07-1737-ag

07-2011-ag, and 07-5141-ag (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GREEN ISLAND POWER AUTHORITY AND ADIRONDACK HYDRO DEVELOPMENT CORPORATION, PETITIONER,
v.
FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES: **PAGE**

TABLE OF AUTHORITIES

STATUTES: **PAGE**

TABLE OF AUTHORITIES

REGULATIONS: **PAGE**

Glossary

A-	Indicates page numbers in the Joint Appendix
Adirondack	Adirondack Hydro Development Corporation
Br.	Petitioners' Brief
Commerce	U.S. Department of Commerce National Marine Fisheries Service
Commission, FERC	Federal Energy Regulatory Commission
EA	Environmental Assessment
Erie	Erie Boulevard Hydropower, L.P.
FPA	Federal Power Act
Green Island	Green Island Power Authority
License Order	*Erie Boulevard, L.P.*, 118 FERC ¶ 61,101 (2007), R.563, SPA-27.
License Rehearing Order	*Erie Boulevard, L.P.*, 120 FERC ¶ 61,267 (2007), R.571, SPA-65.
NEPA	National Environmental Policy Act
New York DEC	New York Department of Environmental Conservation
Niagara Mohawk	Niagara Mohawk Power Corporation
Notice Rehearing Order	*Erie Boulevard, L.P.*, 117 FERC ¶ 61,189 (2006), R.540, SPA-13.
P	Refers to the Paragraph number in Commission orders
Petitioners	Petitioners Adirondack and Green Island
Project	The School Street Project, FERC Project No. 2539
SPA-	Indicates page numbers in the Special Appendix

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1) Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably interpreted and applied its regulations in denying petitioner Green Island Power Authority's ("Green Island") late motion to intervene, filed more than a decade into the proceeding, where Green Island's belated development and filing of a statutorily-barred competing proposal did not justify its delay.

2) Assuming jurisdiction, whether the Commission, in issuing a new license for an existing hydroelectric project, satisfied its responsibilities under the Federal

Power Act and the National Environmental Policy Act, by balancing a comprehensive range of developmental and environmental interests and examining reasonable alternatives, but declining to restart its analysis more than a decade into the proceeding to consider Green Island's and Adirondack Hydro Development Corporation's ("Adirondack") (together, Petitioners) late-filed, and statutorily-barred, competing proposal.

COUNTER-STATEMENT REGARDING JURISDICTION

Petitioners invoke this Court's jurisdiction under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), and the Administrative Procedure Act, 5 U.S.C. § 702. Br. at 4. As demonstrated in Part II of the Argument below, however, Green Island has standing only to challenge the denial of its motion to intervene as a party, and Adirondack lacks standing for failure to raise a cognizable injury; therefore, their petitions for review should be dismissed, in whole or in part, for lack of jurisdiction. *See, e.g.*, *City of Orrville v. FERC*, 147 F.3d 979, 985-87, 990 n.12 (D.C. Cir. 1998).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

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

This case involves the relicensing, under Part I of the Federal Power Act ("FPA"), 16 U.S.C. § 791a, *et seq.*, of the School Street Project, FERC Project No. 2539, a hydroelectric project owned and operated by Erie Boulevard Hydropower, L.P. ("Erie"). Erie purchased the Project from Niagara Mohawk Power Corporation ("Niagara Mohawk"), which initiated this proceeding in 1991 by filing an application for a new license. The Commission proceeded to analyze the application, but the proceeding was delayed while the New York Department of Environmental Conservation ("New York DEC") considered Niagara Mohawk's application for water quality certification under the Clean Water Act. The New York DEC ultimately issued its certification in October 2006 after settling with Erie and other participants in that proceeding.

Near the end of the Commission's lengthy proceeding, petitioner Green Island proposed a new hydroelectric project which would replace the School Street Project and require its removal. Green Island initially pursued this alternative by filing a preliminary permit application, which the Commission dismissed as statutorily-barred in orders not on review here. *Green Island Power Auth.*, 110 FERC ¶ 61,034, *reh'g denied*, 110 FERC ¶ 61,331 (2005), *petition for review dismissed, Green Island Power Auth. v. FERC*, No. 05-1170 (D.C. Cir. Dec. 14,

2005).

Green Island also sought to intervene in the School Street Project relicensing proceeding. Later, Green Island, together with Adirondack (which the Commission admitted as a party in 1997) submitted various pleadings proposing the same barred alternative. Adirondack and Green Island now challenge (No. 07-1737) Commission orders denying the intervention and rejecting the pleadings. *Erie Boulevard, L.P.*, "Notice Rejecting Pleading," Project No. 2539-021 (May 24, 2006), R.478, SPA-1; "Notice Rejecting Motion," Project No. 2539-003 (June 28, 2006), R.501, SPA-3; "Notice Denying Late Intervention," Project No. 2539-003 (June 28, 2006), R.502, SPA-5; "Order Denying Rehearing," 117 FERC ¶ 61,189 (Nov. 16, 2006) ("Notice Rehearing Order"), R.540, SPA-13; "Order Rejecting Request For Rehearing, Motion For Clarification, And Request For Reconsideration," 118 FERC ¶ 61,196 (Mar. 15, 2007), R.567, SPA-59.

The Commission approved the Settlement among Erie, New York DEC and other participants and granted Erie a new license for the School Street Project on February 15, 2007. *Erie Boulevard, L.P.*, 118 FERC ¶ 61,101 (2007) ("License Order"), R.563, SPA-27. Petitioners sought rehearing. The Commission rejected the request for rehearing as to Green Island, a non-party, which again petitioned this Court for review (No. 07-2011). *Erie Boulevard, L.P.*, 119 FERC ¶ 61,038 (Apr. 12, 2007), R.569, SPA-63. In the final order on review here, the

Commission denied the request for rehearing as to Adirondack. *Erie Boulevard, L.P.*, 120 FERC ¶ 61,267 (Sept. 21, 2007) ("License Rehearing Order"), R.571, SPA-65. The third and final petition for review before this Court followed (No. 07-5141).

II. STATEMENT OF THE FACTS

A. Statutory And Regulatory Background

Part I of the FPA constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). FPA section 4(e) authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. FPA § 4(e), 16 U.S.C. § 797(e). The Commission also issues preliminary permits, which grant the holder priority of application and allow it to investigate the feasibility of a proposed project. FPA §§ 4(f), 5, 16 U.S.C. §§ 797(f), 798.

Under FPA section 4(e), the Commission must balance power and non-power values in arriving at a licensing decision:

> [T]he Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. § 797(e).

FPA section 10(a)(1), 16 U.S.C. § 803(a)(1), which permits the Commission to include conditions in licenses, requires a similar balancing of public interest considerations. It provides:

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section [4(e)] . . . .

Id.

FPA section 15, 16 U.S.C. § 808, sets forth the procedures applicable upon relicensing, where the Commission may issue a "new" license to an existing licensee or another entity. *See also* 18 C.F.R. pt. 16. Section 15(c)(1) requires that "[e]ach application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license." 16 U.S.C. § 808(c)(1); 18 C.F.R. § 16.9(b)(1). Section 15(a)(2) also establishes a public interest standard: "Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest . . . ." 16 U.S.C. § 808(a)(2).

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, sets out procedures to be followed by federal agencies to ensure that the

environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), *cited in U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). Under NEPA, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted).

B. The Commission's Hydroelectric Licensing Proceedings

The School Street Project was constructed in the early 1900s and first licensed to Erie's predecessor, Niagara Mohawk, in 1969 for a term expiring December 31, 1993.[1] *Niagara Mohawk Power Corp.*, 41 FPC 772 (1969). Under FPA section 15(c)(1), 16 U.S.C. § 808(c)(1), all applications for a new license for the Project were due no later than two years prior to expiration, or December 31, 1991. Three years before an application was due, Niagara Mohawk filed a notice of intent to seek relicensing, which the Commission published. *See Niagara Mohawk Power Corp.; Intent to File an Application for a New License*, 54 Fed. Reg. 10579 (Mar. 14, 1989). On December 23, 1991, Niagara Mohawk filed an application for a new license for the Project, as well as nine other projects, the licenses for which all expired in 1993. No other applications for the Project were filed by the statutory deadline.

[1] Between 1993 and issuance of the License Order, the Project continued to operate under annual licenses. *See* FPA § 15(a)(1), 16 U.S.C. § 808(a)(1).

At the same time, Niagara Mohawk applied to the New York DEC for water quality certification for the School Street Project and the nine other projects, as required by section 401 of the Clean Water Act, 33 U.S.C. § 1341. Obtaining water quality certification is a necessary prerequisite to Commission action on a license application. License Order at P 2 n.5, SPA-28. The New York DEC initially denied certification for all ten projects. *Id.* Niagara Mohawk appealed this decision and the parties, including the New York DEC and Niagara Mohawk, later initiated settlement negotiations concerning all ten projects. *Id*. at P 27, SPA-31-32. The parties addressed the projects seriatim, and the last settlement reached addressed the School Street Project. *Id*. at P 2 n.5, SPA-28. Later, in October 2006, the New York DEC issued water quality certification for the School Street Project. *Id*. at P 27, SPA-32.

Notwithstanding the state's denial of water quality certification in 1992, the Commission proceeded with its analysis of the license application. In 1993, the Commission issued public notice that the application was accepted for filing, soliciting interventions from interested members of the public. *Id*. at P 3, SPA-28 Several agencies, environmental organizations and individuals intervened. License Order at P 3, SPA-28. Various agencies and interested parties, including petitioner Adirondack, the City of Cohoes, New York DEC and the U.S. Department of Commerce National Marine Fisheries Service ("Commerce"), also filed late

motions to intervene between 1995 and 1999; the Commission granted each of these. *Id.*

In 1995, the Commission issued scoping documents and held public scoping meetings to identify the environmental issues to be analyzed in detail by the Commission under its FPA and NEPA processes. Final Environmental Assessment at 13, R.309, A-692. Shortly thereafter, the Commission issued notice that the application was ready for environmental analysis, and solicited comments, recommendations, terms and conditions from the public and agencies. *Id*. at 13-14, A-692-93; License Order at P 4, SPA-28. Again, several parties, including agencies, environmental organizations and the City of Cohoes filed comments. License Order at P 4, SPA-28. Next, in 1996, the Commission issued a draft environmental assessment under NEPA. Again, several parties filed comments. *Id*. at P 5, SPA-28. In 1999, the Commission authorized transfer of the license from Niagara Mohawk to Erie, again following notice and an opportunity for public comment. *Niagara Mohawk and Erie Boulevard Hydropower, L.P.*, 88 FERC ¶ 62,082 (1999). The Commission issued a final environmental assessment in 2001, completing its environmental analysis. License Order at P 5, SPA-28.

