11-1960

11-1960 (L), and 11-3792 (con)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GREEN ISLAND POWER AUTHORITY,
***Petitioner*,**

v.

FEDERAL ENERGY REGULATORY COMMISSION,
***Respondent*.**

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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GREEN ISLAND POWER AUTHORITY,
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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

STATEMENT OF THE ISSUES

(1) Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably interpreted and applied its regulations in determining that a settlement agreement modifying, in certain respects, a hydroelectric license application is not a "material amendment," 18 C.F.R. § 4.35(f)(1), which would require the Commission to solicit new motions to intervene in the licensing proceeding.

(2) Alternatively, if the settlement agreement is a "material amendment,"

whether substantial evidence supports the Commission's determination that the petitioner's alternative proposal is not economically feasible.

COUNTER-STATEMENT REGARDING JURISDICTION

Petitioner Green Island Power Authority ("Green Island") invokes this Court's jurisdiction under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). Br.2. As discussed *infra*, p. 43, however, substantial questions exist as to whether Green Island has standing to challenge the Commission's alternative holding that its alternative project is not economically feasible.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in Addendum B. To aid understanding, the Commission appends to this brief a decisional flow chart and short chronology, in Addendum A.

STATEMENT OF THE CASE

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

This case returns to this Court for review of the limited question remanded to the Commission in *Green Island Power Authority v. FERC*, 577 F.3d 148 (2d Cir. 2009) ("*Green Island*"): whether a settlement agreement, which proposed changes to a then-pending license application for the School Street Project ("Project"), an existing hydroelectric project now owned by Erie Boulevard Hydropower, L.P. ("Erie"), "materially amended" that application, within the

meaning of the Commission's regulations. *Id*. at 168. On remand, the Commission followed the reasoning earlier employed by the Commission and affirmed by this Court in *Green Island*, in addressing other amendments to the license application, and determined that the settlement agreement is not a material amendment. *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036 (2010) ("Remand Order"), R.578, SPA1, *reh'g denied*, 134 FERC ¶ 61,205 (2011) ("First Rehearing Order"), R.596, SPA27, *reh'g denied*, 136 FERC ¶ 61,044 (2011) ("Second Rehearing Order"), R.600, SPA63. The filing of the settlement agreement, therefore, did not trigger the requirement to solicit motions to intervene, a second time, in the licensing proceeding.

The Court in *Green Island* also instructed the Commission that, if it determined that the settlement is a material amendment and granted Green Island's motion to intervene, the Commission must consider whether Green Island's proposed Cohoes Falls Project, an alternative to the School Street Project, is a feasible alternative requiring further consideration. 577 F.3d at 168-69. Although the Commission determined that the settlement is not a material amendment, it considered the feasibility of the Cohoes Falls Project in any event. Upon examination, it found that the Cohoes Falls Project would not be feasible. Remand Order at P49, SPA12. The Commission, accordingly, reinstated the license order vacated by the Court in *Green Island*.

Green Island challenged these determinations, along with various evidentiary rulings, before the Commission, and now petitions this Court for review.

II. STATEMENT OF THE FACTS

A. Statutory And Regulatory Background

Part I of the Federal Power Act ("FPA") constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). FPA section 4(e) authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. FPA § 4(e), 16 U.S.C. § 797(e).

Under the FPA and the Commission's regulations, a person may become a "party" to a proceeding, including a hydroelectric licensing proceeding, by filing a timely motion to intervene. *See* FPA § 308, 16 U.S.C. § 825g(a); 18 C.F.R. § 385.214. A person filing a late motion to intervene must demonstrate good cause for failing to timely intervene. 18 C.F.R. § 385.214(b)(3); *see also* 18 C.F.R. § 385.214(d)(1)(i). Only a "party" "aggrieved" by a Commission order may seek rehearing and judicial review. FPA §§ 313(a), (b), 16 U.S.C. §§ 825*l*(a), (b).

FPA section 15, 16 U.S.C. § 808, sets forth the procedures applicable upon relicensing, where the Commission may issue a "new" license to an existing

licensee or another entity. Section 15(c)(1) requires that "[e]ach 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." 16 U.S.C. § 808(c)(1); 18 C.F.R. § 16.9(b)(1).

As relevant here, the Commission's regulations require it to issue public notice and solicit motions to intervene when a license application is filed, 18 C.F.R. § 16.9(d), and again if the license application is "materially amended" by a later filing. 18 C.F.R. § 16.9(b)(3). Section 4.35(f)(1) defines a "material amendment" as a "fundamental and significant change" and provides guidance in the form of examples. 18 C.F.R. § 4.35(f)(1).

Under the FPA, the Commission licenses the project that is "best adapted" to a comprehensive plan for improving or developing a waterway, for a variety of beneficial public uses. FPA § 10(a)(1), 16 U.S.C. § 803(a)(1). In a relicensing proceeding, such as this, FPA section 15(a)(2) provides that the project licensed must specifically be "best adapted to serve the public interest . . . ." 16 U.S.C. § 808(a)(2).

B. The School Street Project Relicensing Proceeding

This proceeding commenced on December 23, 1991, with the filing of an application (R.1, JA1) for a new license for the School Street Project by Niagara Mohawk Power Corporation, Erie's predecessor. Under FPA section 15(c)(1), 16

U.S.C. § 808(c)(1), all applications for such a license were due on December 31, 1991. *See Niagara Mohawk Power Corp.*, 41 FPC 772 (1969) (issuing license). No other applications were filed, and the Commission issued public notice of the application, soliciting motions to intervene, in 1993. *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P3 (2007) ("2007 License Order") (explaining history), R.563, JA2505. The Commission granted timely interventions, and untimely interventions, until 1999. *Id.*

The Commission proceeded with its assessment of the license application under the FPA and the National Environmental Policy Act ("NEPA"), issuing a final environmental assessment in 2001. Niagara Mohawk's license application proposed to add a 21-megawatt ("MW") unit to the Project, but in 1995 it withdrew that proposal. *Erie Boulevard Hydropower, L.P.*, 120 FERC ¶ 61,267 at P16 (2007), R.571, JA2759. Later, after Erie acquired the Project from Niagara Mohawk, it notified FERC that it intended to proceed with the addition of the 21-MW unit. *Id.* at P21, JA2760. The proceeding was substantially delayed, primarily because of state proceedings concerning Erie's application for water quality certification under the Clean Water Act, and subsequent settlement negotiations.

Green Island did not seek to participate in the Commission's licensing proceeding prior to 2004. In 2004, it formally proposed an alternative project, the Cohoes Falls Project, to replace the School Street Project. In so doing, it first filed

a preliminary permit application, which the Commission dismissed as time-barred by FPA section 15(c)(1), 16 U.S.C. § 808(c)(1). *Green Island Power Auth.*, 110 FERC ¶ 61,034, *reh'g denied*, 110 FERC ¶ 61,331 (2005), *petition for review dismissed*, *Green Island Power Auth. v. FERC*, No. 05-1170 (D.C. Cir. Dec. 14, 2005). Subsequently, it filed a late motion to intervene in the School Street Project relicensing proceeding, noting that it had been attempting to acquire the School Street Project from Erie since 2001. R.346 at 4-5, JA861-62.

In March 2005, Erie reached a settlement with several resource agencies and environmental and conservation organizations. R.380, JA1120. As relevant here, the offer of settlement, instead of a 21-MW generating unit, proposed an optional 11-MW "fish-friendly" generating unit, located either in a new powerhouse or in an addition to the existing powerhouse, at the same location as proposed in the relicense application. 2007 License Order at P55, JA2514.

A year later, Green Island and Adirondack Hydro Development Corporation ("Adirondack"), collectively with other participants, submitted an "alternative offer of settlement" (R.477, JA1587), appending a draft license application for the Cohoes Falls Project. The Commission rejected this pleading in light of its earlier ruling that the Cohoes Falls Project is untimely under the statute. R.478, JA2352.

Green Island and Adirondack next filed a motion to present evidence, once again attaching a draft license application for the Cohoes Falls Project. R.494,

JA2424. The Commission likewise rejected this pleading, and, on that same day, denied Green Island's motion for late intervention as unjustified in light of the late stage of the proceeding and Green Island's failure to act promptly to protect its claimed interest. *Erie Boulevard, L.P.*, Notice Rejecting Motion (June 28, 2006), R.501, JA501; *Erie Boulevard, L.P.*, Notice Denying Late Intervention (June 28, 2006), R.502, JA2475.

On February 15, 2007, the Commission approved the 2005 settlement and issued a new license for the Project. 2007 License Order, JA2505. Green Island and Adirondack sought rehearing. The Commission rejected the request for rehearing as to Green Island, because the FPA only permits parties to seek rehearing. *Erie Boulevard, L.P.*, 119 FERC ¶ 61,038 (2007), R.569, JA2756.

Subsequently, the Commission denied rehearing as to Adirondack's claims on the merits, concluding that the Commission's evaluation of Erie's license application satisfied FPA and NEPA requirements. *Erie Boulevard, L.P.*, 120 FERC ¶ 61,267, JA2757. Green Island and Adirondack petitioned this Court for review of the Commission's orders.

C. The Court's Opinion

On review, this Court agreed with the Commission that Adirondack lacked standing to challenge the Commission's orders, but found that the Commission erred in its analysis supporting the denial of Green Island's late motion to

intervene. *Green Island*, 577 F.3d at 161, 164-65. Green Island argued that the Commission had failed to solicit new motions to intervene at three points during the licensing proceeding: (1) in 1995, when Niagara Mohawk withdrew the proposal for a new 21-MW unit; (2) in 2001, when Erie reversed course and notified the Commission that it intended to pursue approval of the 21-MW unit originally proposed; and (3) in 2005, when Erie filed the settlement, proposing various changes to Project features and operations. *Id*. at 162. As to the first two changes, the Court upheld, as supported by substantial evidence, the Commission's determination, under 18 C.F.R. § 4.35(f)(1)(i), that these changes would not significantly modify the flow regime associated with the project. *Id*. at 162-63. Accordingly, the Court held that they were not "material amendments" requiring the Commission to solicit new motions to intervene. *Id*.

As to the third set of changes, contained in the 2005 settlement, the Court held that the Commission erred by not addressing – as it had for the 1995 and 2001 proposals – whether the settlement proposals constitute "fundamental and significant change[s]" under 18 C.F.R. § 4.35(f)(1). *Id*. at 164-65. As the Court explained, "if the Offer of Settlement *was* a material amendment, then [FERC] would have been required to solicit interventions, Green Island's renewed motion to intervene would have been timely, and FERC could not have analyzed that motion [as] . . . untimely . . . ." *Id*. at 164.

The Court next considered whether, upon remand, "the outcome of the administrative proceedings will be the same absent FERC's error." *Id.* at 165. First, the Court held that

> it cannot be certain that FERC will deny Green Island's motion to intervene after applying its regulations properly, because FERC has never addressed whether the extensive proposals contained in the Offer of Settlement materially amended the School Street license application, and we lack the expertise to make this determination in the first instance.

Id. The Court then considered whether, on remand, the result would be the same if Green Island is allowed to intervene. The Court answered this question in the negative, concluding that, if Green Island is admitted as a party, "FERC must consider Green Island's evidence regarding the Cohoes Falls Project so that it may determine whether the Cohoes Falls Project is a feasible alternative." *Id.* at 168. If it is a feasible alternative, FERC must then "give it full consideration when determining whether the School Street Project satisfies the 'best adapted' standard" of the FPA. *Id.* Accordingly, the Court vacated the 2007 License Order and remanded the case for further proceedings.

D. The Commission's Proceedings On Remand

Following the Court's directives, on remand the Commission considered whether the 2005 Settlement is a material amendment to the 1991 license application. Answering the question in the negative, the Commission ultimately reinstated the license for the School Street Project, as issued in the 2007 License

Order. Remand Order at P1, SPA1. Nevertheless, the Commission also considered, in the alternative, whether the Cohoes Falls Project is a feasible alternative to the School Street Project. Upon conducting an independent evaluation of the economic feasibility of the Cohoes Falls Project, the Commission concluded that it is not a feasible alternative, and therefore did not necessitate further consideration under the "best adapted" standard of FPA sections 10(a)(1) and 15(a)(2), 16 U.S.C. §§ 803(a)(1), 808(a)(2). Remand Order at P45-46, 49, SPA11-12.

