ORAL ARGUMENT HAS BEEN SCHEDULED FOR OCTOBER 9, 2009

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

No. 08-1224

JACKSON COUNTY, NORTH CAROLINA, *ET AL*.,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

JENNIFER S. AMERKHAIL
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

JUNE 15, 2009
FINAL BRIEF: JULY 27, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties and intervenors appearing below and in this Court are listed in Petitioners' brief.

B. Rulings Under Review:

1. *Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054 (July 19, 2007) ("Surrender Order"), R.302, JA 2266.

2. *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069 (Apr. 22, 2008) ("Rehearing Order"), R.326, JA 2480.

C. Related Cases:

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this Court or any other court.

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Jennifer S. Amerkhail
Attorney

July 27, 2009

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North Carolina Regulations

GLOSSARY

2005 Certification	The water quality certification issued on May 15, 2005, by North Carolina in compliance with Section 401 of the Clean Water Act
2007 Certification	The water quality certification issued on November 21, 2007, by North Carolina in compliance with Section 401 of the Clean Water Act
Commission or FERC	Federal Energy Regulatory Commission
Communities	Petitioners Jackson County, North Carolina, Town of Franklin, North Carolina, and Friends of Lake Glenville Association, Inc.
Communities' Proposal	The offer of settlement submitted by Communities
Duke	Licensee Duke Energy Carolinas, LLC
ESA	Endangered Species Act
FPA	Federal Power Act
FWS	Fish and Wildlife Service, U.S. Department of Interior
JA	Joint Appendix
Lake Glenville Association	Petitioner Friends of Lake Glenville Association, Inc.
NEPA	National Environmental Policy Act
North Carolina	North Carolina Division of Water Quality
P	Paragraph number in a FERC order
R.	Record citation

Rehearing Order	*Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069 (Apr. 22, 2008) R.326, JA _____
Surrender Order	*Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054 (July 19, 2007), R.302, JA ____
Tuckasegee Projects	The four hydroelectric projects located on or adjacent to the Tuckasegee River: Dillsboro; Bryson; East Fork; and West Fork Projects

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission"), in accepting the surrender of a hydroelectric license and approving the project's powerhouse and dam removal, satisfied the requirements of the Federal Power Act, the Clean Water Act, the National Environmental Policy Act and the Endangered Species Act and, otherwise, reasonably addressed objections by representatives of communities located near the project or other projects in North Carolina.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in Addendum A to this brief.

COUNTERSTATEMENT OF JURISDICTION

Petitioners Jackson County, North Carolina ("Jackson County"), Town of Franklin, North Carolina and Friends of Lake Glenville Association, Inc. ("Lake Glenville Association") (collectively, "Communities") assert various arguments that they either failed to raise at all on rehearing before the Commission or failed to raise with specificity as required by the Federal Power Act ("FPA"), Section 313(b), 16 U.S.C. § 825*l* (b). Consequently, these issues are jurisdictionally barred. *See, e.g.*, *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34-35 (D.C. Cir. 1992) ("Under the FPA's judicial review provision, 16 U.S.C. § 825*l*(b), parties seeking review of FERC orders . . . must themselves raise in [the rehearing] petition all of the objections urged on appeal. Neither FERC nor this court has authority to waive these statutory requirements.") (internal quotations and citations omitted). These arguments are:

- That the Commission failed to ensure that North Carolina met its requirement to notice the issuance of a water quality certification. Br. at 44-45; *infra* pp. 41-43.

- That the Final Environmental Assessment failed to analyze the cumulative impacts of the four projects along the Tuckasegee River. Br. at 50, 51, 59; *infra* p. 49.

- That the Final Environmental Assessment improperly "segmented" environmental review of the four projects along the Tuckasegee River from review of three other projects in western North Carolina. Br. at 49, 50, 51; *infra* pp. 50-52.

STATEMENT OF THE CASE

This case concerns the Commission's approval of an application to surrender a license for the Dillsboro hydroelectric project and remove the project's dam and powerhouse ("Surrender Application"). The licensee, Duke Energy Carolinas, LLC ("Duke"), filed to surrender the license to comply with a settlement that it reached with federal and state resource agencies and other stakeholders. These parties agreed that the removal of the dam would restore about ten miles of the Tuckasegee River to its natural state and, as a result, benefit the environment and improve recreation opportunities with minimal loss of renewable energy.

The Commission, after conducting an independent and thorough analysis of the cumulative environmental and developmental impacts of the removal, and of the relicensing of the other three projects along the river, and after providing many opportunities for comments and conducting five public meetings on this analysis, reached the same conclusion. Approving the Dillsboro Surrender Application, FERC found, based on this extensive record, that removal of the dam and powerhouse would be in the public interest. *Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054 ("Surrender Order"), R.302, JA 2266. The Commission took no action on the settlement or the other pending relicensing proceedings for projects

along the Tuckasegee River. These other relicensing proceedings are pending because North Carolina has not yet issued water quality certifications for the projects.

As relevant to this appeal, Communities sought rehearing of the Surrender Order arguing, *inter alia*, that the Commission, in approving the Dillsboro Project removal, effectively approved the settlement and, thereby, prejudged the outcome of Duke's other pending relicensing proceedings. In lieu of the settlement submitted by Duke (and others), they sought approval of their own offer of settlement, in which, admittedly, neither Duke nor any state or federal resource agency participated. The Commission denied rehearing in an April 22, 2008 order which addressed these objections and many others raised in Communities' rehearing request. *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069 ("Rehearing Order"), R.326, JA 2480.

Certain of these issues are raised again in this appeal. Communities allege that the Commission failed to ensure that North Carolina met the public notice requirements of the Clean Water Act required for FERC's approval of the dam removal. Communities also ask the Court to reconsider the Commission's compliance with procedural requirements of the National Environmental Policy Act, arguing that the scope of the analysis and the alternatives examined were unreasonable. Further, they challenge the Commission's reliance on the analysis

completed by the Fish and Wildlife Service ("FWS") pursuant to the Endangered Species Act. Finally, they claim that the Commission erred in treating their offer of settlement as unilaterally-filed comments, rather than as a settlement. FERC addressed each of these arguments on rehearing and concluded that it had complied with the relevant statutes and properly interpreted and applied its regulations.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Federal Power Act

Part I of the Federal Power Act, § 4 *et seq*., 16 U.S.C. § 797 *et seq*., constitutes "a complete scheme of national regulation" that would "secure a comprehensive development of national resources and not merely . . . prevent obstructions to navigation" on jurisdictional waters. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180-81 (1946). This part "authorizes FERC to issue [hydroelectric project] licenses subject to the conditions that FERC deems best suited for power development and other public uses of the waters" after "consider[ing] a project's effect on fish and wildlife." *California v. FERC*, 495 U.S. 490, 494 (1990) (referencing FPA § 10(a)(1), 16 U.S.C. § 803(a)(1)). FPA Section 4(e), 16 U.S.C. § 797(e), also requires the Commission, when issuing a license, to give "equal consideration" to power development, energy conservation,

the protection of wildlife and recreational opportunities, and the preservation of environmental quality.

As relevant to this case, FPA Section 6, 16 U.S.C. § 799, governs the alteration or surrender of an existing license. "Licenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission." 16 U.S.C. § 799; *see generally Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83-87 (D.C. Cir. 1983) (explaining that Section 6 limits FERC's licensing powers). In the Commission's view, Section 6 allows it to condition the surrender of a license, but does not allow it to compel the continued operation of a project if the licensee seeks to surrender its license. *Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005); *see Pacific Gas & Elec. Co.*, 720 F.2d at 87 & n.18 (Section 6 limits the Commission's general regulatory power over licenses to make licensees "reasonably secure from regulatory interference"). The Commission applies a broad public interest standard in determining whether to accept the surrender of an existing license. *See Save Our Sebasticook*, 431 F.3d at 381 (FERC found that surrender and partial dam removal would be in the public interest).

B. Clean Water Act

Under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), the Commission may not issue a license or permit for an activity that may result in any

discharge into waters of the United States unless the appropriate state agency has either issued a water quality certification for the activity or has waived certification. *See City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006). Section 401(a)(1) further requires the appropriate state agency to "establish procedures for public notice" of the water quality certification application and, as appropriate, public hearings for specific applications. *See Tacoma*, 460 F.3d at 68 (explaining FERC's obligation "to obtain some minimal confirmation of [public notice] compliance, at least in a case where compliance has been called into question").

C. National Environmental Policy Act

The Commission's substantive licensing responsibilities (including surrender actions) under the FPA, to the extent they implicate environmental issues, are informed by the procedural requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* *See, e.g.*, *Friends of the River v. FERC*, 720 F.2d 93, 95 (D.C. Cir. 1983). NEPA requires federal agencies to adhere to certain procedural requirements, "with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Department of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *see* 42 U.S.C. § 4332(2) (describing procedures). Under NEPA, a federal agency must take "a 'hard look' at the environmental consequences of its decision to go

forward with the [proposed major federal action]." *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004) (quoting *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1503-04 (D.C. Cir. 1994)).

D. Endangered Species Act

Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a), requires that the Commission consult with the appropriate expert agency to further the purpose of the ESA, that is, the protection of listed species and their habitats. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 127 S. Ct. 2518, 2526 (2007) (discussing Section 7 requirements). As part of the consultation process in cases in which an action may affect a listed species, the expert agency issues a biological opinion on whether a proposed licensing action, that may affect an endangered species, is likely to result in a violation of the ESA. 16 U.S.C. § 1536(b); *see also* 16 U.S.C. § 1536(c) (requiring an action agency to conduct a biological assessment to aid in development of expert agency's biological opinion).

