

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 04-1221

**SAVE OUR SEBASTICOOK,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

JULY 26, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioners.

B. Rulings Under Review

1. *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 61,038 (2004);
and
2. *FPL Energy Maine Hydro, LLC*, 107 FERC ¶ 61,120 (2004).

C. Related Cases

This case has not previously been before this Court or any other court.

Counsel is not aware of any other related cases pending before this or any other court.

Lona T. Perry
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July 26, 2005

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GLOSSARY

Central Maine	Central Maine Power Company
EA	Environmental Assessment
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FPL	FPL Energy Maine Hydro, LLC
Kennebec Coalition	American Rivers, Inc., the Atlantic Salmon Federation, Trout Unlimited, the Kennebec Valley Chapter of Trout Unlimited, and the Natural Resources Council of Maine
KHDG	Kennebec Hydro Developers Group
KHDG Agreement	1998 agreement between KHDG, the State of Maine, the National Marine Fisheries Service, the United States Fish and Wildlife Service, and the Kennebec Coalition
Rehearing Order	<i>FPL Energy Maine Hydro, LLC</i> , 107 FERC ¶ 61,120 (2004)
SOS	Petitioner Save Our Seabasticook
Surrender Order	<i>FPL Energy Maine Hydro, LLC</i> , 106 FERC ¶ 61,038 (2004)

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**BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUES

1. Whether all of petitioner's challenges to the Commission's interpretation of § 6 of the Federal Power Act ("FPA"), as prohibiting rejection of a license surrender application so as to require continued operation of a project against a licensee's will, are jurisdictionally barred because they were not raised on rehearing.

2. Assuming jurisdiction, whether the Commission reasonably interpreted FPA § 6 to permit licensees to surrender their licenses, subject only to

the Commission's authority to impose conditions on such surrenders in the public interest.

3. Whether the Commission correctly determined that, absent the licensee's consent, it lacked authority under FPA § 6 to amend the licensee's license or require the licensee to seek license amendment.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTERSTATEMENT OF JURISDICTION

Every argument raised by petitioner Save Our Seabasticook ("SOS") in its brief on appeal, except for the argument raised in Argument Section IV, Br. at 23-26, is jurisdictionally barred as SOS failed to raise the arguments on rehearing.

As more fully discussed *infra* in Section I of the Argument, in the challenged orders, the Commission interpreted FPA § 6, 16 U.S.C. § 799, to permit surrender of existing licenses, and to deny the Commission authority to compel a licensee to continue operating the project against its will. *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 61,038 at ¶ 31 (2004) ("Surrender Order"), JA 82; *FPL Energy Maine Hydro, LLC*, 107 FERC ¶ 61,120 at ¶ 9 (2004) ("Rehearing Order"), JA 107. SOS on brief challenges this conclusion as: (1) an erroneous interpretation of FPA § 6, Br. at 10-15; (2) contrary to FERC precedent, Br. at 15-18; and (3)

contradictory to the FPA statutory scheme promoting comprehensive development of waterways, Br. at 18-23, 26-30. Argument IV of SOS's brief, Br. at 23-26, alone concerns a different topic, the effect of a private agreement on the surrender proceedings.

SOS's rehearing requests raised no challenge to FERC's interpretation of FPA § 6. SOS's requests for rehearing,¹ R. 328, JA 315-18; R. 329, JA 319-25, never even mentioned the FPA, let alone cited or discussed FPA § 6, its purpose or proper interpretation, or Commission precedent interpreting that section. Rather, SOS's requests for rehearing raised only two points: the effect of the private agreement on the surrender proceeding (the argument raised Br. at 23-26), and certain evidence that SOS contended the Commission did not previously have the opportunity to consider (an argument not pursued on appeal). *See* Rehearing Order ¶ 6, JA 108 (describing arguments raised on rehearing).

Accordingly, other than the arguments at Br. 23-26, the Court lacks jurisdiction to hear any of SOS's arguments. FPA § 313(b), 16 U.S.C. § 825l(b) ("[n]o objection to the Order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.").

¹ SOS filed two requests for rehearing, one by itself and one jointly with the Town of Winslow.

See also City of Orrville, Ohio v. FERC, 147 F.3d 979, 990 (D.C. Cir. 1998) (court lacks jurisdiction to hear arguments not made on rehearing); *Platte River Whooping Crane Critical Habitat Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (same).

