

ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 7, 2011

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

No. 10-1096

PETERSBURG MUNICIPAL POWER & LIGHT,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

Robert H. Solomon
Solicitor

Jennifer S. Amerkhail
Attorney

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

December 13, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in Petitioner's brief.

B. Rulings Under Review:

1. Order Issuing Preliminary Permit, Denying Competing Applications, and Granting Priority to File License Application, *City of Angoon, Alaska, et al.*, 129 FERC ¶ 62,101 (Nov. 5, 2009) ("Permit Order"), R.54, JA 130.
2. Order Denying Rehearing, *City of Angoon, Alaska, et al.*, 130 FERC ¶ 61,219 (Mar. 18, 2010) ("Rehearing Order"), R.59, JA 159.

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.

/s/ Jennifer S. Amerkhail
Jennifer S. Amerkhail
Attorney

November 9, 2010

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUE.....	1
STATUTORY AND REGULATORY PROVISIONS.....	2
INTRODUCTION.....	2
STATEMENT OF FACTS.....	3
I. Statutory And Regulatory Background.....	3
A. Preliminary Permit Provisions.....	3
B. Regulations Concerning After Hours Filing.....	5
II. Events Leading To The Orders On Review.....	6
III. Challenged FERC Orders.....	9
SUMMARY OF ARGUMENT.....	11
ARGUMENT.....	12
I. Standard Of Review.....	12
II. The Commission Acted Consistently With The Federal Power Act And Reasonably Interpreted Its Own Regulations When It Awarded The Preliminary Permit To Angoon.....	14
A. The Commission Properly Applied The Process In Its Regulations In Awarding The Permit.....	15
B. The Commission Properly Applied Its Better Adapted Regulations And Policies.....	19

TABLE OF CONTENTS

	PAGE
C. In General, And In These Circumstances, A Lottery Is An Impartial And Transparent Means Of Breaking A Tie.....	23
1. A Lottery Is A Reasonable Way To Establish Filing Priority Among Simultaneously-Filed Applications.....	23
2. Unsupported Allegations Of Collusion Are Irrelevant At The Preliminary Permit Stage.....	26
III. The Commission Has Broad Discretion To Determine How Best To Structure Its Selection Process For Preliminary Permits.....	27
CONCLUSION.....	32

TABLE OF AUTHORITIES

	PAGE
COURT CASES:	
<i>*Aliceville Hydro Assocs. v. FERC</i> , 800 F.2d 1147 (D.C. Cir. 1986).....	17, 18, 21
<i>Appomattox River Water Auth. v. FERC</i> , 736 F.2d 1000 (4th Cir. 1984).....	21, 22, 23
<i>Arkansas Power & Light Co. v. ICC</i> , 725 F.2d 716 (D.C. Cir. 1984).....	31
<i>Bluestone Energy Design, Inc. v. FERC</i> , 74 F.3d 1288 (D.C. Cir. 1996).....	13, 19
<i>Central Vt. Pub. Serv. Corp. v. FERC</i> , 214 F.3d 1366 (D.C. Cir. 2000).....	13
<i>Chippewa & Flambeau Improvement Co. v. FERC</i> , 325 F.3d 353 (D.C. Cir. 2003).....	28
<i>City of Bedford v. FERC</i> , 718 F.2d 1164 (D.C. Cir. 1983).....	14, 22, 25, 26, 27
<i>*City of Dothan v. FERC</i> , 684 F.2d 159 (D.C. Cir. 1982).....	15, 16, 17, 20, 21, 22, 23
<i>Colorado Interstate Gas Co. v. FERC</i> , 599 F.3d 698 (D.C. Cir. 2010).....	13
<i>Domtar Me. Corp. v. FERC</i> , 347 F.3d 304 (D.C. Cir. 2003).....	30
<i>Energie Group, LLC v. FERC</i> , 511 F.3d 161 (D.C. Cir. 2007).....	4, 19, 27

* Authorities chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

	PAGE
COURT CASES:	
<i>First Iowa Hydro-Electric Coop. v. FPC</i> , 328 U.S. 152 (1946).....	3
<i>Hirschey v. FERC</i> , 701 F.2d 215 (D.C. Cir. 1983).....	20
<i>Howmet Corp. v. EPA</i> , 614 F.3d 544 (D.C. Cir. 2010).....	13
<i>International Paper Co. v. FERC</i> , 737 F.2d 1159 (D.C. Cir. 1984).....	20, 28
<i>Jackson County v. FERC</i> , 589 F.3d 1284 (D.C. Cir. 2009).....	12
<i>Lichoulas v. FERC</i> , 606 F.3d 769 (D.C. Cir. 2010).....	12, 13
<i>Malta Irrigation Dist. v. FERC</i> , 955 F.2d 59 (D.C. Cir. 1992).....	3, 14, 17, 21
<i>Midwest Indep. Transmission Sys. Operator v. FERC</i> , 388 F.3d 903 (D.C. Cir. 2004).....	13, 22, 28
<i>*Mobil Oil Exploration Co. v. FERC</i> , 814 F.2d 998 (5th Cir. 1987).....	24, 25
<i>Mobil Oil Exploration & Producing Se., Inc. v. United Distribution Cos.</i> , 498 U.S. 211 (1991).....	13, 29
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	13
<i>New England Power Co. v. FERC</i> , 467 F.2d 425 (D.C. Cir. 1972).....	28

TABLE OF AUTHORITIES

	PAGE
COURT CASES:	
<i>NSTAR Elec. & Gas Corp. v. FERC</i> , 481 F.3d 794 (D.C. Cir. 2007).....	13
<i>Save Our Sebasticook v. FERC</i> , 431 F.3d 379 (D.C. Cir. 2005).....	30
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	31
<i>Town of Summersville v. FERC</i> , 780 F.2d 1034 (D.C. Cir. 1986).....	15, 22
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978).....	29
<i>Wisconsin Pub. Power, Inc. v. FERC</i> , 493 F.3d 239 (D.C. Cir. 2007).....	13
ADMINISTRATIVE CASES:	
* <i>City of Angoon, Alaska, et al.</i> , Order Issuing Preliminary Permit, Denying Competing Applications, and Granting Priority to File License Application, 129 FERC ¶ 62,101 (2009) (“Permit Order”).....	2, 6, 7, 9-10, 14, 15, 16, 17, 18, 20, 21, 23-28, 31
* <i>City of Angoon, Alaska, et al.</i> , Order Denying Rehearing, 130 FERC ¶ 61,219 (2010) (“Rehearing Order”).....	3, 6, 7, 8, 10, 15-19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30