The statute further requires that the expert agency suggest "reasonable and prudent alternatives" to the action if the biological opinion finds that the agency action jeopardizes the endangered species or adversely modifies its critical habitat. 16 U.S.C. § 1536(b)(3)(A); *see also National Ass'n of Home Builders*, 127 S. Ct. at 2526 (referencing Department of Interior regulations that require alternatives to be

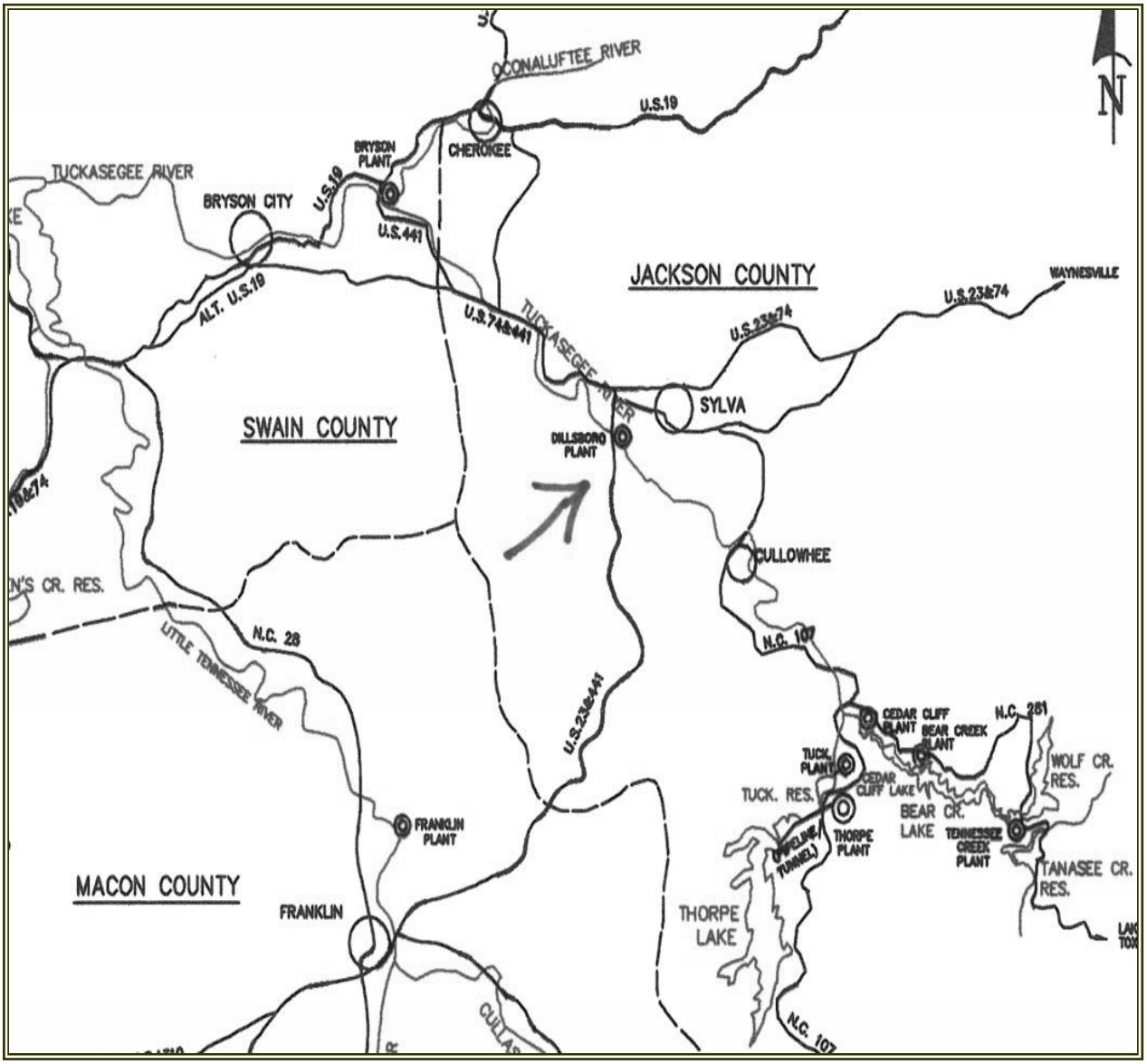
implemented consistent with the scope of the agency's jurisdiction). If the biological opinion determines that the licensing action is not likely to violate the ESA but may result in an incidental taking of a listed species, the expert agency provides an incidental take statement. 16 U.S.C. § 1536(b)(4). That statement specifies the measures required to avoid or minimize the harm to the species and permits any incidental taking that results from the agency's action. 16 U.S.C. § 1536(b)(4); *see also Tacoma*, 460 F.3d at 75 (summarizing the requirements of biological opinions and incidental take statements).

II. The Dillsboro Project And Other Projects On The Tuckasegee River

The Dillsboro Project, a hydroelectric project located on the Tuckasegee River in Jackson County, North Carolina, consists of a 12-foot high dam, a three to 12-foot deep reservoir, and a powerhouse. Relicensing Application, R.10 at ES-1, JA 5. The dam was first constructed around 1913. *Id*. The project was subsequently licensed by the Commission to a predecessor of Duke for a term expiring in July 2005. Surrender Order at P 5, JA 2267.

Duke is the licensee for other hydropower projects in North Carolina near the Dillsboro Project. *See* Surrender Order at P 8 n.8, JA 2269. The West Fork, East Fork, Dillsboro and Bryson Projects (collectively, "Tuckasegee Projects") are located on, or adjacent to, the Tuckasegee River. *See* Figure 1.

Fig. 1: Map of Western North Carolina Showing Tuckasegee Projects



As shown in Figure 1, the Tuckasegee River runs northwest from the West Fork Project (containing Thorpe Lake, now known as Lake Glenville) on the West Fork of the River and the East Fork Project (containing Bear Creek Lake, Wolf Creek Reservoir and Tanasee Creek Reservoir) on the East Fork of the River to the Dillsboro Project. The Bryson Project is located below the Dillsboro Project where

the Oconaluftee River meets the Tuckasegee. *Id*. The Tuckasegee empties into the Little Tennessee River at Lake Fontana in the far northwest corner of the map. *See id*.; *see also* Addendum B containing the map issued with the Final Environmental Assessment, R.250, JA 1594.

The East and West Fork Projects are major hydropower projects with output capabilities of 18.1 and 23.05 megawatts, respectively. Final Environmental Assessment at xiii, JA 1607. The Bryson Project has an output capability of 0.98 megawatts. *Id*. Dillsboro has two generators with a total combined output capability of 0.225 megawatts, an amount equal to less than one percent of the capability of the West Fork Project. *Id*.

III. The Tuckasegee And Nantahala Settlement Agreements

When Duke filed its relicensing application for the Dillsboro Project on July 12, 2003, it requested that the Commission delay action on the application. Relicensing Transmittal Letter, R.10 at 3, JA 3. Duke stated that, with facilitation help from North Carolina State University, it had undertaken a collaborative relicensing process and reached consensus with a majority of stakeholders concerning the relicensing of Duke's seven projects in the Tuckasegee River Basin and adjacent Nantahala area. *Id*. at 2, JA 2; *see, e.g.*, Surrender Application, Appendix B, Tuckasegee Settlement Agreement, R.64 at 2, 4, JA 122, 125 (listing

the 25 parties that signed the consensus agreement, including Petitioner Lake Glenville Association).

The consensus agreements envisioned removal of the Dillsboro Project as a starting point for negotiations. Relicensing Transmittal Letter at 2, JA 2. These negotiations began in September 2000 and concluded with the final settlement agreements in October 2003. Tuckasegee Settlement at 4, JA 125; *see also* Surrender Application, Appendix B, Nantahala Settlement at 2, JA 361. The Settlement Agreements were filed with the Commission on January 8, 2004. Surrender Order at P 8 & n.7, JA 2268-69 (listing signatories, including state and federal resource agencies). Consistent with Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f)(1), the Commission set deadlines for comments and reply comments on the filed offers of settlement. Notice, R.69 at 1, JA 601; *see also* Surrender Order at P 9 n.11, JA 2270. As of the date of the final challenged order in this appeal and as of the date of this brief, the Commission has not acted on the Tuckasegee and Nantahala Settlements.

IV. FERC Evaluation Of The Tuckasegee Project License Proceedings

A. The Dillsboro Surrender Application And Duke's Relicensing Applications

Duke filed for a subsequent license for the Bryson Project on July 22, 2003. Cover Letter, Scoping Document 1, R.105 at 1, JA 2547. Contemporaneous with filing the Tuckasegee Settlement with the Commission, Duke also filed relicensing

applications for the East and West Fork Projects on January 26, 2004. *Id*. On May 28, 2004, when Duke filed the Dillsboro Surrender Application, it requested action on the surrender and removal proposal prior to Commission action on these and other relicensing applications. Surrender Application, R.66, Transmittal Letter at 2, JA 437.

Duke followed a collaborative process in preparing the Dillsboro Surrender Application. After the interested parties, including Petitioners Jackson County and Lake Glenville Association, collectively identified potential impacts of the Tuckasegee Projects in the consensus agreements (Tuckasegee Settlement at 2, 4, JA 122, 125), Duke conducted studies of the effects of the removal of the Dillsboro Project on recreation, aesthetics, and environmental and cultural resources and also conducted an engineering analysis to develop a decommissioning plan. Surrender Application at 2-4, 2-9, JA 451, 456. Duke then used stakeholders' written and oral input regarding the study results to develop its Environmental and Biological Assessments of the removal proposal. Surrender Application at 2-7, JA 454. Pursuant to its obligations in the Tuckasegee and Nantahala Settlements, Duke filed the Dillsboro Surrender Application and its Environmental and Biological Assessments evaluating dam and powerhouse removal on May 28, 2004. Surrender Order at P 8, JA 2269-70.

B. Communities' Offer of Settlement

On June 16, 2005, Petitioner Communities, along with nine other neighborhood associations and county or town governmental entities, filed a document styled as an "offer of preferred settlement agreement." R.164 at 1-3, JA 859-61; *see* Br. at 26 n.20 (listing signatories). This document "differed fundamentally from the [Tuckasegee Settlement] in its requirement to retain Dillsboro dam." Final Environmental Assessment, R.251 at 35, JA 1654. Consistent with Rule 602, 18 C.F.R. § 385.602(f)(1), the Communities' offer of settlement ("Communities' Proposal") contained a notice providing for comments and reply comments on the offer of settlement. Communities' Proposal at 1-2, JA 856-57.