First, the Commission examined the material amendment rule, 18 C.F.R. § 4.35(f)(1), and considered whether the changes in proposed generating units and structures would constitute material amendments. The Commission found that the elimination of the proposed 21-MW unit, replaced by either an 11-MW unit or no new unit, would not "significantly modify the flow regime of the project" as contemplated by 18 C.F.R. § 4.35(f)(1)(i). Remand Order at P29, SPA7-8. The Commission also found that proposed powerhouse changes that would accompany the changes in generating units would not be "material amendments," because either change would have the "same environmental effects" addressed in the 1991 license application. *Id*. P30, SPA8.

The Commission next examined changes in Project operations proposed in the 2005 settlement, including changes in minimum flows, run-of-river operation,

aesthetic flows, and recreation, and determined that none of these changes, individually or cumulatively, would "alter the [P]roject in a fundamental and significant way." *Id*. P44, SPA11; *id*. P39-43, SPA10-11. Accordingly, the Commission determined that it need not consider Green Island's motion to intervene as timely filed, and its decision to deny Green Island's late-filed motion stands. *Id*. P5 (noting that the Court did not vacate the Commission's order denying Green Island's late intervention), SPA2.

The Commission did not stop there. Noting both the Court's instruction that, if it admits Green Island as a party, the Commission must assess the feasibility of the Cohoes Falls Project, and its own policy to examine all reasonable alternatives regardless of their source, the Commission proceeded further to examine whether the Cohoes Falls Project is a feasible alternative to the School Street Project. *Id*. P45, SPA11. The Commission cannot issue a license to Green Island for the Cohoes Falls Project in this proceeding. Therefore, its task is limited to considering the feasibility of that project, and, if it is feasible, whether and how that affects the Commission's "best adapted" analysis. *Id*. P46, SPA11. In this light, the Commission questioned whether Green Island has standing to challenge the Commission's feasibility determination, because Green Island has pursued only its interest as a competitor to construct the Cohoes Falls Project. *Id*. P47, SPA12.

In any event, the Commission determined that, "while the project appears to be feasible from an engineering standpoint, it is not economically feasible, such that we would consider it a reasonable alternative to the School Street Project." *Id.* P50, SPA12. Indeed, the Cohoes Falls Project "would be significantly less cost-effective than the School Street Project." *Id.* P80, SPA17. "When comparing alternative projects . . . economic feasibility is a public interest factor that the Commission cannot overlook." *Id.* P78, SPA17. Accordingly, the Commission affirmed that the School Street Project is the "best adapted" proposal under the FPA, and reinstated the 2007 License Order. *Id.* P83, SPA17.

Green Island sought rehearing and subsequently submitted several supplemental filings and motions to present additional evidence. The Commission denied rehearing, and in so doing offered an even more comprehensive explanation for its findings on both the material amendment issue and the economic feasibility issue. *See* First Rehearing Order, P30-75, P84-108, SPA33-40, SPA42-47. As part of its evaluation, the Commission admitted relevant evidence, and excluded late-filed, irrelevant, and unreliable evidence. *Id.* P19-20, SPA30. Green Island petitioned this Court for review of the first two orders (No. 11-1960), and sought a limited agency rehearing of the evidentiary rulings. The Commission subsequently denied Green Island's limited rehearing request. *See* Second Rehearing Order,

SPA63. Green Island's petition for review of all three post-remand orders (No. 11-3792) followed.

SUMMARY OF ARGUMENT

The Commission's orders on remand fully satisfy the mandate of the Court in *Green Island*. Following the Court's directives, the Commission applied its regulations and determined that the 2005 settlement did not materially amend the 1991 license application. The Commission was not required to solicit a new round of motions to intervene, and it properly analyzed, and denied, Green Island's motion to intervene as unjustifiably late.

Green Island is correct that the 2005 settlement represents significant efforts by parties with diverse interests to reach agreement on improvements to the School Street Project, and on the way the Project uses and affects natural resources. But the Commission's regulations require it to solicit motions to intervene only when an amendment proposes a fundamental and significant change that results in a different project than that previously proposed. Here, not surprisingly, the parties to the 2005 settlement, including the license applicant, reached agreement by not proposing a radically different or wholly new Project. The Commission, after careful consideration of flow analyses and powerhouse changes, determined that they are not "material amendments" to the 1991 license application. The Commission's interpretation and application of its "material amendment"

regulations – resting in part on this Court's consideration in *Green Island* of earlier Project alterations – is reasonable and thus deserving of this Court's respect.

The Court can stop here. The Commission did more than it had to do, finding that, even if the 2005 settlement is a material amendment necessitating a new round of intervention, the Cohoes Falls Project is not an economically feasible alternative to the School Street Project. Consistent with *Green Island*, the Court need address the Commission's alternative feasibility determination only if it rejects the Commission's material amendment analysis as arbitrary and capricious – and only if Green Island has standing to object to the Commission's feasibility determination. *See* Addendum A (decisional flowchart).

In support of its claim of standing, Green Island raises the potential impact of the School Street Project on a downstream project that it operates. But, because Green Island did not preserve this argument on rehearing to the agency, it cannot, under the terms of the statute, advance it now as the basis for judicial review. And Green Island's asserted interest as a potential competitor, as the Court found as to Adirondack in *Green Island*, is too speculative for standing purposes.

In any event, the Commission thoroughly analyzed the feasibility of the Cohoes Falls Project. Green Island submitted its own cost analysis for the project, but the Commission reasonably rejected that evidence in favor of independent cost data, as analyzed by its expert staff. The Commission's analysis shows the Cohoes

Falls Project to be significantly less cost-effective than the existing School Street Project, and significantly more expensive than the regional average cost of power. Substantial evidence supports the Commission's determination that the Cohoes Falls Project is not a feasible alternative; that determination should not be disturbed.

ARGUMENT

I. STANDARD OF REVIEW

In proceedings on remand, the Commission's determinations are reviewed to ensure that they are responsive to the Court's mandate. *See*, *e.g.*, *Process Gas Consumers Grp. v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). In all proceedings, the Court reviews Commission action under the Administrative Procedure Act, overturning the disputed orders only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A "court must evaluate whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1553 (2d Cir. 1992) (citation omitted). "This inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *Green Island*, 577 F.3d at 158 (citations omitted).

The Commission's findings of fact, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825*l*(b); *Ompompanoosuc*, 968 F.2d at

1554; *see also Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965). "Substantial evidence has been defined to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Green Island*, 577 F.3d at 162 (quoting *Ompompanoosuc*, 968 F.2d at 1554). On review of "scientific determination[s], as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Envtl. Def. v. EPA*, 369 F.3d 193, 204 (2d Cir. 2004) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

The possibility that different conclusions may be drawn from the same evidence does not render the Commission's conclusions unreasonable. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89 (2d Cir. 2000). Likewise, when the Commission resolves a technical dispute among competing experts, its resolution merits deference. *See*, *e.g*., *Murray Energy Corp. v. FERC*, 629 F.3d 231, 239 (D.C. Cir. 2011) (deferring to Commission's reasonable choice among expert reports on pipeline safety).

Also, an agency's interpretation of its own regulations "enjoys a presumption of correctness." *FCC v. Nextwave Personal Communs., Inc.*, 200 F.3d 43, 58 (2d Cir. 1999) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). "When an agency's regulations are ambiguous, a court must defer to the agency's interpretation of its own regulations, unless that interpretation is

‘plainly erroneous or inconsistent with the regulation[s] or there is any other reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.’” *Mullins v. City of New York*, 653 F.3d 104, 106 (2d Cir. 2011) (quoting *Talk Am., Inc. v. Michigan Bell Tel. Co. dba AT&T Michigan*, 131 S. Ct. 2254, 2261 (2011)).

II. THE COMMISSION REASONABLY INTERPRETED ITS REGULATIONS AND DETERMINED THAT THE 2005 SETTLEMENT IS NOT A MATERIAL AMENDMENT TO THE 1991 LICENSE APPLICATION

The Commission has consistently interpreted its material amendment regulation, 18 C.F.R. § 4.35(f)(1), from the time of promulgation, as providing that a “material amendment” is one that “would result in a new and different project.” Remand Order at P13, SPA4. As relevant here, section 4.35(f)(1) of the Commission’s regulations provides that:

> a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to:
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> (i) A change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project;
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> (ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:
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> > . . .
> >
> > (B) Cause adverse environmental impacts not previously discussed in the original application . . . .

18 C.F.R. §§ 4.35(f)(1)(i), (ii).

Under the 2005 settlement, "[t]he same project would operate in the same manner at the same location, with [only] a slightly different balance of developmental and environmental values." First Rehearing Order at P72, SPA40. Accordingly, the Commission's finding that the 2005 settlement did not materially amend the 1991 application is reasoned and based on substantial evidence, and should be affirmed.

A. The Commission's Determination That The 2005 Settlement Does Not Significantly Modify The Flow Regime Associated With The Project Is Reasonable, Consistent With Precedent, And Supported By Substantial Evidence

1. The Commission's interpretation of the change in capacity provision is reasonable

The Commission's interpretation of the change in capacity provision, 18 C.F.R. § 4.35(f)(1)(i), of its "material amendment" rule – the same interpretation relied upon before this Court in *Green Island*, the same interpretation offered in the regulatory preamble, and the same interpretation used for the 30 years since – is reasonable and warrants deference from this Court. *See* First Rehearing Order at P31, SPA32.

Green Island primarily challenges the Commission's determination that the decrease in the Project's capacity, by replacing the 21-MW unit with an 11-MW unit, or with no additional unit at all, would "significantly modify the flow regime

associated with the project." 18 C.F.R. § 4.35(f)(1)(i). "Flow regime" is not defined in the FPA, Commission regulations, or Commission precedent. Remand Order at P24, SPA6. It is, however, frequently used in Commission decisions to describe the schedule and amount of minimum flows to be provided to a project's bypassed reach. *Id.* (citing cases).

Taking this into account, the Commission turned to the dictionary definition of "regime" or "regimen," which is defined as "a systematic plan," a "regular course of action," or a "rule." *Id.* P25 (citing dictionary), SPA7. Thus, the Commission concluded that "flow regime" "is the set of rules governing how flows are to be managed at and released from the project." *Id.*; *see also* First Rehearing Order at P39, SPA33. The Commission further identified that, "[w]hile there are a number of factors that can influence the availability of flows, the primary elements that characterize a project's flow regime are its mode of operation and conditions that specify the amount, location, and timing of any required flow releases." Remand Order at P25, SPA7; *see also* First Rehearing Order at P39, SPA33.

For example, the Commission explained that, under the mode of operation for a run-of-river project, like the School Street Project, "inflows to the project are approximately equal to outflows, with a limited amount of allowable fluctuation in reservoir levels." Remand Order at P26, SPA7. Specific flow releases, or minimum flows, can be required for varying purposes, "[m]ost commonly . . . to

benefit fish and wildlife resources." *Id*. P27, SPA7. As the Commission explained, "[c]ollectively, these rules regarding a project's mode of operation and release of flows define the project's flow regime." *Id.*

Section 4.35(f)(1)(i) provides that a material amendment includes a change in installed capacity, but only "if the change would significantly modify the flow regime associated with the project." 18 C.F.R. § 4.35(f)(1)(i). The question is not whether there is a change in installed capacity *accompanied by* a significant modification of the flow regime. Rather, the question, as the Commission interprets section 4.35(f)(1)(i), is whether the change in installed capacity itself would "cause or require[]" a significant modification to the flow regime. Remand Order at P29, SPA7. Contrary to Green Island's assertion that the Commission has read section 4.35(f)(1)(i) "out of existence," Br.25, severing the link between the change in installed capacity and a significant modification to the flow regime would do just that.