TABLE OF AUTHORITIES

	PAGE
ADMINISTRATIVE CASES:	
<i>*City of Wrangell, Alaska, et al.,</i> 128 FERC ¶ 61,077 (2009) (“Lottery Notice”).....	8, 17, 18, 24, 30, 31
STATUTES:	
Administrative Procedure Act	
5 U.S.C. § 553.....	30
5 U.S.C. § 706(2)(A).....	12
Federal Power Act	
Section 3(7), 16 U.S.C. § 796(7).....	15
Section 4(f), 16 U.S.C. § 797(f).....	3, 4, 14
Section 5, 16 U.S.C. § 798.....	4, 14, 25
Section 7(a), 16 U.S.C. § 800(a).....	1, 2, 4, 10, 11, 14, 19
Section 9, 16 U.S.C. § 802.....	4
Section 309, 16 U.S.C. § 825h.....	28
Section 313(b), 16 U.S.C. § 825l(b).....	30
Judicial Procedure	
28 U.S.C. § 2112(a)(3).....	24

TABLE OF AUTHORITIES

	PAGE
REGULATIONS:	
18 C.F.R. § 4.37(b).....	1, 2, 14, 15
18 C.F.R. § 4.37(b)(1).....	5, 11, 16, 19, 21
18 C.F.R. § 4.37(b)(2).....	5, 7, 12, 15, 16, 18, 19, 24
18 C.F.R. § 4.37(b)(3).....	5, 11, 15
18 C.F.R. § 375.101(c).....	5, 17
18 C.F.R. § 385.2001(a)(2).....	1, 2, 5, 7, 11, 17, 18, 23, 29, 30

GLOSSARY

Acceptance Notice	Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions to Intervene, and Competing Applications (Feb. 18, 2009), R.10, JA 1
Angoon	City of Angoon, Alaska, municipality competing for the Project permit
Cascade	Cascade Creek, LLC, private entity competing for the Project permit
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
JA	Joint Appendix
Lottery Notice	<i>City of Wrangell, Alaska, et al.</i> , 128 FERC ¶ 61,077 (July 23, 2009), R.41, JA 82
P	Paragraph number in a FERC order
Permit Order	<i>City of Angoon, Alaska, et al.</i> , 129 FERC ¶ 62,101 (Nov. 5, 2009), R.54, JA 130
Petersburg	Petitioner Petersburg Municipal Power & Light
Project	The proposed Ruth Lake Project
R.	Record citation
Rehearing Order	<i>City of Angoon, Alaska, et al.</i> , 130 FERC ¶ 61,219 (Mar. 18, 2010), R.59, JA 159
Wrangell	City and Borough of Wrangell, Alaska, municipality competing for the Project permit

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

No. 10-1096

PETERSBURG MUNICIPAL POWER & LIGHT,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) acted consistently with section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a), and reasonably interpreted its own regulations, 18 C.F.R. § 4.37(b) and 18 C.F.R. § 385.2001(a)(2), in employing a lottery to select among otherwise equal competing applications for a preliminary permit to study the feasibility of developing a hydroelectric project in southeastern Alaska.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns competing applications for a preliminary permit under section 7(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 800(a). The permit allows the holder to study the development of the proposed Ruth Lake Project (“Project”) with the assurance that it has priority during the term of the permit with respect to any subsequent license application to develop the Project.

The permit applications were electronically filed after the close of business on the same day that a previous permit for the same Project expired. Applying its rule on after-hours filing, 18 C.F.R. § 385.2001(a)(2), the Commission deemed them simultaneously filed on the next morning. Soon thereafter, the Commission announced that it would use a random drawing for applications with identical filing times to determine filing priority in the event that the other criteria in its regulatory regime failed to produce a single preferred applicant.

To select among the competing applicants, the Commission applied the criteria detailed in its regulations, 18 C.F.R. § 4.37(b). Order Issuing Preliminary Permit, Denying Competing Applications, and Granting Priority to File License Application, *City of Angoon, Alaska, et al.*, 129 FERC ¶ 62,101 (Nov. 5, 2009) (“Permit Order”), R.54, JA 130; Order Denying Rehearing, *City of Angoon*,

Alaska, et al., 130 FERC ¶ 61,219 (Mar. 18, 2010) (“Rehearing Order”), R.59, JA 159.¹ First it determined that three of the four applicants enjoyed a municipal preference. Because these three applicants prepared almost identical development plans and none submitted detailed studies to support its application, the Commission next determined that it was unable to award the permit based on a better adapted application. Owing to the after-hours filings, it also was unable to award the permit based on its usual tie breaker policy, that is, favoring the first to file. As a result, the Commission awarded the permit to the winner of the random drawing, the City of Angoon, Alaska.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Preliminary Permit Provisions

Part I of the Federal Power Act, § 4 *et seq.*, 16 U.S.C. § 797 *et seq.*, constitutes “a complete scheme of national regulation” to “promote the comprehensive development of the water resources of the Nation.” *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). The statute establishes two distinct types of authorizations: preliminary permits and licenses. *Malta Irrigation Dist. v. FERC*, 955 F.2d 59, 61 (D.C. Cir. 1992) (describing “two-stage process”).

¹ “R.” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

Under sections 4(f) and 5 of the FPA, 16 U.S.C. §§ 797(f), 798, the Commission may issue preliminary permits “for the sole purpose of maintaining priority of application for a license [for a period] not exceeding a total of three years.” FPA § 5, 16 U.S.C. § 798. Preliminary permits, as described in FPA section 4(f), 16 U.S.C. § 797(f), “enabl[e] applicants for a license . . . to secure the data and to perform the acts required by” FPA section 9, 16 U.S.C. § 802, which details the requirements for a license application. *See also Energie Group, LLC v. FERC*, 511 F.3d 161, 163 (D.C. Cir. 2007) (“[t]o obtain a license, an applicant must submit a substantial amount of data, and the preliminary permit process helps applicants gather necessary information”).