C. Environmental Review Of The Tuckasegee Projects

On July 9, 2004, as a result of Duke's Dillsboro Surrender Application and the Tuckasegee and Nantahala Settlements, the Commission notified parties that it would analyze the environmental impacts of the pending licensing applications by river basin. Notice of Process Changes, R.91 at 1, JA 644 (processing the Tuckasegee Projects in one environmental document and Franklin, Mission and Nantahala Projects in another).

On October 29, 2004, the Commission issued its scoping document for the environmental analysis of the Tuckasegee Projects. Scoping Document, R.105, JA

2549. The following December, four meetings were held in Jackson County to obtain public comments on the issues and alternatives to be analyzed in the environmental review. Final Environmental Assessment at 30-31, JA 1649-50. A month later, interested parties submitted written comments on the scope of review. *Id*. at 31-32, JA 1650-51 (listing entities commenting on Dillsboro Surrender Application).

After reviewing comments, Commission staff then prepared a Draft Environmental Assessment. R.198, JA 1037. The Draft Environmental Assessment concluded that relicensing of the East Fork, West Fork and Bryson Projects and surrender of the Dillsboro license, with removal of the dam and powerhouse, "would not constitute a major federal action significantly affecting the quality of the human environment." Draft Environmental Assessment at 361, JA 1424. Of note for purposes of this appeal, the Draft Environmental Assessment reviewed the environmental impact of one alternative to the Dillsboro dam and powerhouse removal, that is, the option of taking no action and allowing continued operation under the terms of Duke's hydroelectric license. *Id*. at 24, JA 1087; *see also id*. at 306, JA 1369 (analyzing the economic impacts of three Dillsboro alternatives: (1) full facilities removal; (2) dam removal without powerhouse removal; and (3) surrender without removal of facilities).

The Commission held another public meeting in Jackson County on June 8, 2006, and extended the deadline for comments on the Draft Environmental Assessment. Final Environmental Assessment at 36, JA 1655. Taking into account the comments received, the Commission staff issued the Final Environmental Assessment on July 14, 2006. *Id*., Notice of Availability, JA 1595. The Final Environmental Assessment evaluated an additional alternative to the proposed Dillsboro surrender action, one with an added staff-recommended mitigation measure. *Id*. at 25, JA 1644 (recommending an archaeological survey in addition to Duke's proposed mitigation measures). The document maintained the conclusion in the Draft that surrender of the Dillsboro license and removal of the facilities "would not constitute a major federal action significantly affecting the quality of the human environment." *Id*. at 389, JA 2008.

In Appendix C to the Final Environmental Assessment, FERC staff responded in detail to comments on the Draft Environmental Assessment, including comments asserting that the agency should consider Communities' Proposal as additional alternatives to the proposed dam removal. *See id*. at C-5 to C-6, JA 2031-32. In response to these concerns about alternatives, in Appendix D to the Final Environmental Assessment, FERC staff compared each element of Duke's proposed action (as reflected in the Tuckasegee Settlement) with each

element of the Communities' Proposal and provided a rationale for those elements that were not selected. *Id*. at D-1 to D-28, JA 2070-97.

With regard to endangered species, the Environmental Assessments contained Commission staff's biological assessment of the impact of the Dillsboro Dam removal and relicensing of the other three Tuckasegee Projects on the federally listed Appalachian elktoe mussel and its habitat. *See* Final Environmental Assessment at 185-195, JA 1804-14; Draft Environmental Assessment at 174-184, JA 1793-1803. The Final Environmental Assessment concluded that "[t]he operational changes . . . at the East Fork, West Fork and Bryson projects . . . should have no additional detrimental effects" on the mussels (Final Environmental Assessment at 190, JA 1809), and that the removal of the Dillsboro dam would benefit the mussels by "restor[ing] riverine habitat and permit[ting] access to upstream areas" by separate mussel populations. *Id*. at 191, JA 1810. On August 14, 2006, FWS issued a Biological Opinion generally concurring with the Environmental Assessments. *See, e.g.*, Biological Opinion, R.261 at 32, JA 2129. FWS determined that issuance of new licenses for the projects and the removal of the Dillsboro Project will not adversely affect critical habitat and are "not likely to jeopardize the continued existence of the Appalachian elktoe." *Id*. at 42, JA 2139. In addition, FWS determined that the amount of incidental take of the mussels resulting from the Tuckasegee Projects is not likely

to jeopardize the Appalachian elktoe. *Id*. at 45, JA 2142; *see id*. at 46, JA 2143 (prescribing "reasonable and prudent measures" to minimize harm to the mussels).

D. Water Quality Certifications

On March 11, 2005, Duke applied to North Carolina, under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), for a state water quality certification in conjunction with a "request[] that FERC process [Duke's] license surrender application . . . to approve the removal of the Dillsboro Dam and Powerhouse." *See* Certification Application, R.142 at 1, JA 809 (filed Mar. 17, 2005) (emphasis in original to distinguish surrender from relicensing applications). On May 15, 2005, the North Carolina Division of Water Quality ("North Carolina") granted the water quality certification ("2005 Certification") with the caveat that the certification was "only valid for the purpose and design submitted in the application and as described in the Public Notice." *See* 2005 Certification, R.160 at 2, JA 853 (filed May 24, 2005). On July 17, 2005, Duke requested that North Carolina "place a hold" on the applications for its other projects until "final disposition" of the FERC Dillsboro Project proceeding. R.174 at 2, 6, 8, JA 1029, 1031, 1033.

The 2005 Certification expressly required the filing of another water quality certification application for the "[Dredging] Permit needed to physically remove the Dillsboro dam" as issued by the U.S. Army Corps of Engineers. 2005

Certification at 3, JA 855. Duke complied with that requirement and North Carolina granted the second water quality certification ("2007 Certification") on November 21, 2007. 2007 Certification, R.320 at 1, JA 2464 (filed Dec. 6, 2007).

E. Challenged FERC Orders

On July 19, 2007, following completion of staff's environmental analysis and receipt of the 2005 Water Quality Certification, the Commission issued an order approving Duke's request to surrender the Dillsboro license and remove the dam and powerhouse. Surrender Order at P 18, JA 2275. The Surrender Order also dismissed Duke's application to renew its license for the Dillsboro Project. *Id.* at P 1, JA 2266.

While noting that Duke had included the Tuckasegee Settlement in an appendix to its Surrender Application, the Commission analyzed the proposal independent of the Tuckasegee Settlement. *See, e.g.*, Surrender Order at PP 15-18, JA 2272-75. On the basis of its independent evaluation, the Commission determined that the public interest would best be served by removal of the Dillsboro Project. *Id*. at P 50, JA 2285. The Commission found that the removal, when conducted in consultation with appropriate agencies and consistent with remediation plans to be filed with FERC (*id*. at P 18 & n.30, JA 2275), would have some negative short-term environmental effects, but lead to long-term

environmental benefits. *Id*. at P 50, JA 2285; *see id*. at P 17, JA 2274 (noting restoration of riparian habitat, wider distribution of mussels and greater fish access). In addition, the surrender and removal would significantly improve recreational and fishing opportunities without adversely affecting aesthetics (*id*. at PP 30-32, JA 2279-80), while, at the same time, resulting in the loss of "only a very small amount of [hydroelectric] energy." *Id*. at P 17, JA 2275.

While not accepting or rejecting the Tuckasegee Settlement, the Commission found that certain of its provisions were not enforceable by FERC, and therefore, inappropriate to include as conditions on the surrender of the Dillsboro license. *Id*. at PP 24-25, JA 2277-78. FERC also found that Communities' "offer of settlement" was not a settlement agreement at all because it lacked involvement of the licensee or any of the resource agencies. *Id*. at P 12 n.14, JA 2271. Instead of treating the offer of settlement as a contested settlement under its regulations (*see* 18 C.F.R. § 385.602(h)(1)(i)), the Commission chose to address the substance of the Communities' Proposal as it differed from the Tuckasegee Settlement. *Id*. at PP 27-32, JA 2278-80 (treating Communities' Proposal as public comments). Addressing the core difference of Communities' Proposal, that is, the proposal for license renewal, retention of the dam and transfer of facilities to Jackson County, FERC explained that it lacked the power to require Duke to retain or renew its license or compel transfer of the license (and associated

dam and powerhouse facilities). *Id*. at PP 27-28, JA 2278. Duke applied for license surrender and could not be compelled to continue operating the project if it wished to surrender its license. *Id*. at P 28 & n.41, JA 2278 (citing *Arizona Pub. Serv. Co.*, 109 FERC ¶ 61,036 at P 39 & n.34 (2004)). Further, Duke could not be compelled to transfer its license. *Id*. at P 28, JA 2278 (noting that "no entity developed a transfer proposal").

Communities (jointly, with four other entities representing local interests) and three other parties (raising issues not relevant to this appeal) filed requests for rehearing of the Surrender Order. *See* Rehearing Request, R.305, JA 2299. On April 22, 2008, the Commission issued an order addressing the many procedural and substantive issues raised in these rehearing requests. *See* Rehearing Order at PP 14-16, JA 2483-84 (granting Jackson County's late intervention); PP 17-25, JA 2484-87 (finding the 2005 Water Quality Certification applied to both surrender and removal); PP 26-55, JA 2487-99 (addressing challenges to the sufficiency of the environmental analysis); PP 56-58, JA 2499-2500 (addressing "site-hoarding" allegation); PP 59-61, JA 2500-01 (explaining legal standard for surrender cases); PP 63-74, JA 2501-04 (addressing sediment removal plans, removal timelines and other construction details); PP 75-84, JA 2504-07 (granting some and rejecting other requests for role in post-licensing consultation).

