926 A.2d at 1209. After the U.S. Supreme Court denied FPL Energy's petition for a writ of certiorari, the instant appeal, previously held in abeyance during state court litigation, was reactivated.

SUMMARY OF ARGUMENT

After the Maine Board rescinded FPL Energy's state water quality certification, the Commission took the limited action of staying the effectiveness of FPL Energy's license pending the resolution of state court proceedings on the certification. Despite FPL Energy's claims to the contrary, the Commission did not take any action, such as altering or vacating the license, that gave legal effect to the Maine Board decision. The Commission also did not decide how it would proceed to modify a license if a state-issued certification was invalidated after the one-year deadline for certification contained in the Clean Water Act. Rather, in taking the single step to delay final action on the license so that FPL Energy could pursue judicial review of the Maine Board decision, the Commission left open what future actions it would take should FPL Energy fail in its efforts to overturn the Maine Board decision and to obtain necessary state water quality certification.

Because FPL Energy's claims are based on what future actions the Commission can take in recognizing the Maine Board decision, and because the Court has no context for evaluating these future actions, the petition for review is premature. FPL Energy also has not demonstrated the requisite injury from the appealed orders to meet Article III standing requirements. Accordingly, the Court lacks jurisdiction and the petition for review should be dismissed

Assuming jurisdiction, the Commission reasonably acted within its

discretion to control the timing and disposition of its licensing proceeding. By awaiting the completion of parallel state proceedings, concerning necessary state water quality certification, the Commission respected the important role that states play in licensing decisions. Like a district court that grants a stay of judicial proceedings, the Commission is entitled to substantial deference by the Court in evaluating its stay decision in the challenged orders.

ARGUMENT

I. The Court Lacks Jurisdiction Over This Case Because FPL Energy's Claim is Unripe and It Has Not Demonstrated Standing

A. The Commission's Stay of FPL Energy's License Is Not An Action Ripe For Judicial Review

In determining the ripeness of a claim, the court assesses the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *City of Fall River v. FERC*, 507 F.3d 1, 6 (1st Cir. 2007) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

FPL Energy's case is predicated on the Commission having taken actions to modify the substance of the license, actions that the Commission did not take in the orders on appeal. *See* Br. at 11 (alleging the Commission "clarified how the Commission intends to proceed if a state-issued certification in support of a Commission license is later purportedly invalidated"), Br. at 29 ("The Commission could not lawfully incorporate untimely action taken by the [Maine] Board"), Br.

at 40 (alleging that "the Commission has no discretion to subsequently remove [certification conditions] on its own initiative"), Br. at 43 ("the Commission had no legal authority to alter the New License"), Br. at 53 ("federal agency has very limited ability to change the terms of the federal permit").

In the orders on review, the Commission's sole action was to stay the effectiveness of the license pending the outcome of state proceedings on the water quality certification. Stay Order at P 12, JA 212; Rehearing Order at P 3, JA 244. The Commission has not given any effect to the state proceedings on the certification except to stop the clock while those proceedings were ongoing. The Commission has not vacated or amended any of the terms of FPL Energy's license for the Flagstaff Storage Project. Nor has the Commission determined how it will treat Maine Board's rescission of the 2003 Certification now that state courts have upheld the Maine Board's decision. *See* Stay Order at P 12 n.15, JA 212 (providing that "[i]f the certification denial is upheld we will determine the appropriate course of action with respect to the new license").

Moreover, FPL Energy still has at least one additional opportunity, and perhaps more, to resolve issues related to its certification and have the stay lifted on its new license. *See* Stay Order at P 5 n.6, JA 209 (stating FERC policy that an original license application is dismissed only after the second denial of a Clean Water Act certification and that "relicense applicants [such as FPL Energy] are

afforded greater flexibility" to address certification denials). The Maine Board dismissed FPL Energy's certification without prejudice to filing a new application. *See supra* p. 7. FPL Energy has not explained to the Commission or this Court whether it has filed (or intends to file) another certification application with the state regarding the licensed Flagstaff Storage Project.