C. Green Island's Late Intervention And Proposed Alternative

In 2004, thirteen years after the deadline for license applications and nearly three years after the Commission issued the final environmental assessment, Green Island proposed a new hydroelectric project, the Cohoes Falls Project, to be located just downstream of the School Street Project, which it acknowledges would require removing the School Street Project dam and decommissioning other facilities. License Order at P 6, SPA-28-29; Br. at 49-50. In pursuit of developing this project, Green Island first filed a preliminary permit application. The Commission dismissed that application as barred under FPA section 6, 16 U.S.C. § 799, which prohibits the Commission from modifying an existing license without the licensee's consent, and FPA section 15(c)(1), 16 U.S.C. § 808(c)(1), which required all applications for a project that would compete with the School Street Project to be filed in 1991. *Green Island Power Auth.* 110 FERC ¶ 61,034, *reh'g denied*, 110 FERC ¶ 61,331 (2005), *petition for review dismissed, Green Island Power Auth. v. FERC*, No. 05-1170 (D.C. Cir. Dec. 14, 2005). Green Island appealed the Commission's orders to the D.C. Circuit, but later voluntarily withdrew its petition, making those orders final.

Shortly after filing its preliminary permit application, Green Island, which had to that point elected not to participate in the relicensing proceeding, moved to intervene in the School Street Project relicensing proceeding. R.346, A-859.

Green Island asserted that it had an interest in the relicensing because it sought to develop the Cohoes Falls Project, intended to seek a non-power license for the School Street Project, and together with the City of Cohoes, had attempted to acquire the Project from Erie between 2001 and 2004. *Id*. at 4-5, A-862-63. Green Island also explained that in 2000, four years prior, it had acquired another project located on the Hudson River downstream of the confluence with the Mohawk River. *Id*. at 3, A-861. The Commission did not immediately act on Green Island's motion.

In March 2005, Erie submitted an Offer of Settlement ("Settlement"), R. 380, A-1037, addressing the relicensing of the Project. The Settlement was signed by Erie, the New York DEC, the U.S. Fish and Wildlife Service, the National Park Service, New York Rivers United, the New York Power Authority, the New York State Conservation Council and Rensselaer County Conservation Alliance. License Order at P 7 n.12, SPA-29. Commerce filed comments supporting the Settlement. *Id*. at P 66, SPA-37.

Over a year later (while the Commission awaited the New York DEC's final water quality certification), Green Island, together with Adirondack and three entities now before this Court as *amici*, submitted a self-styled "alternative offer of settlement," which proposed the development of the Cohoes Falls Project the Commission had earlier found time-barred. R.477, A-1639. In the first of the

orders on review here, the Commission rejected this pleading, explaining that the purported "settlement" merely sought to place a barred competing proposal before the Commission. *Erie Boulevard, L.P.*, "Notice Rejecting Pleading," Project No. 2539-021 (May 24, 2006), R.478, SPA-1. Green Island and Adirondack next filed a motion to present evidence, again proposing the development of the Cohoes Falls Project. R.494, A-2577. The Commission similarly rejected that pleading. *Erie Boulevard, L.P.*, "Notice Rejecting Motion," Project No. 2539-003 (June 28, 2006), R.501, SPA-3. On the same day, the Commission denied Green Island's late intervention as unjustified in light of the late stage of the proceeding and Green Island's failure to act promptly to protect its claimed interest. *Erie Boulevard, L.P.*, "Notice Denying Late Intervention," Project No. 2539-003 (June 28, 2006), R.502, SPA-5-6. For similar reasons, in orders not on review here, the Commission also denied late motions to intervene filed by other entities seeking only to support the Cohoes Falls Project, who claimed that they did not have reason to intervene in the School Street Project proceeding until the Cohoes Falls Project proposal materialized. *See* R.502a, SPA-7; R.502b, SPA-9; R.502c, SPA-11.[2]

[2] The certified index to the record mistakenly lists only one "Notice Denying Late Intervention" on June 28, 2006, R. 502. To remedy this error, the Commission adopts the designations in Petitioners' opening brief. Br. at 11 n.2. "R.502a" is the Notice denying the interventions of the Capital District Regional Planning Commission, the Friends of the Falls, and the New York Association of Public

Green Island sought rehearing of the denial of its intervention and, with Adirondack, the rejection of the pleadings, which the Commission denied on November 16, 2006. Notice Rehearing Order at P 1, SPA-13. The Commission explained that Green Island had failed to justify its very late intervention, that (with the dismissal of its appeal in the D.C. Circuit) the Commission's decision that the proposed Cohoes Falls Project is statutorily-barred had been definitively answered in the negative, and that allowing Petitioners to pursue that project by other means would unlawfully circumvent the statutory bar. *See, e.g.*, *id*. at PP 26, 33, 42, SPA-16, 17, 19.

Petitioners sought rehearing of the Notice Rehearing Order, R.547, A-2793, and also sought review in this Court (No. 07-0138). The Court dismissed the petition, while the Commission rejected the request for rehearing because the Notice Rehearing Order did not alter the outcome of the prior orders. *Erie Boulevard, L.P.*, 118 FERC ¶ 61,196 (2007), R.567, SPA-59. Green Island and Adirondack filed another petition for review, now before this Court (No. 07-1737).

D. The Commission's Licensing Orders

As noted above, the New York DEC issued water quality certification for the

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Power; "R.502b" is the Notice denying the interventions of the City of Watervliet, the Preservation League of New York State, the Public Utility Law Project, and the Town of Green Island; and "R.502c" is the Notice denying the intervention of the Alliance for Economic Renewal.

School Street Project in October 2006, allowing the Commission to act on the license application. The Commission approved Erie's Settlement and issued a new license for the Project on February 15, 2007. License Order at P 1, SPA-27-28. Green Island and Adirondack sought rehearing. R.568, A-2857. FPA section 313(a), 16 U.S.C. § 825*l*(a), provides that only a party may seek rehearing; therefore, the Commission rejected the request for rehearing as to Green Island. *Erie Boulevard, L.P.*, 119 FERC ¶ 61,038 (2007), R.569, SPA-63. Green Island petitioned this Court for review (No. 07-2011).

In the final order on review here, the Commission denied the request for rehearing as to Adirondack, addressing Adirondack's litany of procedural and substantive objections, most of which are reiterated in Petitioners' opening brief. *Erie Boulevard, L.P.*, 120 FERC ¶ 61,267 (2007), R.571, SPA-65. In so doing, the Commission explained that Adirondack had not demonstrated that it was "aggrieved," as required by FPA section 313, 16 U.S.C. § 825*l*, for purposes of rehearing and judicial review, because it had not shown how its own interests – as opposed to those of Green Island – would be adversely affected by the License Order. License Rehearing Order at PP 7-10, SPA-66. As to the merits, the Commission found that its comprehensive analysis of Erie's application fully satisfied both the FPA and NEPA, and the terms of the license were supported by substantial record evidence. *See, e.g.*, *id*. at P 43, SPA-72. The final petition for

review before this Court followed (No. 07-5141).

SUMMARY OF ARGUMENT

The Federal Power Act endows the Commission with the important responsibility of balancing the development of the Nation's water resources with the protection of environmental, historic, cultural and other resources. In this lengthy proceeding, the Commission has done just that and issued a new license for the existing School Street Project. Only Green Island and Adirondack, who became active in this proceeding at the eleventh hour, protest the Commission's action.

Green Island came into this proceeding far too late, with too little justification for the Commission to allow it to disrupt the proceeding and, as it has urged, require the process to start anew with consideration of its competing proposal. Thus, the Commission reasonably rejected its late intervention, filed eleven years after the deadline, five years after the Commission ceased granting late interventions, and at least four years after its claimed interest arose. Consistent with the FPA, as a non-party Green Island may challenge only the denial of its intervention.

Adirondack, although it entered this proceeding before Green Island, now advocates Green Island's (and perhaps its own) interest in developing the proposed competing project. This interest is inadequate for standing. Likewise, Adirondack's claim to represent the public interest is insufficient, as it has not

demonstrated this interest, and a general grievance is also not enough to establish standing.

As to the merits, Petitioners in this case ask the Court to compel the Commission to do indirectly that which the Commission cannot do directly: consider and authorize, by removing existing legal barriers, the development of a time-barred competing project. Such extreme action is inconsistent with the FPA, which set a deadline for the competing proposal that the Petitioners failed – by more than a decade – to meet. The Commission conducted a comprehensive analysis of Erie's license application, considering all required factors as well as reasonable alternatives, and reached a balance that, in the Commission's judgment, achieves the best result. The Commission's reasonable refusal to restart its analysis and hold up this already protracted proceeding, just as it neared an end, should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission action under the Administrative Procedure Act, overturning the disputed orders only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A "court must evaluate whether the decision was based on a 'consideration of the relevant factors and whether there has been a clear error of judgment.'" *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1553 (2d Cir. 1992) (quoting *Allegheny Elec. Coop, Inc. v. FERC*, 922 F.2d 73, 80 (2d Cir. 1990)); *see also LaFleur v. Whitman*, 300 F.3d 256, 267 (2d Cir. 2002) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Actions of administrative agencies taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377-78 (1989). When reviewing factual determinations by an agency under NEPA, a court "must generally be at its most deferential." *Baltimore Gas & Elec. Co.*, 462 U.S. at 103.

The Commission's findings of fact, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825*l*(b); *Ompompanoosuc*, 968 F.2d at 1554 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416

(1971)); *see also Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965). Because substantial evidence is more than a scintilla, but something less than a preponderance of the evidence, the possibility that different conclusions may be drawn from the same evidence does not render the Commission's conclusions unreasonable. *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

Also, the Commission's interpretation of the statute it administers is entitled to deference where the language is ambiguous and the Commission's interpretation is reasonable. *Chauffeur's Training Sch., Inc. v. Spellings*, 478 F.3d 117, 124-25 (2d Cir. 2007) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)); *see also Conn. Dep't of Soc. Servs. v. Leavitt*, 428 F.3d 138, 146 (2d Cir. 2005) (agency interpretation of its own regulations also entitled to "considerable deference").

II. ADIRONDACK LACKS STANDING AND GREEN ISLAND HAS STANDING ONLY TO CHALLENGE THE COMMISSION'S DENIAL OF ITS INTERVENTION.

A. Green Island Is Not A Party And Therefore May Challenge Only The Commission's Denial Of Its Intervention.

Under FPA section 313(b), "any *party* to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain" judicial review of such order. 16 U.S.C. § 825*l*(b) (emphasis added). Green Island was not a party to the relicensing proceeding, because the Commission denied its

late motion to intervene. *See infra* Part III. Accordingly, Green Island may seek rehearing and judicial review only of the Commission's denial of its intervention. *Erie Boulevard, L.P.*, 119 FERC ¶ 61,038 at p. 1, SPA-63; *see City of Orrville*, 147 F.3d at 990 n.12 (finding petitioner Orrville had standing to challenge the denial of its late intervention motion, but not "the merits" of the order, because it was not a party); *Covelo Indian Community v. FERC*, 895 F.2d 581, 585-86 (9th Cir. 1990) (same); *see also Scenic Hudson*, 354 F.2d at 617 (finding that petitioners had standing, but confirming the Commission's "ample authority reasonably to limit those eligible to intervene or seek review").