This appeal followed.

SUMMARY OF ARGUMENT

The heart of this case concerns a question of Commission authority to compel a licensee to renew a license when it prefers to surrender its existing license. The surrender approved by the challenged orders: (1) represents the culmination of over three years of negotiation with more than 25 interested parties, including the licensee, the relevant federal and state resource agencies and community advocates; and (2) promotes the interest of the public by restoring the natural river channel, and, thereby, creating significant environmental benefits and improving recreational opportunities. Communities seek to overturn the challenged orders so that their preferred approach, relicense of the Dillsboro Project and charitable contribution of the project to Communities, may be implemented. But the Commission is limited by the Federal Power Act in the actions that it can require a licensee to take. If a licensee seeks surrender, FERC cannot compel a licensee to seek relicensing. Nor may FERC compel a licensee to transfer its license against its will. Thus, the ultimate remedy that Communities seek is barred by the FPA.

Communities do not challenge this limitation of the FPA or the Commission's application of a broad public interest standard to determine the suitability of the surrender proposal. Instead, they mount a scatter-shot attack on the Commission's (and FWS's) compliance with many statutory and regulatory

provisions at issue in any licensing matter. Much of their challenge contains bald assertions unsupported by authority or by the record upon which the Commission decided these issues. Three of the arguments they raise on appeal are barred because Communities failed to raise them on rehearing. In any event, the Commission wholly met its obligation, pursuant to the FPA and related statutes, to evaluate the surrender and dam removal proposal and reasonably determined, based on substantial evidence in the record, that the proposal was in the public interest.

The Commission faithfully and fully completed the many steps required by the statutes and regulations raised in Communities' challenge. It reasonably awaited a valid Section 401 water quality certification by North Carolina before approving the surrender and project removal. It also properly took account of a second valid certification issued by North Carolina before FERC's final order in the proceeding below. Having no reason to question the validity of these certifications prior to its initial action on the Surrender Application, the Commission reasonably determined that the state action satisfied the public notice requirements of the Clean Water Act.

The Commission conducted a thorough and extensive review of the environmental impacts of the Tuckasegee Projects, examining all of the reasonable alternatives and the cumulative effects of the projects on, *inter alia*, water

resources, riparian habitats, endangered species and recreation. Its decision on the Surrender Application was fully informed by this review which the National Environmental Policy Act requires before the Commission acts. FERC did not violate any NEPA statutory or regulatory requirement by acting on the Surrender Application prior to acting on the licensee's other pending license applications.

The Commission also reasonably deferred to the expertise of FWS in endangered species matters without blindly accepting its Biological Opinion. Communities alleged that FWS failed to consider the current operating status of the Project in its analysis of the threat of dam removal on the endangered elktoe mussels. The Commission reasonably determined, however, that Communities failed to show how this alleged flaw in any way undermines the sound conclusions in the Biological Opinion.

Finally, the Commission reasonably interpreted and applied its own regulations on the submission of settlement offers. Communities' Proposal, while not a true settlement (in that it lacked the support of the licensee or relevant federal and state resource agencies), nevertheless was analyzed in the environmental assessments and considered by the Commission in the challenged orders.

ARGUMENT

I. Standard Of Review

A court reviews FERC licensing decisions "to determine whether the factual findings underlying the decision were 'supported by substantial evidence.' 16 U.S.C. § 825*l*(b). [This Court] also review[s] Commission licensing decisions to determine whether they were 'arbitrary and capricious.' In both cases, the review is quite deferential." *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997) (citation omitted); *see also, e.g., Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 375 (D.C. Cir. 2008) (the Court "review[s] the Commission's licensing decisions . . . under a deferential standard").

Under the deferential "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), a "court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . " *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (quotation omitted); *see Eastern Niagara Pub. Power Alliance v. FERC*, 558 F.3d 564, 567 (D.C. Cir. 2009) (the Court's "role is 'quite limited' and 'narrowly circumscribed'").

"The same standard applies to . . . challenges to the adequacy of the Commission's compliance with the National Environmental Policy Act . . . and to the [C]ourt's determination of the adequacy of the [Environmental Assessment]."

National Comm. for New River v. FERC, 373 F.3d 1323, 1327 (D.C. Cir. 2004). The Court is not to "substitute its judgment for that of the agency as to the environmental consequences of its actions" – "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). Additionally, an agency's resolution of issues regarding the possible cumulative environmental impacts of proposed actions is entitled to deference. *Id.* at 412-414.

In evaluating compliance with the Clean Water Act, just as in evaluating compliance with the FPA, the Court "treat[s] the Commission's findings of fact as conclusive if they are supported by substantial evidence." *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296 (D.C. Cir. 2003) (quotations omitted). Because Communities do not challenge the Commission's statutory interpretation of the Clean Water Act (Br. at 43-36), the *de novo* standard reserved for such appeals is inapplicable here. *Alabama Rivers*, 325 F.3d at 296-97.

The same is true for compliance with the Endangered Species Act. *Pyramid Lake Paiute Tribe v. Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) (compliance is determined by "whether the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choice made'") (quoting *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985), and *Baltimore Gas & Elec. Co. v. Natural Res. Defense*

Council, Inc., 462 U.S. 87, 105 (1983)); *see Tacoma*, 460 F.3d at 75-76 (citing *Pyramid Lake*).

The Commission's interpretations of its own regulations are also afforded substantial deference "unless [FERC's] interpretation is plainly erroneous or inconsistent with the regulation." *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1292 (D.C. Cir. 1996).

II. The Commission Satisfied All Federal Power Act Responsibilities In Acting On Duke's Surrender Application

The theme expressed throughout Communities' brief is that the Commission improperly, in violation of its responsibilities as the licensing agency under the FPA and related statutes, allowed the agreements between Duke and the federal and state resource agencies to unduly influence its review of the Surrender Application, while, at the same time, it ignored the competing offer of settlement proffered by Communities. *See, e.g.*, Br. at 37 ("[r]efusal to consider competing offer of settlement" and "[f]ailure to consider alternatives" to the Tuckasegee and Nantahala Settlements); *id*. at 40-41 (claiming flawed environmental review of "various projects that Duke has contractually tied together"); *id*. at 58 (FERC "fail[ed] to review and analyze the objections and comments contesting [Tuckasegee Settlement] offer" and "fail[ed] to review the alternative offer of settlement submitted by [Communities]"); *id*. at 67 (the Tuckasegee and Nantahala Settlements undermined "the integrity of the decisional process"). Communities

further claim that the Commission's approval of the Dillsboro license surrender was a *de facto* acceptance of the Tuckasegee and Nantahala Settlements that will predetermine a lower level of mitigation in Duke's other pending licensing proceedings. *Id*. at 54-59.

The Tuckasegee and Nantahala Settlements did not, however, improperly limit the Commission's options or otherwise influence the Commission in this case. Rather, the alternatives open to the Commission in this proceeding were limited by the nature of the Surrender Application that Duke filed. Surrender Order at PP 27-28, JA 2278 (explaining that FERC cannot consider the alternative of relicense and license transfer if the licensee seeks surrender). Under FPA Section 6, 16 U.S.C. § 799, a licensee may surrender its license and cannot be compelled to seek a license renewal. *Id*. at P 28, JA 2278; Rehearing Order at P 31 n.41, JA 2491; *see also Save Our Sebasticook*, 431 F.3d at 381 (summarizing FERC's actions in another contested surrender case). "Likewise, the Commission cannot compel a transfer" from the licensee to another entity. Surrender Order at P 28, JA 2278. Thus, the limitations on the exercise of the Commission's authority in a surrender proceeding precluded adoption of Communities' preferred result – requiring relicensing and charitable transfer of the license and project to Jackson County. Rehearing Order at PP 31 n.41, 56, JA 2491, 2499. That Duke sought surrender to implement the terms of the Tuckasegee and Nantahala Settlements

does not alter the applicability of this principle. *See Save Our Sebasticook*, 431 F.3d at 382 ("it was the nature of [the licensee's] application that constrained the Commission's choices" not "the agreement between [the licensee] and others").

Further, the Commission did not ignore Communities' offer of settlement in favor of the Tuckasegee and Nantahala Settlements. *See* Surrender Order at P 12 n.14, JA 2271. Acknowledging the "comprehensive proposal" submitted by community representatives (Rehearing Order at P 30 n.35, JA 2490), the Commission afforded that proposal appropriate weight and consideration given that the licensee and federal and state resource agencies did not participate in the negotiations. Surrender Order at P 12 n.14, JA 2271; Rehearing Order at P 26 n.26, JA 2487. The Commission noted that the Final Environmental Assessment analyzed the developmental costs and benefits of Communities' Proposal and found that costs would exceed benefits by $582,220 each year. Rehearing Order at P 33 n.43, JA 2492. Moreover, the Final Environmental Assessment thoroughly analyzed Communities' recommendations in the body of the assessment. *See id*. at P 30 n.35, JA 2490 (listing discrete issues and providing Final Environmental Assessment pages addressing each issue). It also contained an appendix comparing and making recommendations on each element of the Communities' Proposal and the Tuckasegee Settlement, rejecting elements of both proposals. Final Environmental Assessment, Appendix D, D-1 to D-28, JA 2070-97. Thus,

Communities' Proposal was fully analyzed and given appropriate consideration along with the Tuckasegee Settlement in the Final Environmental Assessment. *See, e.g.*, Final Environmental Assessment at 34-36, JA 1653-1655 (summarizing the Tuckasegee Settlement and Communities' Proposal and listing commenters to both).