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

On June 20, 2002, FPL Energy Maine Hydro, LLC (“FPL”) filed an application to surrender its license for the Fort Halifax Project because the project economics did not justify the cost of installing the permanent fish lift required in the project license. FPL proposed to provide the required fish passage upon surrender by partially removing the existing dam. SOS urged the Commission to reject FPL’s surrender application and order continued operation of the project, with an experimental, less expensive fish pump in lieu of the required fish lift, to preserve the dam and reservoir. The Commission rejected SOS’s request because FPL had not sought to amend its license to substitute the experimental fish pump for the required fish lift, but, rather, had applied for license surrender. Under FPA § 6, a license may not be altered without the licensee’s consent, and a licensee is not required to continue operating a project if it wishes to surrender the license. Presented with FPL’s license surrender application, the Commission’s options were limited to imposing conditions upon the license surrender in the public

interest. The challenged orders granted the surrender application subject to the proposed partial dam removal for fish passage.

This appeal followed.

II. Statement of Facts

A. Background

The Fort Halifax Project, upstream of the confluence of the Sebasticook and Kennebec Rivers, was constructed in 1907-08 and was first licensed to Central Maine Power Company (“Central Maine”) in 1968. Rehearing Order ¶ 2, JA 107. In 1998, Central Maine and other owners of hydropower projects in the Kennebec River Basin (“Kennebec Hydro Developers Group” or “KHDG”) entered into an agreement (the “KHDG Agreement”) with the National Marine Fisheries Service, the United States Fish and Wildlife Service, the State of Maine, and the Kennebec Coalition, comprising American Rivers, Inc., the Atlantic Salmon Federation, Trout Unlimited, the Kennebec Valley Chapter of Trout Unlimited, and the Natural Resources Council of Maine. Surrender Order ¶ 5, JA 83; Rehearing Order ¶ 3, JA 107. Under the KHDG Agreement, the KHDG were to provide \$4.75 million toward fish restoration in the Kennebec River Basin and removal of the Edwards Dam, the lowermost dam on the Kennebec. Surrender Order ¶ 5, JA 83. In addition, the KHDG sought amendment of their FERC licenses to incorporate specific, agreed-upon fish passage measures. *Id.*

At the Fort Halifax Project, the KHDG Agreement required installation of a temporary fish pump and trap-and-transport facility for the capture of upstream-migrating alewives (river herring). Rehearing Order ¶ 3, JA 107. Those temporary facilities were to be replaced by a fish lift that would pass American shad, river herring, and Atlantic salmon, in quantities to meet state fisheries management goals, by May 1, 2003, unless the licensee surrendered its license and the Commission ordered the project dam to be decommissioned by the summer of 2003. *Id.* The resource agencies and the Kennebec Coalition agreed to delay installation of the permanent fish lift so that Central Maine could decide if continued project operation was economically viable. Surrender Order ¶ 7, JA 84. The agreement prohibited the licensee from seeking to eliminate or defer the permanent fish passage requirement before FERC or any other regulatory body. Surrender Order ¶ 6, JA 83; Rehearing Order ¶ 3, JA 107.

Upon submission of the KHDG Agreement as a settlement, the Commission amended the pertinent licenses, including the Fort Halifax Project license, to include the fish passage requirements set forth in the Agreement. Surrender Order ¶ 8, JA 84 (citing *Edwards Manufacturing Co., Inc.*, 84 FERC ¶ 61,227 (1998)). In 1999, the license for the Fort Halifax Project was transferred to FPL, which installed the temporary fish pump. *Id.*

In May 2002, FPL sought the consent of the KHDG Agreement signatories to installation of new fish passage technology, a Canavac fish pump, in lieu of the agreed-upon permanent fish lift, with the provision that, if evaluations showed the pump did not meet the agencies' fish restoration goals, it would be removed by May 1, 2008, and replaced with the agreed-upon lift facility. Surrender Order ¶ 26, JA 90. Both Interior and the Kennebec Coalition rejected this proposal. *Id.*

On June 20, 2002, FPL applied to surrender the Fort Halifax project license because the project economics did not justify the \$4.1 million initial investment for the fish lift along with the \$130,000 in annual operating and maintenance costs. *Id.* ¶ 9, JA 84. FPL proposed to provide fish passage after surrender by partial removal of the dam. *Id.*

The Commission held scoping meetings in Waterville, Maine on November 7, 2002 to obtain public comment on the surrender application. Surrender Order ¶ 10, JA 85; Rehearing Order ¶ 5, JA 108. Commission staff then prepared a draft environmental assessment (“EA”). Surrender Order ¶ 10, JA 85.