Nonetheless, contrary to Green Island's claim, Br.24, the Commission's interpretation of flow regime does not render changes in minimum flows irrelevant. While "changes in installed capacity can be examined separately from changes in minimum flows, this does not mean that they are completely independent." First Rehearing Order at P44, SPA34. But, for this type of project, a run-of-river project with specified minimum flows, the change in installed

capacity itself "would neither cause nor require a corresponding change in minimum flows." Remand Order at P29, SPA7.

2. The purpose and history of the regulation support the Commission's interpretation

The Commission's interpretation of section 4.35(f)(1)(i) accurately reflects the purpose of the rule, as enunciated in the 1981 rulemaking. *See Revisions to Certain Regulations Governing Applications for Preliminary Permit and License for Water Power Projects*, Order No. 183, 46 Fed. Reg. 55245 (Nov. 9, 1981), FERC Stats. & Regs. ¶ 30,305 (1981), *cited in* Remand Order at P13 n.15, SPA19. Prior to adoption of section 4.35, applicants could amend their applications without consequence. Remand Order at P13, SPA4. Under the new rule, which applied to both applications for new projects and relicensing applications,[1] the filing of a "material amendment" effectively requires the Commission to treat the proposal as a new application, by setting a new opportunity for comments, motions to intervene, and competing applications. *Id*. Thus, a material amendment can cause the original application to be rejected as late, and can open a site up to competition. *Id*.

In light of these significant consequences for an applicant, "the Commission

[1] In 1989, the Commission amended the rule to make it inapplicable to relicensing, except for the requirement, at issue here, to reissue public notice of any material amendments. Remand Order at P13, n.16, SPA19 (citing rule); *see also Green Island*, 577 F.3d at 164 (discussing 1989 amendment).

made it clear that a material amendment must be a change of such magnitude that the proposal should be treated as a new application." *Id.* Thus, the preamble to the 1981 rule explains: "These changes are of such a fundamental nature as to constitute the proposal of a different project." *Id.* (quoting Order No. 183 at 55,249, FERC Stats. & Regs. ¶ 30,305 at 31,723). This interpretation draws upon the Commission's use of the phrase "fundamental and significant." 18 C.F.R. § 4.35(f)(1). "The use of the word 'and' rather than 'or' makes it clear that, even if a change might be considered significant, it would not be material unless it also changed the proposal in some fundamental way." First Rehearing Order at P72, SPA40.

The history of amendments to section 4.35(f)(1) also supports the Commission's interpretation. When first issued, the rule provided that a "material amendment" included a change to average annual energy production or installed capacity – without further qualification. Remand Order at P13 n.16, SPA19. In 1985, the Commission added several exceptions to the rule,[2] and modified the rule to qualify that a change in installed capacity is considered material, as the rule provides today, only "if the change would significantly modify the flow regime associated with the project." *Id.* (citing *Application for License, Permit, and*

[2] The exceptions to the rule, which this Court found inapplicable to a relicensing application in *Green Island*, have in fact historically been used to inform decisions on all applications. Remand Order at P13 n.16, SPA19.

Exemption from Licensing for Water Power Projects, Order No. 413, 50 Fed. Reg. 11658, at 11681 (Mar. 25, 1985), FERC Stats. & Regs. ¶ 30,632 (1985)).

Green Island misunderstands the purpose of the material amendment rule when it accuses the Commission of rendering the rule "meaningless." Br.25. Consistent with the 1981 rulemaking and subsequent amendments, the rule "is indeed a high standard, intended to apply to only those changes that radically alter a proposed project." First Rehearing Order at P32, SPA32.

Green Island cites the length of this proceeding and the potential for shifts in parties' interests as supporting the need for the Commission to find the settlement is a material amendment and solicit new interventions. Br.48. In light of the purpose of the rule and Green Island's own actions in this case, this argument is not compelling. As the Commission found in denying Green Island's late intervention, its interest apparently arose in 2001 – if not earlier (*see* Br.66 (noting acquisition of downstream project in 2000)) – and yet it inexplicably delayed seeking to intervene until 2004. Notice Denying Late Intervention, R.502, 2475. Moreover, the Commission did issue public notice and invite comments on the 2005 settlement; it simply did not solicit a new round of interventions. *See* First Rehearing Order at P59, SPA37. Nothing in the course of this proceeding justifies interpreting the rule in a manner contrary to its purpose.

3. Green Island does not demonstrate that the Commission's interpretation of the rule is unreasonable

Green Island claims that the Commission's interpretation of section 4.35(f)(1)(i) violates the plain language of the regulation. Br.31-32. In fact, it is Green Island's proposed interpretation that disregards the regulatory text.

First, as suggested above, by claiming that the Commission necessarily must consider whether the increase in minimum flows in the bypassed reach, *together with* the change in installed capacity, significantly modifies the flow regime associated with the Project, Green Island misreads the regulation (although the Commission did perform that analysis in order to respond to Green Island's concerns, *see infra* p. 31). Br.21. Rather, the Commission must examine whether the change in installed capacity itself "causes or requires" a significant modification to the flow regime associated with the Project. Remand Order at P29, SPA7; First Rehearing Order at P39, SPA33.

Second, Green Island's proposed interpretation of flow regime would render superfluous the words "associated with the project" in section 4.35(f)(1)(i). Br.33 ("'flow regime' . . . is universally used as a *descriptor* of the existing characteristics *of a river*") (second emphasis added); Br.33 ("books likewise define 'flow regime' as a description of the . . . flows *in a river*") (emphasis added). Indeed, as the Commission explained, the sources on which Green Island relies are irrelevant because they all "are concerned with defining or describing the flow

regimes of rivers." First Rehearing Order at P47, SPA35; *id*. P45 n.43, SPA54.

As the Commission explained, the flow regime of the river is a concept distinct from "flow regime associated with the project" as used in section 4.35(f)(1)(i). *Id*. P47, SPA35. As discussed above, "flow regime associated with the project" means "the set of rules governing how flows are to be managed at and released from the project." Remand Order at P25, SPA7. "[I]t is obvious that, by directing flow to the turbines and thus around the bypassed reach, the existing School Street Project can change the flows and depth of the bypassed reach of the Mohawk River." First Rehearing Order at P52, SPA36.

If all that section 4.35(f)(1)(i) requires is a change in flows, any change in capacity would satisfy this standard. But, the Commission's inquiry, guided by the regulatory text, is "different: we must determine whether the changes proposed in the 2005 settlement would significantly affect the flow regime *associated with the School Street Project.*" *Id*. (emphasis added).

Green Island's reliance, Br.34, on *Niagara Mohawk Power Co*., 30 FERC ¶ 61,180 (1985), for the argument that the rule refers to the "flow regime" of the river – not the project – does not advance its cause. The Commission here is interpreting section 4.35(f)(1)(i), but *Niagara Mohawk* does not address this provision, and did not concern an amendment to a development application. *Id*. at 61,367-68 (addressing dispute concerning scope of studies).

Finally, Green Island errs in relying on *Puget Sound Energy, Inc.*, 102 FERC ¶ 61,331 (2004). In *Puget*, the Commission noted in a licensing order that, nine years prior, it determined "the change from the 73-MW capacity proposed in the relicense application to 49[-]MW constituted a material amendment," citing 18 C.F.R. § 4.35(f)(1). 102 FERC ¶ 61,331 at P9, n.16. The 1995 public notice of the amendment described 20 changes, in addition to changes in minimum flows mandated by the state. Br.29 (citing notice). The 2004 order suggests that the Commission relied on the change in capacity alone, while the 1995 notice does not specify the Commission's reasoning. Green Island's reliance on strained implications is unavailing in light of the regulatory text and history, as well as Commission precedent.

In any event, even if Green Island's interpretation of section 4.35(f)(1)(i) is a reasonable one, it has failed to demonstrate that the Commission's interpretation is unreasonable. *New York v. Shalala*, 119 F.3d 175, 182 (2d Cir. 1997) ("We do not decide which competing interpretation is most reasonable . . . ."). As explained in the following sections, the Commission's interpretation of its regulation is supported by its factual findings which, in turn, are supported by substantial evidence.

4. The Commission's factual findings that the changes in installed capacity are not material amendments are supported by substantial evidence

The Commission's factual determinations, that reducing the size of the new generator or omitting it altogether are not material amendments, track the Commission's determinations that this Court upheld in *Green Island*. First Rehearing Order at P39 n.37, SPA53-54 ("we are now using the same reasoning that the court previously upheld."). Like the Commission's factual findings in *Green Island*, as to proposed 1995 and 2001 Project alterations, the Commission's findings here, as to proposed 2005 alterations, are supported by substantial evidence, including analyses performed by its expert staff, and should not be disturbed. *Green Island*, 577 F.3d at 162. First, consistent with section 4.35(f)(1)(i), the Commission examined whether the changes in capacity cause or require a significant modification in the flow regime associated with the Project, and answered no. Second, as urged by Green Island on rehearing, the Commission analyzed the changes in installed capacity combined with the changes in minimum flows and likewise determined that, while flows in the bypassed reach of the river would change, there would be no significant modification to the flow regime.

a. The reductions in capacity do not cause a significant modification to the flow regime

Upon examining the 2005 settlement's proposed reductions in installed capacity at the Project, the Commission determined that the reduction would cause

a change in flows at the Project, but not a significant modification to the flow regime. "Decreasing the project's size would increase the amount and frequency of flows that would enter the bypassed reach or be spilled over the dam instead of passing through the turbines for power generation." Remand Order at P29, SPA8; *see also* First Rehearing Order at P39 (decrease would "change . . . how flows pass through the project, because more water would spill over the dam under the settlement proposal with its smaller overall hydraulic capacity turbines"), SPA33.

But, the Commission's analysis continued, "for this particular project, either of these changes in installed capacity could occur without causing or requiring any changes to the project's run-of-river operation or required minimum bypassed reach flows." First Rehearing Order at P39, SPA33; Remand Order at P29, SPA7-8. The Commission determined that "the project would still be required to operate in a run-of-river mode and could provide the same minimum flows to the bypassed reach of the Mohawk River." First Rehearing Order at P39, SPA33. Accordingly, the reduction in capacity alone would have "no effect on the project's flow regime (that is, the rules governing flow releases from the project)." Remand Order at P29, SPA8.

Contrary to Green Island's insistence, Br.22-24, the Commission does not deviate from the Court's opinion in *Green Island*. *See* 577 F.3d at 162-63. There, the Court examined the Commission's factual findings concerning the 1995 and

2001 proposals to, respectively, eliminate the 21-MW unit included in the 1991 application and add back in the 21-MW unit. Affirming the Commission, the Court explained that these capacity changes would "result in a change in flows," but "that this would not *significantly* affect the project's flow regime because 'the project would still be required to operate in run-of[-]river mode, and to provide the same minimum flows in the bypassed reach.'" 577 F.3d at 162-63 (quoting Commission orders) (emphasis and alteration in original). The same is true here: the reductions in capacity do not change the mode of operation, or alter the minimum flows required for the bypassed reach. First Rehearing Order at P40, SPA33-34.

As the Commission acknowledged, for this *particular* type of project – "a run-of-river project with a specified minimum flow release" – these "*particular* changes in installed capacity" can occur without altering the minimum flows. *Id.* P42 (emphasis added), SPA34. But, as the Commission explained, this would not necessarily be true at other types of projects. *Id.* P42 (listing peaking projects and projects with powerhouses integral to the dam, among others), SPA34; Remand Order at P29 n.42, SPA21 (analysis depends on project-specific factors). Moreover, a different change in installed capacity – e.g., quadrupling the capacity, as Green Island suggested before the Commission – could potentially rise to the level of a material amendment even at this type of project. First Rehearing Order

at P42 n.38, SPA54[3] Thus, Green Island's claim that, according to the Commission's interpretation, "'flow regime' is *never* significantly modified by the installed capacity," Br.26, is inaccurate.

b. The reductions in capacity, together with changes in minimum flows, do not significantly modify the flow regime

Taking the analysis beyond that required by section 4.35(f)(1)(i), the Commission next examined the combined effect of the proposed changes in minimum flows with the proposed changes in installed capacity. Specifically, in the First Rehearing Order, the Commission explained that its staff conducted, as demanded by Green Island on rehearing, a detailed quantitative analysis of the effect of the settlement proposals on flows in the bypassed reach. First Rehearing Order at P49-50, SPA 35; *see* Staff Flow Analysis, R.595, JA3545.