B. Adirondack Lacks Standing Because It Has Not Demonstrated An Injury-In-Fact Arising From The Commission's Orders.

FPA section 313(b) imposes the additional requirement that a party to a proceeding be "aggrieved" by an order of the Commission in order to obtain judicial review. 16 U.S.C. § 825*l*(b). "A party is aggrieved . . . if it can establish both the constitutional and prudential requirements for standing." *Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239, 267 (D.C. Cir. 2007) (citation omitted). "[T]he requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *LaFleur*, 300 F.3d at 269 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)).

To establish constitutional standing, the petitioner "must have suffered an

injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Wisconsin Public Power, Inc.*, 493 F.3d at 267 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal marks omitted)); *see also LaFleur*, 300 F.3d at 269. "When the [party] is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562.

Adirondack became a party to the relicensing proceeding in 1997, when the Commission granted its late motion to intervene. *Niagara Mohawk Power Corp.*, "Notice Granting Late Intervention," Project No. 2539-003 (Aug. 19, 1997), R.216, A-601. Adirondack's late motion to intervene offered only its interest as a partner in the ownership of an existing downstream hydroelectric project, the New York State Dam Hydroelectric Project, FERC Project No. 7481, as its basis for intervention. R.202, A-566; *see* License Rehearing Order at P 9, SPA-66. In the License Rehearing Order, the Commission noted that it is unclear whether Adirondack has a continuing interest in that downstream project, *id*. at P 9 n.10, SPA-66, but, in any event, Adirondack's arguments on rehearing did not concern any alleged effect on the downstream project and sought only to advance Green Island's interest in developing the proposed Cohoes Falls Project. *Id*. at P 10, SPA-66. The Commission therefore concluded that Adirondack did not appear to

be aggrieved by the License Order, and thus could not properly seek rehearing or judicial review. *Id*.

In its opening brief, Adirondack offers nothing to clarify its interest in the proceeding. *LaFleur*, 300 F.3d at 268 (petitioner bears the burden of demonstrating standing). As the Commission found, License Rehearing Order at PP 9-10, SPA-66, Adirondack has neither alleged nor demonstrated any injury from the School Street Project to its interest, if any, in the New York State Dam Hydroelectric Project. Other participants in the proceeding with interests in the New York State Dam Project expressed support for operating the School Street Project in run-of-river mode. *Id*. at P 9 n.10, SPA-66. The new license requires the Project to operate in run-of-river mode; therefore, there appears to be no harm to the New York State Dam Project. *Id*.

Any interest Adirondack has in pursuing development of the Cohoes Falls Project is also inadequate to establish an injury-in-fact. *City of Orrville*, 147 F.3d at 985-987 (petitioner's interest in development of downstream project insufficient for Article III standing). Green Island has made clear that it is pursuing the consideration of the Cohoes Falls Project in the context of the School Street Project relicensing because it intends to construct and operate that project, if authorized, itself. *See, e.g.*, R.477 at 7, A-1646; *see* Br. at 70. Adirondack has sought to advance Green Island's interest in the Cohoes Falls Project, although it has not

specified the nature of its involvement in the development effort. License Rehearing Order at PP 8-10, SPA-66; *see also* Br. at 71. Adirondack also asserted that it once had an interest in developing multiple projects in the area. R.477 at 7-8, SPA-1646-47.

In *City of Orrville*, the D.C. Circuit found that a petitioner's interest in developing a potential downstream project was "too attenuated, and therefore its injury too speculative, to satisfy the requirements" for standing. 147 F.3d at 986. In that case, the petitioner did not have a license for the downstream project, although it had earlier held a preliminary permit and professed an interest in pursuing a license, and it claimed that the Commission failed to consider the effect of amending the upstream project's license on the potential downstream project. *Id*. at 984, 987. The court held that while the Commission's orders might make the petitioner ineligible to seek a license for the project, "even if it were [eligible,] success on its claim here would not . . . increase the likelihood that it will ultimately be licensed to build and operate" the downstream project. *Id*. at 987.

Here, even if the Court were to set aside the Commission's orders rejecting Adirondack's filings and granting Erie a new license, Adirondack's ability to develop or otherwise benefit from development of the Cohoes Falls Project would still be speculative. *Id*. (citing *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992) (rejecting as

speculative "[a]llegations of injury based on predictions regarding future legal proceedings")). So long as the School Street Project is licensed, Adirondack cannot obtain a license for the statutorily-barred Cohoes Falls Project. *See infra* Part IV.B.1. Even if it were not, Adirondack would still need to seek a license from the Commission, with (notwithstanding Adirondack's claims that its application is "ready-to-file," Br. at 11, 12, 20, 47, 74) no guarantee that it would receive such a license. Thus, as in *City of Orrville,* Adirondack's success here "would not make [its] interest in the . . . project any less speculative and it would not improve [Adirondack's] opportunity to apply for the [Cohoes Falls] project license in the future." 147 F.3d at 987 n.8.

Similarly, Adirondack's claimed interest in resource and community issues addressed in the relicensing, *e.g.*, Br. at 71, is inadequate to establish an injury-in-fact because Adirondack fails to demonstrate a "particularized" interest. *Lujan*, 504 U.S. at 560. "The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000) (finding desire to use area allegedly harmed was sufficient for standing where plaintiffs presented affidavits and other sworn testimony demonstrating same). Moreover, Adirondack "must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." *Lafleur*, 300 F.3d at 269 & n.2 (consultant

for residents lacked "personal stake" necessary for standing) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

Mere *situs* in the Project area and a professed desire to protect the environment and improve the community are demonstrably inadequate to justify standing. *Lafleur*, 300 F.3d at 269; *see also Hydro Investors v. FERC*, 351 F.3d 1192, 1195-96 (D.C. Cir. 2003) (petitioner's asserted interest in joint venture with licensee inadequate for standing, despite affidavits of counsel, which contained only assertions). Adirondack has not presented evidence to demonstrate its interest in the environment and the community or any injury to those interests. *See* Notice Rehearing Order at P 50, SPA-20-21. Adirondack states that it "is in the business of operating and developing small hydroelectric projects" and it is located in the Project area. Br. at 16, 70 n.38. For the first time on appeal, Adirondack also alleges a prior interest in development of other projects in the School Street Project vicinity. Br. at 15-17. Also, Adirondack states that it is a "wholly owned subsidiary of Albany Engineering Corporation, a . . . New York state corporation that is authorized to provide professional engineering services as a corporation pursuant to" state law. Br., Adirondack Corporate Disclosure Statement. These mere assertions do not demonstrate any injury to Adirondack.

Finally, in the absence of an alleged injury arising from the substance of the Commission's action, Adirondack's claims that the Commission committed

procedural errors, *see infra* Part III.B, IV.C, may not go forward. A petitioner may enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8; *see also City of Orrville*, 147 F.3d at 986 (alleged infraction of Commission regulation insufficient for standing in absence of substantive injury). Adirondack expresses, and the record reflects, nothing more than a mere interest, as opposed to a "direct stake," in the Commission's orders. *North Carolina Utils. Comm'n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981).

III. THE COMMISSION REASONABLY INTERPRETED AND APPLIED ITS REGULATIONS IN DENYING GREEN ISLAND'S LATE INTERVENTION.

Consistent with the FPA and the Commission's regulations, the School Street Project relicensing proceeding included multiple opportunities for public input and comments, and an opportunity for formal intervention. *See* License Order at PP 3-5, SPA-28; Notice Rehearing Order at P 33, SPA-17; *see supra* pp. 7-9. The Commission set a deadline for filing interventions in 1993 and granted late interventions, including Adirondack's, filed through 1999. *See* Notice Rehearing Order at P 40, SPA-19. When Green Island moved to intervene in 2004, *after* studying the Cohoes Falls Project for at least three years and *after* filing a preliminary permit application for that project, the Commission reasonably interpreted its regulations and determined that Green Island had failed to justify its

delay and had not demonstrated a cognizable interest. *See, e.g., id*. at P 33, SPA-17. The Commission did, however, consistent with the FPA and its regulations, consider Green Island's and other non-parties'[3] comments. *See, e.g.*, License Order at PP 66-77, SPA-37-39; *see* Notice Rehearing Order at P 42, SPA-19.

A. The Commission Reasonably Applied Its Regulations And Precedent Governing Late Interventions.

The Commission's regulations specify the factors it may consider in acting on late motions to intervene and the Commission did not abuse its discretion in applying those factors to Green Island's[4] eleven-year out-of-time motion to intervene. *See Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd*., 247 F.3d 437, 446-47 (2d Cir. 2001) (denial of late intervention subject to abuse of discretion standard); *City of Orrville*, 147 F.3d at 990-91 (same). In acting on a

[3] On appeal, Green Island and Adirondack appear to challenge the Commission's denial of intervention to other entities that supported the Cohoes Falls Project (the New York Association of Public Power, Capital District Regional Planning Commission, and Friends of the Falls, the Public Utility Law Project, City of Watervliet, Preservation League of New York State, the Town of Green Island, the Alliance for Economic Renewal, the Village of Green Island and the New York Bicycling Coalition), *see* Br. at 30-31, all of whom, except the Preservation League, appear before this Court as *amici*. In the Notice Rehearing Order, the Commission denied these entities' requests for rehearing of the Commission's orders denying intervention and no further review, before the Commission or this Court, was sought. Accordingly, the issue of whether other entities were properly denied intervention is jurisdictionally barred. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989).

[4] Only Green Island may raise this issue before this Court, because only Green Island, and not Adirondack, timely sought rehearing of the Commission's Notice Denying Late Intervention as to Green Island. *See* Notice Rehearing Order at P 23, SPA-16. The Commission rejected Adirondack's attempt to raise this issue anew on rehearing of the License Order. License Rehearing Order at P 35, SPA-71.

motion to intervene filed after the prescribed deadline, the "decisional authority may consider: whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting the intervention." Notice Rehearing Order at P 30 (citing 18 C.F.R. § 385.214(d)), SPA-16.

According to Green Island, its interest in the relicensing developed when it began assisting the City of Cohoes in efforts to acquire the Project from Erie. R.346 at 6, A-864; *id*. at 7, A-865 ("With the development of a new plan of proposal [the Cohoes Falls Project] in mid-2001 by" Green Island, it approached Erie, more than once, between 2001 and 2004 regarding acquisition of the School Street Project); *id*. at 9, A-867 (noting there is a "limit to the interval in which events can take place 'behind the scenes'").