When faced with more than one preliminary permit application for a single site, section 7(a) of the FPA, 16 U.S.C. § 800(a), requires that the Commission give preference to a municipality over a private applicant. Section 7(a) further provides that “as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region. . . .” *See also Energie Group*, 511 F.3d at 164 (“FERC . . . has discretion to consider the fitness of the applicant” in awarding a permit).

These priority provisions of the statute are reflected in the Commission’s regulations. The Commission will favor a municipality over a non-municipal

applicant, all else being equal. 18 C.F.R. § 4.37(b)(3). As relevant here, when municipalities are competing, “the Commission will favor the applicant whose plans are better adapted” and “tak[e] into consideration the ability of each applicant to carry out its plans.” 18 C.F.R. § 4.37(b)(1). Finally, if the Commission finds that the competing plans are equally well adapted, it will break the tie by awarding the permit to “the applicant with the earliest application acceptance date.” 18 C.F.R. § 4.37(b)(2).

B. Regulations Concerning After Hours Filings

Rule 2001(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.2001(a)(2), has long provided that “[a]ny document received after regular business hours is considered filed on the next regular business day.” *See Revision of Rules of Practice and Procedure To Expedite Trial-Type Hearings*, Order No. 225, 47 Fed. Reg. 19,014 (May 3, 1982) (“Any document is considered filed on the date stamped by the Secretary” unless later rejected or received after business hours); *see also* 18 C.F.R. § 375.101(c) (the Commission’s business hours are from 8:30 a.m. to 5:00 p.m.).

This language did not change when the Commission first allowed electronic filing in lieu of paper filing for certain types of documents. *See Electronic Filing of Documents*, Order No. 619, 65 Fed. Reg. 57,088, 57,091 (Sept. 21, 2000) (amending 18 C.F.R. § 385.2001(a)(2) to provide that “any document is considered

filed, . . . in the case of a document filed via the Internet, on the date indicated in the acknowledgement that will be sent immediately upon the Commission’s receipt of a submission”). Nor did it change when the Commission expanded the availability of electronic filing to all types of documents. *See Filing Via the Internet*, Order No. 703, 72 Fed. Reg. 65,659, 65,664 (Nov. 15, 2007).

II. Events Leading To The Orders On Review

This case concerns a preliminary permit for the proposed Ruth Lake Project, to be located on Ruth Lake and Delta Creek near an unorganized borough in southeastern Alaska. Permit Order at P 1, JA 130. Two consecutive preliminary permits for the Project, spanning a total of six years, were held by Cascade Creek, LLC (“Cascade”) until the second permit expired at 5:00 p.m. on February 2, 2009. Permit Order at P 13, JA 133; Rehearing Order, 130 FERC ¶ 61,219 at 61,999, JA 171 (Comm’r Moeller, concurring).

Petitioner Petersburg Municipal Power and Light (“Petersburg”), the City of Angoon, Alaska (“Angoon”), the City and Borough of Wrangell, Alaska (“Wrangell”), and Cascade filed competing applications for a preliminary permit for the Project. *See Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions to Intervene, and Competing Applications at 1-2* (Feb. 18, 2009) (“Acceptance Notice”), R.10, JA 1-2. All the applications were filed electronically between the time that the Commission closed

for business on February 2, 2009, and when it opened for business on February 3, 2009. Rehearing Order at P 4 n.7, JA 160. The three municipal applicants also stood in line overnight in order to physically file their permit applications on the morning of February 3, 2009. Angoon Intervention at 2 (Apr. 20, 2009), R.36, JA 51; *see also* Rehearing Order at P 4 n.7, JA 160.

On February 18, 2009, consistent with Rule 2001(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2001(a)(2), the Commission gave all the applications "the filing date of February 3, 2009, at 8:30 AM." Acceptance Notice at 1, JA 1; *see also* Permit Order at P 14 & n.10, JA 134.

In a protest of the competing applications, Petersburg agreed with the Acceptance Notice that all applications had been filed on February 3, 2009 "at the same time." Petersburg Protest at 5 (Apr. 20, 2009), R.27, JA 8. Petersburg argued, therefore, that the Commission "cannot apply" its tie breaker regulations, 18 C.F.R. § 4.37(b)(2), that award the permit to the "first-filed applicant." *Id.* (arguing for award of permit to Petersburg as "the only legitimate municipality" and the one with the "better adapted" plan). In the same submission, Petersburg argued that the Commission must deny a permit to the private developer, Cascade, in favor of the municipalities, *id.* at 4, JA 7, and that it must investigate whether Angoon or Wrangell have a "hidden hybrid" arrangement with Cascade, *id.* at 7,

JA 10. *See* Rehearing Order at P 8 n.16, JA 162 (defining “hidden hybrid”).

On July 23, 2009, because the three municipalities’ applications were “considered filed at the same time[,]” the Commission provided notice that it would use a random drawing to establish “filing priority” among them, in the event the Commission later was to conclude that not one of the three applicants’ plans is better adapted than the others. Notice Announcing Preliminary Permit Procedures, *City of Wrangell, Alaska, et al.*, 128 FERC ¶ 61,077 at PP 2-3 (2009) (“Lottery Notice”), R.41, JA 82-83. On August 12, 2009, the Secretary of the Commission conducted a public drawing and determined that the order of priority of the applications, from first to last, was Angoon, Petersburg and Wrangell. Notice Announcing Filing Priority for Preliminary Permit Applications at 1 (Aug. 12, 2009), R.49, JA 90.

On September 22, 2009, in response to Petersburg’s assertions regarding the availability of municipal preference, Commission staff directed filings by Angoon and Wrangell on their qualifications as municipalities. Letter Requesting City of Angoon to File Additional Information at 1 (Sept. 22, 2009), R.50, JA 91; Letter Requesting City of Wrangell to File Additional Information at 1 (Sept. 22, 2009), R.51, JA 93. On October 2, 2009, Angoon and Wrangell timely filed their qualifications. *See* R.52, JA 115, and R.53, JA 118.