Staff examined all three capacity proposals and the accompanying proposed minimum flows: (1) the 21-MW unit with 60 cubic feet per second minimum flows proposed in 1991; (2) the 11-MW unit with seasonal minimum flows

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[3] Green Island errs in relying, Br.29-30, on *Indian River Power Supply, LLC*, 117 FERC ¶ 61,089 (2006), where the Commission explained that, if a proposed amendment to more than double the generating capacity of a project had been accepted, it "might have" been a material amendment. *Id*. P6. The 2005 settlement concerns a licensed project, not an exempted project, and it does not propose to double the capacity of the School Street Project. And, as the Commission explained in *Indian River*, because the amendment was rejected, the material amendment issue "never arose." *Id*. P9. This is not, therefore, a binding holding upon the Commission.

proposed in the settlement; and (3) no additional generation, with seasonal minimum flows proposed in the settlement. First Rehearing Order at P49, SPA35. The analysis showed "little variation in the shape or magnitude of the hydrographs under each of the scenarios." *Id*. P50, SPA35. Moreover, for both proposed reductions in capacity, the number of days each year when flows in the bypassed reach of the river would exceed minimum flows would increase by an insignificant margin. *Id*. Staff's analysis therefore demonstrates that the impact of the reductions in installed capacity, combined with the proposed increases in minimum flows, "would not significantly change the flow regime of the bypassed reach." *Id*.

Green Island challenges the Commission's reliance on staff's analysis on rehearing. Br.80. But "Green Island had both adequate notice of Commission staff's flow analysis and a reasonable opportunity to respond to it." Second Rehearing Order at P54, SPA71. Green Island itself argued, on rehearing of the Remand Order, that the Commission needed quantitative studies to support its conclusions. *Id*. P53 (citing Rehearing Request, pp. 22, 26, R.581, JA2887, 2891), SPA71. Accordingly, it was on notice to expect that the Commission might prepare such studies. Yet, despite having 30 days to respond, Green Island chose only to challenge the Commission's analysis as procedurally deficient and based on a "flawed premise," without further explanation. *Id*. P54 n.56, SPA76.

As courts have previously held, rehearing provides ample and meaningful

opportunity for parties to raise objections. *Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010) (petition for rehearing provides a meaningful opportunity to challenge new evidence); *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006) (same); *see also* Second Rehearing Order at P55, SPA72. Green Island errs in claiming that it was "procedurally barred" from addressing the Commission's analysis on rehearing. Br.83 n.36 (citing cases discussing circumstances where rehearing is required). The possibility of rejection has not previously deterred Green Island. Second Rehearing Order at P54 n.57, SPA76. Green Island's decision not to use the opportunity to pursue this issue on rehearing – in stark contrast to its submission of comments at every other stage of this proceeding – was unreasonable in the circumstances.

In any event, to the extent that the Court deems the Commission's preparation of a detailed quantitative analysis, upon request from a participant, inappropriate, the Commission explained that this analysis is "not required before the Commission can determine whether a proposed change is a material amendment." First Rehearing Order at P53, SPA36; *see also* Second Rehearing Order at P53, SPA71. The Commission did not acknowledge, "tacitly," Br.83, or otherwise, any deficiency in the factual record. Even without this study, substantial evidence supports the Commission's finding, above, that the settlement changes in installed capacity do not result in a significant modification of the flow

regime associated with the Project.

Finally, the Commission addressed Green Island's argument, Br.22, that the change in prescribed minimum flows – alone – constitutes a material amendment. The settlement proposed to increase minimum flows two-fold, but "these flows would be released in the same manner from the same project, with no significant changes in the project's physical features." First Rehearing Order at P55, SPA36. Moreover, the flows used for generation would remain within the range proposed in the 1991 application. *Id*. P40, SPA33. The Commission reasonably determined that the changes are "ordinary, routine, and expected adjustments to the minimum flow schedule." Remand Order at P39, SPA10; *see also id*. P36-37, SPA9. Thus, the Commission concluded that the "change in flows used for generation would not be a fundamental and significant change." *Id*. Indeed, the Commission "doubt[s] whether an increase in minimum flows, without more, could ever" result in a "different project." First Rehearing Order at P55, SPA36; *see also* Remand Order at P17 ("changes that do not concern a project's physical features would seldom, if ever, rise to the level of a fundamental and significant change to the plans of development"), SPA5.

5. The Commission reasonably found unhelpful Green Island's evidence concerning changes in flows

Green Island misunderstands the Commission's reasons for rejecting its March 15, 2011 motion to lodge evidence (R.594, JA3522), including an attached

affidavit and a flow analysis. *See* Br.38 & n.17. First, the Commission denied Green Island's motion as a late and improper attempt to supplement its rehearing request, prohibited by FERC regulations and the FPA. First Rehearing Order at P29 n.22, SPA52; Second Rehearing Order at P43, SPA69. *See also* 18 C.F.R. § 385.713(b) (30 days to petition for rehearing); 16 U.S.C. § 825*l*(a) (same). Green Island filed its rehearing request of the Remand Order on May 17, 2010; it stated that it became aware of the modeling software used in its analysis in "late 2010" (R.594, Besha Affidavit ¶ 6, JA3529); and it filed the motion to lodge on March 15, 2011 – just two days before the publicly-noticed meeting at which the Commission was scheduled to consider this matter. Second Rehearing Order at P40, SPA69. Before the Commission, Green Island offered no reason for its delay, and it likewise fails to do so before this Court. *Id*. P43, SPA69. This determination alone is an independent basis for the Commission's reasonable evidentiary determination, and was not an abuse of discretion. *Nat'l Labor Relations Bd. v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (stating that remand is required "*only* where there is a significant chance that but for the error, the agency might have reached a different result") (citing *SEC v. Chenery Corp*., 318 U.S. 80 (U.S. 1943)); *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) (only one of multiple, alternative bases for agency need be upheld on judicial review).

Second, the Commission reviewed Green Island's analysis and reasonably found it lacking in both reliability and relevance. Second Rehearing Order at P45, SPA70. Commission staff was not "unable to understand the model." Br.38 n.17. Rather, it found that Green Island's "approach is a significant departure from the typical application of the . . . method." Second Rehearing Order at P48, SPA70. The modeling software Green Island selected is typically used to compare river flows with negligible human impacts or input against proposed changes in flow management. *Id*. But Green Island substituted, as the base case, flow conditions under the 1991 application, without explanation or evidence to demonstrate that this is appropriate. *Id*. Moreover, Green Island did not "describe the calculations or assumptions used to estimate flows in the bypassed reach" under the 2005 settlement and does not provide the estimated flow data. *Id*. P46-47, SPA70. Since the Commission needs this information to evaluate the "accuracy and appropriateness of the flow data," it understandably rejected the analysis as unreliable. *Id*. P46, SPA70.

The Commission alternatively found that, "even if [it] were to admit and consider [the] analysis as evidence in this case," that analysis would not support, let alone compel, a different result. Second Rehearing Order at P50, SPA71. Green Island's analysis does not demonstrate that the changes in installed capacity would result in significant modifications to the flow regime associated with the

project. *Id*.; *see also id*. P49, SPA70. Rather, the analysis is essentially a comparison of the changes in minimum flow requirements. *Id*. P49 (discussing significant overlap in hydrologic variation values for the analysis of the 11-MW addition option and the no-additional-generation option as suggesting that "results are driven by the differences in the minimum flows"), SPA70.

Thus, contrary to Green Island's claim, Br.83, the Commission in fact "articulate[d] a nonarbitrary reason," *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003), for rejecting Green Island's evidence. If admitted, Green Island's flow analysis – even if taken at face value – would not "clearly mandate a change in result." Br.82 (quoting *Greene Cnty. Planning Bd. v. FPC*, 559 F.2d 1227, 1233 (2d Cir. 1977)).

Finally, even had it accepted Green Island's unexcused late filing, the Commission must have discretion to select and rely upon the expert opinions of its own expert staff, as opposed to Green Island's evidence. Second Rehearing Order at P51 (citing *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1982)), SPA71. And, given the technical nature of the flow analysis, the Commission's choice here warrants substantial deference. *See*, *e.g*., *Envtl. Def.*, 369 F.3d at 204.

B. The Commission's Determination That The Powerhouse Changes Do Not Constitute A Material Amendment Is Reasonable And Supported By Substantial Evidence

Green Island also claims that the powerhouse changes associated with substituting the 21-MW unit proposed in the 1991 application with either an 11-MW unit, or with no additional generation, constitute a material amendment under the Commission's regulations at section 4.35(f)(1)(ii). Br.41-44. A material amendment includes:

> (ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:
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> . . .
>
> (B) Cause adverse environmental impacts not previously discussed in the original application . . . .

18 C.F.R. § 4.35(f)(1)(ii). Green Island addresses only the potential changes in the powerhouse location; there are no material changes in the dam or reservoir.

As the Commission explained, there is no material change in the location of the powerhouse. First Rehearing Order at P63, SPA38. The 1991 application proposed to house a new 21-MW unit in an addition to the existing powerhouse. *Id*. The 2005 settlement proposes two options: (1) to eliminate the powerhouse proposals altogether; or (2) to add a new 11-MW unit in either a new powerhouse or a powerhouse addition in the same location as the proposed 1991 addition. *Id*. Under the Commission's interpretation, neither would result in a "material change in the location of the powerhouse." *Id*. The Project powerhouse "would continue

to exist at the same location, either with or without a new powerhouse or an addition." *Id.*

But even if there is a proposed change in the location of the powerhouse, there is no change that would cause adverse environmental impacts not addressed in the 1991 application. *Id.* P64, SPA38. As the Commission noted, the 1991 application addressed environmental impacts associated with constructing the new powerhouse or addition. *Id.* P64 n.58, SPA55. The 2005 settlement would either eliminate these impacts altogether, by eliminating any powerhouse changes, or produce the same or reduced environmental impacts, by constructing a new powerhouse or addition of the same or smaller size, at the same location. *Id.* P65, SPA38. Green Island does not challenge these findings.

Rather, Green Island argues that a change in the type of turbine housed in the powerhouse causes new adverse environmental effects. Br.42-44. In the First Rehearing Order, the Commission explained that section 4.35(f)(1)(ii) applies only, as relevant here, to changes in the "location" of the powerhouse – not "to any other types of changes that might cause new adverse environmental impacts." First Rehearing Order at P67, SPA39; *see also id.* P64, SPA38. Green Island's opening brief disregards this interpretation, thereby waiving the opportunity to challenge it. *EDP Med. Computer Sys. v. United States,* 480 F.3d 621, 625 n.1 (2d Cir. 2007) ("failure to press" arguments in "opening brief waives them").

In any event, Green Island has not demonstrated that changes in the powerhouse equipment result in a new adverse environmental impact. The 21-MW unit proposed in the 1991 application was intended to be the Project's primary means of downstream fish passage, with a special design (a "Kaplan" unit) intended to pass fish safely through the turbine. Thus, when the applicant proposed to eliminate the unit, in 1995 and in 2005, the applicant, the parties and the Commission recognized the need for a new fish passage plan. *See* Br.42. To replace the Kaplan unit, the 2005 settlement proposes in Phase I to install screening mechanisms, conventional structures used at many hydroelectric projects, to protect fish. First Rehearing Order at P69-70, SPA39. The optional new 11-MW fish friendly turbine, Phase II, proposed in the 2005 settlement "could not be used as the primary means of fish passage unless, after a period of testing, its fish passage effectiveness is found to be equal to or greater than that of" the Phase I measures. *Id*. P69, SPA39; *see also* 2007 License Order at P55-57, JA2514.