The Commission reasonably concluded that because Green Island could not file a competing license application – as it stated its intent to – "it has failed to demonstrate . . . a cognizable interest in the proceeding . . . ." Notice Rehearing Order at P 33, SPA-17; *see infra* Part IV.B.1. Following the denial of its intervention, Green Island has asserted that it is also interested in resource protection issues. *See, e.g.*, Br. at 33. Like Adirondack, however, Green Island

has not demonstrated an interest in these issues. *See supra* pp. 24-25. Further, if Green Island thought that the School Street Project relicensing proposal was inconsistent with the public interest, it "would appear to have had strong reasons to intervene early." Notice Rehearing Order at P 36, SPA-17-18. Indeed, a number of entities with interests in resource protection, including the City of Cohoes, American Rivers, the Adirondack Mountain Club and New York Rivers United, intervened in the early stages of the proceeding and they, with other participants and the Commission, have considered those issues from the start. *Id*.

Moreover, the Commission reasonably concluded that it could not permit Green Island to "'sleep on its rights' and then seek untimely intervention." *Id*. at P 37, SPA-18 (citing, *e.g.*, *Southern Co. Servs.*, 87 FERC ¶ 61,097 at 61,416-17 (1999) (citing *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995) (equity ministers to the vigilant))). The late development of a competing proposal, the Cohoes Falls Project, does not justify intervening over a decade late, particularly where that proposal was known to Green Island for at least three years prior to its moving to intervene. *Id*. (citing, *e.g.*, *Palisades Irrigation District*, 34 FERC ¶ 61,377 at 61,702 (1986) (denying late motion to intervene by a potential competitor or co-licensee whose interest did not develop until long after the intervention deadline)).

The Commission's conclusion that Green Island failed to justify its delay

applies with equal force to Green Island's contention that its 2000 acquisition of a downstream project justifies its intervention. *See, e.g.*, Notice Rehearing Order at P 31 n.16 (citing cases), SPA-16-17; *Erie-Niagara Rail Steering Comm.*, 247 F.3d at 447 (agency did not abuse discretion in denying intervention where petitioner "long delayed intervening even though it had had ample notice"). In any event, while Green Island appears to suggest that its interest in its downstream project justifies its late intervention, *see* Br. at 40-41, it does not even claim that the Commission's orders in this proceeding adversely affect that project.

The Commission reasonably determined that permitting Green Island to intervene at this late stage of the proceeding would significantly disrupt the proceeding, and result in prejudice to existing parties. Notice Rehearing Order at P 38, SPA-18. As the Commission explained, Green Island and the other entities denied late intervention "are engaged in a campaign to convince the Commission to consider the merits of the Cohoes Falls Project, notwithstanding our final orders clearly holding that to do so would be contrary to the dictates of the FPA and of our regulations." *Id*. This campaign, which included proposing the Cohoes Falls Project in nearly every conceivable type of pleading, had already substantially burdened existing parties and the Commission, each obliged to review and respond as necessary to numerous pleadings, and was reasonably expected to continue if Green Island were admitted as a party.

Green Island suggests something improper in the Commission's consideration of fairness to existing parties who had participated in good faith in the proceeding for a number of years (including Erie), and its obligation to ensure an orderly administrative process. Br. at 41-42. As above, the Commission's regulations allow consideration of these factors. The Commission did not deny intervention based upon Green Island's position, but rather based upon its unjustified delay and the disturbance that would result from granting it party status. Notice Rehearing Order at P 40, SPA-19. In any event, Green Island cannot dispute the Commission's finding that granting Green Island party status would in fact disrupt and lengthen the proceeding, and result in additional burdens on and prejudice to existing parties.

Finally, Green Island asserts that the Commission erred in concluding that Adirondack, which apparently shares its interest in supporting the Cohoes Falls Project, could represent this perspective in the proceedings, because the Commission effectively revoked Adirondack's party status. Br. at 42. First, the Commission did not revoke Adirondack's party status. The Commission found that Adirondack was not "aggrieved," but considered the merits of its objections in any event. License Order at P 10, SPA-29. Moreover, to the extent the Court reaches the merits of this case, the Petitioners have not contested Adirondack's ability to effectively represent this interest. And, finally, the Commission's finding

in this regard is not essential to its decision, as adequacy of representation is but one factor the Commission "may consider." 18 C.F.R. § 385.214(d); *see City of Orrville*, 147 F.3d at 991 (Commission not required to make findings on each factor in denying late intervention).

On each of the factors the Commission considered, "none weighed in favor" of granting Green Island's motion. *City of Orrville*, 147 F.3d at 991 (citing *Citizens to Preserve Overton Park*, 401 U.S. at 416). Accordingly, the Commission did not abuse its discretion in denying Green Island's motion for late intervention. *See, e.g., Covelo Indian Community*, 895 F.2d at 586-87 (affirming Commission's denial of late intervention where tribe alleged it had not received actual notice and Commission found late intervention would be burdensome).

B. The Commission Reasonably Interpreted Its Regulations And Determined That Additional Public Notices Were Not Required.

The Commission published multiple public notices in this proceeding, alerting interested stakeholders to the filing of the license application, the Commission's intent to proceed with its environmental analysis, various scoping documents and meetings, a draft environmental assessment and a final environmental assessment. License Order at PP 3-5, SPA-28. Only one of those notices, the first, solicited interventions.

The Commission followed its regulations in finding that none of the events Adirondack and Green Island raise, Br. at 31-36, required an additional public

notice and opportunity to intervene. Notice Rehearing Order at PP 44-45, SPA-19-20; *see supra* p. 19 (agency's interpretation of its own regulations entitled to deference). Thus, the Commission properly treated Green Island's motion to intervene as late and the License Order is not procedurally deficient. Likewise, Green Island's attempt to renew its motion to intervene is ineffective. *See id.* at P 45, SPA-19-20; License Rehearing Order at P 24 n.26, SPA-69.

The Commission's regulations provide that if a relicense application is materially amended, the Commission will reissue public notice, setting new dates for comments, interventions and protests. 18 C.F.R. § 16.9(b)(3); License Rehearing Order at P 13, SPA-66-67. A "material amendment" is defined as "any fundamental and significant change" including, "[a] change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project . . . ." 18 C.F.R. § 4.35(f)(1)(i); *see* License Rehearing Order at P 12, SPA-66. The regulations exempt "amendments made by [an] . . . applicant to its proposed plans of development to satisfy requests of resource agencies . . . or concerns of the Commission." 18 C.F.R. § 4.35(e)(4).

Two of the filings Petitioners assert qualify as "material amendments," Br. at 31-32, relate to the feasibility of adding an additional generating unit to the Project. First, in 1995 Niagara Mohawk informed the Commission that the new 21-

megawatt ("MW") turbine it had proposed in its license application was no longer economically feasible. R.150 at 2, A-328; License Rehearing Order at P 16, SPA-67. Niagara Mohawk therefore requested that the Commission consider, as an alternative in its environmental analysis, relicensing the Project without the additional unit. R.150 at 2, A-328. In its draft environmental assessment, the Commission therefore analyzed both the original proposal, and an alternative that omitted the additional turbine. License Rehearing Order at P 16, SPA-67.

The Commission found that the 1995 letter was not an amendment to the application because Niagara Mohawk indicated no intent to amend its application and the change omitted a proposal to add a turbine that was included in the license application. License Rehearing Order at PP 17-20, SPA-67-68. In contrast, a new proposal to increase the number of generating units, not analyzed in a license application, would require an amended application. *Id*. at P 17, SPA-67.

Even if the letter were an amendment, the Commission reasonably concluded that it is not a "material" amendment requiring new public notice. *Id*. at PP 18-20, SPA-67-68. The Commission found that while more water would spill over the dam when flows available for generation exceed the capacity of the existing turbines, the Project would still be required to operate in run-of-river mode and to provide the same minimum flows in the bypassed reach. License Rehearing Order at P 18, SPA-67. Therefore, omitting the additional unit would not

"significantly modify the flow regime." 18 C.F.R. § 4.35(f)(1)(i). Further, the Commission found that its staff reasonably did not treat the change as a material amendment by analyzing the omission of the additional turbine as an alternative in the draft environmental assessment. License Rehearing Order at P 19, SPA-67-68. Particularly in light of the delay due to the outstanding water quality certification, this treatment preserved the possibility that the Commission could authorize the additional turbine without further analysis or delay if it became economically feasible later in the proceeding. *Id*.

Second, in 2001, Erie requested that the Commission analyze the application as originally filed, in light of improved economic feasibility. License Rehearing Order at PP 21-22, SPA-68. The Commission concluded that this was neither an amendment nor a "material amendment" for the same reasons as the 1995 letter. *Id.* at P 22, SPA-68; Notice Rehearing Order at P 45, SPA-19-20. Moreover, since the 1995 letter did not amend the license application, no amendment was necessary to allow the Commission to consider the license application as filed. License Rehearing Order at P 22, SPA-68.

Finally, Petitioners contend, Br. at 33, that Erie's Settlement materially amended its license application. Although the Commission published public notice of the Settlement, it did not treat the Settlement as an amendment and therefore did not solicit interventions because the Settlement did not "significantly affect

interests in a manner not contemplated by the original application." License Rehearing Order at P 24, SPA-68-69; *see* License Order at P 7, SPA-29. Also, the Settlement is not an amendment because it "supplements," but does not replace the original proposal. License Rehearing Order at P 23, SPA-68.

Moreover, the Commission reasonably concluded that the Settlements falls within the exception to the notice requirements for changes made "to satisfy requests of resource agencies . . . submitted after an applicant has consulted." 18 C.F.R. § 4.35(e)(4); License Rehearing Order at P 24, SPA-68-69. Petitioners assert that this exception cannot cover an entire settlement. Br. at 35. But, Erie developed the Settlement in negotiations with several state and federal resource agencies with jurisdiction in the relicensing process; three agencies signed the Settlement, and one filed supporting comments. *See supra* p. 11. While the negotiations leading to the Settlement are not in the record, as is the nature of settlement negotiations, resource agencies participated in the negotiations, the Settlement requires the participation of those agencies in the development and approval of various plans and requirements, and conditions submitted by the agencies were consistent with the Settlement. *See* License Order at P 28 (New York DEC certification consistent with Settlement), SPA-32; *id*. at P 30 (Commerce and U.S. Department of Interior mandatory prescriptions consistent with Settlement), SPA-32. The Commission therefore reasonably concluded that

the Settlement includes measures responsive to the requests of the resource agencies. License Rehearing Order at P 24, SPA-68-69.