The United States Department of the Interior, Maine Planning Office, the Friends of the Kennebec Salmon, and the Kennebec Coalition all supported partial removal of the dam, because it would provide fish passage in accordance with restoration goals and convert the reservoir environment to a riverine environment. Surrender Order ¶ 11, JA 85. FPL expanded the size of the proposed dam breach

in response to concerns that the breach was not sufficiently large for effective upstream fish passage under all conditions. *Id.* ¶ 13, JA 86.

The Final EA, issued on May 8, 2003, Surrender Order ¶ 10, JA 85, analyzed the modified dam removal proposal, and several alternatives, including cessation of generation without dam removal. Rehearing Order ¶ 5, JA 108; Surrender Order ¶ 13, JA 86. The staff also considered continued project operation using the Canavac fish pump. *Id.* The Final EA did not recommend any alternative. *Id.*

Opponents of breaching the dam urged that the Commission require installation of the Canavac fish pump to provide fish passage in order to retain the reservoir. Surrender Order ¶ 23, JA 90. Interior and the Maine Planning Office expressed concern that the Canavac fish pump's floating platform had never been used to concentrate fish for upstream passage, and the pump's use of a vacuum to collect fish would have an adverse effect on shad, which are vulnerable to handling. *Id.* ¶ 24, JA 90. They argued there were no data to indicate that the Canavac fish pump would be a safe and efficient method of passing fish other than alewife. *Id.*

The Final EA concluded that the survival rates for alewife passed by the Canavac fish pump, if handling were minimized, would likely be comparable to those of alewife passed by a fish lift. *Id.* ¶ 25, JA 90. However, even an improved

fish pump could risk injury to shad, due to significantly more handling of fish than is involved with a fish lift. *Id.* (citing Final EA at 90-91).

An order issued July 28, 2003 noted FPL's apparent preference for retaining its license and continuing project operations if a less expensive fish passage option were available. Surrender Order ¶ 27, JA 91 (citing *FPL Energy Maine Hydro, LLC*, 104 FERC ¶61,135 (2003)). Because the Commission was reluctant to eliminate a source of clean, renewable energy if it could provide simultaneously for continued project operation and effective fish passage, and because the Final EA had concluded that the Canavac fish pump might be effective, the Commission directed the licensee to initiate discussions with the other KHDG Agreement signatories regarding fish passage alternatives that would allow continued operation of the project. *Id.* The Commission stayed the license requirement that FPL install the permanent fish lift pending receipt of a status report on such discussions and the Commission's further action. *Id.*

On August 1, 2003, FPL notified the Commission that most of the KHDG Agreement signatories had reaffirmed their position that only a fish lift or dam removal would satisfy the terms of the KHDG Agreement and the State of Maine's fish restoration goals. *Id.* ¶ 28, JA 91. Because the signatories agreed further discussion would not be productive, FPL requested that the Commission approve its surrender application expeditiously since the KHDG Agreement required

installation of the fish lift unless the license has been surrendered and the Commission has ordered the dam decommissioned by the summer of 2003. *Id.*

On September 26, 2003, the Commission issued notice of a technical meeting to discuss alternative means of fish passage at the project. *Id.* ¶ 29, JA 91. The meeting was held on October 16, 2003, at Waterville, Maine. *Id.* ¶ 30, JA 92. Following the meeting, the Commission received filings taking varying positions on the potential effectiveness of the Canavac fish pump and on the status and goals of fishery restoration in the river. *Id.* However, no signatory to the KHDG Agreement indicated any change in its position that use of the Canavac fish pump to achieve fish passage at the project was unacceptable, and that fish passage must be achieved either through installation of a fish lift or dam removal. *Id.*

B. The Commission Orders

1. The Surrender Order

On January 23, 2004, the Commission granted FPL's surrender application. Surrender Order ¶ 1, JA 82.