While Green Island claims that the provision for effectiveness testing suggests that the "efficacy of these measures was – and remains – uncertain," Br.42, it has elsewhere acknowledged that such testing "does not inherently mean that a facility is either infeasible or ineffective." First Rehearing Order at P70 n.61 (quoting Rehearing Request, Besha Aff., p. 8 of 10, JA2983), SPA56; Br.66

(Green Island is conducting effectiveness monitoring at its own project). And, in any event, both the Departments of Interior and Commerce included the fish passage measures and testing provisions as mandatory license conditions under FPA section 18, 16 U.S.C. § 811. First Rehearing Order at P70, SPA39; *see also* 2007 License Order at P57 (discussing studies showing that the 11-MW fish-friendly unit design is a "considerable improvement" over the 1991 proposed Kaplan unit), JA2514.

To support its assertion that the fish protection measures cause a new adverse environmental impact, Green Island relies on inappropriate comparisons and unreliable, irrelevant evidence rejected by the Commission. First, Green Island references 1995 and 1996 fish passage concerns, Br.43, but the relevant comparison here is between environmental conditions under the 1991 application and under the 2005 settlement.

Second, Green Island continues to rely, Br.43 n.22, on a statement in a Low Impact Hydropower Institute report, potentially questioning the effectiveness of some of the 2005 settlement's fish passage measures, that the Commission excluded from the record as unreliable, irrelevant and, in any event, unpersuasive. Second Rehearing Order at P34-36, SPA68. Erie provided record evidence – not acknowledged by Green Island – on the efficacy testing, indicating that the statements on which Green Island relies reflect a misunderstanding. *Id.* P34 n.34,

SPA74. A single statement – subject to significant accuracy questions – does not justify reopening the record because it would not compel a different result in this proceeding. *Id*. P36, SPA68. And, the Commission is entitled, in its expert judgment, to view one submission as more reliable and persuasive than another, especially in such a technical area. *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 154 (2d Cir. 2008) (agency responsibility to "resolve record contradictions and to determine which evidence was most persuasive and what weight it deserved").

III. THE COMMISSION REASONABLY DETERMINED THAT THE COHOES FALLS PROPOSAL IS NOT A FEASIBLE ALTERNATIVE

If the Court affirms the Commission's decision on the material amendment issue, it can stop here. *See* Appendix A (decisional flowchart). In *Green Island*, this Court instructed the Commission that "if Green Island is permitted to intervene upon remand, FERC must consider Green Island's evidence regarding the Cohoes Falls Project so that it may determine whether the Cohoes Falls Project is a feasible alternative." 577 F.3d at 168. On remand, the Commission did not permit Green Island to intervene. Accordingly, under the Court's mandate, the Commission was not obligated to address the feasibility of the Cohoes Falls Project, but did so in order to ensure that it had considered all relevant factors that may bear upon its decision. Remand Order at P45, SPA11.

A. Green Island Has Not Demonstrated That It Has Standing To Challenge The Commission's Feasibility Analysis

FPA section 313(b) requires that, in order to obtain agency rehearing and judicial review, a party must be "aggrieved" by a Commission order. 16 U.S.C. §§ 825*l*(a), (b). "A party is 'aggrieved' if it can establish that it has both constitutional and prudential standing." *Green Island*, 577 F.3d at 158. "[T]he requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception." *LaFleur v. Whitman*, 300 F.3d 256, 269 (2d Cir. 2002) (citation omitted).

To establish constitutional standing, Green Island, among other things, "must demonstrate that (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Green Island*, 577 F.3d at 159 (internal citations omitted). Green Island asserts two potential injuries: (1) the effect of the School Street Project on its downstream hydroelectric project; and (2) its interest as a potential competitor in developing the Cohoes Falls Project. Br.66. In *Green Island*, 577 F.3d at 160-61, this Court held that Adirondack lacked standing because its interest – also tied to the development of the Cohoes Falls Project – was too speculative. The facts here support the same result.

In the orders on review, the Commission ruled that Green Island had not demonstrated a concrete, non-speculative injury for purposes of establishing that it

is an "aggrieved" party eligible to seek agency rehearing and judicial review of the Commission's feasibility determination. Remand Order at P48 & n.52, SPA12, SPA22; First Rehearing Order at P77, SPA41. Green Island sought rehearing, claiming only that it is aggrieved as a potential competitor – without mention of its downstream project. *See* Rehearing Request at 45-52, JA2910-17.

Green Island must first establish that it is an aggrieved party for purposes of rehearing, under FPA section 313(a), 16 U.S.C. § 825*l*(a), before it has the opportunity to argue that it is aggrieved for purposes of judicial review, under FPA section 313(b), 16 U.S.C. § 825*l*(b), and Article III. *Green Island*, 577 F.3d at 158 ("the ability to petition for review is predicated on party status, and . . . FERC has the authority to 'limit those eligible to intervene or to seek review'") (quoting *Scenic Hudson*, 354 F.2d at 617). FPA section 313(b), 16 U.S.C. § 825*l*(b), however, precludes a party from raising, on judicial review, an argument that it did not first raise on rehearing and from "apply[ing] to the court for leave to adduce additional evidence," absent "reasonable grounds for failure" to do so on rehearing. While a petitioner ordinarily may present new argument and evidence in support of Article III standing, Br.66 n.30, FPA section 313(b) precludes this for establishing aggrievement under FPA 313(a) for purposes of rehearing. 16 U.S.C. §§ 825*l*(a), (b); *see Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 2007) ("Neither FERC nor this court has

authority to waive these statutory requirements.”).

Accordingly, FPA section 313(b) bars Green Island from arguing that it will suffer an injury to its downstream project for purposes of establishing that it is an aggrieved party, eligible to seek rehearing under FPA section 313(a). Because rehearing is a statutory prerequisite to judicial review under FPA section 313(b), Green Island may only challenge the Commission’s feasibility determination if it succeeds in demonstrating that it is aggrieved as a potential competitor.

In any event, Green Island’s claim of injury to its downstream project is too speculative to establish standing. Even if the Court reversed the Commission’s decision that the Cohoes Falls Project is not feasible, such that the Commission were compelled to consider the Cohoes Falls Project in determining whether the School Street Project is “best adapted” to the public interest, Green Island has not demonstrated what effect, if any, this would have on the Green Island Project, located three miles away, beyond the confluence of the Mohawk and Hudson Rivers. *See* Br.66. First, Green Island presents evidence of conditions at each project separately, but does not demonstrate a causal link between conditions at the two projects. *See*, *e.g*., Br.69 (stating, without citation, “School Street is a major contributor to this deficiency”). Second, Green Island has not shown that, if the Commission considers the Cohoes Falls Project in its “best adapted” analysis, the Commission would require changes that would improve water quality and fish

passage, or affect any operational condition, at the Green Island Project. As the Court suggested in *Green Island*, such layering of assumptions does not demonstrate standing. *Green Island*, 577 F.3d at 161 (detailing three levels of speculation).

Green Island's interest as a potential competitor in seeking a license for the Cohoes Falls Project, *see* Br.73, is likewise too speculative to establish standing. In *Green Island*, this Court held that Adirondack's interest – based on the potential for the Cohoes Falls Project to move forward – was wholly speculative. 577 F.3d at 161. Green Island's alleged injury is no less speculative. *See* First Rehearing Order at P81-82, SPA41-42. At most, Green Island has been deprived of "the opportunity to compete in a *possible* new licensing proceeding," but this possibility has been deemed "too speculative an injury for Article III standing." *Id*. P82 (quoting *Free Air Corp. v. FCC*, 130 F.3d 447, 449 (D.C. Cir. 1997)), SPA42. Indeed, the D.C. Circuit has specifically deemed the potential to compete in a hydroelectric development proceeding "too attenuated, and therefore . . . too speculative" for Article III purposes. *City of Orrville v. FERC*, 147 F.3d 979, 986 (D.C. Cir. 1998); *see also Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992) (rejecting as speculative "[a]llegations of injury based on predictions regarding future legal proceedings").

Unlike the situation in *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664 (D.C. Cir. 1987), on which Green Island relies, Green Island's ability to compete is not "curable with a simple amendment." Br.73. Green Island incorrectly assumes that, if the Commission determined the Cohoes Falls Project were feasible, and if it found that project to be better adapted to the public interest, it would deny Erie's license application and allow Green Island and others to compete for the site. *See* First Rehearing Order at P83, SPA42. But the Commission "could issue Erie a license incorporating those aspects of the alternative that [the Commission] found to be in the public interest." *Id.* Thus, Green Island's ability to complete for the site may also depend on Erie's decision whether to accept such a license. *Id.* Green Island's "theory of injury stacks speculation upon hypothetical upon speculation, which does not establish an actual or imminent injury." *Occidental Permian Ltd. v. FERC*, No. 10-1381, 2012 LEXIS 6184 (D.C. Cir. Mar. 27, 2012) (citation omitted).

B. Substantial Evidence Supports The Commission's Determination That The Cohoes Falls Project Is Not A Feasible Alternative

The Commission reasonably determined, in light of the context of the proceeding and based upon substantial record evidence, that the Cohoes Falls Project is not a feasible alternative to the School Street Project. Remand Order at P49, SPA12. As the Commission explained, a "'feasible' alternative is one that is 'reasonable, likely' or 'capable of being done or carried out.'" *Id*. P50 (quoting dictionary), SPA12. The Commission's feasibility assessment includes analysis of the project's proposed design, construction, operation, generation, environmental and recreational measures, and cost. *Id*.; *see also id*. P68-72 (discussing non-cost factors), SPA15. The Commission found economic feasibility to be determinative.

1. The Commission reasonably relied upon its own economic feasibility analysis

FPA section 15(a)(2), 16 U.S.C. § 808(a)(2), provides that cost, or cost-effectiveness, is one of the public interest factors that the Commission considers whether a proposed project is "best adapted to the public interest." Remand Order at P74, SPA16. Here, the Commission examined the cost-effectiveness of both the Cohoes Falls Project and the School Street Project, and determined that the Cohoes Falls Project "would cost significantly more than the School Street Project and would also cost significantly more than currently available alternative power." *Id*. P75, SPA16.

a. The cost estimates

The following table, explained in additional detail below, sets forth the key figures in the Commission's assessment of the cost-effectiveness of the Cohoes Falls Project. *See* Remand Order at P60-66, SPA14-15.

Cohoes Falls Project Cost Estimates (2010 dollars)		
Value Description	Green Island Estimate	Commission Estimate
Total construction cost	$92,270,800	$370,000,000
Construction cost per kilowatt (kW)	$922.71/kW	$3700/kW
Annual cost	$8,966,370	$29,143,100
Annual cost per megawatt hour (MWh)	$31.19/MWh	$101.37/Mwh
Annual power value	$11,787,500	$11,787,500
Difference, per MWh, as compared to average regional power price, $41.00/MWh	$9.81/MWh less	$60.37/MWh more

The Commission's construction cost estimate is based on an independent report prepared by the Idaho National Engineering and Environmental Laboratory (Idaho National Laboratory), using a median cost of $3,700 per kW to develop new capacity at undeveloped sites. Remand Order at P62, SPA14. Both construction cost estimates are conservative, as they omit the cost of acquiring the School Street Project, for which Erie estimated, in 2006, a $90,000,000 market value. *Id*. P61 & n.61, SPA14, SPA23.

To determine the annual power value, the Commission multiplied the

estimated average annual generation of 287,500 MWh (a figure that Green Island disputes, *see infra* p. 54), by the cost of alternative power, i.e., the average market price in the region, $41.00 per MWh. *Id*. P64-65, SPA14. For both estimates, this yields a total annual power value of $11,787,500. *Id*.

The difference between Green Island's total annual cost and the total annual value, in the first year, is $2,821,130. *Id*. P65, SPA14. This is $9.81 per MWh less than the alternative cost of power. *Id*.

By contrast, the difference between the Commission's estimated total annual cost of Green Island's Cohoes Falls Project and its total annual value, in the first year, is $17,355,600. *Id*. P66, SPA15. This is $60.37 per MWh *more* than the alternative cost of power. *Id*.