In these circumstances, the Commission may never amend FPL Energy's license or dismiss its application. *See City of Fall River*, 507 F.3d at 6 (a claim is unripe that "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all'" (citation omitted)). Should the Commission amend the terms of the license or take the rare action of dismissing FPL Energy's relicensing application in response to state denial of certification, FPL Energy will have the opportunity to request rehearing of the Commission's decision and, therein, to make the same arguments that it makes to this Court in this appeal. *See id*. at 7 (concerns about hardship to party is lessened by party's ability to challenge any future FERC decision on the same project). FPL Energy's claim is premature because the Commission has not taken any of these actions in addressing the rescinded 2003 Certification, FPL Energy would not be barred from seeking appeal of such later actions, and immediate review of the stay action could result in the court "deciding issues in a context not sufficiently concrete to allow for focus and intelligent analysis." *Id*. at 6.

B. FPL Energy Has Not Satisfied the Requirements Of Article III Standing.

A party seeking judicial review of Commission orders must satisfy Article III's requirement of standing and the Federal Power Act's "aggrievement" standard in FPA § 313(b), 16 U.S.C. § 825*l*(b). *See, e.g., Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2002). Although FPL Energy is the licensee in (and thus the subject of) the orders on appeal, its standing to seek review of the challenged orders is not self-evident. "The burden to show standing is upon the litigant whose standing is challenged." *Town of Norwood v. FERC*, 202 F.3d 392, 405 (1st Cir. 2000) (citation omitted).

FPL Energy has not demonstrated the requisite "injury in fact" or threat of such injury from the Commission's stay of the effective date of FPL Energy's long-term license. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Town of Norwood*, 202 F.3d at 406 (citing *Bennett*). FPL Energy is not deprived of an operating license; it continues to operate the project pursuant to annual licenses. License Order at P 3, JA 106. FPL Energy makes no argument that it somehow is now worse off by operating under annual licenses, replicating the terms of the original license, rather than under the new (stayed) license. Nor is FPL Energy threatened with loss of its new long-term license from the challenged stay orders. While loss of the long-term license is a concrete and particularized harm, such loss will not materialize unless

and until the Commission denies FPL Energy's license application, an action that is by no means certain to occur. Stay Order at P 5 n.6, JA 209 (allowing more flexibility for relicensing applications than original license applications when certifications are denied).

II. The Commission Acted Reasonably in Staying the Effectiveness of FPL Energy's License

A. Standard of Review

FERC orders are generally reviewed by the courts under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). When "acting within their respective bailiwicks, [agencies are] due substantial deference in interpreting and implementing [the statute that they administer]." *Caribbean Petroleum Corp. v. EPA*, 28 F.3d 232, 234 (1st Cir. 1994). Thus FERC is due substantial deference in implementing the licensing provisions of the Federal Power Act, "so long as its decisions do not collide directly with substantive statutory commands and so long as procedural corners are squarely turned." *Id*. (citation and punctuation omitted). Here, to the extent the Commission was acting pursuant to its authority over licensing decisions to determine the proper effectiveness of FPL Energy's license, its decision to stay the license is due deference.

Because the Clean Water Act is administered by another agency, the Environmental Protection Agency ("EPA"), courts review the Commission's

interpretations of the Clean Water Act using a *de novo* standard. *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003); *Am. Rivers*, 129 F.3d at 107. That standard is not applicable here, however, because the Commission's action in staying the license was not an interpretation of that Act. To be sure, the Commission responded with analysis of precedent on section 401 of the Clean Water Act in rejecting FPL Energy's arguments that the Commission must ignore the Maine Board's decision. *See* Stay Order at PP 6-9, JA 210-211. But the decision to stay the license was fundamentally based on the project's questionable compliance with water quality standards. Rehearing Order at P 3, JA 244. The Commission did not decide here whether Maine complied with the Clean Water Act or whether FPL Energy's new license would violate the Clean Water Act; rather, given the uncertainty of the situation, the Commission reasonably chose to allow a parallel proceeding over which it had no authority (and no particular expertise) to go forward to completion, prior to finalizing the license. *See Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (federal courts and agencies are without authority to review the validity of state actions under section 401 of the CWA).