In addition, the Commission reasoned that it provided the public with adequate notice and opportunity to comment on any changes. *Id*. at PP 20, 24, SPA-68-69. The Commission did not find, as Petitioners contend, Br. at 36, that the lack of additional notice and opportunity to comment was "harmless." However, the Commission properly considered whether any of the three events raised by Petitioners would affect new or different third party property rights as, for instance, the relocation of a transmission line route might, and reasonably concluded that no such rights were affected. *Id*. at PP 20, 24, SPA-68-69. Moreover, the Commission ensured that the public had notice of the new turbine proposals and the Settlement, and Petitioners do not demonstrate the contrary. *Id*. at P 20, SPA-68. The draft environmental assessment, published and noticed in 1996, included analysis of the Project both with and without the new turbine, but Green Island did not respond. *Id*. The final environmental assessment, published and noticed in 2001, also analyzed the proposal for a new turbine. Again, although Green Island claims an interest in this proceeding arising in 2000 or 2001, and sought to acquire the Project during that time frame, it did not respond to the final environmental assessment in 2001 or even seek intervention until 2004. *See supra* pp. 28-30. As noted above, in 2006 the Commission issued public notice of the

Settlement, which again included the option of installing a new turbine. While the Commission did not solicit interventions, the public did have an "up-to-date basis for their comments" at all times. Br. at 34.

In any event, Petitioners' argument that a "showing of actual prejudice is not required" when an agency violates notice obligations is inapposite, because the Commission reasonably construed and applied its regulations, *see Conn. Dep't of Soc. Servs.*, *supra* p. 19 (agency interpretation of its own regulations deserves deference), and certainly did not "utterly fail" to comply with notice and comment requirements. Br. at 37 (citing, *e.g.*, *Sprint Corp. v. FCC*, 315 F.3d 369, 376-77 (D.C. Cir. 2003)). The interpretation of the Commission's regulations urged by Petitioners contravenes the language of the regulations by suggesting that the Commission publish new public notice each time a license applicant changes any aspect of its proposal, no matter how minor. Br. at 34. This proposal and Petitioners' proposed remedy, Br. at 38, are merely belated attempts to excuse Petitioners' own failure to promptly act on their interest when it arose.

IV. THE COMMISSION SATISFIED ITS RESPONSIBILITIES UNDER THE FPA AND NEPA BY FULLY CONSIDERING THE PUBLIC INTEREST AND REASONABLE ALTERNATIVES.

Adirondack challenges the Commission's orders under both the FPA and NEPA, claiming procedural and substantive deficiencies. Under the FPA, a "licensed hydroelectric project [must] be best adapted to a comprehensive plan for improving or developing a waterway based on a balancing of a full range of public interest factors, and reflecting equal consideration of developmental and environmental values." License Rehearing Order at P 39 (summarizing FPA §§ 4(e), 10(a)(1), 15(a)(2), 16 U.S.C. §§ 797(e), 803(a)(1), 808(a)(2)), SPA-71; *see supra* pp. 5-6. Far from simply "parroting" the standards, Br. at 76, the Commission's orders reflect consideration of a range of alternatives, as required by NEPA, and the balancing of all required public interest factors. *See, e.g.,* License Order at PP 109-113, SPA-42-43. The rejection of one late alternative does not render this analysis incomplete.

A. The Commission Considered All Required Public Interest Factors In Issuing A New License For The School Street Project.

Whether a licensing proceeding involves competing applications or not, "the licensing standard is the same; the project must be 'best adapted to serve the public interest,' as provided in [FPA] section 15(a)(2)." License Rehearing Order at P 45, SPA-72-73; 16 U.S.C. § 808(a)(2); 18 C.F.R. § 16.13(a). The Commission issues a license "to the applicant having the final proposal which the Commission

determines is best adapted to serve the public interest." FPA § 15(a)(2); 16 U.S.C. § 808(a)(2). In this proceeding there is one "applicant" and one "final proposal." Accordingly, the Commission must determine whether the applicant's proposal for the School Street Project, as modified by additional measures required by the Commission, is "best adapted" to the public interest based upon the information in the record. License Rehearing Order at P 44, SPA-72; *see id*. at P 48, SPA-73. Both this standard and NEPA require the Commission's consideration of feasible, reasonable alternatives, but, as discussed *infra* Part IV.B, neither mandates consideration of all alternatives.

FPA sections 10, 16 U.S.C. § 803, and 15, 16 U.S.C. § 808, specify the public interest factors the Commission must consider. FPA section 10(a)(1), 16 U.S.C. § 803(a)(1), lists: the improvement or development of waterways for the use or benefit of commerce; the improvement and utilization of water-power development; the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat); and other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in FPA section 4(e), 16 U.S.C. § 797(e). FPA section 15, 16 U.S.C. § 808(a)(2)(A)-(G), further specifies: the applicant's plans and capabilities; safe management, operation, and maintenance of the project; need for power and conservation efforts; transmission services; and cost effectiveness of

plans. Where, as here, the applicant is the existing licensee, the Commission also considers the licensee's record of compliance with the existing license and actions the licensee has taken which affect the public. 16 U.S.C. § 808(a)(3). Under FPA section 10, the Commission conditions a project to ensure that it is best adapted to the public interest. 16 U.S.C. § 803(a)(1); *see* License Rehearing Order at PP 37-49, SPA-71-73 ("Relicensing Under the FPA").

This FPA standard requires the Commission to "use [its] judgment to determine the best balance of developmental and environmental resources, and to ensure that the project as licensed reflects consideration of all aspects of the public interest." License Rehearing Order at P 43, SPA-72. "Best adapted" has been interpreted as calling for the "highest and best use," *Municipal Elec. Ass'n of Mass. v. FPC*, 414 F.2d 1206, 1207 (D.C. Cir. 1969), *cited in* Br. at 46, but this does not require the Commission to license the project with the highest generating capacity or that best serves only one of the multitude of public interest factors the Commission must consider. To the contrary, FPA section 4(e), 16 U.S.C. § 797(e), requires the Commission to give "equal consideration" to these factors. *California v. FERC*, 966 F.2d 1541, 1550 (9th Cir. 1992) ("equal consideration" does not dictate "equal treatment").

Moreover, the D.C. Circuit has rejected the suggestion that the "best adapted" standard requires the Commission to license the "better adapted" project

regardless of the impact on an existing project. *Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 86 (D.C. Cir. 1983) (affirming Commission order denying license application and finding petitioner "overreads section 10(a)" in urging the "better adapted" standard). Rather, in proceedings where there is one applicant, the Commission considers all of the relevant public interest factors, *Udall v. FPC*, 387 U.S. 428, 450 (1967), to find the "best adapted" *balance*. *See* License Rehearing Order at P 46, SPA-73. There may be more than one way to meet resource objectives or balance competing resources under the FPA standards, but Congress entrusted the Commission to exercise its independent judgment to find the appropriate balance. *See id.* at P 48, SPA-73.

The License Order and License Rehearing Order, as well as the draft and final environmental assessments, reflect careful consideration of all the required factors. For instance, with regard to the protection, mitigation, and enhancement of fish and wildlife, FPA § 10(a)(1), 16 U.S.C. § 803(a)(1), and other environmental concerns, the License Order considered in detail proposed measures for habitat and aesthetic flows, License Order at PP 42-49, SPA-34-35, fish protection and passage, *id*. at PP 50-54, SPA-35-36, and sediment removal and bedrock excavation, *id*. at PP 59-60, SPA-36-37. *See, e.g.*, Final EA §§ V.C.3 (fisheries), V.C.4 (terrestrial), VII.A-C (fish protection and flow recommendations), A-699, 725, 746-48. The new license requires Erie to

implement a number of new measures to ensure the protection, mitigation and enhancement of fish and wildlife and other environmental interests. For example, Erie will implement a new flow schedule on weekends and holidays from May 15 to October 31 to improve aesthetic flows at Cohoes Falls, providing higher flows than Commission staff recommended in the final environmental assessment. License Order at P 49, SPA-35. The new flow schedule will produce a "full waterfall effect" during these peak visitation days. *Id.*; Final EA § VII.C, A-747-48.

The Commission also considered the Project's impact on recreational resources, FPA § 10(a)(1), 16 U.S.C. § 803(a)(1), and adopted the Settlement proposal requiring Erie to install, *inter alia*, new foot paths and a new trail, and access for the disabled. License Order at PP 61-63, SPA-37; *see* Final EA §§ V.C.6, VII.D, A-730-34, A-748-50. The Commission's consideration of other factors disputed by Adirondack is discussed in further detail *infra* Part V.

Likewise, the Commission considered Erie's record as a licensee with respect to the factors enumerated in FPA sections 10(a)(2)(C), 16 U.S.C. § 803(a)(2)(C), and 15(a)(2)(A)-(G), 16 U.S.C. § 808(a)(2)(A)-(G), discussing, *inter alia*, Erie's compliance history as a licensee, the safe management, operation and maintenance of the Project, the growing need for power, and the cost effectiveness of Erie's plans. License Order at PP 95-103, SPA-41-42. Also, with regard to

FPA section 15(a)(3), 16 U.S.C. § 808(a)(3), which requires the Commission to consider an existing licensee's actions "which may affect the public," the Commission first noted that the relicensing proceeding provided extensive opportunities for public involvement, *see supra* pp. 7-9, and found that Erie provides employment and recreational opportunities, it helps to meet regional power needs, and it pays local taxes. License Order at P 104, SPA-42.

Accordingly, the Commission reasonably interpreted the scope of its duties under the FPA by considering the full range of public interest factors required. *See supra* pp. 18-19; *see also U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 543-545 (D.C. Cir. 1992) (narrow standard of review of licensing decisions is not altered by FPA sections 4(e) and 10, 16 U.S.C. §§ 797(e), 803). Exercising its independent judgment, the Commission selected the Settlement, with modifications recommended by Commission staff (*see, e.g.*, License Order at Art. 404 (recreation plan), Art. 403 (historic properties), SPA-47, 46), as the preferred alternative, which it found is best adapted to a comprehensive plan for developing the Mohawk River. License Order at PP 112-13, SPA-43.

B. The Commission Satisfied FPA And NEPA Standards For The Consideration Of Reasonable Alternatives.

Adirondack claims that the FPA and NEPA mandate Commission consideration of the Cohoes Falls Project as an alternative in the relicensing process, and that the Commission failed to satisfy this mandate. Br. at 43-57.

Adirondack is mistaken on both accounts. Both the FPA and NEPA require consideration of feasible, reasonable alternatives, but neither mandates consideration of the time-barred Cohoes Falls Project. In this proceeding, the Commission reasonably declined to restart its multi-year environmental analysis just as the proceeding neared closure to consider the Cohoes Falls Project, and the various mechanisms that could allow construction of that project. However, the Commission did consider an appropriate range of alternatives, which included aspects of the Cohoes Falls Project.