III. Challenged FERC Orders

After evaluating the applications and all supplemental information, the Commission awarded the Ruth Lake Project preliminary permit to Angoon on November 5, 2009. Permit Order at P 1, JA 130.

In the Permit Order, the Commission made three findings. First, the Commission determined that no applicant's plan was better adapted than any of the others because no detailed studies were submitted with any of the applications. *Id.* at PP 10, 20, JA 133, 135. Second, the Commission determined that Angoon, Petersburg and Wrangell had preference over Cascade because of their municipal status. *Id.* at P 11, JA 133. Third, because all the applications were found to be filed at the same time, *id.* at P 6, JA 132, the Commission determined that Angoon had preference over Petersburg and Wrangell due to filing priority determined through the random drawing. *Id.* at P 11, JA 133.

Rejecting Petersburg's assertion that Angoon and Wrangell should be treated as joint applicants and given one lot between them in the random drawing, the Commission reasoned that one lot for each was appropriate given that each municipality is a "distinct entity" and "each submitted separate preliminary permit applications. . . ." *Id.* at P 18, JA 135. Further, the Commission rejected requests to withhold municipal preference from Angoon and Wrangell because of alleged hybrid applications with the private developer, Cascade. *Id.* at P 21, JA 136. The

Commission also rejected requests to determine filing priority based on the order of the submission of paper filings by the applicants. *Id.* at PP 14-16, JA 134.

On March 18, 2010, the Commission issued its Rehearing Order denying Petersburg's request for rehearing. Rehearing Order at P 1, JA 159. Consistent with section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a), the Commission reiterated that "absent the results of the detailed studies to be conducted under a permit, it cannot, except in unusual cases, determine that one applicant's plans are better adapted than another's plans." *Id.* at P 12, JA 164. The Commission addressed the "hidden hybrid" allegation, noting that Petersburg had provided no evidence that Angoon would not control the proposed Project. *Id.* at PP 7-8, JA 162. In response to Petersburg's concerns about possible banking of sites to prevent development, the Commission instructed its staff to monitor closely Angoon's development activities for sufficient progress. *Id.* at P 23, JA 169-170.

The Commission also affirmed that it had correctly treated all applicants as individual entities, giving each one chance in the random drawing. *Id.* at P 22, JA 169. It concluded that the drawing to determine application priority was an impartial approach within its regulatory discretion, *id.* at PP 19-22, JA 167-169, represented a proper application of its existing regulations and policies, *id.* at P 16, JA 166, and eliminated unseemly races to file, *id.* at P 17, JA 166. *See also id.* at

P 21, JA 168 (summarizing the steps of FERC's analysis under the FPA and its regulations).

This appeal followed.

SUMMARY OF ARGUMENT

In this case of first impression, the Commission had to break a tie among competing permit applications that, according to its regulations, 18 C.F.R. § 385.2001(a)(2), were filed at the same time. In the end, the Commission properly broke the tie by means of a random drawing, employing a fair and impartial method used commonly by the federal courts and others to resolve filing races.

But first the Commission tried to select among the applicants by applying its existing permit preference regulations and related longstanding policies. The Commission properly applied the mandatory municipal preference in section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a)(2), and its own regulations, 18 C.F.R. § 4.37(b)(3). Three applicants with municipal preference remained.

The Commission also exercised its discretion under section 7(a) of the Federal Power Act to look for a plan that was best adapted to develop the water resources of the region. Applying its related regulations, 18 C.F.R. § 4.37(b)(1), and its precedents requiring detailed studies for a demonstration of superiority, the Commission properly found that the competing plans were equally well adapted. Again, three applicants remained.

The Commission applied its tie breaker regulation, 18 C.F.R. § 4.37(b)(2), that “favor[s] the applicant with the earliest application acceptance date.” The Commission has long interpreted this language as favoring the applicant that filed first. Because all the after-hours applications were filed simultaneously, the Commission reasonably determined that a random drawing should determine filing priority. The Commission awarded the permit on this basis.

The Commission’s action here to resolve a three-way tie for a preliminary permit was consistent with the Federal Power Act, a reasonable application of its existing regulations and policies, and a proper exercise of the Commission’s discretion to manage and determine its own procedures.

ARGUMENT

I. Standard Of Review

This Court reviews Commission decisions made in the context of hydroelectric licensing proceedings under the “arbitrary and capricious” standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Lichoulas v. FERC*, 606 F.3d 769, 775 (D.C. Cir. 2010) (surrender of license); *Jackson County v. FERC*, 589 F.3d 1284, 1286 (D.C. Cir. 2009) (removal of hydroelectric project). “Under this deferential standard, [the Court] must affirm the Commission’s orders as long as it has ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found

and the choice made.’” *Lichoulas*, 606 F.3d at 775 (quoting *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007), and *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Court’s scope of review in this case is narrow. The Commission’s interpretations of its own regulations are afforded substantial deference unless they are plainly erroneous or inconsistent with the text of the regulations. *Central Vt. Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000); *Bluestone Energy Design v. FERC*, 74 F.3d 1288, 1292 (D.C. Cir. 1996); accord *Howmet Corp. v. EPA*, 614 F.3d 544, 549 (D.C. Cir. 2010) (“[w]e accord an agency’s interpretation of its own regulations a high level of deference”). This same deference is given to the Commission’s interpretation of its own precedents. See *Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-704 (D.C. Cir. 2010); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007). Moreover, the Commission has broad discretion in developing its own priorities and procedures. See *Mobil Oil Exploration & Producing Se., Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991); *Midwest Indep. Transmission Sys. Operator v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004).