To be sure, the Commission recognized that "the licensee, state and federal resource agencies, and numerous non-governmental organizations (and even the Town of Dillsboro)" had agreed that project removal was in the public interest. Rehearing Order at P 57, JA 2500; *see Public Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1062-63 (D.C. Cir. 2008) (noting with approval that "the Commission often gives weight to a proposal that may not represent complete stakeholder consensus but is the position of the majority" and that there is nothing wrong with such a weighing as long as the agency process of consideration is "open" and allows for "extensive participation"). In the end, however, it based its finding that project removal was "appropriate and in the public interest," not on the agreements concerning other licensing proceedings, but on the record of the Dillsboro surrender proceeding. Rehearing Order at P 57, JA 2500; *see also, e.g.*, *id*. at P 8, JA ____ (discussing benefits of natural river channel restoration and citing Final Environmental Assessment conclusions); *id*. at P 32, JA 2491 (same); *id*. at P 48

n.60, JA 2496-97 (citing environmental studies for dam removal that are part of the record).

Contrary to Communities' claims (Br. at 55, 57), the Commission did not create a *de facto* or actual acceptance of the Tuckasegee and Nantahala Settlements in the challenged orders. *See* Surrender Order at P 22, JA 2276-77. Approval of the Surrender Application does not prejudge the outcome of the other licensing proceedings because the Commission has not relied on Dillsboro dam removal as mitigation for the other projects. Rehearing Order at P 29, JA 2489. The Environmental Assessments addressed mitigation for each project separately and did not tie that mitigation to Dillsboro Project removal. *Id*. at P 29 n.31, JA 2489; *see, e.g.*, Final Environmental Assessment at 343-347, JA 1962-66 (mitigation measures for East Fork); *id*. at 347-352, JA 1966-71 (mitigation measures for West Fork); *id*. at 360-361, JA 1979-80 (minimum flow recommendations for East and West Fork). Moreover, the Commission will conduct a complete review of mitigation for Duke's other pending license applications when it acts in those proceedings.[1] Rehearing Order at P 29, JA 2489. Based on support in the record, it will also independently determine the appropriate term of other Tuckasegee Project licenses. *See* Br. at 55; *see also, e.g.*, *Missouri Coal. for the Env't v.*

[1] The Commission cannot act on these relicensing proceedings until North Carolina issues (or waives) the requisite Section 401 water quality certifications for the projects. These appear to be on hold pending final disposition of this case. *See supra* p. 18.

FERC, 544 F.3d 955, 958 (8th Cir. 2008) (approval of dam reconstruction "will not influence" future relicensing of reconstructed hydroelectric project).

The Commission is not constrained by the agreements that Duke negotiated with others. *See* Surrender Order at PP 23-25, JA 2277-78 (not adopting Tuckasegee Settlement provisions as requirements of surrender because, *inter alia*, FERC has no authority to enforce them); Rehearing Order at P 29 n.32, JA 2489 (FERC is not bound to consider removal of the Dillsboro Project as mitigation for other projects); *see also Eastern Niagara*, 558 F.3d at 568 ("off-license agreements . . . are irrelevant to FERC's statutorily mandated assessment of the relicensing application"). In sum, "FERC did not approve those agreements, . . . FERC does not and cannot control the agreements' terms" (*Eastern Niagara*, 558 F.3d at 568), and it is not required to abide by the agreements in deciding the mitigation or license terms for still-pending relicensing applications.

Finally, Communities are also wrong that the Commission acted under Section 4(e) of the FPA, 16 U.S.C. § 797(e), and thus employed the wrong standard of review, in approving the Surrender Application. Br. at 43; *see also id.* at 65 (arguing that FERC incorrectly weighed the economic impact of project removal, an analysis required under FPA § 10(a)(1), 16 U.S.C. § 803(a)(1)). Responding to Communities' request for rehearing, the Commission clarified that it applied a broad public interest standard pursuant to Section 6 of the FPA, 16

U.S.C. § 799, in approving the Surrender Application. Rehearing Order at PP 59-61, JA 2500-01; *see also Save Our Sebasticook*, 431 F.3d at 381 (noting standard of review applied by FERC in surrender case); Final Environmental Assessment at 3, JA 1622. It admitted error in referencing the developmental standards of FPA § 10(a)(1) in the Surrender Order. Rehearing Order at PP 60-61, JA 2500-01. And it rejected Communities' contention that the "equal consideration" standard for licensing projects under Section 4(e) of the FPA, 16 U.S.C. § 797(e), should apply. *Id*. at P 60, JA 2500. The Commission concluded that surrender and project removal met the broad public interest standard because record evidence showed that dam removal will bring significant environmental and recreational benefits to the Tuckasegee River. Surrender Order at P 50, JA 2285; Rehearing Order at P 61, JA 2501.

Communities do not challenge the Commission's FPA Section 6 standard on appeal. They do not argue the Commission's fundamental determination, that the public interest would best be served by removal of the dam, is somehow flawed. *But see* Br. at 55 (arguing that FERC failed to find that the Tuckasegee and Nantahala Settlements, which it did not accept, were in the public interest). Rather, they "adopt[ ] a 'scatter-shot' approach" of raising numerous issues on appeal without adequate record or legal support. *Staub v. City of Baxley*, 355 U.S.

313, 333 (1958) (rejecting same approach in a constitutional challenge).[2] The following sections address these arguments.

III. The Commission Fully Complied With The Clean Water Act

Communities assert that the Commission improperly issued an order approving Dillsboro Project removal based on a Section 401 water quality certification that was invalid because North Carolina failed to meet its public notice requirements. Br. at 43-46. The Commission has an obligation under the Clean Water Act to determine that the "specific certification required by section 401 has been obtained" before issuing a license (*Tacoma,* 460 F.3d at 68 (punctuation omitted)), an obligation that it met in this case.

A. The Commission Met Its Obligation To Ensure A Valid Section 401 Certification Existed Prior To Issuance Of Its Order

1. The 2005 Certification Facially Satisfied The Requirement For Public Notice Of The Application

Acting under a conservative assumption that a Section 401(a)(1) certification was required before approval of the Surrender Application (Surrender Order at P 33, JA 2280), the Commission awaited North Carolina's issuance of the 2005 Certification before acting on the application. In *Tacoma*, this Court held that

[2] To the extent that Communities have now, in their opening brief, merely referred to certain arguments in passing in their factual description, they have waived these contentions on appeal. *See, e.g.*, *City of Nephi v. FERC*, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998) (petitioner failed to properly raise argument by "merely informing" the Court of it "in its statement of facts in its opening brief").

"when a state issues a water quality certification, FERC has an obligation to confirm, *at least facially*, that the state has complied with Section 401(a)(1)'s public notice requirements." 460 F.3d at 68 (emphasis added). Based on the record before it when it issued the Surrender Order, the Commission reasonably believed that there was public notice of Duke's pending application for certification. The 2005 Certification, on its face, referenced a public notice that described the Section 401 application. 2005 Certification at 2, JA 854 ("approval is valid for the purpose . . . submitted in the application materials and as described in the Public Notice"). The Commission need not look further than the 2005 Certification for assurance of a valid certification because the certification facially provided "the minimal confirmation of [public notice] compliance" required by Section 401 of the Clean Water Act. *Tacoma,* 460 F.3d at 68 (FERC's limited role when notice is questioned is to seek "assertion of compliance from the relevant state agency").

2. Jackson County's Letters Did Not Call Into Question State Compliance With Public Notice Procedures

Prior to issuance of the Surrender Order, the Commission had no reason to question whether notice of the application had been provided by North Carolina because the issue was not timely raised by Communities. Rehearing Order at P 25, JA 2486; *see Tacoma*, 460 F.3d at 68 (some FERC action is required to ensure state "compliance, at least where compliance has been called into question"). The

filings referenced by Communities (Br. at 32, 44-45) do not allege lack of public notice of the pending application or that North Carolina violated its own notice procedures; rather, they alert the Commission to the fact that parties were pursuing their rights to a public hearing on certain Section 401 applications and seeking other information on the state water quality proceedings. 2006 Filing, R.274, cover letter at 1, JA 2178 ("each letter requests the convening of public hearings by [North Carolina]"); 2007 Filing, R.292, Jackson County Letter to North Carolina at 2, JA 2196 ("I and others will be seeking the convening of a public hearing"); *see* Rehearing Order at P 24 n.24, JA 2486 (rejecting contention that these filings raised a public notice issue).

Read together, the two filings also indicate that Petitioner Jackson County had not received public notice of the various certification applications (2006 Filing, cover letter at 2, JA 2179), because it failed to earlier request addition of its name to the state's water quality certification mailing list (2007 Filing, Jackson County letter at 1, JA 2195). *See* Rehearing Order at P 24 n.24, JA 2486 (finding statements that counties had not received copies of public notices inadequate to raise the issue to FERC). In such circumstance, missing notices should not, and did not, indicate to the Commission that infirmities with North Carolina's notice process might exist. The Commission takes seriously its "role . . . in verifying compliance with state public notice procedures" (*Tacoma*, 460 F.3d at 68), but

reasonably requires, first, that the issue be raised in an unambiguous and timely manner. Rehearing Order at P 25, JA 2486 (explaining that the notice issue in *Tacoma* was timely raised before FERC took action on the relicensing application). Communities failed to do so in the proceeding below.

3. The Commission Properly Found That The Valid 2007 Certification Met The Public Notice Obligations

More than two years after the 2005 Certification was issued, Communities raised the lack of public notice of the application to the Commission on rehearing, albeit without reference to any North Carolina public notice statute or regulations. Rehearing Order at P 22, JA 2485; *see* Rehearing Request at 11-21, JA 2317-27; *accord Domtar Me. Corp. v. FERC*, 347 F.3d 304, 310 (D.C. Cir. 2003) (disfavoring consideration of arguments when petitioner cites a statute on appeal for which there is no citation in the record below). The Commission, on its own initiative, examined the relevant sections of the North Carolina administrative code regarding water quality certifications, 15A N.C. Admin. Code 2H.0500, and determined that the regulations required the state to publish notice of a pending application 15 days prior to proposed final action. Rehearing Order at P 23, JA 2485-86; *see* 15A N.C. Admin. Code 2H.0503(a) ("Publication shall be made at least 15 days prior to proposed final action by the Director upon the application and not more than 20 days after acceptance of a completed application."). Finding that the interested parties received constructive notice of the pending application

and, moreover, that "[a]ny defect in notice as to the first certification was cured by the notice issued in connection with the second certification," the Commission reasonably concluded that it need not further investigate North Carolina's compliance with North Carolina's public notice requirements. Rehearing Order at P 25, JA 2486-87.