Finally, for comparison, the School Street Project, with the proposed new 11-MW turbine, would generate about 188,500 MWh annually, at an annual cost of $6,189,400 or $32.84 per MWh, with a total annual value of $7,728,500. *Id*. P75, SPA16. Thus, the Project would cost about $8.16 per MWh less than the alternative cost of power, and about $68 per MWh less than the Cohoes Falls Project (as calculated by the Commission) *Id*. P75, 76, SPA16.

b. The Commission cannot assume that Green Island would develop the Cohoes Falls Project

In evaluating the economic feasibility of the Cohoes Falls Project, the Commission's goal is not to determine a precise, site-specific construction cost

estimate. Rather, the Commission's purpose is to "obtain a general sense of construction costs for the project and to test the reasonableness of Green Island's estimates." First Rehearing Order at P93, SPA44; *see also id*. P101, SPA46.

Green Island's construction cost estimate assumes that Green Island would be the entity developing the Cohoes Falls Project, claiming that its construction costs might be lower than the industry average. *See* Br.50, 58; Remand Order at P77, SPA17. But as the Commission explained, this is both inappropriate and speculative. Remand Order at P77, SPA17; First Rehearing Order at P93, SPA44. As this Court recognized in *Green Island*, the Commission cannot issue a license to Green Island for the Cohoes Falls Project in this proceeding. *Green Island*, 577 F.3d at 168 (statute bars licensing of late-filed proposal); *see also* Remand Order at P46, SPA11. As instructed by the Court and consistent with the FPA, the Commission here must determine if the Cohoes Falls Project is a feasible alternative and, if it is, "whether and how it might affect our consideration of whether the School Street Project" is "best adapted" under the FPA. Remand Order at P46, SPA11. Even if the Cohoes Falls Project is feasible, and if the Commission then determines that it is "better adapted," the Commission

> could either (1) require changes to Erie's School Street Project to make it best adapted, including possibly requiring Erie to develop the Cohoes Falls Project . . . , or (2) deny a new license for the School Street Project, require that the project be retired, and issue notice inviting new applications to develop the site.

Id.

At best, Green Island can hope to have an opportunity to compete to develop the site, if the Commission selects the second alternative. Accordingly, Green Island's claim that it stands ready to file a development application for the Cohoes Falls Project does not change this analysis. Br.58.

Moreover, Green Island has an obvious financial interest in the outcome of this proceeding. As the Commission explained, it would be inappropriate to rely on cost estimates that may be "unreasonably low or unrealistic to give the appearance that the proposed project would be financially feasible." First Rehearing Order at P93, SPA44. Again, the purpose of the cost estimate is not to determine what it might cost Green Island to develop the project, but "whether other entities, including perhaps Erie, could reasonably be expected to construct the Cohoes Falls Project." *Id*.

c. The Commission appropriately relied on industry average data in the Idaho National Laboratory report

With this purpose in mind, and contrary to Green Island's claims, Br.50-51, the Commission appropriately relied on the industry average cost data prepared by the independent Idaho National Laboratory to develop a general estimate to compare to Green Island's site- and applicant-specific estimate. The Commission's $370,000,000 construction cost estimate is based on the Idaho National Laboratory report's median cost of $3,700 per kW, in 2010 dollars, to

develop new capacity at undeveloped sites. Remand Order at P62, SPA14.

Green Island correctly points out that the Idaho National Laboratory report states that it "should not be interpreted as precise engineering estimates." Br.51 (quoting Idaho National Laboratory report, R.581, Att. A, App. 2 at vi, JA2994). The Commission therefore used the data appropriately: "as a general cost estimate based on historical experience, not as a precise engineering estimate for a particular site." First Rehearing Order at P101, SPA46. The Idaho National Laboratory data is the only independently sourced data in this proceeding. *Id*. Thus, it is the only data that can reasonably be used to develop an estimate of what it might cost an applicant, other than Green Island, to construct the Cohoes Falls Project.

Green Island further claims that the Idaho National Laboratory dataset includes noncomparable projects, with different designs and a wide range of sizes and geographic areas, constructed over a 60-year time period. Br.51. Green Island does not elaborate on any of these points, limiting the Commission's ability to respond. Nevertheless, the Commission previously addressed similar claims. *See*, *e.g*., First Rehearing Order at P99 (Green Island failed to explain why the boundary for comparable projects should be drawn at the New York State border), SPA45; *id*. P100 (while Green Island questions inclusion of projects less than 25 MW in the Idaho National Laboratory report, 10 out of 12 of the projects in its own

dataset are 5 MW or less), SPA45-46.

d. The Commission appropriately revised the estimated average annual generation of the Cohoes Falls Project

Finally, Commission staff appropriately estimated average annual generation from the Cohoes Falls Project, based upon the proposal as originally submitted to the Commission. While Green Island provided an average annual generation estimate of 300,000 MWh, Commission staff estimated production to be 287,500 MWh. The difference derives from staff's determination that tailwater elevations (i.e., the depth of the water at the point of discharge) would be higher than Green Island's estimates, based upon staff's review of Green Island's draft application and applicable stream gauge data. Remand Order at P58, SPA13. Green Island's tailwater rating curve was not accompanied by an explanation allowing the Commission to verify its accuracy. *Id.* The Commission therefore developed its own tailwater rating curve on which to base energy production estimates. *Id.*

Green Island claims that the Commission failed to account for improved hydraulic conditions in the project tailrace, which it asserts were included in its 2006 proposal. Br.59. But neither the original exhibits to Green Island's draft license application nor the late-submitted affidavit provides any specific information regarding the proposal to modify the tailrace. First Rehearing Order at P88 (describing exhibits), SPA43. Likewise, upon review of the new information Green Island provided with its request for rehearing (Rehearing Request, Att. A,

Ex. 2 at 1, JA2966), including a new affidavit describing changes to the tailrace, the Commission found "insufficient support to find that Green Island's proposal to modify the tailrace area was included as part of the Cohoes Falls alternative." First Rehearing Order at P89, SPA43. In other words, Green Island appears to be modifying its proposal in order to claim a belated advantage in the economic feasibility analysis. It is this "moving target" that the Commission found unacceptable. *Id.*

2. The Commission reasonably rejected Green Island's construction cost estimate

The Commission reasonably determined that Green Island's estimates are unreasonably low, unreliable and unrealistic. Remand Order at P77, SPA17; First Rehearing Order at P93, 95, SPA44. Green Island estimates the cost of developing the Cohoes Falls Project at $923 per kW, while the Idaho National Laboratory report provides an estimated median per kW cost of $3,700, and Erie estimated the cost of adding capacity to the School Street Project at $2,250 per kW. Remand Order at P77, SPA17. Green Island claims its estimate is site-specific, Br.49, but really it is applicant-specific, and therefore inappropriate. *See supra* p. 50.

Green Island's claim, Br.53 & n.24, that its cost estimate falls well within the range of costs included in the Idaho National Laboratory dataset relies upon a misapplication and manipulation of the data. First Rehearing Order at P95, SPA44. Specifically, Green Island claims that the Idaho National Laboratory data

would support a construction cost estimate as low as $90,497,800 in 2010 dollars. *Id*. P94, SPA44. But the data also support a construction cost estimate as high as $619,800,000 in 2010 dollars.[4] *Id*. P95, SPA44. The Commission found unreasonable Green Island's reliance on the lowest cost projects in the dataset, because the Cohoes Falls Project "would require more extensive work than simply constructing a new project at an undeveloped site." *Id*. P95, SPA44.

The exclusion of the cost of acquiring the School Street Project from the construction cost estimate underscores Green Island's inappropriate reliance on the lower end of the Idaho National Laboratory dataset. *Id*. P96, SPA45. Adding the estimated market value of the Project, $90 million, to Green Island's adjusted cost of $94 million, results in a total construction cost of $184 million. *Id*. Adding the acquisition cost to the Commission's estimate yields a total of about $460 million. *Id*. Green Island's opening brief does not dispute the omission of this significant cost from its estimate.

At best, if the Commission blindly adopts Green Island's construction cost estimate – without including the cost of acquiring the School Street Project – the

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[4] Green Island questions, Br.54 n.25, the Commission's reliance on a 1982 article to dispute Green Island's claim that the Idaho National Laboratory report overestimates costs by including mostly utilities with more costly projects. First Rehearing Order at P98, SPA45. Green Island submitted this article to the Commission, and only disclaimed it when the Commission pointed out that the two subject projects, both located at existing dams, cost more to develop than the average cost cited in the Idaho National Laboratory report, and far more than Green Island's estimated cost. *Id*.

Commission "*might* conclude that the Cohoes Falls Project is slightly more cost-effective than the School Street Project." Remand Order at P77, SPA17. This possibility does not render the evidence on which the Commission relied inadequate. Moreover, the possibility that different conclusions may be drawn from the same evidence does not render the Commission's conclusions unreasonable. *Cellular Phone Taskforce*, 205 F.3d at 89. And, to the extent that Green Island's cost estimate can be considered expert evidence, the Commission's reliance upon its own expert staff – instead of Green Island's unreliable and unrealistic evidence – was reasonable and deserves deference from this Court. *See, e.g.*, *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) ("the court defers to the Commission's resolution of factual disputes between expert witnesses").

3. The Commission reasonably determined that cost-effectiveness is an appropriate basis for determining the feasibility of the Cohoes Falls Project

Green Island's suggestion, Br.56, 62, that the Commission can simply ignore the results of its economic feasibility analysis contravenes the Commission's obligation to fully consider the public interest, as established in Commission precedent.

Under FPA section 15(a)(2), 16 U.S.C. § 808(a)(2), the Commission considers many factors when determining whether a project – and in a competitive

proceeding, which project – is "best adapted to serve the public interest." Remand Order at P67, SPA15. Because this is not a competitive relicensing proceeding, the Commission is comparing projects, not applicants, and it excludes as irrelevant those factors focused on the identity of the applicant (e.g., plans and abilities to comply with the license, applicant's need for power). *Id*. P68, SPA15.

Cost-effectiveness, however, is an appropriate factor for the Commission's examination of the public interest in considering alternative feasibility. *Id*. P74, SPA16. "[T]he Commission must have some means of determining whether the new development could feasibly replace the existing project," and cost-effectiveness is an important tool in this evaluation. First Rehearing Order at P107, SPA47.

The Commission's policy on cost-effectiveness for licensing determinations does not require it to disregard cost-effectiveness here, in a feasibility determination. In *Mead Corp.*, 72 FERC ¶ 61,027, at 61,068-70 (1995), the Commission explained that it will not deny a license on the basis of the Commission's own economic analysis, but leaves to the license applicant the decision of whether to proceed with an economically infeasible project. Remand Order at P73, SPA16. Green Island asserts that the Commission's *Mead* policy requires it to reject the results of its economic feasibility analysis here. Br.57. "When comparing alternative projects, however, economic feasibility is a public

interest factor that the Commission cannot overlook." Remand Order at P78, SPA17; *see also id*. P79, SPA 17 (citing *Holyoke Water Power Co*., 88 FERC ¶ 61,186, at 61,605 (1999) (relying on cost-effectiveness in deciding between two competing license applications)).

Moreover, the Court should reject Green Island's effort to render the cost-effectiveness test less meaningful by incorporating into it various unquantified, alleged benefits of the Cohoes Falls Project. Br.62-64. Section 15(a)(2)(F) of the FPA, 16 U.S.C. § 808(a)(2)(F), contemplates that the Commission will compare the costs and benefits of the proposals to evaluate the cost effectiveness of the plans of development, not that the Commission will attempt to monetize other non-monetary benefits, such as environmental measures, recreational measures, and aesthetics. First Rehearing Order at P108, SPA47.

IV. THE COMMISSION'S EVIDENTIARY DETERMINATIONS ARE REASONABLE

Green Island overreaches when it accuses the Commission of "severely limit[ing] the opportunity for parties . . . to provide comments and responsive evidence on issues salient to this proceeding." Br.83. While the Commission refused to reopen the record for any and all evidentiary submissions, the Commission in fact admitted relevant evidence on the issues requiring resolution on remand. First Rehearing Order at P19-20, SPA30 (granting motion to lodge evidence concerning feasibility analysis).