The Commission "did not consider the [Cohoes Falls Project] proposal as an alternative because [it] found that it [was] not reasonable under either the FPA or NEPA." License Rehearing Order at P 44 n.55, SPA-72; *see* Notice Rehearing Order at PP 51-58, SPA-21-22. The Commission offered two independent reasons why the Cohoes Falls Project was an unreasonable alternative: first, the Cohoes Falls Project is barred by statute, Notice Rehearing Order at PP 55-57, SPA-21; and second, "even were the Cohoes Falls Project not legally barred," neither "the law, [Commission] regulations, or sound regulatory practice would permit consideration at this late stage of a newly-proposed, unilateral alternative that would replace the alternatives that had been under consideration throughout the proceeding." Notice Rehearing Order at P 58, SPA-22. *See National Labor Relations Bd. v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (agency may

be affirmed even if one reason, among others, reflects error, unless it would have reached a different result "but for the error"); *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) (only one of multiple, alternative bases for agency need be upheld on judicial review).

1. The Cohoes Falls Project Is Legally Barred.

Adirondack challenges all of the Commission's reasons for finding the Cohoes Falls Project was not a reasonable alternative, as it may, but it is barred by the doctrine of issue preclusion, or *collateral estoppel*, from challenging the Commission's underlying decision, not on review here, that the Cohoes Falls Project is statutorily-barred. Br. at 47. Issue preclusion attaches where "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003) (citation omitted) (finding petitioner precluded). Decisions of administrative agencies qualify for preclusive effect, *see, e.g., University of Tenn. v. Elliott*, 478 U.S. 788, 797-98 (1986), as do voluntary dismissals of appeals. *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995) (discussing corollary doctrine of claim preclusion or *res judicata*).

In orders not on review here, the Commission dismissed Green Island's

preliminary permit application because issuance of a license for that project is barred by FPA sections 6, 16 U.S.C. § 799, and 15(c)(1), 16 U.S.C. § 808(c)(1) and the Commission's regulations. *Green Island Power Auth.*, 110 FERC ¶ 61,034, *reh'g denied*, 110 FERC ¶ 61,331 (2005), *petition for review dismissed*, *Green Island Power Auth. v. FERC*, No. 05-1170 (D.C. Cir. Dec. 14, 2005). *See supra* p. 10. Collateral estoppel precludes Adirondack from relitigating whether the project is statutorily-barred because the issue was litigated and decided in the earlier *Green Island* proceeding and that decision was essential to the Commission's dismissal of Green Island's application in that proceeding. Green Island vigorously litigated this issue, in which it may have an even stronger interest than Adirondack, and the Petitioners do not dispute the mutuality of their interest (though that interest is inadequate for standing purposes, *supra* Part II.B); therefore, Adirondack has had a full and fair opportunity to litigate the issue.

In any event, on brief, Adirondack presents no valid objection to the Commission's finding but only confuses the issues by asserting that because "no license application for the Cohoes Falls Project has been filed," competing applications are not barred. Br. at 47. What is barred here is an out-of-time application in competition with Erie's timely license application for the School Street Project. In the earlier *Green Island* case, the Commission first found, as a matter of fact (which Adirondack does not dispute, Br. at 49), that the Cohoes Falls

Project and the School Street Project cannot coexist. *Green Island*, 110 FERC ¶ 61,034 at P 14. Thus, the projects "compete" and any application for the Cohoes Falls Project would be a competing application. *Id*. (citing *City of Fremont v. FERC*, 336 F.3d 910, 916 (9th Cir. 2003)). FPA section 15(c)(1), 16 U.S.C. § 808(c)(1), required all competing applications for the resources used by the School Street Project to be filed in 1991. *See supra* p. 7. Accordingly, any license application would be statutorily-barred, and the Commission followed its regulations in dismissing the permit application. *Green Island*, 110 FERC ¶ 61,034 at PP 14, 16, 18 (citing *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1306-09 (9th Cir. 1997)); *see* License Rehearing Order at P 54, SPA-74.

Adirondack's remaining argument, that other mechanisms (denying Erie's application, granting Erie a new license subject to termination upon issuance of a license for the Cohoes Falls Project, etc.) are available to remove the bar on the Cohoes Falls Project, likewise fails because it assumes the result that Adirondack seeks: the Commission *must* consider the Cohoes Falls Project as an alternative and, *if it did so*, it would be compelled to adopt one of these mechanisms to allow construction of the Cohoes Falls Project. Br. at 47-62. Adirondack assumes too much because, as set forth below, the Commission is not mandated to consider the Cohoes Falls Project as an alternative, and because, *even if it did*, Adirondack's assumption that the Cohoes Falls Project is preferable is just that, an assumption

well-designed to serve Adirondack's purpose. Moreover, these alternatives find no support in the record. *See infra* pp. 58-59.

2. The Commission Reasonably Determined That It Need Not Consider The Cohoes Falls Project As An Alternative.

Adirondack neglects to acknowledge that the FPA and NEPA require consideration only of feasible, reasonable alternatives. Neither requires the Commission to disregard statutory and regulatory processes to consider an eleventh-hour competing proposal.

a. The Commission Satisfied The FPA And NEPA By Considering A Range Of Alternatives.

Throughout this lengthy relicensing proceeding, the Commission considered a wide range of alternatives to the applicant's proposal for relicensing. The range of alternatives examined by the Commission falls well within its discretion and was reasonable. *Ompompanoosuc*, 968 F.2d at 1558.

In broad terms, the Commission's NEPA analysis included consideration of the applicant's proposal, a Commission staff recommended alternative, the no action alternative, federal takeover, a non-power license and retirement of the Project. *See, e.g.*, License Rehearing Order at P 53, SPA-74; Draft EA § 3, A-350-54; Final EA § III (Proposed Action and Alternatives), A-683-92. The Commission eliminated federal takeover, a non-power license and retirement from detailed study based on a finding that these alternatives were not reasonable. Final

EA at 12-13, A-691-92.

In addition, the Commission "evaluated alternative proposals for project operation, increased power generation, compliance monitoring, fish passage facilities, aesthetic flows to protect the scenic and cultural values of Cohoes Falls, minimum flows to protect fishery resources in the bypassed reach, and recreational and cultural resource measures." License Rehearing Order at P 43, SPA-72; *see also id*. at P 53, SPA-74. *See, e.g.,* License Order at PP 48-49 (aesthetic flows), 61-63 (recreation), SPA-48-49, SPA-37; Final EA §§ V.C.7 (aesthetic flows), V.C.6 (recreation), A-734-37, A-730-34. The alternatives the Commission considered for increased power generation, fish protection and habitat flows are discussed *infra* Part V.B.–D.

Indeed, the alternatives considered by the Commission actually included aspects of the Cohoes Falls Project. License Rehearing Order at P 95, SPA-82. Adirondack asserts that the Cohoes Falls Project would improve flows for habitat and aesthetic purposes, and would produce more power than the School Street Project. Br. at 20. The Commission's final environmental assessment analyzed a range of minimum habitat flows and aesthetic flows that would serve these goals. License Rehearing Order at P 95 (citing Final EA at 32, 62-64, A-711, 741-43), SPA-82. Also, both the final environmental assessment and the License Order examined the effects of increasing generation at the School Street Project. *Id.* at P

96, SPA-82; License Order at PP 55-58, 72, 77, 110, SPA-36, 38, 39, 42-43.

b. The FPA Does Not Mandate Consideration Of the Cohoes Falls Project As An Alternative.

The FPA, as this Court explained in *Scenic Hudson*, "instruct[s] the Commission to probe all feasible alternatives," 354 F.2d at 620 (citations omitted), not all alternatives, regardless of circumstances, as Adirondack contends. Br. at 51-57, 61. In *Scenic Hudson*, the Court faulted the Commission for failing to develop a complete record, by omitting consideration of various alternatives to the construction of a large pumped storage hydroelectric project. 354 F.2d at 620-25. The Commission's rejection of untimely testimony regarding an alternative, and failure to develop other alternatives, contravened its "duty to inquire into and consider all relevant facts." *Id*. at 620. *Scenic Hudson* relied in part on *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956), which provides that the Commission has the authority to reject a proposal in favor of an alternative that is beyond its jurisdiction. *Id*. at 751 n.28.

Here, the Commission found that neither the FPA nor *Scenic Hudson* mandate consideration of a statutorily-barred alternative and, even if the alternative were not so barred, neither requires consideration of an eleventh-hour, unilateral alternative that would replace all alternatives considered by multiple participants and the Commission throughout this lengthy proceeding. Notice Rehearing Order at PP 55, 58, SPA-21, 22. The Commission's "task is to determine whether the

School Street Project is best adapted based on the information in the record, rather than with reference to some hypothetical and speculative alternative that the FPA has barred from consideration." License Rehearing Order at P 44, SPA-72; *see also National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1475 (D.C. Cir. 1990) (affirming Commission licensing decision where based on a comprehensive analysis of issues relevant to the public interest, though not every conceivable use).

Placing *Scenic Hudson* and the Commission's FPA mandate in context demonstrates the reasonableness of the Commission's conclusion that it did not have to consider the Cohoes Falls Project. *Scenic Hudson* was decided in an earlier era of hydroelectric licensing proceedings, before the enactment of NEPA and the Commission's promulgation of its detailed NEPA compliance regulations. Notice Rehearing Order at P 55, SPA-21; *see generally* 18 C.F.R. pt. 380. Likewise, *Scenic Hudson* predated the enactment of the Electric Consumers Protection Act of 1986, which amended the FPA relicensing provisions in order to encourage competition under definitive rules by, among other things, establishing requirements for public notice concerning projects undergoing relicensing, and setting a deadline for competing applications upon relicensing (*see supra* p. 6 discussing FPA section 15(c)(1), 16 U.S.C. § 808(c)(1)). License Rehearing Order at PP 26-27 (explaining agency's post-1986 revision of its relicensing regulations), SPA-69.

Thus, at the time of *Scenic Hudson*, the Commission's process, as used here, did not exist: the Commission did not conduct a comprehensive NEPA process, and there were no statutory deadlines for competing proposals or regulatory deadlines for comments and public input. Directing the Commission to consider an alternative that FPA section 15(c)(1), as enacted by Congress in 1986, required to be filed in 1991, would plainly "contravene this statutory framework." License Rehearing Order at P 47, SPA-73; *see also Niagara Mohawk Power Corp*., 43 FERC ¶ 61,015, 61,048 (1988) (1986 Act "intended to facilitate *fair* and equal competition") (emphasis added).