Communities' due process argument (Br. at 45) is unavailing on these facts. The record shows that Communities "had at least constructive notice" of the Section 401 application for Dillsboro license surrender and dam removal. Rehearing Order at P 25 n.23, JA 2486. The Section 401 application and the 2005 Certification were both filed with the Commission (*see supra* p. 18), and, shortly thereafter, made available to the public through the Commission's website. Moreover, Communities received direct notice of the Section 401 application just 12 days after North Carolina received the application. On March 29, 2005, Duke filed with the Commission and served on all intervenors, including the three petitioners in this appeal, a stamped copy of the transmittal letter to North Carolina that accompanied the application. R.151 at 1-2, JA 834-35 (showing "received stamp" of March 17, 2005). Thus, Communities were made aware of the pending application before North Carolina's deadline for issuing a public notice. *See* 15A N.C. Admin. Code 2H.0503(a) (public notice required not more than 20 days after acceptance of an application). Duke's letter informed Communities of the

pendency of the Section 401 application for the Dillsboro Surrender Application, allowing them to exercise their due process rights and to request hearing from North Carolina on the water quality impacts of the dam removal proposal. *See, e.g.*, *California v. FERC*, 329 F.3d 700, 706-08 (9th Cir. 2003) (FERC *Federal Register* notice of utility application, while not revealing the applicant's underlying motive, nevertheless sufficient in conveying "essential attributes" of the application).

Communities now claim that the 2007 Certification cannot cure the problems with the 2005 Certification because Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), requires state action prior to issuance of a licensing order. Br. at 46. This ignores that *Tacoma* allows states to correct their compliance problems well after FERC's licensing orders have issued without impacting the issuance of the license. 460 F.3d at 68-69 ("FERC should seek an affirmation from [the appropriate state agency] that it [already] complied with state law notice requirements . . . or, if it did not, that it has done so in response to this decision"); Rehearing Order at P 25 n.25, JA 2487 (citing *Tacoma*); *see also*, *California*, 329 F.3d at 711 (even assuming initial deprivation of procedural right, such deprivation cured when party later given a meaningful opportunity to be heard). Like the factual situation in *Tacoma*, here, any decision to vacate the Surrender Order on the basis of an invalid water quality certification would have

an adverse environmental impact. *See Tacoma*, 460 F.3d at 69 (discussing impacts of operating under new license versus annual renewals of 1924 license). It would halt the removal of a dam that currently restricts fish passage and limits the habitat and gene pool of a federally-listed endangered species. Final Environmental Assessment at 143-44, 148-49, 155, 191, JA 1762-63, 1767-68, 1774, 1810; Biological Opinion at 30-31, JA 2127-28.

The fact that the 2007 Certification is on appeal in a North Carolina forum is of no consequence to this proceeding. *See* Br. at 46. The Commission acts on license applications when the certification is first issued by the state; given the sometimes lengthy delays between a certification request and initial state action, and between initial state action and final state action, the Commission understandably need not wait longer. *See FPL Energy Me. Hydro LLC v. FERC*, 551 F.3d 58, 60-61 (1st Cir. 2008) (describing applicant's wait for an initial water quality certification and FERC's issuance of license even after notice of a pending state appeal of that certification). Here, the Commission followed its past practice and reasonably relied on the 2007 Certification as a valid certification conforming with the requirements of the Clean Water Act.

B. Communities' Argument Regarding Lack Of Notice Of Certification Issuance Is Jurisdictionally Barred And Without Merit

On appeal, Communities allege that North Carolina violated its public notice procedures by failing to notice the issuance of the 2005 Certification, that is, by failing to provide "notice of the Director's intent to issue or deny a complete application" in March or April of 2005. Br. at 44-45 (citing 15A N.C. Admin. Code 2H.1303) (punctuation omitted). On rehearing, Communities raised no challenge regarding public notice of the issuance of the 2005 Certification or lack of notice of the Director's intent to issue or deny the application. Indeed, Communities' request for rehearing never even cited the North Carolina notice regulations, let alone alleged violations of the requirements with regard to the issuance of the 2005 Certification. *See* Rehearing Order at P 22, JA 2485. The focus of Communities' challenge to the validity of the 2005 Certification was on whether the certification covered dam removal as well as surrender of the license (Rehearing Request at 12, JA 2318), and whether there was public notice of Duke's pending Section 401 application. *See id*. at 19, JA 2325 ("no public notices of the Section 401 applications[ ] . . . had been received"); *id*. at 20, JA 2326 ("parties learned of the existence of the [Section 401] application" only after issuance of the Surrender Order). The Rehearing Order fully responded to these

contentions, but (understandably, under the circumstances) did not address any missing certification notice. Rehearing Order at PP 20-25, JA 2484-87.

Under FPA § 313(b), 16 U.S.C. § 825*l*(b), only an objection raised on rehearing below may later be raised on appeal. Because Communities failed to argue on rehearing to the agency that the 2005 Certification was invalid because there was no public notice of its issuance, the argument is not properly before this Court. 16 U.S.C. § 825*l*(b) (reviewing court may not consider an "objection" that was not "urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do"); *Save Our Sebasticook*, 431 F.3d at 381 (failure to raise issue on rehearing "pose[s] a jurisdictional bar"); *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (noting that objections must be raised with specificity in a rehearing request before the Commission or they are waived on appeal).

In any event, the record before the Commission does not indicate that North Carolina violated its public notice procedures by failing to issue notice of intent to act on the 2005 water quality certification. The document lodged with this court [3] may show that no "notice of intent to issue or deny" the 2005 Certification was

[3] The Dorney Affidavit is not in the record before this court and was not before the Commission when it decided the issues in the challenged orders. "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision . . . ." *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (citations omitted).

published pursuant to 15A N.C. Admin. Code 2H.1303(a)(1). *See* Br. at 45 (citing Dorney Affidavit). But, this does not appear to be a violation of the North Carolina public notice regulations on water quality certifications. North Carolina regulations do not require publication or notice of issuance of water quality certifications. *See* 15A N.C. Admin. Code 2H.0503(a), (d) (requiring only public notice of a pending application and of any hearings); 15A N.C. Admin. Code 2H.0507(a) (certifications must issue 60 days after receipt of applications or the requirement is automatically waived).

In their brief, Communities apply the wrong regulations to the case at hand. Sections 1300 *et seq*. of Subchapter 2H of the North Carolina Code, cited by Communities, apply to permits for discharges to isolated wetlands and isolated waters, not to water quality certifications. *Compare* 15A N.C. Admin. Code 2H.1301(a) ("this Section shall apply to resource management determinations regarding isolated wetlands and isolated classified surface waters") *with* 15A N.C. Admin. Code 2H.0501(b) ("Rules [in this Section] outline the application and review procedures for activities that require water quality certifications . . . pursuant to Section 401 of the Clean Water Act"). Therefore, even at the eleventh hour, in seeking to raise a new issue and newly-cited regulation to this Court, Communities have failed to show a violation of the state public notice procedures that would invalidate the 2005 Certification.

IV. FERC's Analysis Of The Environmental Impacts Associated With The Tuckasegee Projects Fully Complied With The Agency's NEPA Obligations

As noted above, NEPA acts to "ensure that the agency [takes] a 'hard look' at the environmental consequences of its decision to go forward with the project." *City of Grapevine*, 17 F.3d at 1503-04. NEPA's mandate to the agencies is procedural, rather than substantive. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 558 (1978). Under the statute, an agency must "adequately consider[ ] and disclose[ ] the environmental impact of its actions." *Baltimore Gas & Elec.*, 462 U.S. at 97-98 (describing goals of NEPA).

Communities assert that the Commission failed to review reasonable alternatives to the proposed surrender and project removal action and that it impermissibly segmented review of the environmental impacts of the removal proposal. Br. at 46. In fact, the Commission here took the requisite "hard look" at the environmental consequences of the project removal and approval of the surrender application, evaluating these impacts in light of the expected effects of renewal of the other three Tuckasegee Projects. Thus, neither of Communities' arguments has merit.

A. The Commission Properly Excluded Review Of Alternatives Over Which It Has No Authority

The courts afford considerable deference to an agency's choice of alternatives in an Environmental Assessment so long as the alternatives considered are reasonable. *Vermont Yankee*, 435 U.S. at 551-52 (the range of alternatives considered is a matter within an agency's discretion); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991) (same). This Court reviews "whether a particular alternative is reasonable in light of [the] objectives" of the agency. *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999) (citing *Citizens Against Burlington*, 938 F.2d at 196). Where, as in FERC licensing and certification cases, the reviewed action is "triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor." *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1324 (10th Cir. 2004) (quoting *Citizens' Comm. to Save Our Canyons v. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002)); *see also National Comm. for the New River*, 373 F.3d at 1332 ("it was the prerogative of [applicant] to determine the project's goals and the means of achieving them").

As the Commission explained, the Draft and Final Environmental Assessment satisfy the requirement to analyze all reasonable alternatives "by considering the alternative of license surrender with project removal as proposed by the licensee, the licensee's proposal with additional staff-recommended

measures, and continued project operation under the terms of the existing license (no-action alternative)." Rehearing Order at P 31, JA 2491. The Final Environmental Assessment also evaluated "whether the Dillsboro Surrender should include decommissioning of the powerhouse, removal of the powerhouse, and/or removal of the dam" and recommended, to the Commission, full removal of all facilities. Final Environmental Assessment at 3, 342, JA 1622, 1961.