II. The Commission Acted Consistently With The Federal Power Act And Reasonably Interpreted Its Own Regulations When It Awarded The Preliminary Permit To Angoon

The Federal Power Act empowers the Commission to award preliminary permits for proposed hydroelectric projects. FPA § 4(f), 16 U.S.C. § 797(f). According to section 5 of the FPA, 16 U.S.C. § 798, a permit's sole purpose is to assure priority in order "to induce holders to undertake the research and investment necessary for the preparation of a license application. . . ." *Malta*, 955 F.2d at 61; *see also City of Bedford v. FERC*, 718 F.2d 1164, 1168 (D.C. Cir. 1983) (similar statement of purpose); Permit Order at P 22, JA 136 ("the purpose of a preliminary permit is to study the feasibility of the project;" permittee is not authorized "to undertake any construction"); *id.* at Article 1, Terms and Conditions of Preliminary Permit, JA 140 (purpose is "to maintain priority of application;" permittee is not authorized "to conduct any ground-disturbing activities or grant[ed] a right of entry onto any lands").

With this purpose in mind, and cognizant that "developers submit rudimentary information about their intended projects" in permit applications, *Malta*, 955 F.3d at 61, the Commission codified the priorities established in section 7(a) of the FPA, 16 U.S.C. § 800(a), into a regulatory process. *See* 18 C.F.R. § 4.37(b) (containing step-by-step preference formula for awarding permits). Given a permit's relative insignificance, this regulatory process is structured to deal

efficiently and decisively with competing preliminary permit applications. *See* 18 C.F.R. § 4.37(b)(2) (preference for earliest acceptance date); *City of Dothan v. FERC*, 684 F.2d 159, 160 (D.C. Cir. 1982) (upholding first-to-file policy now contained in 18 C.F.R. § 4.37(b)(2)); *accord Town of Summersville v. FERC*, 780 F.2d 1034, 1038 (D.C. Cir. 1986) (“[t]he preliminary permit is actually only a minor threshold hurdle for the applicant”). Here, the Commission followed the establish priorities for preliminary permit applications contained in the Federal Power Act and in its own regulations.

A. The Commission Properly Applied The Process In Its Regulations In Awarding The Permit

Petersburg argues that the Commission “ignored,” “abandoned,” “avoided,” “bypassed,” and “disregarded” its rules of preference for preliminary permits, 18 C.F.R. § 4.37(b). Br. 6-7, 10, 18, 25. Even a cursory examination of the challenged orders belies this argument.

Applying the permit preference formula in its regulations, the Commission first gave preference to the three municipal applicants pursuant to 18 C.F.R. § 4.37(b)(3). Permit Order at PP 10-11 & n.6, JA133; Rehearing Order at P 6 n.10, JA 161. It awarded this preference after investigating whether Angoon and Wrangell met the statutory definition of municipality at section 3(7) of the FPA, 16 U.S.C. § 796(7). *See supra* p. 8.

Second, pursuant to 18 C.F.R. § 4.37(b)(1), the Commission analyzed the applications to determine whether one applicant’s plan was “better adapted to develop the water resources of the region.” Permit Order at P 20, JA 135; Rehearing Order at PP 10-11 & n.20, JA 163-164. Finding that the plans were for “almost identical projects,” Rehearing Order at P 12, JA 164, the Commission properly relied on its well-settled interpretation of this regulation as requiring detailed studies to enable a “better-adapted” selection. Permit Order at P 10, JA 133; Rehearing Order at P 11, JA 163; *see also Dothan*, 684 F.2d at 168 (Mikva, J., dissenting) (noting that “FERC has consistently” required the submission of “detailed studies” before awarding the permit for a better adapted plan); Br. 19-20 (summarizing FERC policy requiring “detailed studies”). Here, the Commission reasonably concluded that none of the applicants’ plans is better adapted than the others. Permit Order at P 10, JA 133; Rehearing Order at PP 5, 12, JA 160, 164; *see infra* Part II.B (fully explaining application of 18 C.F.R. § 4.37(b)(1)).

Because three applicants were awarded municipal preference and all three had equally well adapted development plans, the Commission applied its tie breaker rule in favor of “the applicant with the earliest application acceptance date.” 18 C.F.R. § 4.37(b)(2); Permit Order at P 10, JA 133. For the last thirty years, the Commission has interpreted this regulation to mean that, in the event of

a tie, the permit is awarded to “the applicant whose application was filed first.” Permit Order at P 10 n.7, JA 133; *see Malta*, 955 F.2d at 61 (when the other preference rules do not produce a winner, the Commission “grants the permit to the first-filing applicant”); *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1149 (D.C. Cir. 1986) (“the applicant whose application was first accepted for filing” is the “first filed”); *Dothan*, 684 F.2d at 161 & n.1 (same).

Also for the last thirty years, the Commission has enforced a regulation that provides “[a]ny document received after regular business hours is considered filed on the next regular business day.” *See supra* p. 5 (now codified at 18 C.F.R. § 385.2001(a)(2)). In light of its related regulation that it is open for business on weekdays from 8:30 a.m. to 5:00 p.m., *see* 18 C.F.R. § 375.101(c), the Commission reasonably concluded that the electronic filings here were made “at the same time” at 8:30 a.m. on February 3, 2009. Permit Order at P 11, JA 133; *see* Rehearing Order at P 16, JA 166 (exercising discretion to continue practice of treating after-hours filings as filed at 8:30 a.m. on the next day); Permit Order at P 14 n.10, JA 134 (“[a]ny document received after regular business hours is considered filed at 8:30 a.m. on the next . . . day”); Lottery Notice at P 1 & n.1, JA 82 (“[o]n February 3, 2009, at 8:30 a.m., the Commission received three preliminary permit applications”). That conclusion, based on the agency’s interpretation of its Rules of Practice and Procedure related to a timing issue, “is

entitled to special deference.” *Aliceville*, 800 F.2d at 1150.

The Commission interpreted its tie breaker regulation, 18 C.F.R. § 4.37(b)(2), as a first-to-file priority. Because “a first-filed applicant could not be determined. . . . [by the] first . . . application[] delivered to the Commission’s docketing office,” Rehearing Order at PP 13-14, JA 165, the Commission “determine[d] the filing priority” by impartial drawing. Lottery Notice at P 3, JA 83; *see also* Permit Order at P 11, JA 133 (“[b]ecause Angoon, Petersburg, and Wrangell filed at the same time, the Commission determined priority among the three municipalities through the random drawing”); Rehearing Order at P 21, JA 168 (“Commission staff has diligently followed the directive of . . . the permit preference formula”). The Commission concluded that Angoon had filing priority and, thus, according to 18 C.F.R. § 4.37(b)(2), “the earliest application acceptance date.” It awarded the permit accordingly.