FPA § 6 provides that licenses "may be altered or surrendered only upon mutual agreement between the licensee and the Commission" *Id.* ¶ 20, JA 88. Because FPA § 6 specifies no standard to be applied to surrender applications, the Commission applies a broad "public interest" standard in acting on such applications, which differs from the comprehensive development standard applied

to licensing proceedings by FPA §§ 4(e), 16 U.S.C. § 797(e), and 10(a)(1), 16 U.S.C. § 803(a)(1). *Id.* (citing *Niagara Mohawk Power Corp. and Fourth Branch Associates (Mechanicville)*, 100 FERC & 61,185 at ¶¶ 12-13 (2002)).

FPL filed this surrender application to satisfy fish passage requirements at the Fort Halifax Project. *Id.* ¶ 21, JA 89. Efforts to assure fish passage at Fort Halifax and other dams on the Kennebec and Sebasticook Rivers reach back at least to 1985, when Maine fisheries agencies developed the first plan to restore anadromous fish to the lower Kennebec River. *Id.* FERC licenses for two projects were modified to reflect the 1985 plan, *id.* (citing *Central Maine Power Company*, 61 FERC & 61,095 at 61,385 (1992)), and later all KHDG project licenses were amended to reflect first the 1987, and then the KHDG, Agreements. *Id.* In amending those licenses to reflect the changing schedules of the fisheries agencies for fish restoration in various reaches of these rivers, the Commission recognized the importance of fish passage at these projects and its role in promoting it. *Id.* Assuring fish passage at the Fort Halifax Project was, therefore, a central issue in the Commission's consideration of the surrender application. *Id.*

Although staff evaluated the use of the Canavac fish pump in the Final EA, requiring FPL to provide fish passage through the existing or an improved fish pump was not an alternative the Commission could adopt in this proceeding. Surrender Order ¶ 31, JA 92. FPL applied for license surrender, and could not be

compelled to continue operating the project if it wished to surrender its license. *Id.* (citing *Niagara Mohawk Power Corp.*, 83 FERC ¶ 61,226 at 62,007 (1998); *Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194 at n.60 (1999); *Niagara Mohawk Power Corp. and Fourth Branch Associates (Mechanicville)*, 98 FERC & 61,227 at 61,903, *reh'g denied*, 100 FERC & 61,185 (2002)). The Commission could only consider using the Canavac fish pump as an alternate method of fish passage if FPL sought to amend its license to substitute the fish pump for the required fish lift. *Id.* However, FPL was not able to seek such an amendment because of the constraints in the KHDG Agreement. *Id.* Neither the licensee's nor the Commission's efforts caused the KHDG Agreement signatories to reconsider the fish passage provisions of the KHDG Agreement for this project. *Id.*

Having failed to obtain the consent of the other KHDG Agreement signatories to the Canavac fish pump, FPL did not seek to amend its license, and the alternatives open to the Commission were limited by the nature of the application that had been filed. *Id.* ¶ 32, JA 93. Since only a surrender application was filed, the Commission could not require the licensee to continue operating the project with a Canavac fish pump. *Id.* n. 16, JA 93.

The Commission had the option of conditioning surrender on no, partial, or total removal of the dam. *Id.* ¶ 32, JA 93. After analysis of the effects on

resources of these alternatives, the Final EA concluded that dam removal would promote fish passage at the project site, convert about five miles of reservoir to riverine habitat, provide about five miles of additional unrestricted range for anadromous fish species and American eel, and improve water quality in the project area. *Id.* Elimination of the reservoir, on the other hand, would result in the loss of the existing reservoir habitat, loss or reduction of reservoir-based recreational uses and of the existing resident fishery, possible release of contaminated sediments, and increased potential for ice jams and ice scour below the dam site. *Id.* The no dam removal option would preserve the reservoir habitat and uses, and would avoid the sediment and ice jam impacts, but leave uncertain prospects for fish passage at the site. *Id.* The Final EA did not recommend a particular alternative. *Id.*

The Commission concluded that FPL's proposed surrender with partial dam removal was the best alternative. *Id.* ¶ 35, JA 94. Federal and state fisheries agencies, conservation groups, and hydropower project owners, including FPL, had agreed on a carefully-developed plan for restoration of anadromous fish in the Sebasticook and lower Kennebec Rivers under the KHDG Agreement. *Id.* The Commission determined that the public interest would best be served by fish passage comparable to that required if the license had remained in effect. *Id.* To

approve surrender without providing for some form of dam removal would create considerable uncertainty about the prospects for fish passage at the project site. *Id.*