This Court should review the Commission's decision to stay the license for abuse of discretion as it would review the decision by a district court to stay the proceedings before it pending the outcome of suits in state or federal court

involving some of the same issues. *See Acton Corp. v. Borden, Inc.*, 670 F.2d 377, 383 (1st Cir. 1982) (explaining limited exceptions that allow for appeal of a decision by a district court to stay litigation); *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004) (the decision whether or not to stay civil litigation is discretionary). When appeals of stay decisions are allowed, Courts have long applied a highly deferential standard of review in determining the appropriateness of lower court decisions to stay proceedings. *See, e.g., Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) ("[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket" and "calls for the exercise of judgment"); *Jewell v. Davis*, 192 F.2d 670, 673 (6th Cir. 1951) (power to stay case pending state court outcome is incidental to power to control court docket); *Amdur v. Lizars*, 372 F.2d 103, 107 (4th Cir. 1967) (applying deferential abuse of discretion standard); *Commonwealth Ins., Co. v. Underwriters, Inc.*, 846 F.2d 196, 199 (3d Cir. 1988) (same). The Commission needs the same tools allowed District Courts to control the disposition of cases before it, to defer to parallel state proceedings and to exercise its judgment, within the statutory bounds of the Federal Power Act, concerning the timing of licensing decisions.

B. FERC Acted Reasonably in Processing FPL Energy's Licensing Application

FPL Energy notes that the Commission initially acted on the license application with knowledge of the pending appeal of Maine Department's certification. Br. at 47. There is nothing unreasonable in the mere fact of agency action rather than inaction; an agency cannot leave an applicant "dangling forever." *Puerto Rico Sun Oil Co. v. EPA* , 8 F.3d 73, 80 (1st Cir. 1993). Here, the Commission issued a license three months after it was notified of the pending certification appeal, and then stayed the effectiveness of that license upon hearing the results of that appeal – actions well within the wide boundaries of reasonableness. *See Caribbean Petroleum*, 28 F.3d at 235 (finding EPA acted reasonably in (1) delaying permit for eleven months pending state board appellate review and (2) issuing a permit after no state action was taken in that timeframe); *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) (finding FERC "did not need to delay licensing until all state-law challenges to [a Coastal Zone Management Act state] action were complete").

In this case, FPL Energy's state certification application had been withdrawn and simultaneously resubmitted every year for six years before the Maine Department acted on the application. Unfortunately, such delay in the issuance of state certifications is not unusual. *See, e.g.*, *Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,149, 104 FERC ¶

61,109 at P 263 (2003) ("the single most common cause of new licenses not being issued prior to expiration of the existing license is the absence of water quality certification"); Rehearing Order, Comm'r. Kelliher Concurrence, JA 257 (noting that the "long history" of state certifying agencies failing to timely act on certifications "frustrates the will of Congress"). The Commission issued the license when it determined that Maine had issued the water quality certification within one year of FPL Energy's latest certification request. *See Am. Rivers*, 129 F.3d at 110 ("the Commission may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period"). Although the Commission was made aware of the pending Maine Board appeal, it issued the license without knowledge that (as Maine courts subsequently determined) the Maine Department had wrongly applied an unapproved water quality standard. *See Maine Certification Case*, 2007 ME 97, ¶ 6, 926 A.2d at 1200.

The Commission was informed that the Maine Board rescinded the 2003 Certification and denied FPL Energy's certification application at a time when the Commission was considering a request for rehearing of its licensing decision. Finding no court decisions directly on point and based on its own precedent in a factually similar situation, the Commission reasonably stayed the effectiveness of the non-final license. Stay Order at PP 8-9, JA 210-211 (citing *City of Tacoma*,

Washington, 99 FERC ¶ 61,067 (2002)); *see also* Rehearing Order at PP 14-15, JA 248-249 (explaining other factually similar FERC cases, citing *Richard Balagur*, 64 FERC ¶ 61,028 (1993), and *OMYA, Inc.*, 65 FERC ¶ 61,376 (1993)). In doing so, the Commission understood that the Maine Board's decision was not definitive, but only "call[ed] into question" the project's compliance with applicable water quality standards and thus the validity of the license. Stay Order at P 9, JA 211. Instead of invalidating the license, the Commission delayed final action on the license, in part to allow FPL Energy its day in state court, and allowed FPL Energy to revert to operation under annual licenses. *See id*. at P 5, JA 209.