Contrary to Petersburg’s contention, Br. 6, the Commission did not institute a new process divorced from the permit preference rules. The Commission had to determine the “earliest application acceptance date,” which it did traditionally by selecting the applicant that was first to file. Rehearing Order at P 13, JA 164. Here, because the filing dates were all the same due to application of Rule 2001(a)(2), the Commission selected the filing priority by lottery. Lottery Notice

at P 3, JA 83. This is a reasonable interpretation of the tie breaker rule, 18 C.F.R. § 4.37(b)(2), for which the Commission is due substantial deference. *See Bluestone Energy Design*, 74 F.3d at 1292-93 (upholding FERC’s reasonable interpretation of hydroelectric reporting regulations).

B. The Commission Properly Applied Its Better Adapted Regulations And Policies

Section 7(a) of the FPA, 16 U.S.C. § 800(a), provides that the Commission “may give preference” to an applicant if it “finds and determines” that the applicant’s plans are “best adapted to develop” the water resources of the region. *See* Rehearing Order at P 11, JA 163 (“such preference is at the Commission’s discretion”); *see also Energie Group*, 511 F.3d at 164 (recognizing FERC’s discretion under 16 U.S.C. § 800(a)). Petersburg argues that the Commission’s regulations convert this discretionary power into an “obligation” that the Commission “find and determine” that one applicant’s plan is better adapted than all others. Br. 17. Petersburg continues that the Commission was compelled to find Petersburg’s application “best adapted” and thus had no reason to conduct a lottery tie breaker. Br. 6.

While the Commission’s regulations call for it to review applications to determine whether (or not) there is a superior plan, nothing in the language of 18 C.F.R. § 4.37(b)(1) compels the Commission to distinguish among projects that, in its judgment, are indistinguishable. *See* Rehearing Order at P 11, JA 163

(disagreeing that there is “no other option” but to determine one best adapted application); *cf. International Paper Co. v. FERC*, 737 F.2d 1159, 1161 (D.C. Cir. 1984) (“decision to engage in formal comparative evaluation” to determine best adapted license exemption is a “purely discretionary matter”); *Hirschey v. FERC*, 701 F.2d 215, 219 (D.C. Cir. 1983) (prior regulation detailing selection process for competing license exemption applications “provides that the first filed application will be favored *unless* the FERC *affirmatively finds* that the later filed application is measurably better” (emphasis original)). Petersburg has pointed to nothing in the language of the Commission’s regulations or established policy on preliminary permits for the proposition that the Commission is required to solicit additional information from permit applicants when plans are otherwise indistinguishable. *See* Br. 21 & n.7 (citing only dissenting opinion in *Dothan*, 684 F.2d at 168 n.7, and FERC’s requests for information made in the post-permit licensing context). In fact, in 1985, the Commission revised its regulations to remove the requirement that permit applicants submit information distinguishing their plans from their competitors, recognizing that “plans are too rudimentary at this stage of the process.” Rehearing Order at P 11 & n.22, JA 163-164.

Once the Commission examines the permit applications, it generally finds that competing plans at the permitting stage are indistinguishable unless detailed studies are submitted. Permit Order at P 20, JA 135 (detailed studies can

substantiate plan superiority); Rehearing Order at P 12, JA 164 (only “in unusual cases” can FERC find a better-adapted plan without detailed studies). The courts recognize and accept that, in most cases, the Commission will find permit applications are equally well adapted and resort to a tie breaker to award the permit. *Malta*, 955 F.2d at 61 (“when, as is typically the case, no proposal is clearly superior,” FERC uses a tie breaker); *Aliceville*, 800 F.2d at 1149 (“FERC will usually determine that [plans] are equally well adapted” and award the permit to the first-filed application); *Appomattox River Water Auth. v. FERC*, 736 F.2d 1000, 1002-1003 & n.3 (4th Cir. 1984) (noting past practice of awarding permit to the first to file when plans are equally well adapted).

Contrary to Petersburg’s assertion, it is not the Commission’s “policy [to] ignor[e] the better adapted requirement.” Br. 20. Rather, it is the Commission’s reasonable policy to apply 18 C.F.R. § 4.37(b)(1) by requiring “detailed information substantiating the superiority of the proposal,” in a way that preserves agency and applicant resources and recognizes that merit-based decisions are usually premature at the preliminary permit stage. Permit Order at P 20 & n.13, JA 135 (permit allows applicant to expend resources to become “fully qualified”); *see* Rehearing Order at P 11, JA 163 (past policy of comparing competing better adapted statements was ineffective because preliminary plans are too rudimentary); *see also Dothan*, 684 F.2d at 164 (“the preliminary permit stage is an exploratory

period, often characterized by modifications resulting from the acquisition of fuller information”). “Because of the high attrition rate [of permittees that apply for licenses], FERC has determined that the most efficient use of staff resources militates against any substantive investigation of legal or factual uncertainties at the preliminary permit stage.” *Summersville*, 780 F.2d at 1039; *see also Bedford*, 718 F.2d at 1170 (finding a policy “eminently reasonable” that preserves resources and avoids delay at the permitting stage); *Appomattox River*, 736 F.2d at 1003 (upholding “rational” approach that awaits the quantification of all factors at the post-permit licensing stage before finding a best adapted application).

At bottom, Petersburg argues that this policy should change because applicants are now allowed to file applications for preliminary permits electronically. *See* Br. 20-21. But electronic filing does not change that applicants’ plans for permits are usually “flexible and speculative.” *Dothan*, 684 F.2d at 163. Accordingly, the Commission’s continued application of its policy in these circumstances is reasonable. *See Midwest Indep. Transmission Sys. Operator*, 388 F.3d at 911 (court owes “considerable deference” to FERC’s policy choices).