The Commission, moreover, could not require the installation and operation of a Canavac fish pump as a condition of surrender. *Id.* n. 18, JA 94. The Commission does not require the installation of substantial new facilities at a project that will no longer be under license and thus no longer subject to Commission jurisdiction. *Id.* (citing *Project Decommissioning at Relicensing; Policy Statement*, FERC Stats. and Regs. Preambles, ¶ 30,011 at 31,223 (December 14, 1994)). Even if the Commission required installation of such facilities, it could not enforce their continued operation after surrender because Commission jurisdiction would be terminated.

2. The Rehearing Order

FPL's surrender proposal was generally supported by state and federal agencies and by conservation groups, primarily because partial dam removal would provide fish passage. Rehearing Order ¶ 6, JA 108. SOS and the Town of Winslow opposed FPL's proposal and sought rehearing, arguing that the proposal was unduly influenced by the KHDG Agreement, and proffering evidence they asserted the Commission did not previously have the opportunity to consider.² *Id.*

² As SOS does not challenge on appeal the Commission's conclusions with regard to the evidentiary issues raised on rehearing, the Commission's discussion of those issues is omitted herein.

SOS and the Town complained that the KHDG Agreement was not developed in an open process, and that inclusion of the Kennebec Coalition, but not of local communities, as a signatory prevented a proper appreciation of the public interest. *Id.* ¶ 7, JA 109. They also complained that the Agreement precluded FPL from including the Canavac fish pump alternative in its surrender application, which limited the Commission's options to denying the surrender application, or granting it and requiring dam removal. *Id.* SOS and the Town asked the Commission to rehear the application with the option of considering the Canavac fish pump as an alternative means of achieving fish passage.

The Commission found that the validity of the KHDG Agreement and the process leading to it could not be considered in this surrender proceeding. *Id.* ¶ 8, JA 109. The license amendment proceeding incorporating the fish passage provisions of the Agreement as conditions of the Fort Halifax Project license became final long ago and could not be revisited here. *Id.*

Moreover, the Commission reiterated that a licensee is free to seek surrender of its license, and the Commission cannot require a licensee to continue operating and maintaining a project against its will. *Id.* ¶ 9, JA 109 (citing Surrender Order ¶ 31 and n.15, JA 92). This principle is equally applicable where a licensee is seeking license surrender to implement the terms of a private agreement. *Id.* The Commission can, however, consider, as it did in this proceeding, whether to require

dam removal as a condition of the surrender or to allow a dam to remain in place. *Id.* The Commission's decision to authorize partial removal of the dam was based on the record, including the submissions of the opponents of dam removal and the environmental analysis of the effects of removing the dam and of leaving it in place. *Id.*

The KHDG Agreement did not deprive the Commission of information about the Canavac fish pump. *Id.* ¶ 10, JA 109. To the contrary, the EA assessed its capabilities and probable effectiveness in passing the targeted species of fish, and staff conducted a technical conference in October 2003 at which additional information about the Canavac pump was presented. *Id.* The record thus contained considerable information about the fish pump. *Id.*

The Commission's inability to require installation and operation of a Canavac fish pump resulted, not from a lack of information about the pump, but from the fact that the licensee sought surrender of its license. *Id.* ¶ 11, JA 110. Even without the KHDG Agreement, the Commission would not have required the licensee to install and to operate a Canavac fish pump as a condition of surrender. *Id.* The Commission could not enforce such a provision because surrender of the license terminates Commission jurisdiction, and the provision would be financially unwarranted, given that hydropower generation would cease upon surrender. *Id.*

Therefore, no purpose would be served in reevaluating the application with a view to selecting the Canavac fish pump option, as SOS and the Town urged. *Id.*

Installation and operation of the Canavac fish pump could have been ordered in connection with an application to amend the license, but the licensee did not seek to amend, and the Commission could not compel it to do so. *Id.* ¶ 12, JA 110. While FPL was constrained from seeking license amendment by the terms of the KHDG Agreement, it had agreed to the KHDG Agreement's requirements for a fish lift to the exclusion of other fish passage facilities and voluntarily sought license amendment to include those provisions as license conditions. *Id.*

SUMMARY OF ARGUMENT

Every argument raised by petitioner SOS on appeal, except for the argument raised in Argument Section IV, Br. at 23-26, is jurisdictionally barred as SOS failed to raise any of those arguments on rehearing.