Should the Court find jurisdiction in this case, the only action ripe for review is this decision to stay the license. *See supra* pp. 12-14. The Commission considered the impact of instituting a delay in the licensing proceeding on the licensee and on water quality and state jurisdiction before it took any action. Stay Order at P 5 n.6, P 9, JA 209, 211. With these interests in mind, the Commission reasonably exercised its discretion to control the timing of its own proceedings to implement the most limited action possible in response to the rescinded certification. *See Microfinancial*, 385 F.3d at 78 ("an inquiring [district] court must take a careful look at the idiosyncratic circumstances of the case before it" in balancing "the interests of the parties, the court and the public").

C. FERC's Action Respected the Role of States in Licensing Decisions

The applicable statutory scheme adopted by Congress requires cooperation among federal and state administrative agencies in balancing competing interests in hydroelectric licensing matters. *See Pub. Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704-705 (1994). "State certifications under [Clean Water Act] § 401 are essential in the scheme to preserve state authority to address" changes to rivers caused by dams. *S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006); *see also United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983) ("states are the prime bulwark in the effort to abate water pollution"); *City of Tacoma*, 460 F.3d at 67 (D.C. Cir. 2006) ("The Clean Water Act gives a primary role to states 'to block . . . local water projects' by imposing and enforcing water quality standards that are more stringent than applicable federal standards." (citation omitted)). The Commission must respect the states' role or risk reversal of its decisions. *See Am. Rivers*, 129 F.3d at 110 (vacating orders in which FERC "attempted to ignore [the] command [to incorporate certification conditions] and substitute its own judgment for that of the certifying agency").

In this system of cooperative federalism, some boundaries are definitive. *See, e.g., S. D. Warren*, 547 U.S. at 384 (FERC may not review the adequacy of section 401 certifications); *City of Tacoma*, 460 F.3d at 68 (FERC may not issue a

license until a section 401 certification has been obtained or waived). Other boundaries are less clear. *See, e.g.*, *City of Tacoma*, 460 F.3d at 68 (FERC must determine that state certification facially satisfies section 401 requirements, but in satisfying this requirement need not "inquire into every nuance of the state law proceeding" or resolve disputes that would require it to construe state law). Nevertheless, the Commission has discretion, within statutory strictures of the Federal Power Act, to manage the timing of its own docket. *See supra* pp. 17-18; *cf. Kokajko v. FERC*, 837 F.2d. 524, 526 (1st Cir. 1988) (allowing more time for final agency review given, in part, that the Court does "not know the number and type of other matters presently pending before the agency"). It is reasonable for the Commission to use that discretion, as it did in this case, to take action that allows for the completion of parallel state proceedings and respects the role that states play in licensing decisions.

D. FPL Energy's Argument That Its License Is Final and Unalterable Is Jurisdictionally Barred and Without Merit

FPL Energy argues that the Commission has no authority to unilaterally alter the new license without FPL Energy's consent because of the bar on unilateral alterations of final licenses under section 6 of the FPA, 16 U.S.C. § 799. Br. at 42-43. Addressing this issue in the Stay Order, the Commission found that the Club's rehearing request of the License Order subjected the License Order to further administrative review and kept the license from becoming final. Stay Order at P

10, JA 211. In its rehearing request to the Commission, FPL Energy did not renew its objection to Commission modification of the license; rather, it argued to the contrary that the Commission should modify the license to remove all of the Maine Department's water quality certification conditions. FPL Energy Rehearing Request at 1, 9, JA 215, 223. Because FPL Energy failed to argue on rehearing that it had an unalterable final license, the argument is not properly before this Court. 16 U.S.C. § 825*l*(b) (reviewing court may not consider an "objection" that was not "urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do"); *see, e.g., Londonderry Neighborhood Coalition*, 273 F.3d at 424 n.6 (construing same provision in the Natural Gas Act); *Allegheny Power*, 437 F.3d at 1220 (finding that objections raised in an initial proceeding that are not raised with specificity in a rehearing request before the Commission are waived on appeal).