Moreover, *Scenic Hudson* was decided on unique facts, which involved an entirely different energy source as an alternative, and not a statutorily-barred competing proposal to harness the water resource used by an existing project. Notice Rehearing Order at P 56, SPA-21. In *Scenic Hudson* and *City of Pittsburgh*, the Commission erred in refusing to consider an alternative beyond its jurisdiction. Here, the alternative urged is not just beyond the Commission's jurisdiction, it is affirmatively barred by the FPA and cannot be authorized by any entity. *See* License Rehearing Order at P 54, SPA-74. And, even if the Cohoes Falls Project were not statutorily-barred, as a competing proposal it is *governed* by a distinct set of procedures for competing proposals under the FPA and Commission regulations. *See supra* Part IV.B.1. Accordingly, whether the

Cohoes Falls Project is barred by statute or simply governed by separate procedures, ascribing the meaning Adirondack advocates to *Scenic Hudson* would allow parties to "ignore the statutory and regulatory parameters that govern hydropower licensing proceedings." Notice Rehearing Order at P 58, SPA-22. The Commission's reasonable interpretation, which gives meaning to all parts of the FPA, warrants deference. *See supra* p. 19 (citing *Chevron*, 467 U.S. at 843).

c. NEPA Does Not Mandate Consideration Of the Cohoes Falls Project As An Alternative.

NEPA also requires, where appropriate, consideration of reasonable alternatives. *See* 42 U.S.C. § 4332(2)(C); *Ompompanoosuc*, 968 F.2d at 1558; *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 836-37 (D.C. Cir. 1972). Under NEPA and its implementing regulations, an environmental assessment, like that prepared by the Commission in this case, need not include a discussion of alternatives unless the proposal "involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b) (defining environmental assessment); *see* License Rehearing Order at P 51, SPA-74.

When an environmental assessment must address alternatives, the "range of alternatives that must be considered is a matter within an agency's discretion." *Ompompanoosuc*, 968 F.2d at 1558 (affirming Commission decision not to consider conservation as an alternative to construction of a new hydroelectric

project) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551-52 (1978)). And, "the range of alternatives an agency must consider is narrower when, as here, the agency has found that a project will not have a significant environmental impact." *Id*. (citing *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 n.11, 745 (2d Cir. 1983)). *See* License Rehearing Order at PP 52-54, SPA-74. Statutory objectives provide a "pertinent guide" to determining the scope of reasonable alternatives. *City of New York*, 715 F.2d at 743.

In this case, the only possible "unresolved conflict concerning alternative uses of available resources" is that which Adirondack seeks to create by introducing the Cohoes Falls Project as an alternative. License Rehearing Order at P 51 n.66, SPA-74. And, the Commission found that the Cohoes Falls Project is "remote and speculative," and therefore unreasonable, because, absent an amendment to the FPA or other congressional directive, it is "currently beyond the authority of any entity, public or private, to accomplish." *Id.* at P 54, SPA-74.

Accordingly, consistent with *City of New York*, the Commission relied on the FPA, its regulations and well-established policy to define the appropriate range of alternatives. 715 F.2d at 743 ("an agency need not consider 'alternatives which could only be implemented after significant changes in government policy or legislation'") (citation omitted). FPA section 15(c)(1), 16 U.S.C. § 808(c)(1), bars

construction of the Cohoes Falls Project, so long as Erie has a license, and establishes a deadline – and a distinct set of procedures – for consideration of such a competing proposal. The Commission's regulations and policy provided multiple public notices and opportunities for public comment, *supra* pp. 7-9, and sound regulatory policy does not support delaying an already-protracted proceeding for consideration of an alternative that is legally barred.

The length of the School Street Project relicensing proceeding – due primarily to the protracted state environmental review – presents no reason to force the Commission, at this late stage, to restart its environmental analysis by considering a wholly new alternative. The Commission took the requisite "hard look" at numerous alternatives, and its rejection of a late-filed statutorily-barred alternative in these circumstances does not support a contrary conclusion. *See Baltimore Gas & Elec. Co.*, *supra* p. 7. On the other hand, sanctioning such tactics "would mean that anyone could delay the completion of a licensing proceeding simply by postulating a supposed alternative at any time," making "a mockery of the regulatory process." Notice Rehearing Order at P 58, SPA-22.

C. The Commission's Relicensing Decision Otherwise Satisfied The Requirements of NEPA And The FPA.

1. The Commission Reasonably Rejected Petitioners' Repeated Efforts To Put The Cohoes Falls Project Before The Commission.

Since developing the concept of the Cohoes Falls Project, the Petitioners

have attempted to put their proposal before the Commission by nearly every means contemplated by the FPA and Commission regulations – and some not. Green Island first filed a preliminary permit, which led to the Commission's finding that the Cohoes Falls Project is statutorily-barred. *See supra* pp. 46-49. Undeterred, Green Island, together with Adirondack, submitted the same proposal to the Commission in the School Street Project proceeding as an alternative offer of settlement and a motion to present evidence (as well as in attachments to various other pleadings), which Adirondack argues the Commission erred in rejecting. Br. at 43-47, 61, 73-76.

Refusing to place form over substance when the result would effectively breach its statutory limits, the Commission reasonably rejected these pleadings as what they are: attempts to circumvent the statutory bar on competing applications. Notice Rehearing Order at PP 27, 69, SPA-16, SPA-69; License Rehearing Order at P 47, SPA-73; License Order at P 71 (rejecting Scenic Hudson's request), SPA-38. The Commission found that it could not entertain such a proposal "in any form." Notice Rehearing Order at PP 49, 65, SPA-20, 23. Moreover, the Commission found that Adirondack and Green Island's "posturing as objective commenters seeking to vindicate the public interest simply lacks credibility," since they had asserted no interest other than as competitors. *Id*. at P 50, SPA-20.

In addition, the Commission reasonably found that neither the FPA nor its

regulations require consideration of the alternative offer of settlement. *Id*. at P 59, SPA-22. The Commission found that Adirondack's alternative offer of settlement is "unilateral and is a settlement in name only," *id*. at P 63, SPA-22, and is simply a position statement among aligned participants. *Id*. at PP 60 (citing earlier rejected settlement offers and agency precedent), 63, SPA-22; *see also City of New Martinsville v. FERC*, 102 F.3d 567, 573 (D.C. Cir. 1996) ("[T]he Commission is not obliged to accept all negotiated settlements presented to it"). Because the settlement does not include any parties opposed to the Cohoes Falls Project, such as Erie, or any federal or state resource agencies with jurisdiction, it was not the product of compromise, nor was it likely to resolve the proceeding. *Id*. at PP 60, 63, SPA-22. The title Petitioners assign to a pleading does not affect the Commission's consideration of its substance: calling a late-filed alternative a settlement did not require the Commission to consider it.

Adirondack is correct that the Commission has the statutory authority to deny Erie's license application, issue a non-power license or issue a new license terminating upon issuance of a license for the Cohoes Falls Project, Br. at 45, 58-59, but these proposals, offered in the alternative offer of settlement, are likewise simply attempts to circumvent the statutory bar on the Cohoes Falls Project. License Rehearing Order at PP 88-91, SPA-80-81; *see City of Tacoma v. FERC*, 460 F.3d 53, 74 (D.C. Cir. 2006) (agreeing that Commission may deny a new

license); *see id*. at 72-74 (statutory background). Moreover, neither the record nor any party (except Adirondack) supports such action. License Rehearing Order at PP 89 (license denial), 90 (non-power license), 91 (conditioning Erie's new license), SPA-81; *see also* Final EA at 12-13, A-691-92 (retirement could introduce significant issues and impacts). Conditioning a license to allow development of a "better" project has never been permitted to allow circumvention of the FPA's deadline for relicensing applications (FPA § 15(c)(1), 16 U.S.C. § 808(c)(1)). License Rehearing Order at P 91 & n.121 (distinguishing cases cited by Adirondack, Br. at 59 n.29), SPA-81. The Commission reasonably concluded that considering Adirondack's alternative proposal, in any of its disguises, would "undercut the licensee's certainty as to the viability of the project, would consequently discourage investment in renewable hydropower, and would be bad policy." *Id*. Further, the Commission found that its authority under FPA section 10(a)(1), 16 U.S.C. 803(a)(1), to condition a license to ensure that it is "best adapted" does not authorize the Commission to compel Erie itself to develop the time-barred Cohoes Falls Project. *Id*. at P 97, SPA-82-83.

2. The Commission Reasonably Determined That NEPA Does Not Require A Supplement To The Final Environmental Assessment.

Adirondack asserts that the information Petitioners developed and presented after the Commission completed its final environmental assessment, information

which Green Island apparently had in 2001 when the Commission issued public notice of the final environmental assessment, now requires the Commission to supplement the final environmental assessment. Br. at 64-69. Also, Adirondack argues that the changes to the proposed action resulting from the Offer of Settlement require supplementation of the final environmental assessment. *Id*.[5]

An environmental assessment must be supplemented when there are significant changes to the proposed action, or upon identification of significant new impacts. License Rehearing Order at P 56, SPA-74-75 (citing 40 C.F.R. § 1502.9(c)(1) and *Price Road Neighborhood Ass'n v. United States*, 113 F.3d 1505, 1510 (9th Cir. 1997) (same standard applies to supplementing an environmental assessment)). The Commission reasonably relied on its earlier conclusion that the Cohoes Falls Project is statutorily-barred under the FPA, as well as its finding that that project is not a reasonable alternative under NEPA, to determine that the new information is not significant, and would not affect the validity of the Commission's finding of no significant impact. *Id*. at P 57, SPA-75; *see Marsh*, 490 U.S. at 383-85 (applying "rule of reason" to decision to supplement).

[5] *Amici* assert, at 27-29, that the Commission should have prepared an environmental impact statement instead of an environmental assessment. This argument comes too late, as it was not raised on rehearing before the Commission. *Platte River*, 876 F.2d at 113. In any event, the Commission may rely on mitigation measures in assessing the significance of the environmental impact, *Ompompanoosuc*, 968 F.2d at 1556-57, *cited in National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997), and the thorough environmental assessment prepared provided a substantial basis for the Commission's action.

With regard to changes in the proposed action resulting from Erie's Settlement, *see* Br. at 69, the Commission considered the significance of these changes, and reasonably determined that a supplemental environmental assessment was not required. License Rehearing Order at P 58 (citing, *e.g.*, *Price Road*, 113 F.3d at 1510 (agency properly used non-NEPA procedures to evaluate significance of new information)), SPA-75. In particular, the environmental effects of the two primary differences, the provisions for minimum habitat flows and the new turbine, were within the range of effects analyzed in the draft and final environmental assessments, and thus do not alter the finding of no significant impact. *Id*. at PP 58-59, SPA-75. Therefore, the Commission permissibly included its supplemental analysis of these changes in the licensing orders. *Id*. at P 58, SPA-75. Further, because the Commission published notice of the Settlement with an opportunity for comments and interested parties had an opportunity to review and seek clarification or rehearing of the License Order, the Commission's procedures satisfied the goals of NEPA. *Id*. at P 60, SPA-75; *see Robertson*, 490 U.S. at 350 (purpose of NEPA).

V. SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE TERMS AND CONDITIONS OF THE NEW LICENSE.

Adirondack argues that the Commission's draft and final environmental assessments, the License Order, and the License Rehearing Order provide nothing more than "conclusory" support for the new license issued to Erie. Br. at 76-88. As reflected in the record, including the lengthy draft and final environmental assessments and orders, the Commission carefully evaluated all aspects of the proposed action, including the changes proposed in the Settlement, required appropriate mitigation measures and reasonably explained its decision. *Ompompanoosuc*, 968 F.2d at 1554-56; *Krauss v. Oxford Health Plans, Inc.*, 2008 U.S. App. LEXIS 4083, at *21 (2d Cir. Feb. 26, 2008) (The substantial evidence standard "requires more than a scintilla but less than a preponderance.") (citation omitted). Accordingly, the Commission's orders merit deference. *Ompompanoosuc*, 968 F.2d at 1554 (citing *Citizens to Preserve Overton Park*, 401 U.S. at 416); *see supra* pp. 18-19.

A. The Commission's Judgment That The School Street Project Is Properly Sized Is Supported By Substantial Evidence.

Adirondack argues that the new School Street Project license, which authorizes Erie to expand the Project, fails to adequately utilize the available water resources in the Mohawk River. Br. at 78-79. Adirondack supports its arguments with nothing more than untested statements of the Cohoes Falls Project's potential.

The Commission considered the capacity of the School Street Project both with and without additional capacity and found that, in either case, the Project as licensed is best adapted to a comprehensive plan for developing the Mohawk River. License Order at PP 72, 77, 109-113, SPA-38, 39, 42-43; License Rehearing Order at PP 61-67, SPA-75-77. Typically, at run-of-river hydroelectric projects available flows exceed hydraulic capacity 15 to 30 percent of the time. License Order at P 110, SPA-43. At the School Street Project, available flows will exceed the capacity of the Project 21 percent of the time with expansion and 31 percent of the time without expansion. *Id*. Based upon this analysis, the Commission found that the "capacity of the existing and proposed turbines is properly sized to help meet daily base load electrical demand." *Id*. Adirondack does not question the accuracy of this analysis, and the Commission's technical judgment deserves deference. *See, e.g., B&G Oil & Gas Co. v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) (courts are "particularly reluctant to interfere with the agency's reasoned judgments" on "complex scientific or technical questions").

B. The Fish Protection Measures Required By The New License Are Supported By Substantial Evidence And Are Subject To Extensive Monitoring.

As the result of the Settlement among Erie, New York DEC and the U.S. Fish & Wildlife Service, the new license for the School Street Project requires Erie, in phase I, to install screens and bar racks that will guide fish to new facilities

for downstream passage. License Order at PP 20-22, 50-58, SPA-30-31, SPA-35-36. In phase II, Erie may install a new "fish-friendly" turbine, also with structures to deter fish. *Id*. at P 21, SPA-31. Erie must develop plans for these devices in consultation with resource agencies, and study the effectiveness of the measures pursuant to plans developed with the agencies. *Id*. at P 22, SPA-31. All of the plans are subject to Commission approval and oversight. *Id*. at Art. 401, SPA-46.

Adirondack faults the Commission for failing to replacing the older, indeed historic, School Street Project with the new Cohoes Falls Project, yet objects to Erie's and the Commission's efforts to implement modern improvements, like screens and bar racks, and new technological developments, in the case of the "fish-friendly" turbine. Br. at 79-81. The Commission analyzed a number of alternative fish passage devices as well as a new turbine in the final environmental assessment and License Order. License Order at PP 50-54 (protection and passage), 55-58 (new turbine), SPA-35-36; Final EA at 34-45 (protection and passage, turbine), 66-68 (passage recommendations), A-713-24, A-745-47. The Commission found, *inter alia*, that the adult blueback herring mortality rate at some Mohawk River projects, including the School Street Project, is 20 to 30 percent. Final EA at 37, A-716. The new turbine analyzed in the final environmental assessment (not a "fish-friendly" turbine) resulted in lower mortality rates at nearby projects. Final EA at 36, A-715. The License Order

explained that the "fish-friendly" turbine would considerably lessen mortality, as studies have shown survival rates of 98 percent for American eel and 94 percent or higher for certain other species. License Order at P 57, SPA-36; License Rehearing Order at P 69, SPA-77.

Adirondack's assertions that the Commission's data are untested fall flat in light of the above findings and the extensive testing and monitoring required in the new license. Where, as here, the Commission has adequately examined an issue, requirements for future monitoring and testing to ensure the effectiveness of these measures are consistent with this reasoned decision-making. *Ompompanoosuc*, 968 F.2d at 1555; *LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (where Commission adequately examines issues, it may rely on post-licensing studies). In the event the studies show that the measures fail to achieve their goals, the Commission and jurisdictional agencies have the authority to require more. *See, e.g.*, License Order at Art. 401, 405, SPA-46, 47.

C. The Habitat and Minimum Flow Conditions Are Supported by Substantial Evidence.

Adirondack contends that the habitat flows, to be released on a seasonal schedule to enhance habitat in the bypassed reach of the river, lack evidentiary support. Br. at 81-83. But, the habitat flows the Commission examined, which included a wide range of alternatives from 60 cubic feet per second ("cfs") to 1,500 cfs, License Rehearing Order at P 72, SPA-78, Final EA at 30-33, A-709-12,

encompass the flow schedule ultimately agreed upon in the Settlement and approved by the Commission. License Rehearing Order at PP 72-74, SPA-78. Further, the flow regime developed by the settling parties, regardless of how the parties' method is characterized, *id*. at P 74 n.99, SPA-78, corroborates the results of the flow release study the Commission examined in the final environmental assessment. *Id*. at P 74, SPA-78; License Order at P 46, SPA-34-35. With additional analysis provided in the License Order, the Commission concluded that the required flows would benefit habitat, particularly during spawning, rearing and growing seasons, and would also provide more stable water temperatures and dissolved oxygen levels. License Order at PP 46-47, SPA-34-35. Adirondack's disagreement with this analysis does not render it inadequate. *See supra* p. 18.

Adirondack objects to the Commission's rejection of Commerce's recommendation for minimum flows higher than those required by the Settlement. Br. at 83. Commerce missed the deadline for filing its recommendation pursuant to FPA section 10(j), 16 U.S.C. § 803(j), which provides a process for resolution of conflicting recommendations; therefore, the Commission considered the recommendation under FPA section 10(a), 16 U.S.C. § 803(a), which does not provide that process. License Order at P 39 n.31, SPA-33; License Rehearing Order at PP 75-77, SPA-78-79; *see* 18 C.F.R. § 4.34(b) (late-filed 10(j) recommendations may be considered under section 10(a)). Commerce itself

supported the Settlement and did not seek rehearing of the Commission's determination. Adirondack errs in relying on *City of Tacoma v. FERC*, 460 F.3d at 64-65, which provides that the Commission may not reject as late mandatory conditions under FPA section 4(e), 16 U.S.C. § 797(e), based upon the mandatory nature of FPA section 4(e). License Rehearing Order at P 76, SPA-78-79. FPA section 10(j) recommendations are not mandatory; therefore, the Commission may set reasonable time limits. *Id*.; *see Am. Rivers v. FERC*, 201 F.3d 1186, 1202-05 (9th Cir. 1999) (affirming Commission's discretion with regard to section 10(j) recommendations). In any event, as discussed above, the flows required by the Settlement are supported by substantial evidence. *Id*. at P 77, SPA-79.

D. The License Terms and Conditions Adequately Address Construction-Related Concerns And Water Quality.

Adirondack argues that the Commission failed to fully consider water quality issues and other construction-related impacts at the School Street Project, and claims the Commission improperly relied on the New York DEC's water quality certification as a substitute for its independent analysis. Br. at 83-87. Adirondack is mistaken.

The Commission's final environmental assessment, issued in 2001, long before the New York DEC issued its water quality certification, examined dissolved oxygen levels, the potential for construction-related impacts, and the potential presence of contaminants in the power canal and impoundment. License

Rehearing Order at PP 79-81, SPA-79. The final environmental assessment recommended erosion and sediment control plans due to potential construction-related impacts, and the Settlement and New York DEC's water quality certification both require such measures. Final EA at 18, 20, A-697, 699; License Order at PP 17, 60, Art. 302, App. A para. 15-21, SPA-30, 36-37, 45, 50-51. Also, if Erie installs the new turbine, the turbine type selected should require less excavation, thereby reducing other asserted impacts of which Adirondack complains. License Order at P 60, SPA-36-37. Hardly "brushing off" (Br. at 82, 86 n.50) its responsibility to ensure that licensees maintain their facilities, the Commission inspected the canal walls in 2005 and found no deficiencies. License Rehearing Order at P 62 n.79, SPA-76. Further, any construction activities under the new license will only occur following Commission approval of detailed plans and specifications. License Order, Art. 302, SPA-45.

Before Green Island became active in this proceeding, no participant raised concerns regarding dissolved oxygen levels, although the Commission did examine those levels in the final environmental assessment. License Rehearing Order at P 79, SPA-79; Final EA at 19-20, A-698-99. Also, in the License Order, the Commission noted that the enhanced habitat flows are expected to improve dissolved oxygen levels. *See supra* p. 66. That the Commission's concerns regarding water quality and potential construction-related impacts are adequately

addressed by the Settlement, as well as New York DEC's certification, hardly suggests a lack of independence given that the parties negotiated the Settlement for the purpose of Commission approval.

E. The Commission Otherwise Complied With Its Regulations.

Adirondack contends that Niagara Mohawk's license application, adopted by Erie when it became the licensee, is inadequate and out-of-date. Br. at 86-88. The Commission, however, adjusted for the passage of time to which Adirondack objects by updating the economic information used in its analysis. License Order at PP 106-08, SPA-42; License Rehearing Order at P 32, SPA-70-71; *see supra* p. 43-44 (consideration of affect on public). Further, the Commission examined, following public notice and comment, and approved the transfer of license from Niagara Mohawk to Erie, finding Erie qualified to hold the license. *Niagara Mohawk and Erie Boulevard Hydropower, L.P.*, 88 FERC ¶ 62,082. To the extent Adirondack continues to question Erie's qualifications, *see, e.g.*, Br. 14, 23, 71, this Court, like the Commission below, should reject Adirondack's attempts, by reference to matters not material to the relicensing process, "to suggest that something might be amiss." License Rehearing Order at P 32 n.40, SPA-70-71.

CONCLUSION

For the reasons stated, the petitions for review, to the extent they are not dismissed for lack of jurisdiction, should be denied and the challenged orders should be affirmed in all respects.

Respectfully submitted,

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