In the one viable argument, SOS contends the KHDG Agreement improperly “clouded” FERC’s review of FPL’s surrender application. In SOS’s view, the Commission should have denied FPL’s application for surrender, required FPL to continue operating the project, and either unilaterally amended FPL’s license or required FPL to seek a license amendment to replace the fish lift license requirement with a Canavac fish pump license condition.

However, the alternatives open to the Commission in this proceeding were limited, not by the KHDG Agreement, but by the nature of the surrender application that FPL filed. The FPA permits a licensee to seek surrender of its license, and the Commission cannot require a licensee to continue operating a project against its will. Thus, the limitations on the Commission’s authority in a surrender proceeding precluded SOS’s preferred alternative – continued project operation with a Canavac fish pump. Further, because the FPA prevents license amendments without the consent of the licensee, the Commission could consider the Canavac fish pump as an alternative fish passage facility only if FPL applied to amend its license, but FPL filed no such application, and the Commission could

not compel FPL to file one. The fact that FPL was constrained from seeking license amendment by the KHDG Agreement does not change this result.

SOS nowhere challenged the Commission's conclusion that it could not compel FPL to amend its license to install the Canavac fish pump. SOS's brief does challenge the determination that FERC could not require continued project operation, but those arguments were never raised on rehearing, and, in any event, are without merit.

SOS contends that FPA § 6 unambiguously confers authority on the Commission to deny surrender and compel the licensee to continue operating the project. In SOS's view, a license is an "enduring obligation" to which the licensee can be held against its will for the remaining length of the license term.

The Commission, however, reasonably interpreted FPA § 6 to permit licensees to surrender their licenses, subject to the Commission's acceptance of that surrender upon appropriate conditions. Under FPA § 6 and the Commission's regulations, the Commission conditions surrenders to assure public safety and to provide as appropriate for the restoration of project lands and the mothballing or removal of some or all of the project works. Accordingly, while the Commission must agree to any surrender, that authority does not extend to compelling a licensee to continue operating its project against its will. The Commission's reasonable interpretation is entitled to deference.

SOS argues that the Commission’s interpretation is not entitled to deference because the Commission has interpreted its § 6 authority inconsistently. The decision on which SOS primarily relies, however, expressly held, as did the Commission here, that under FPA § 6 a licensee is not compelled to continue to operate its project; rather it is free to surrender its license. There is no inconsistency.

SOS contends that the Commission, in evaluating surrender applications, must apply the “comprehensive development” standard applicable to initial licensing applications under FPA § 4(e), 16 U.S.C. § 797(e), and § 10(a)(1), 16 U.S.C. § 803(a)(1). However, while §§ 4(e) and 10(a)(1) expressly state the factors that the Commission shall consider in granting a license, FPA § 6 specifies no standard to be imposed or factors to be considered in granting a surrender application. Accordingly, the Commission reasonably applies a broad public interest standard when considering surrender applications under FPA § 6, rather than the comprehensive development standards applied to licensing proceedings under the express terms of FPA §§ 4(e) and 10(a)(1). Indeed, the licensee protections enacted in FPA § 6 were intended to promote another principal goal of the FPA – encouraging private investment in waterway development.

ARGUMENT

I. EVERY ARGUMENT MADE BY SOS WITH THE EXCEPTION OF ARGUMENT IV IS JURISDICTIONALLY BARRED AS SOS FAILED TO RAISE THE ARGUMENTS ON REHEARING.

Every argument raised by petitioner SOS on appeal, except for the argument raised in Argument Section IV, Br. at 23-26, is jurisdictionally barred as SOS failed to raise any of those arguments on rehearing.

The challenged orders found that licensees are permitted under FPA § 6 to surrender their licenses, and therefore the Commission lacks authority to compel a licensee to continue operating a project against its will. Surrender Order ¶ 31, JA 92; Rehearing Order ¶ 9, JA 109. SOS's brief, with the exception of Argument Section IV, challenges this conclusion as: (1) an erroneous interpretation of the statute, Br. 10-15; (2) contrary to FERC precedent, Br. at 15-18; and (3) contradictory to the statutory purpose of promoting comprehensive development of waterways, Br. 18-23, 26-30. Argument IV, Br. at 23-26, alone concerns a different topic, the effect of the KHDG Agreement on the surrender proceedings. Br. at 23-26.