In any event, FPL Energy's argument is without merit. FPL Energy ignores the Commission's notice that the License Order was subject to further administrative review in the event of a timely rehearing request. *See* License Order at Ordering Paragraph G, JA 143. A license does not become final, and the bar (of section 6 of the FPA) on unilateral amendment does not vest, until administrative and judicial review is complete or the time for requesting such review has lapsed. *See Henwood Associates, Inc.*, 50 FERC ¶ 61,183 at 61,548

(regarding an "issued-but-not-final license"), *reh'g denied*, 51 FERC ¶ 61,196 at 61,550-51 (1990), *aff'd*, *California v. FERC*, 966 F.2d 1541 (9th Cir. 1992); *see also Appalachian Power Co. v. United States*, 607 F.2d 935, 942 (Ct. Cl. 1979) (holding "that the irrevocable attribute of the . . . license does not vest under the terms of the [FPA] until the validity of the issuance of the license has been completely tested or the time for judicial review has lapsed").

FPL Energy argues that "the New License became final when [FPL Energy] consented to AMC's rehearing request" (s*ee* Br. at 43), but the Commission alone had the authority to act on that request. Furthermore, FPL Energy incorrectly asserts that the Club requested rehearing "on a matter entirely unrelated to [the] Section 401 Certification." Br. at 42. The Club requested rehearing regarding the Lake Management Plan, a license requirement that incorporates several of the Maine Department's certification conditions. AMC Rehearing Request at 3, JA 152; License Order at 29, JA 133 (Article 404). More to the point, because the Club requested a change in the license based on its success in overturning the certification, FPL Energy's assent to the requested change did not address the full scope of the Club's rehearing request. *See* AMC Rehearing Request at 3 (noting the "successful[] appeal[] of the State of Maine 401 Water Quality Certification"); *see also* Tolling Order, JA 158 (providing notice that the Commission was planning to address the full scope of the issues raised in the rehearing request).

FPL Energy also argues that the *issuance* of the Flagstaff Storage Project license by the Commission "drastically changes" the power of a state certifying agency to impose substantive conditions on the license. Br. at 43-44 (citing *Keating v. FERC*, 927 F.2d 616, 623 (D.C. Cir. 1991)). As FPL Energy correctly notes, *Keating* analyzes the Commission's duties under section 401(a)(3) of the CWA and is not applicable to this case. Br. at 44 n.17; *see also* 33 U.S.C. § 1341(a)(3) (certification obtained for construction of facility fulfills requirements for any other license or permit). FPL Energy, however, incorrectly reads *Keating* to assign significance to the issuance of any federal permit or license, rather than a final permit or final license. *See Keating*, 927 F.2d at 620 (noting that the Army Corps of Engineers "issued *final* permits" for construction of a group of projects (emphasis added)). The D.C. Circuit's finding that the role of the state certifying agency changes when "a federal agency has acted upon" a state's "initial certification decisions" is predicated upon a factual situation involving final agency action. *Id*. at 623. Here, the earliest possible final agency action, if final action has occurred at all, is the Commission's Stay Order addressing the Club's request for rehearing of the License Order. *See* Stay Order at P 10, JA 211 (License Order, subject to rehearing, did not constitute final agency action); *see also Kokajko*, 837 F.2d at 525 (agreeing with FERC that an order indicating simply that the FERC will later act on the merits of a rehearing request is not a final

order). Because the Maine Board had already rendered its decision rescinding the 2003 Certification by that time (Stay Order at P 5, JA 209), the court's finding in *Keating* as to the changed role of the state certifying agency is inapplicable here.