Communities claim that the Final Environmental Assessment improperly excluded consideration of additional reasonable alternatives, all predicated upon a requirement that Duke seek relicensing of its Dillsboro Project: (1) "deployment . . . of resources of the site by relicensing;" (2) "competition should the licensee decline . . . relicensing;" and (3) "denial of relicensing." Br. at 60; *see also id*. at 63 (the alternative of increasing renewable energy at the site is also premised on a relicensing application). The Commission did not adopt these as reasonable alternatives to the surrender proposal because compelling Duke to seek relicense of its Dillsboro Project is not within FERC's authority. Rehearing Order at P 31 & n.41, JA 2491 (given the surrender application, "any alternative predicated on . . . a new license is not feasible and merits no further consideration"); *id*. at P 32, JA 2491 (Final Environmental Assessment did not study fish passage scenarios suggested by Communities because FERC would lack jurisdiction to monitor their effectiveness once the license was surrendered). The Commission reasonably

satisfied its obligation to give adequate consideration to the reasonable alternatives to surrender and removal. *See National Comm. for the New River*, 373 F.3d at 1332 (finding review of pipeline routes in Draft and Final Environmental Impact Statements was sufficient and citing *Vermont Yankee*, 435 U.S. at 551).

B. FERC Did Not Impermissibly "Segment" The Dillsboro Surrender And Facilities Removal Proposal From Future Operation Of Six Other Projects Under New Licenses

On rehearing, Communities argued that FERC failed to address "how its singular and isolated processing of just the license surrender application outside of acting upon the [Tuckasegee] settlement (at a minimum) and the other Tuckasegee projects is not impermissible segmented analysis under NEPA." Rehearing Request at 51, JA 2357. Rather than faulting the NEPA review in the Final Environmental Assessment, Communities faulted the Commission for issuing the Surrender Order prior to acting on the Tuckasegee Settlement or the pending licensing proceedings for the other Tuckasegee Projects. *Id*. at 53-57, JA 2359-63 (citing 40 C.F.R. § 1502.9(a)).

The Commission responded that "NEPA does not require a consolidated review of all the projects in a river basin." Rehearing Order at P 29 n.31, JA 2489. In any event, it had met the applicable NEPA requirements because:

> the [Final Environmental Assessment] examined the cumulative impacts and benefits of the Dillsboro surrender together with continued operation of the East Fork, West Fork, and Bryson Projects on the potentially affected resources, including water quantity and

> quality, aquatic riverine habitat, aquatic resources, threatened and endangered species, and recreation resources.

Id.; *see also Kleppe*, 427 U.S. at 410 ("when several proposals for [ ]related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together").

Citing Council on Environmental Quality regulations that were not cited to the Commission on rehearing (Br. at 48 (citing 40 C.F.R. § 1508.25)), Communities now assert that FERC violated NEPA by: (1) improperly "segmenting" its environmental review of the four Tuckasegee Projects (including the Dillsboro Project) from review of the other three Nantahala Projects (Br. at 49, 50, 51); (2) failing to consider the cumulative impacts of the Tuckasegee Projects (Br. at 50, 51, 59); and (3) improperly "segmenting" its action on the Dillsboro Surrender Application from action on the other Tuckasegee Projects (Br. at 52-56, 58). The first two of these arguments were not raised on rehearing to the Commission and Communities are now barred by FPA Section 313(b), 16 U.S.C. § 825*l*(b), from raising them on appeal. *See Save Our Sebasticook*, 431 F.3d at 381 (explaining the policy reasons for barring such arguments); *Allegheny Power*, 437 F.3d at 1220 (requiring sufficient specificity on rehearing below to warrant judicial review). The third argument is based on a fundamental misunderstanding of NEPA requirements and is without merit.

1. The Environmental Impacts Of All Four Tuckasegee Projects Were Properly Analyzed In The Same Set Of Environmental Assessments

First, contrary to Communities' arguments here, the Commission did not segment anything in conducting its NEPA review. It consolidated the review of four hydroelectric projects (the Tuckasegee Projects) in order to conduct an environmental analysis of the cumulative impacts along the Tuckasegee River and its tributaries. Rehearing Order at P 29 n.31, JA 2489. Communities' claim that the Final Environmental Assessment did not consider the cumulative impacts of the Tuckasegee Projects (Br. at 50) is contradicted by the contents of the Final Environmental Assessment. The Final Environmental Assessment devoted over a hundred pages to an analysis of the cumulative effects of the Tuckasegee Projects on "water quantity and quality, aquatic riverine habitat, aquatic resources, threatened and endangered species and recreation[al] . . . resources. . . ." Final Environmental Assessment at 44-45, JA 1663-64; *see id*. at 50-156, 185-195, 217-285, JA 1669-1775, 1804-14, 1836-1904. Communities' own request for rehearing acknowledges this substantial cumulative impacts analysis and directly contradicts their argument on appeal. Rehearing Request at 53, JA 2359 (referencing "cumulative impacts to which the [Final Environmental Assessment] devoted considerable ink").

Communities' other argument, raised for the first time on appeal, also contradicts their position below. Rather than arguing that one Environmental Assessment should review the environmental impacts of all seven of the Nantahala area projects (the three Nantahala Projects plus the four Tuckasegee Projects), in the proceeding below (Br. at 50), Communities sought the opposite – to narrow the review to the Dillsboro Surrender Application. Meeting on Draft Environmental Assessment Transc., R.213, 20-21, JA 1445-45 (Communities expressing support for the Dillsboro surrender proceeding to be "taken . . . totally out of this relicensing proceeding").

In any event, even if FERC had segmented its analysis of the seven projects, it would not have been unreasonable. "Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without 'significant' impact." *Coalition on Sensible Transp. v. Dole*, 826 F.2d 60, 68 (D.C. Cir. 1987) (citing *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987)). As this Court stated in *Taxpayers Watchdog*:

> The rule against segmentation, however, is not required to be applied in every situation. To determine the appropriate scope for an [environmental assessment], courts have considered such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related projects.

819 F.2d at 298 (citations omitted); *see also Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1140 (5th Cir. 1992) (applying same test); *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004) (same).

Here, the Commission was not attempting to avoid application of NEPA to either the four Tuckasegee Projects or the other three projects in the Nantahala area. FERC engaged in a full NEPA review of both sets of projects, producing two lengthy and thorough sets of Environmental Assessments. Rehearing Order at P 29 n.31, JA 2489; s*ee also* Notice of Process Changes at 1, JA 644.

Moreover, the Commission selected a logical endpoint, the end of the Tuckasegee River where it meets the Little Tennessee River. *See* Fig. 1, *supra* p. 10. And each of the Tuckasegee Projects stands alone in its ability to produce electricity. The exception is the Dillsboro Project. It is operated in run-of-river mode and is thus linked to the upstream East and West Fork Projects. As a result, the Commission reasonably linked the analysis of these three projects in the Environmental Assessment. *See* Rehearing Order at P 29 n.31, JA 2489; *Taxpayer Watchdog*, 819 F.2d at 299 (noting that segmentation is not improper where mass transit project has "substantial independent utility" and "logical endpoints"). None of the Tuckasegee Projects depends for its operation on the three projects located on the tributaries of the Little Tennessee River.

Finally, analyzing the four Tuckasegee Projects instead of all seven of Duke's pending licensing proceedings does not "foreclose the opportunity to consider alternatives," nor does it "irretrievably commit" the Commission to any course of action regarding the other three projects in the Nantahala area. *Taxpayers Watchdog*, 819 F.2d at 298. The Commission has an independent obligation, under the FPA, to examine whether the renewed commitment of those hydroelectric facilities will be the best adapted to the comprehensive development of the waterway for the benefit of the public.

2. Commission Action On The Dillsboro Surrender Application, Prior To Action On Pending Relicensing Applications, Is Not Segmented Environmental Review

Communities' claim that the Commission impermissibly segmented its actions on the Tuckasegee Projects (Br. at 52-56) is based on a faulty understanding of NEPA requirements. NEPA applies to the environmental review of a proposal, not the decision made subsequent to that review. *See Public Citizen v. NRC*, 940 F.2d 679, 684 (D.C. Cir. 1991) (NEPA requires environmental statements "written early enough" so that they can "serve as an input into the decision making process" (quotations omitted)). NEPA does not require that the Commission take any particular action as a result of the outcome of a particular analysis. *Robertson*, 490 U.S. at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process").

The purpose of NEPA is to ensure that "the agency has adequately considered and disclosed the environmental impacts" of the actions that it is considering. *Baltimore Gas & Elec.*, 462 U.S. at 97. Here, the Draft and Final Environmental Assessments were the Commission's tools for accomplishing that consideration and disclosure. FERC took a hard look at the cumulative impacts of the four Tuckasegee Projects in those assessments in order to meet NEPA requirements. Rehearing Order at P 31, JA 2490-91.

Furthermore, segmentation is only impermissible when the agency seeks to avoid compliance with NEPA. *Macht v. Skinner*, 916 F.2d 13, 16 n.4 (D.C. Cir. 1990) (citing *Taxpayers Watchdog*, 819 F.2d at 298). Here, the Commission complied with NEPA, performing the required environmental review of the cumulative impacts of the Tuckasegee Projects, before acting on the Dillsboro Surrender Application. Again, there was no avoidance of NEPA because the Commission conducted a full environmental review, treating the four Tuckasegee Projects as a whole. *Cf. Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 n.8 (D.C. Cir. 2003) ("It is not impermissible . . . to structure [segments of a project] so as to avoid the burden of environmental review" so long as it does not "creat[e] a misleading picture of the impact of the project as a whole"). In sum, the Commission's decision to process the Surrender Application prior to

processing the other pending license applications was in no respect a violation of the environmental review required by NEPA.

V. The Commission And FWS Complied With The Endangered Species Act

Without citation to any authority, Communities claim that the Commission acted unreasonably in relying on a Biological Opinion that contained a factual error and allegedly violated ESA requirements. Br. at 63-64, 66-68. They also challenge the Commission's deferral to the expertise of FWS when FWS committed to project removal prior to conducting its ESA review. These arguments are without merit.