SOS raised no challenge to FERC's interpretation of FPA § 6 on rehearing. Indeed, SOS's requests for rehearing, see R. 328, JA 315-18; R. 329, JA 319-25, never even mentioned the FPA, let alone cited or discussed FPA § 6, its purpose or proper interpretation, or Commission precedent interpreting that section.

SOS's joint request for rehearing with the Town of Winslow argued that the KHDG Agreement prevented: (1) the Commission from receiving "complete information" regarding the surrender application, Joint Rehearing, R. 329 at 1-2, JA 320-21; and (2) FPL from petitioning the Commission to consider the Canavac fish pump alternative, Joint Rehearing, *id.* at 2-3, JA 321-22. The rehearing request also claimed that information concerning the actual status of fish restoration on the Seabasticook was inadequate, *id.* at 3-4, JA 322-23; and the negative consequences to the Town of Winslow of a partial dam breach were inadequately addressed, *id.* at 4-5, JA 323-24.

SOS's separate, solo rehearing request also argued that the KHDG Agreement improperly precluded consideration of the Canavac Fish Pump as an alternative to project surrender, R. 328 at 1, JA 315; that the Commission was not presented with complete and accurate information regarding wetland reduction, fish restoration and recreational access, *id.* at 2-3, JA 316-17; and the interested parties were denied due process rights by not being properly informed of the negotiations that led to the KHDG Agreement, *id.* at 3-4, JA 317-18.

Thus, as the Commission found, SOS and the Town of Winslow's rehearing requests "object[ed] to the role of the KHDG Agreement in [the Commission's] surrender determination and request[ed] that [the Commission] rehear the application in light of information that they assert [the Commission] did not

previously have the opportunity to consider.” Rehearing Order ¶ 6, JA 108. The Rehearing Order fully responded to these contentions. Nowhere did the requests for rehearing challenge the finding in the Surrender Order that the FPA permits a licensee to surrender its license, and does not give the Commission authority to require a licensee to continue operating the project against its will. SOS’s rehearing requests do not discuss the FPA or § 6, let alone argue, as now asserted, the statutory construction or overriding purpose of the FPA or FERC’s precedent on the subject of license surrenders.

Accordingly, the Court lacks jurisdiction to hear any of petitioner’s arguments, other than the argument in Argument Section IV, Br. at 23-26, concerning the KHDG Agreement. FPA § 313(b) (“[n]o objection to the Order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.”) *See also City of Orrville*, 147 F.3d at 990 (court lacks jurisdiction to hear arguments not made on rehearing); *Platte River*, 876 F.2d at 113 (same).

II. SOS’S SOLE VIABLE CLAIM IS WITHOUT MERIT

A. Standard of Review

Judicial review of the Commission’s licensing decisions is limited to determining whether the Commission’s action was arbitrary and capricious, and

whether the factual findings underlying the decision were supported by substantial evidence. *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296 (D.C. Cir. 2003); *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997). Those standards require that FERC examine the relevant data and provide a “reasoned explanation supported by a stated connection between the facts found and the choice made.” *Id.* The Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b).

Where a court is called upon to review an agency's construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted). If the statute is silent or ambiguous as to the question at issue, "the question for the court is whether the agency's answer is based on a permissible construction." *Id.* at 843 (footnote omitted).

B. The KHDG Agreement Did Not Improperly “Cloud the Exercise” of the Commission’s “Responsibilities”

The KHDG Agreement required installation of a permanent fish lift at the Fort Halifax Project, and this requirement was added as a license condition by the Commission. Surrender Order ¶¶ 5, 6, 8, JA 83-84. The KHDG Agreement prohibited FPL from seeking to eliminate or defer this permanent fish passage

requirement before FERC or any other regulatory body. Surrender Order ¶ 6, JA 83; Rehearing Order ¶ 3, JA 107.