E. FPL Energy's Other Arguments Are Without Merit

FPL Energy's remaining arguments go primarily to the timing of Maine's certification actions or to the merits of the judgment of the Maine courts upholding the Maine Board's certification decision, not to the Commission's limited decision simply to stay its proceedings pending completion of state proceedings. *See, e.g.*, Br. at 16-17 (arguing that either the Maine Department issued a valid certification and that the Maine Board action came too late or Maine acted too late and waived its right to certification), Br. at 19 ("Actions of the Maine Board Taken Outside the Clean Water Act's One-Year Period Cannot Revoke or Nullify the New License") and Br. at 58 (Maine Board's denial of certification after one year was "in direct contradiction of Congress' clear intent that the state certification process be concluded within one year"); *see also Maine Certification Case*, 2007 ME 97, ¶ 23, 926 A.2d at 1203 (agreement of Maine Supreme Court with the reasoning in FERC's orders, and finding that certifying agency action on an application within one year, not completion of all in-state appeals, is all that Congress required). To the extent FPL Energy even focuses on the Commission's judgment here, its arguments are irrelevant to the reasonableness of the Commission's limited stay

decision.

For example, FPL Energy argues that the Court must give substantial deference to the Environmental Protection Agency's interpretation of Section 401 certification requirements in the National Pollutant Discharge Elimination Program regulations, 40 C.F.R. § 124.55(a)-(b). Br. at 52. The grant of such deference, FPL Energy asserts, leads to the conclusion that FERC "has very limited ability to change the terms of the federal [license], and can do so only if the [licensee] asks for such change." Br. at 53

To the extent these regulations address state revocation of a certification after "final agency action" (*see* 40 C.F.R. § 124.55(b)), the regulations are inapposite here as there is neither a final license nor final agency action on the license. *See* Section II.D. A thorough parsing of EPA's regulations on an unrelated permit program, as FPL Energy insists, is unnecessary here as the Commission has not changed the terms of FPL Energy's license. FPL Energy cannot challenge the Commission's modification of the terms of its license (whether or not such change comes in response to the Maine Board's rescission of the 2003 Certification) until, and only if, the Commission actually takes such action.

FPL Energy also argues that the Commission has discretion to take notice of the Maine Board action that occurred outside the one-year deadline of section 401,

but it may not reject the 2003 Certification conditions incorporated in the license. *E.g.*, Br. at 36 (citing *Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207 (W.D. Wash. 2003)). The Commission responded to these same interpretations of *Airport Communities* in rejecting FPL Energy's assertion that the Commission could not take action on the license in response to the Maine Board's decision. *See* Stay Order at PP 8-9, JA 210; Rehearing Order at PP 9-11, JA 246-247. The Commission agreed that *Airport Communities* allows agency discretion in accepting new conditions added on appeal after the one-year deadline. Stay Order at P 8, JA 210. FERC, however, concluded that the case was not on point because it "did not purport to establish what action a Federal agency can or should take if a State certification in support of a Federal license or permit is subsequently invalidated." *Id*. at P 9, JA 210; *see also* Rehearing Order at P 12 n.11, JA 247-248 ("the case simply holds that an agency is not required to incorporate into a federal license or permit any certification conditions that are issued after the one-year deadline").

FPL Energy characterizes this case as involving erroneous FERC action on the Maine Board's rescission of FPL Energy's state water quality certification. *See, e.g.*, Br. at 58. It would have this Court decide an issue that it presented to the Maine courts and then subsequently argued was moot at the Maine Supreme Court. *Maine Certification Case*, 2007 ME 97, ¶ 20 n.8, 926 A.2d at 1203 (finding case is

not moot because FERC stayed the order pending the outcome of the litigation in that case); *see id*. at ¶ 23, 926 A.2d at 1203 (concluding "that the [Maine] Board's failure to decide the appeal within a year of FPL [Energy]'s initial request for certification does not waive certification or render its decision ineffective"); *id*. at ¶ 21, 926 A.2d at 1203 (recognizing FERC's "cogent analysis" but giving it no deference in interpretation of ambiguous statutory language). FPL Energy's arguments fail because, as demonstrated, the Commission's only action in the challenged orders was the stay of FPL Energy's license, allowing FPL Energy to proceed in state court on the challenged certification.