To the extent that Petersburg argues that the Commission’s finding, regarding the lack of a single better adapted plan, is not supported by substantial evidence, Br. 18, it is incorrect. The Commission conducted the requisite analysis

when it evaluated Petersburg's better adapted statement and the applications. *See, e.g.,* Permit Order at P 19, JA 135. The Commission reasonably found no significant, substantive differences in the development plans, Rehearing Order at P 12, JA 164, and, consistent with its precedent, rejected as irrelevant the alleged differences among the plans. Permit Order at P 20 & n.13, JA 135 (rejecting, e.g., proximity to Ruth Lake and ability to finance Project as determinative factors); Rehearing Order at P 12 n.24, JA 164 (rejecting, e.g., public support and location of power consumption as determinative factors). In these circumstances, there is no factual or evidentiary basis for upsetting the agency's reasonable decision. *See Dothan*, 684 F.2d at 164 (finding FERC's decision to reject certain factors in its best adapted analysis is supported by substantial evidence); *Appomattox River*, 736 F.2d at 1003 (upholding FERC's determination that factors such as geographic distance from the site, ownership interests, and economic feasibility are not determinative in a best adapted analysis).

C. In General, And In These Circumstances, A Lottery Is An Impartial And Transparent Means Of Breaking A Tie

1. A Lottery Is A Reasonable Way To Establish Filing Priority Among Simultaneously-Filed Applications

Because the Commission's procedural rule, 18 C.F.R. § 385.2001(a)(2), prevented it from awarding the permit to a first-filed applicant, the Commission selected an alternate way to determine which applicant, under 18 C.F.R. §

4.37(b)(2), had “the earliest application acceptance date.” *See* Permit Order at P 17, JA 134 (referencing Lottery Notice); Rehearing Order at P 18, JA 166. The use of a random drawing as a fair and impartial tie breaker is well-established policy. *See Mobil Oil Exploration Co. v. FERC*, 814 F.2d 998, 1001 (5th Cir. 1987) (“[w]here the first filing rule yields no proper resolution, and [another means of resolving jurisdiction and venue is unavailing], chance is a just determinant”).

Congress has institutionalized the “coin toss” used in *Mobil Oil*, 814 F.2d at 1001, and the federal courts now rely upon a “means of random selection [to] designate one court of appeals” when there is a multi-circuit race to the courts of appeals. 28 U.S.C. § 2112(a)(3). Federal agencies and departments also use lotteries to determine “the fairest method of allocation.” Rehearing Order at P 20 n.42, JA 168 (providing examples).

The selection procedure here not only “accords with the spirit of the statute,” *Mobil Oil*, 814 F.2d at 1000, that requires the Commission to select among competing preliminary permit applicants for the purpose of promoting hydroelectric development, Rehearing Order at P 20, JA 167, but it is also grounded in good public policy. *See id.* at P 17, JA 166. Using a lottery to determine filing priority will “discourage entities from making multiple electronic filings” and eliminate the “unfortunate and unseemly consequence of people waiting overnight in line in an effort to be first” to physically file. *Id.* Employing

a lottery instead of an electronic race to file addresses the differing levels of internet access across the nation. *Id.* at P 15, JA 165 (no party was “technologically disadvantaged” in the proceeding); *see Mobil Oil*, 814 F.2d at 1000 (warning that, without a lottery, “the next generation of races” to the courthouse will evolve into technological arms races).

Petersburg argues that a lottery is a poor policy choice because it encourages game playing to increase applicants’ chances of securing a preliminary permit. Br. 25-26. While Angoon and Wrangell could not have known that they would be subject to a lottery at the time of filing, Petersburg asserts that future permit seekers will game the system by making duplicative applications by different municipalities. *Id.*

But such games are undermined by the fact that permits are not transferable. Permit Order at P 25, JA 138; *see also* 16 U.S.C. § 798 (“permits shall not be transferable”). Further, the Commission “deems the intent to share control of the completed project with a nonapplicant to be invalidating.” *Bedford*, 718 F.2d at 1169; *see* Rehearing Order at P 8, JA 162 (same with regard to a municipality sharing control with a private entity); *id.* at P 22 & n.43, JA 169 (same with regard to two municipalities sharing control). It will investigate control by the permitted entity at the licensing stage. *Bedford*, 718 F.2d at 1169; Rehearing Order at PP 8, 22, JA 162, 169. Thus, “there is nothing to be gained from a nontransferable

permit which can lead, after the incurring of some expense, only to a license application that will be denied and possibly prosecuted.” *Bedford*, 718 F.2d at 1169.

2. Unsupported Allegations Of Collusion Are Irrelevant At The Preliminary Permit Stage

Collusion is a secret agreement for a deceitful purpose. Merriam-Webster’s Collegiate Dictionary 260 (9th ed. 1985). In the proceeding below, Petersburg noted that both Angoon and Wrangell had stated their intention in their filings before the Commission to “work[] with all private and proposed public developers in the Ruth Lake area with the exception of Petersburg. . . .” Answer of Petersburg at 3, R.39, JA 58; *see* Br. 26 & n.8. On appeal, for the first time, Petersburg calls this activity collusion, Br. 9, 25, and alleges that the Commission failed to account for it. Br. 9. In the challenged orders, the Commission adequately addressed the foundation of this allegation and reasonably concluded that each distinct municipal applicant with a separate application was fairly accorded one chance in the lottery. Rehearing Order at P 22, JA 169.

On the record below, the Commission reasonably determined that neither Angoon nor Wrangell is a subdivision or subsidiary of the other. Permit Order at P 18, JA 135 (“each is considered a distinct entity”); Rehearing Order at P 22, JA 169 (each is a “separate entity”). Nor did the record show that the applicants were secretly working together. *See* Rehearing Order at P 22, JA 169 (“Angoon has

stated in its pleadings” to FERC that it is working with Wrangell); *cf. Energie Group*, 511 F.3d at 163-64 (FERC properly dismissed applications of corporations formed to veil the identity of non-compliant project operators).