The Commission offered reasoned explanations to support its decisions on the stream of motions, proffers, and affidavits filed. *See Friends of the River v. FERC*, 720 F.2d 93, 99 n.6 (D.C. Cir. 1983) (holding that FERC did not abuse its discretion in disallowing evidence that is “cumulative, unreliable, or not material”). Neither *Green Island* nor *Scenic Hudson*, 354 F.2d at 620, requires the Commission to admit all late-filed, irrelevant evidence. *See* Second Rehearing Order at P15-17, SPA65. Green Island now challenges the Commission’s exclusion of six items, Br.81-82, but the admission of these items would not “clearly mandate a change in result.” *Greene Cnty. Planning Bd.*, 559 F.2d at 1233 (agency did not abuse discretion in excluding evidence that “at best only partial[ly]” undercut agency conclusion).

The Commission’s reasoned rejections of the first and fifth items, Green Island’s flow analysis and the Low Impact Hydropower Institute report, are addressed above. *Supra* p. 34, 41. As to the remaining four items, the Commission’s reasons for rejecting each are detailed in the orders. *See* First Rehearing Order at P26 (rejecting correspondence concerning cost indexing as late-filed and lacking probative value), SPA31; *id*. P23 (rejecting state tax determination regarding Erie partnership as irrelevant to issues on remand and unpersuasive), SPA30; *see also* Second Rehearing Order at P28 (tax determination), SPA67; First Rehearing Order at P22 (rejecting Erie’s request for

extension of time to construct 11-MW unit as not relevant to relicensing and late-filed), SPA30.

The Commission also properly excluded Green Island's evidence concerning Erie's excavation of the power canal, Br.84, as irrelevant to both the material amendment and the feasibility issues, the only issues before the Commission on remand. Second Rehearing Order at P21-22, SPA66. In any event, the 2007 License Order permitted Erie to excavate the power canal without installing the new 11-MW unit. *Id*. P21, SPA66. Also, this "minor change" in conditions was underway at the time of the Court's opinion in *Green Island*, and fell within the range of canal capacity considered in the 2007 License Order. *Id*. P22 & n.20, SPA66, SPA73. Accordingly, acceptance of this evidence would not compel a different result in this case. *See Greene Cnty.*, 559 F.2d at 1233.

CONCLUSION

For the reasons stated, the petitions for review, if not dismissed for lack of standing, should be denied and the challenged orders should be affirmed in all respects as entirely responsive to the Court's mandate in *Green Island*.

Respectfully submitted,

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April 30, 2012
FINAL BRIEF: June 18, 2012

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a), I certify that the Brief of Respondent Federal Energy Regulatory Commission uses a proportionally spaced typeface, Times New Roman, in 14 point font, and contains 13,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Holly E. Cafer
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June 18, 2012

ADDENDUM A

ADDENDUM A

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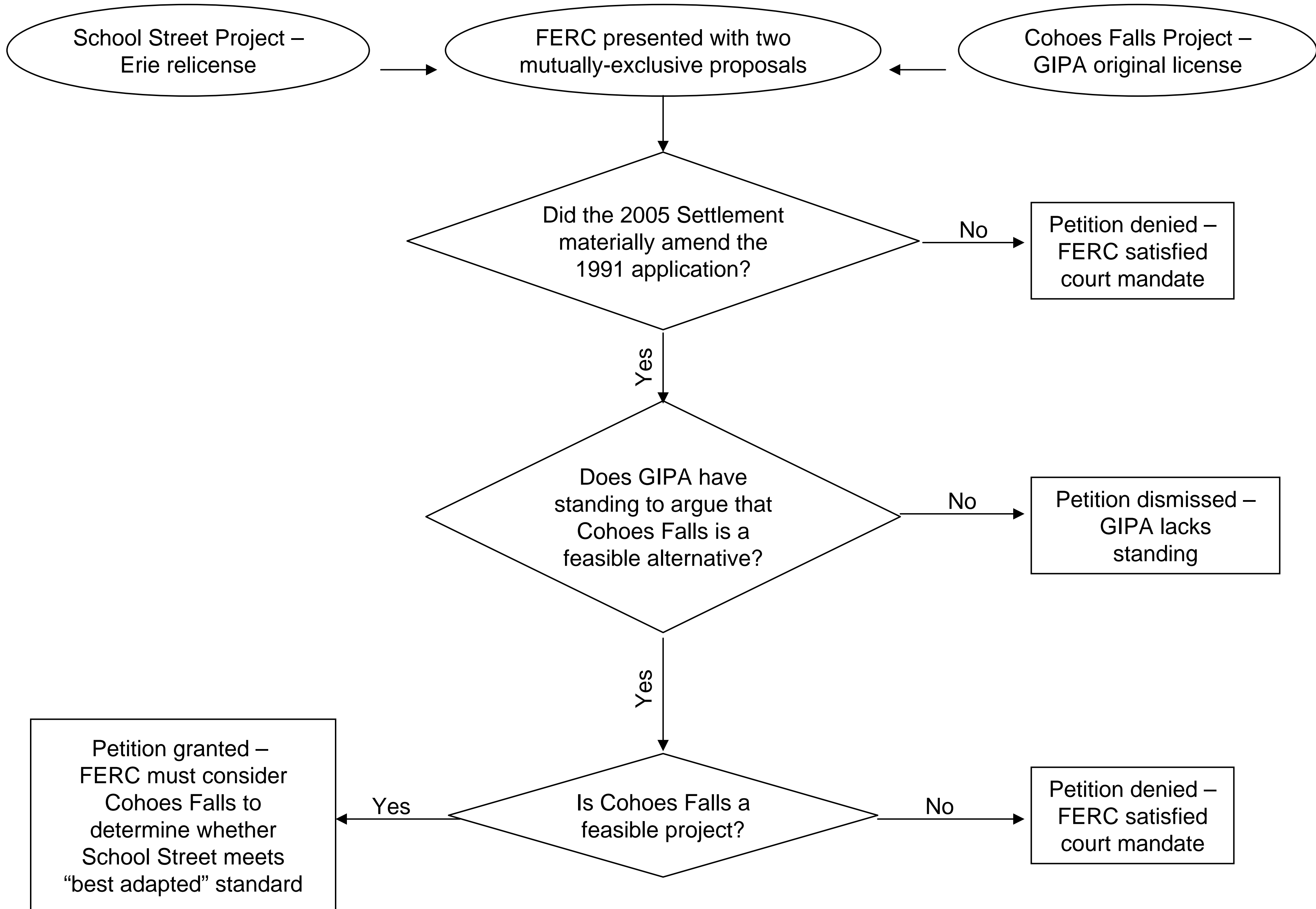
Appendix A – Decisional Flow Chart



School Street Project
Chronology of Relicensing Proceeding

December 23, 1991	Niagara Mohawk (Erie's predecessor) files application to relicense the School Street Project, JA1
December 13, 1995	Niagara Mohawk withdraws proposed 21-MW addition, JA457
May 30, 2001	Erie readopts proposed 21-MW addition, JA698
July 19, 2004	Green Island files a preliminary permit application for the Cohoes Falls Project
September 7, 2004	Green Island moves to intervene, JA858
January 21, 2005	Commission dismisses Green Island preliminary permit application
March 9, 2005	Erie files offer of settlement for the School Street Project, proposing optional 11-MW addition, JA1120
March 24, 2005	Public notice of 2005 settlement
April 13, 2005	Green Island comments on 2005 settlement. JA1236
May 15, 2006	Green Island files alternative offer of settlement, proposing the Cohoes Falls Project, JA1587
June 28, 2006	Commission denies Green Island's 2004 intervention, JA2475
February 15, 2007	Commission issues 2007 License Order, JA2505
September 21, 2007	Commission issues License Rehearing Order, JA2757
August 10, 2009	Court issues opinion, *Green Island Power Auth. v. FERC*, 577 F.3d 148 (2d Cir. 2009)
April 15, 2010	FERC issues Remand Order, SPA1
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18 C.F.R. § 385.713(b)………………………………….....B19-20

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
806. Applicability; severability.
807. Exemption for monetary policy.
808. Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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read as follows: "'qualifying cogeneration facility' means a cogeneration facility which—

"(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

"(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);".

Pars. (22), (23). Pub. L. 109–58, §1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

"(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

"(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale."

Pars. (26) to (29). Pub. L. 109–58, §1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, §726(b), inserted "(including any municipality)" after "State agency".

Pars. (23) to (25). Pub. L. 102–486, §726(a), added pars. (23) to (25).

1991—Par. (17)(E). Pub. L. 102–46 struck out ", and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)" after "geothermal resources" in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, §3(a), inserted "a facility which is an eligible solar, wind, waste, or geothermal facility, or".

Par. (17)(E). Pub. L. 101–575, §3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, §201, amended definitions of "reservations" and "corporations", and inserted definitions of "person", "licensee", "commission", "commissioner", "State commission" and "security".

FERC REGULATIONS

Section 4 of Pub. L. 101–575 provided that: "Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amended by this Act)—

"(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

"(2) shall not be subject to the size limitation contained in section 292.601(b) of such part."

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, §731, Oct. 24, 1992, 106 Stat. 2921, provided that: "Nothing in this title [enacting sections 824*l*, 824m, and 825*o*–1 of this title and former sections 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities."

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Govern-

ments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(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 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.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has

[1] So in original. The colon probably should be a period.

[2] So in original. The period probably should be a colon.

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§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3)[1] Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

(June 10, 1920, ch. 285, pt. I, §9, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847; Pub. L. 99–495, §14, Oct. 16, 1986, 100 Stat. 1257.)

CODIFICATION

Former subsec. (c), included in the provisions designated as subsec. (a) by Pub. L. 99–495, has been editorially redesignated as par. (3) of subsec. (a) as the probable intent of Congress.

AMENDMENTS

1986—Pub. L. 99–495 designated existing provisions as subsec. (a), redesignated former subsecs. (a) and (b) as pars. (1) and (2) of subsec. (a), and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title[1] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

[1] See Codification note below.

[1] So in original. Probably should be followed by "; and".

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caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

(b) Relicensing proceedings; Federal agency recommendations of take over by Government; stay of orders for new licenses; termination of stay; notice to Congress

In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its[1] does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

(June 10, 1920, ch. 285, pt. I, § 14, 41 Stat. 1071; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 207, 212, 49 Stat. 844, 847; Pub. L. 90–451, § 2, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99–495, § 4(b)(2), Oct. 16, 1986, 100 Stat. 1248.)

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–495 struck out first sentence which read as follows: ''No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title.''

1968—Pub. L. 90–451 designated existing provisions as subsec. (a) and added subsec. (b).

1935—Act Aug. 26, 1935, § 207, amended section generally.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

[1] So in original. Probably should be ''it''.

§ 808. New licenses and renewals

(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 its customers) of the alternative source of power, the effect on the applicant's 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 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 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

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of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 371 of Title 43 and Tables. The reclamation fund created by that Act was established by section 391 of Title 43.

AMENDMENTS

1935—Act Aug. 26, 1935, § 208, amended section generally, designating existing provisions as subsec. (a), inserting ''except charges fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this Part,'', substituting ''national forests'' for ''national monuments, national forests, and national parks'' wherever appearing, inserting last sentence relating to payment of proceeds of charges into Treasury, and adding subsec. (b).

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

§ 811. Operation of navigation facilities; rules and regulations; penalties

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. 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 fishways. 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[1] 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. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825*o* of this title.

(June 10, 1920, ch. 285, pt. I, § 18, 41 Stat. 1073; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 209, 212, 49 Stat. 845, 847; 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; June 4, 1956, ch. 351, § 2, 70 Stat. 226; 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090; Pub. L. 109–58, title II, § 241(b), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

2005—Pub. L. 109–58 inserted after first sentence ''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 fishways. 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.''

1956—Act June 4, 1956, substituted ''Secretary of the Department in which the Coast Guard is operating'' for ''Secretary of War'' in first sentence.

1935—Act Aug. 26, 1935, § 209, amended section generally, inserting first sentence, striking out ''Such rules and regulations may include the maintenance and operation of such licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce.'', and substituting section ''825*o*'' for section ''819''.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Reference to Secretary of Commerce inserted in view of: creation of National Oceanic and Atmospheric Administration in Department of Commerce and Office of Administrator of such Administration; abolition of Bureau of Commercial Fisheries in Department of the Interior and Office of Director of such Bureau; transfers of functions, including functions formerly vested by law in Secretary of the Interior or Department of the Interior which were administered through Bureau of Commercial Fisheries or were primarily related to such Bureau, exclusive of certain enumerated functions with respect to Great Lakes fishery research, Missouri River

[1] So in original. Probably should be ''section''.