CONCLUSION

For the foregoing reasons, the petition for review, if not dismissed for lack of jurisdiction, should be denied on the merits.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Robert H. Solomon
Solicitor

Jennifer Amerkhail
Attorney
First Circuit Bar No. 1130824

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel. (202) 502-8650
Fax: (202) 273-0901

July 16, 2008

FPL Energy Maine Hydro. v. FERC **Docket No. P-2612**
1st Cir. No. 05-1871

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,862 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman.

_____
Jennifer Amerkhail
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-8650
FAX: (202) 273-0901

July 16, 2008

Addendum
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Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) provides as follows:

(a) Compliance with applicable requirements; application; procedures; license suspension
(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311 (b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371 (c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d) provides as follows:

(d) Limitations and monitoring requirements of certification
Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) provides as follows:

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc. To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: [1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission

Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) provides as follows:

shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Section 6 of the Federal Power Act, 16 U.S.C. § 799 provides as follows:

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses 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 after thirty days' public notice.

Section 15 of the Federal Power Act, 16 U.S.C. § 808 provides as follows:

(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered
(1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.
(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 803 of this title, consider (and explain such consideration in writing) each of the following:
(A) The plans and abilities of the applicant to comply with
(i) the articles, terms, and conditions of any license issued to it and
(ii) other applicable provisions of this subchapter.
(B) The plans of the applicant to manage, operate, and maintain the project safely.
(C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.
(D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including

Section 15 of the Federal Power Act, 16 U.S.C. § 808 provides as follows:

its customers) of the alternative source of power, the effect on the applicant's 15 operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.
(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.
(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.
(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 803 of this title, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.
(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:
(A) The existing licensee's record of compliance with the terms and conditions of the existing license.
(B) The actions taken by the existing licensee related to the project which affect the public.
(b) Notification of intention regarding renewal; public availability of documents; notice to public and Federal agencies; identification of Federal or Indian lands included; additional information required
(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.
(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at

Section 15 of the Federal Power Act, 16 U.S.C. § 808 provides as follows:

reasonable costs of reproduction. Within 180 days after October 16, 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

(4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this subchapter for such lands, and to provide such additional information as the Commission deems appropriate to carry out the Commission's responsibilities under this section.

(c) Time of filing application; consultation and participation in studies with fish and wildlife agencies; notice to applicants; adjustment of time periods

(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) of this section and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

(2) The time periods specified in this subsection and in subsection (b) of this section shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

(d) Adequacy of transmission facilities; provision of services to successor by existing licensee; tariff; final order; modification, extension or termination of order

(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.

(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new

Section 15 of the Federal Power Act, 16 U.S.C. § 808 provides as follows:

licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this chapter has been executed, the Commission shall order the existing licensee to file (pursuant to section 824d of this title) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 824d of this title and in
accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this subchapter, except that in issuing such order the Commission—
(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;
(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;
(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;
(D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and
(E) shall not order any entity other than the existing licensee to provide transmission or other services.

Section 15 of the Federal Power Act, 16 U.S.C. § 808 provides as follows:

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.
(e) License term on relicensing
Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.
(f) Nonpower use licenses; recordkeeping
In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing,
whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

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

(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.

FPL Energy Maine Hydro LLC v. FERC **Docket No. P-2612**
1st Cir. No. 05-1871

CERTIFICATE OF SERVICE

I hereby certify that I have, this 16th day of July, 2008, served the foregoing by causing copies of it to be mailed to the counsel listed below.

FPL ENERGY MAINE HYDRO LLC

Jeffrey A. Thaler
John H. Montgomery
Sarah B. Tracy, F. Paul Frinsko
Bernstein Shur Sawyer & Nelson
100 Middle Street, PO Box 9729
Portland, ME 04104-5029

James B. Vasile
Davis, Wright, Tremaine, LLP
1500 K St., Suite 450
Washington, DC 20005-1272

Sarah E. Tomalty
FPL Energy Maine Hydro LLC
801 Penn. Ave., NW, Suite 220
Washington, DC 20004

STATE OF MAINE

Gerald D. Reid
Assistant Attorney General
State House Station #6
Augusta, ME 04333

_____

Jennifer S. Amerkhail
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel: (202) 502-8650
Fax: (202) 273-0901