Because Angoon and Wrangell did not file a joint permit application, and because Petersburg had not shown substantial evidence that a joint license application would be filed, the Commission reasonably concluded that it would be a poor use of administrative resources to conduct this type of investigation at the permit stage. Rehearing Order at P 22 (referencing *id.* at P 8, JA 162), JA 169; *see Bedford*, 718 F.2d at 1168-70 (accordng “great weight” to FERC’s decision to investigate, at the post-permit licensing stage, allegations that “successful applicants acted in secret agreement . . . to share control of [projects]”). Here, the Commission instituted a random tie breaker drawing to neutrally and equitably determine whether Petersburg, Angoon, or Wrangell should be considered first-filed, and properly awarded each applicant one chance in that drawing.

III. The Commission Has Broad Discretion To Determine How Best To Structure Its Selection Process For Preliminary Permits

The challenged orders correctly recognize that the Commission has broad discretion to determine which procedures to use to select among competing permit applicants, as long as those procedures are consistent with the Federal Power Act. Permit Order at P 17, JA 134; Rehearing Order at PP 16, 19-20, JA 166, 167-168. The Federal Power Act affords the Commission the authority to “perform any and

all acts . . . as it may find necessary or appropriate to carry out” its obligations under the statute. FPA § 309, 16 U.S.C. § 825h; *cf. Chippewa & Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 358 (D.C. Cir. 2003) (“[b]y enacting the ‘necessary or appropriate’ standard [elsewhere in the statute], the Congress invested the Commission with significant discretion”). The Court defers to this expansive authority “to use means of regulation not spelled out in detail” when “the agency’s action conforms with the purposes and policies of Congress and does not contravene any terms of the [Federal Power] Act.” *New England Power Co. v. FERC*, 467 F.2d 425, 430 (D.C. Cir. 1972); *see Midwest Indep. Transmission Sys. Operator*, 388 F.3d at 909 (because FPA § 309 has “an implementary rather than substantive character,” it must be paired with a “statutory authorization”).

Here, the Commission’s decision to implement a lottery, when application of its regulations and policies failed to produce a single winner, represents a proper exercise of its discretion to fill procedural gaps. *See* Permit Order at P 17, JA 134 (citing FPA § 309, 16 U.S.C. § 825h). Under its regulations and existing policy the Commission was not able to grant a permit because more than one applicant remained; it then instituted a lottery procedure for resolving this tie in accord with its regulatory regime and its obligations under the Federal Power Act. *See* Rehearing Order at P 18, JA 166; *cf. International Paper Co.*, 737 F.2d at 1161

(where a final non-reviewable license exemption is granted by automatic operation of FERC's rules, FERC cannot undo the action using FPA § 309). The Commission is empowered to craft a procedure to address any such shortcoming, and to aid in the application, of its regulations. *See Mobil Oil*, 498 U.S. at 230 (FERC enjoys broad discretion to determine appropriate procedures to apply to its consideration of pending matters); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978) (“[a]bsent . . . extremely compelling circumstances . . . agencies should be free to fashion their own rules of procedure [to permit] them to discharge their multitudinous duties”).

Petersburg is more absolute. In its view, the agency's regulations lead to only one possible conclusion – naming Petersburg the winner. *See* Br. 15-16 (“the only reasonable interpretation” of FERC's rules is that Petersburg's application was “first received” on February 2, 2009). To adopt Petersburg's solution, however, the Commission would have to abandon its established policy of not accepting filings after the close of business, *see supra* pp. 5-6, and ignore its procedural rules implementing this policy. *See* 18 C.F.R. § 385.2001(a)(2) (filings made after hours are deemed filed the next day); *see also* Rehearing Order at P 20 n.35, JA 167 (Petersburg's proposal would be “contrary to our electronic filing rules”).

The Commission reasonably applied Rule 2001(a)(2) to these circumstances to find that the applications were filed simultaneously, a finding that Petersburg did not contest until it lost the lottery. *See supra* p. 7 (Petersburg once agreed that applications were filed at the same time). Even if the Commission had found Petersburg’s proposal reasonable, *see* Rehearing Order at P 15, JA 165, it was not required to adopt that procedure or otherwise assume the absence of a more reasonable procedure. *Domtar Me. Corp. v. FERC*, 347 F.3d 304, 314 (D.C. Cir. 2003) (“[W]e have long given agencies broad discretion as to the manner in which they carry out their duties. . . . An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in any proceeding. . . .”) (citation omitted)).

Finally, on appeal, Petersburg repeatedly faults the Commission for not conducting a “notice and comment rulemaking,” under the Administrative Procedure Act, 5 U.S.C. § 553, to implement the lottery. Br. 6, 7, 14, 15, 22, 23. In the proceeding below, Petersburg did not request a rulemaking to institute the lottery, or raise the alleged error of not conducting one. Nor did Petersburg raise a lack of opportunity to comment on the Lottery Notice as error in its request for rehearing. Petersburg is barred from introducing these issues on appeal. *See* FPA § 313(b), 16 U.S.C. § 825l(b); *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381

(D.C. Cir. 2005) (failure to raise an issue on rehearing is a bar to the Court's consideration of the issue).

In any event, as demonstrated by the contemporaneous filings of their electronic and paper applications, Permit Order at P 14, JA 134, all of the permit applicants were aware of the intense competition for the Ruth Lake site.

Moreover, two weeks after the filings were made, all of the applicants were on notice that their filings were "given the filing date of February 3, 2009, at 8:30 AM." Acceptance Notice at 1, JA 1. More than three months before the permit issued, they were on notice of the procedures for determining filing priority.

Lottery Notice at PP 1-3, JA 82-83. Applicants had ample opportunity, of which they availed themselves, to propose interpretations of the permit preference rules, to submit new procedures for the Commission's consideration, and to comment on the Commission's lottery procedure. The Commission's action here was well within its discretion to implement and interpret its regulations and did not require a rulemaking. *See Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 723 (D.C. Cir. 1984) (because "the choice between rulemaking and case-by-case adjudication 'lies primarily in the informed discretion of the administrative agency,'" *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), the Court must defer to the agency's decision that adjudication is "a sensible response to a new situation").

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,

Robert H. Solomon
Solicitor

/s/ Jennifer S. Amerkhail
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

November 9, 2010
Final Brief: December 13, 2010

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 7,223 words, not including the table of contents and authorities, the certificates of counsel and the addendum.

/s/ Jennifer S. Amerkhail
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

December 13, 2010