Reservoir research, Gulf Breeze Biological Laboratory, and Trans-Alaska pipeline investigations; and transfer of marine sport fish program of Bureau of Sport Fisheries and Wildlife by Reorg. Plan No. 4 of 1970, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, set out in the Appendix to Title 5, Government Organization and Employees.

Coast Guard transferred to Department of Transportation and all functions, powers, and duties, relating to Coast Guard, of Secretary of the Treasury and of other offices and officers of Department of the Treasury transferred to Secretary of Transportation by section 6(b)(1) of Pub. L. 89–670, Oct. 15, 1966, 80 Stat. 938. See Section 108 of Title 49, Transportation.

Reorg. Plan No. II of 1939, set out in the Appendix to Title 5, Government Organization and Employees, transferred Bureau of Fisheries in Department of Commerce and its functions to Department of the Interior, to be administered under direction and supervision of Secretary of the Interior.

CLARIFICATION OF AUTHORITY REGARDING FISHWAYS

Pub. L. 102–486, title XVII, § 1701(b), Oct. 24, 1992, 106 Stat. 3008, provided that: ''The definition of the term 'fishway' contained in 18 C.F.R. 4.30(b)(9)(iii), as in effect on the date of enactment of this Act [Oct. 24, 1992], is vacated without prejudice to any definition or interpretation by rule of the term 'fishway' by the Federal Energy Regulatory Commission for purposes of implementing section 18 of the Federal Power Act [16 U.S.C. 811]: *Provided*, That any future definition promulgated by regulatory rulemaking shall have no force or effect unless concurred in by the Secretary of the Interior and the Secretary of Commerce: *Provided further*, That the items which may constitute a 'fishway' under section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.''

§ 812. Public-service licensee; regulations by State or by commission as to service, rates, charges, etc.

As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

(June 10, 1920, ch. 285, pt. I, § 19, 41 Stat. 1073; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 813. Power entering into interstate commerce; regulation of rates, charges, etc.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in subtitle IV of title 49, and the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 807 of this title for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the

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cumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) Attendance of witnesses and production of documents

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Resort to courts of United States for failure to obey subpena; punishment

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Testimony by deposition

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(e) Deposition of witness in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(f) Deposition fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 10, 1920, ch. 285, pt. III, § 307, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 856; amended Pub. L. 91–452, title II, § 221, Oct. 15, 1970, 84 Stat. 929; Pub. L. 109–58, title XII, § 1284(b), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted '', electric utility, transmitting utility, or other entity'' after ''person'' in two places and inserted '', or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce'' before period at end of first sentence.

1970—Subsec. (g). Pub. L. 91–452 struck out subsec. (g) which related to the immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of inter-

ested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

Commission Review

Pub. L. 99–495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: ''In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action.''

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

Codification

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

Amendments

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

Repeals

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, oper-

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ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(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.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in

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(9) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by § 388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in § 4.32(k).

[Order 533, 56 FR 23148, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991; Order 540, 57 FR 21737, May 22, 1992; Order 596, 62 FR 59810, Nov. 5, 1997; Order 2002, 68 FR 51116, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003]

§ 4.35 Amendment of application; date of acceptance.

(a) *General rule.* Except as provided in paragraph (d) of this section, if an applicant amends its filed application as described in paragraph (b) of this section, the date of acceptance of the application under § 4.32(f) is the date on which the amendment to the applicant was filed.

(b) Paragraph (a) of this section applies if an applicant:

(1) Amends its filed license or preliminary permit application in order to change the status or identity of the applicant or to materially amend the proposed plans of development; or

(2) Amends its filed application for exemption from licensing in order to materially amend the proposed plans of development, or

(3) Amends its filed application in order to change its statement of intent of whether or not it will seek benefits under section 210 of PURPA, as originally filed under § 4.32(c)(1).

(c) An application amended under paragraph (a) is a new filing for:

(1) The purpose of determining its timeliness under § 4.36 of this part;

(2) Disposing of competing applications under § 4.37; and

(3) Reissuing public notice of the application under § 4.32(d)(2).

(d) If an application is amended under paragraph (a) of this section, the Commission will rescind any acceptance letter already issued for the application.

(e) *Exceptions.* This section does not apply to:

(1) Any corrections of deficiencies made pursuant to § 4.32(e)(1);

(2) Any amendments made pursuant to § 4.37(b)(4) by a State or a municipality to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a state or a municipality;

(3) Any amendments made pursuant to § 4.37(c)(2) by a priority applicant to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a priority applicant;

(4) Any amendments made by a license or an exemption applicant to its proposed plans of development to satisfy requests of resource agencies or Indian tribes submitted after an applicant has consulted under § 4.38 or concerns of the Commission; and

(5)(i) Any license or exemption applicant with a project located at a new dam or diversion who is seeking PURPA benefits and who:

(A) Has filed an adverse environmental effects (AEE) petition pursuant to § 292.211 of this chapter; and

(B) Has proposed measures to mitigate the adverse environmental effects which the Commission, in its initial determination on the AEE petition, stated the project will have.

(ii) This exception does not protect any proposed mitigative measures that the Commission finds are a pretext to avoid the consequences of materially amending the application or are outside the scope of mitigating the adverse environmental effects.

(f) *Definitions.* (1) For the purposes of this section, a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to:

(i) A change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project;

(ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:

(A) Enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse; or

(B) Cause adverse environmental impacts not previously discussed in the original application; or

(iii) A change in the number of discrete units of development to be included within the project boundary.

(2) For purposes of this section, a material amendment to plans of development proposed in an application for a preliminary permit means a material change in the location of the powerhouse or the size and elevation of the reservoir if the change would enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse.

(3) For purposes of this section, a change in the status of an applicant means:

(i) The acquisition or loss of preference as a state or a municipality under section 7(a) of the Federal Power Act; or

(ii) The loss of priority as a permittee under section 5 of the Federal Power Act.

(4) For purposes of this section, a change in the identity of an applicant means a change that either singly, or together with previous amendments, causes a total substitution of all the original applicants in a permit or a license application.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988; Order 533, 56 FR 23149, May 20, 1991; Order 2002, 68 FR 51115, Aug. 25, 2003]

§ 4.36 Competing applications: deadlines for filing; notices of intent; comparisons of plans of development.

The public notice of an initial preliminary permit application or an initial development application shall prescribe the deadline for filing protests and motions to intervene in that proceeding (the *prescribed intervention deadline*).

(a) *Deadlines for filing applications in competition with an initial preliminary permit application.* (1) Any preliminary permit application or any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than the prescribed intervention deadline.

(2) Any preliminary permit application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 30 days after the prescribed intervention deadline.

(3) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 120 days after the prescribed intervention deadline.

(b) *Deadlines for filing applications in competition with an initial development application.* (1) Any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than the prescribed intervention deadline.

(2) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than 120 days after the prescribed intervention deadline.

(3) If the Commission has accepted an application for exemption of a project from licensing and the application has not yet been granted or denied, the applicant for exemption may submit a license application for the project if it is a qualified license applicant. The pending application for exemption from licensing will be considered withdrawn as of the date the Commission accepts the license application for filing. If a license application is accepted for filing under this provision, any qualified license applicant may submit a competing license application not later than the prescribed intervention deadline set for the license application.

(4) Any preliminary permit application must be submitted for filing in competition with an initial development application not later than the deadlines prescribed in paragraphs (a)(1) and (a)(2) for the submission of preliminary permit applications filed in competition with an initial preliminary permit application.

(c) *Notices of intent.* (1) Any notice of intent to file an application in competition with an initial preliminary

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(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (i)(1) of this section is first published until a final order is issued on the license application.

(ii) The provisions of §16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section the information specified in paragraph (b)(2) of this section.

(j) *Critical Energy Infrastructure Information.* If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §16.7(d)(7).

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513–A, 55 FR 16, Jan. 2, 1990; Order 533, 56 FR 23154, May 20, 1991; 56 FR 61156, Dec. 2, 1991; Order 2002, 68 FR 51140, Aug. 25, 2003; Order 643, 68 FR 52095, Sept. 2, 2003; 68 FR 61743, Oct. 30, 2003]

§ 16.9 Applications for new licenses and nonpower licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an applicant for a new license or nonpower license for a project subject to sections 14 and 15 of the Federal Power Act.

(b) *Filing requirement.* (1) An applicant for a license under this section must file its application at least 24 months before the existing license expires.

(2) An application for a license under this section must meet the requirements of §4.32 (except that the Director of the Office of Energy Projects may provide more than 90 days in which to correct deficiencies in applications) and, as appropriate, §§4.41, 4.51, or 4.61 of this chapter.

(3) The requirements of §4.35 of this chapter do not apply to an application under this section, except that the Commission will reissue a public notice of the application in accordance with the provisions of §16.9(d)(1) if an amendment described in §4.35(f) of this chapter is filed.

(4) If the Commission rejects or dismisses an application pursuant to the provisions of §4.32 of this chapter, the application may not be refiled after the new license application filing deadline specified in §16.9(b)(1).

(c) *Final amendments.* All amendments to an application, including the final amendment, must be filed with the Commission and served on all competing applicants no later than the date specified in the notice issued under paragraph (d)(2).

(d) *Commission notice.* (1) Upon acceptance of an application for a new license or a nonpower license, the Commission will give notice of the application and of the dates for comment, intervention, and protests by:

(i) Publishing notice in the FEDERAL REGISTER;

(ii) Publishing notice once every week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies, Indian tribes, and non-governmental organizations, by electronic means if practical, otherwise by mail.

(2) Within 60 days after the new license application filing deadline, the Commission will issue a notice on the processing deadlines established under §4.32 of this chapter, estimated dates for further processing deadlines under §4.32 of this chapter, deadlines for complying with the provisions of §4.36(d)(2)(ii) and (iii) of this chapter in cases where competing applications are filed, and the date for final amendments and will:

(i) Publish the notice in the FEDERAL REGISTER;

(ii) Provide the notice to appropriate Federal, state, and interstate resource agencies and Indian tribes, by electronic means if practical, otherwise by mail; and

(iii) Serve the notice on all parties to the proceedings pursuant to §385.2010 of this chapter.

(3) Where two or more mutually exclusive competing applications have been filed for the same project, the

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days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 2002, 68 FR 51142, Aug. 25, 2003; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may be amended or modified only as provided in the regulations under this chapter. A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

(iii) If, in a proceeding, or part of a proceeding, that is set for hearing under subpart E, a written amendment is filed after the time for filing provided under paragraph (a)(3)(ii) of this section, or if an oral amendment is made to a presiding officer during a hearing or conference, the amendment becomes effective as an amendment only as provided under paragraph (d) of this section.

(b) *Answers.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may answer a written or oral amendment in accordance with Rule 213.

(c) *Motion opposing an amendment.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may file a motion opposing the acceptance of any amendment, other than an amendment under paragraph (a)(3)(i) of this section, not later than 15 days after the filing of the amendment.

(d) *Acceptance of amendments.* (1) An amendment becomes effective as an amendment at the end of 15 days from the date of filing, if no motion in opposition to the acceptance of an amendment under paragraph (a)(3)(iii) of this section is filed within the 15 day period.

(2) If a motion in opposition to the acceptance of an amendment is filed within 15 days after the filing of the amendment, the amendment becomes effective as an amendment on the twentieth day after the filing of the amendment, except to the extent that the decisional authority, before such date, issues an order rejecting the amendment, wholly or in part, for good cause.

(e) *Directed amendments.* A decisional authority, on motion or otherwise, may direct any participant, or any person seeking to be a party, to file a written amendment to amplify, clarify, or technically correct a pleading.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.216 Withdrawal of pleadings and tariff or rate filings (Rule 216).

(a) *Filing.* Any participant, or any person who has filed a timely motion to intervene which has not been denied,

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(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

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CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury that on June 18, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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