When a court reviews an agency's reliance on a Biological Opinion under the arbitrary and capricious standard of the APA, 5 U.S.C. § 706(2)(A), it looks for middle ground between two extremes. Action agencies are not required to conduct "a separate, independent analysis of the issues addressed in the [Biological Opinion,]" because to require such would undermine Congress' intent to have expert agencies "make discretionary factual determinations. . . ." *Tacoma*, 460 F.3d at 75 ("[FERC should] defer, at least to some extent, to [FWS's] determinations"). On the other hand, "the ultimate responsibility for compliance with the ESA falls on the action agency" and it cannot "blindly adopt the conclusions" of the experts. *Id*. at 76.

Communities first argue that the Biological Opinion was premised on the understanding that the Dillsboro Project was producing electricity even though it has not produced electricity since 2004. Br. at 64. In evaluating alleged factual flaws, "even when the FWS's opinion is based on 'admittedly weak' information, another agency's reliance on that opinion will satisfy its obligations under the Act if a challenging party can point to no 'new' information . . . which challenges the opinion's conclusions." *Pyramid Lake,* 898 F.2d at 1415. Here, Communities point to new information, the operating status of the Project's generators, but fail to explain how that information challenges the Biological Opinion's conclusions or would lead the expert and action agencies to a different result. Rehearing Order at P 39 n.55, JA 2494. There is no connection drawn between the operating status of the hydroelectric generators and harm to the endangered mussels.

Moreover, the Biological Opinion at issue here was not "based on admittedly weak information . . . ." *Pyramid Lake,* 898 F.2d at 1415. Indeed, it was based on "a thorough analysis of the likely effects of the project removal on the Appalachian elktoe mussel" with evidentiary support for its findings. Rehearing Order at P 39, JA 2494; *see*, *e.g.*, Biological Opinion at 23-24, JA 2120-21 (citing Tuckasegee River mussel studies conducted in 2001 and 2002); *id*. at 22, JA 2119 (citing studies showing that reservoirs and other impoundments adversely affect mussels). Reviewing the record, the Commission reasonably concluded that

the Biological Opinion was not fatally flawed and that, therefore, the expert determinations it contained were deserving of deference. Rehearing Order at P 39 & n.54, JA 2494 (detailing and addressing Communities' other allegations of flaws in the Biological Opinion).

Contrary to Communities' assertion (Br. at 42, 67-68), the Commission did not rely on FWS's independence in conducting the ESA review. Rather, FERC deferred to the expertise of FWS because it has "greater knowledge about the conditions that may threaten listed species" and is "best able to make factual determinations" about the endangered mussels. Rehearing Order at P 37 n.49, JA 2493 (citing *Tacoma*, 460 F.3d at 75). Even if the Tuckasegee Settlement limited the ability of FWS to prescribe certain environmental measures (Br. at 67), it did not diminish FWS expertise in endangered species matters. The deference accorded the Biological Opinion by the Commission was consistent with the statutory scheme and commensurate with this expertise.

Communities also contend that the Biological Opinion was invalid because it did not analyze an alternative, the regulation of minimum flows from upstream projects, that Communities assert would lessen the impacts on endangered mussel habitat in the Tuckasegee River. Br. at 47-48, 66. But, "[u]nlike NEPA, the ESA does not require consideration of alternatives to the proposed action." Rehearing Order at P 35, JA 2492. This is because, here, the FWS found that the Dillsboro

Project removal would not jeopardize the endangered species or adversely modify its critical habitat. Biological Opinion at 42, JA 2139. Having made a "no jeopardy" finding, FWS is not required to analyze alternatives under Section 7 of the ESA. 16 U.S.C. § 1536(b)(3)(A) ("*If* jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives . . . [that] can be taken by the Federal agency" (emphasis added)); *cf. National Ass'n of Home Builders*, 127 S. Ct. at 2526 (explaining options for agencies if FWS makes a jeopardy or adverse modification finding).

Communities also claim that the outcome of the Biological Opinion was predetermined. Br. at 66-67. However, a challenge to the substantive validity of a Biological Opinion must demonstrate that FWS failed to "consider[ ] the relevant factors and articulate[ ] a rational connection between the facts found and the choice made." *Tacoma*, 460 F.3d at 76 (citing *Arizona Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1235-36 (9th Cir. 2001)). Communities' argument does not meet this requirement. They claim that FWS should have done things differently and would have done things differently had it realized the alleged conflict with statutory authority,[4] but make no showing that the facts are disconnected from the

[4] For this assertion, Communities again rely on a document that is not part of the record upon which the Commission based its decision in the challenged orders. *See Walter O. Boswell*, 749 F.2d at 792. In any event, the letter from FWS to the Commission on an unrelated licensing settlement agreement is ambiguous as to the reason FWS did not participate in settlement negotiations. FWS Letter at 2

findings in the Biological Opinion. *See Tacoma*, 460 F.3d at 77 (rejecting substantive challenges to a Biological Opinion in which petitioner alleged inconsistencies between the facts and the findings).

VI. The Commission Followed Its Regulations In Addressing Communities' Offer Of Settlement

FERC Rule 602 provides that any participant in a pending proceeding may submit an offer of settlement to the Commission. 18 C.F.R. § 385.602(b)(1). It further provides that the Commission may decide the merits of any issues raised in an offer of settlement if that offer of settlement is contested. 18 C.F.R. § 385.602(h)(1)(i).

In the proceeding below, parties contested the offer of settlement submitted by Communities and the offers of settlement, i.e., the Tuckasegee and Nantahala Settlements, collectively submitted by Duke, the state and federal resource agencies, and other interested private and governmental parties. *See, e.g.*, R.168 at 1, JA 975 (Duke contesting Communities' Proposal); R.74 at 2, JA 604 (Jackson County contesting the Tuckasegee and Nantahala Settlements). The Commission considered the recommendations in all of the contested offers of settlement (as incorporated into the Environmental Assessments), but, consistent with Rule 602(b)(1), acted on the merits of the Dillsboro Surrender Application instead of

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(explaining only that "[C]ertain terms of the Charter conflicted with our Federal sovereignty"); *id*. at 21-22 (discussing FWS and FERC statutory authority and then pointing to unenforceable provisions of the settlement).

adopting any of the offers of settlement. *See* Surrender Order at P 12 n.14, JA 2271 (declining to treat a filing made without the licensee's consent, and without the support of relevant federal and state resource agencies, as a true settlement); Rehearing Order at P 26 n.26, JA 2487 (same).

In their rehearing request, Communities claimed that the Commission elevated the status of the licensee and state and federal resource agencies by requiring involvement of these entities before treating an offer of settlement as a settlement agreement. *See* Rehearing Order at P 26 n.26, JA 2487-88. But the Commission need "entertain only offers of settlement that present a realistic prospect of resolving . . . the issues in a proceeding and that have sufficient support to justify [FERC's] consideration." *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 60 (2006), *appeal pending sub nom. Green Island Power Auth. v. FERC*, 2d Cir. Nos. 07-1737, *et al*. (filed Apr. 26, 2007). The agency regards an offer of settlement representing agreement among unaligned parties, such as a licensee and the communities surrounding its project, as a settlement agreement. As the Commission concluded, this does not give the licensee veto power over any particular proposal; rather, it ensures that any settlement agreement considered by the Commission has the prospect of reducing the issues in, and, thereby, the length and complexity of, a licensing proceeding. Rehearing Order at P 26 n.26, JA 2487; *see also City of New Martinsville v. FERC*, 102 F.3d 567, 573 (D.C. Cir. 1996)

("the Commission is not obliged to accept all negotiated settlements presented to it").

On appeal, Communities simply state that "the Commission violated its own rules and prior cases" by reviewing Communities' offer of settlement as jointly-filed comments rather than as a settlement agreement. Br. 68-69. The only support provided for this assertion is a reference to FERC Rule 602, 18 C.F.R. § 385.602, and a cite to Communities' arguments raised on rehearing. Br. at 69. Because Communities have presented no arguments in their brief to substantiate their claim that the Commission violated Rule 602 (or any other rule or precedent), this Court should decline to rule on the merits of this issue. *Duncan's Point Lot Owners*, 522 F.3d at 377 (finding petitioner's "argument abruptly ends, without explaining . . . how [statutory] provisions they mention would support a claim against FERC"); *Public Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1171 (D.C. Cir. 2007) (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983), in declining to review an "asserted but unanalyzed" claim).

Should the Court proceed to the merits, it should sustain the Commission's application of Rule 602 in treating Communities' offer of settlement as a position statement among aligned parties. "The Commission's interpretation of its regulations is entitled to substantial deference." *Oconto Falls v. FERC*, 204 F.3d 1154, 1162 (D.C. Cir. 2000). While the Commission, understandably, elected not

to treat Communities' Proposal as a settlement (*see* Rehearing Order at P 26 n.26, JA 2487), it did not ignore their concerns; instead, it chose to address the proposal in detail as unilateral comments on the Surrender Application and the Final Environmental Assessment. Surrender Order at P 12 n.14, JA 2271. Further, Communities were not harmed by having their contested offer of settlement treated as comments; the Commission made a merits determination as it would when faced with a contested settlement. *See* 18 C.F.R. § 385.602(h)(1)(i) ("[i]f the Commission determines that any offer of settlement is contested in whole or in part, . . . [it] may decide the merits of the contested settlement issues"). In these circumstances, the Commission's reasonable interpretation and application of Rule 602 should be upheld. *See Oconto Falls v. FERC*, 41 F.3d 671, 677 (D.C. Cir. 1994) (upholding FERC's interpretation of its hydroelectric licensing regulations).

CONCLUSION

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

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Robert H. Solomon
Solicitor

Jennifer S. Amerkhail
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8650
Fax: 202-273-0901
E-mail: jennifer.amerkhail@ferc.gov

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 13,693 words, not including the table of contents and authorities, the certificates of counsel and the addendums.

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Jennifer S. Amerkhail
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8650
Fax: 202-273-0901
E-mail: jennifer.amerkhail@ferc.gov

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