The expense of installing and operating the required permanent fish lift led FPL to propose surrender of its license, with the necessary fish passage to be provided by partial dam removal. Surrender Order ¶ 9, JA 84. Although FPL attempted to gain the approval of the KHDG Agreement signatories to installation of the experimental Canavac fish pump in lieu of the required fish lift, Interior and the Kennebec Coalition refused. *Id.* at ¶¶ 24, 26, 28, JA 90-91. Without agreement to substitute the Canavac fish pump, FPL could not seek to amend its license to alter the fish lift requirement, and thus FPL only sought license surrender. *Id.* ¶¶ 31-32, JA 92-93.

SOS contends that the Commission improperly permitted the KHDG Agreement to limit its options in considering FPL's surrender application. Br. at 23. According to SOS, in the absence of the KHDG Agreement, FPL would have continued to operate the project by amending its license to incorporate the Canavac fish pump, which SOS theorizes FERC considered a superior alternative to surrender. *Id.* at 24-25. Thus, FERC "knew the proper outcome of the proceeding: installation of the Canavac fish pump and continued operation of the project," and accordingly should have denied surrender and unilaterally amended FPL's license

to require installation of the Canavac fish pump and continued project operation, or directed FPL to seek license amendment. *Id.* at 25.

The KHDG Agreement did not, however, improperly limit the Commission's options in this case. Rather, the alternatives open to the Commission in this proceeding were limited by the nature of the surrender application that FPL filed. Surrender Order ¶ 32, JA 93. Under FPA § 6 a licensee may surrender its license and cannot be compelled to continue operating. Rehearing Order ¶ 9, JA 109; Surrender Order ¶ 31 & n. 15, JA 92 (citing *Niagara Mohawk*, 83 FERC at 62,007 & n. 14; *Fourth Branch Associates*, 89 FERC at 61,596 & n. 60; *Niagara Mohawk*, 98 FERC at 61,903). Thus, the limitations on the exercise of the Commission's authority in a surrender proceeding precluded adoption of SOS's preferred result -- requiring FPL to continue project operation with a Canavac fish pump.³ Surrender Order ¶ 31, JA 92; Rehearing Order ¶ 11, JA 110. That FPL sought surrender to implement the terms of the KHDG

³ The Commission could not have preserved the dam by ordering the installation and operation of the fish pump as a condition of surrender. Surrender Order n. 18, JA 94; Rehearing Order ¶ 11, JA 110. The Commission does not require the installation or operation of substantial new facilities at projects that will no longer be under license and therefore not subject to Commission jurisdiction. *Id.* Conditioning surrender on installation of the fish pump, moreover, would be financially unwarranted, given that hydropower generation ceases upon surrender. Rehearing Order ¶ 11, JA 110.

Agreement does not alter the applicability of this principle. Rehearing Order ¶ 9, JA 109.

Further, “Section 6 of the FPA provides that the terms and conditions of a license may not be altered without the licensee’s consent.” *Wisconsin Public Serv. Co. v. FERC*, 32 F.3d 1165, 1168 (D.C. Cir. 1994). *See also Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 89 (D.C. Cir. 1983) (“[FPA] Section 6 states, without qualification, that licenses ‘may be altered or surrendered only upon mutual agreement between the licensee and the Commission.’”).⁴ Thus, the Commission could have required installation and operation of the Canavac fish pump only if FPL applied to amend its license, but FPL filed no such application, and the Commission could not compel FPL to file one. Rehearing Order ¶ 12, JA 110; Surrender Order ¶ 32, JA 93. That FPL was constrained from filing an amendment application because of the KHDG Agreement, Br. at 25-26, again, does not change this result. Rehearing Order ¶ 12, JA 110; Surrender Order ¶ 31, JA 92. FPL

⁴ As this Court has recognized, FPA § 6 was enacted as a limit on the Commission’s general regulatory power over licenses to make licensees “reasonably secure from regulatory interference” and thereby encourage private investment in hydropower generation. *Pacific Gas & Elec. Co.*, 720 F.2d at 87 & n. 18; *United States Dept. of the Interior v. FERC*, 952 F.2d 538, 547 (D.C. Cir. 1992) (“Congress enacted section 6 to provide licensees with certainty, thereby enabling them to finance development of the nation’s waterways.”) SOS itself acknowledges that Congress provided additional statutory protections in the FPA to licensees in order to encourage private investment in the nation’s waterways. Br. at 28.

consented to the KHDG Agreement and voluntarily sought a license amendment to include the provisions of that Agreement as license conditions. Rehearing Order ¶ 12, JA 110.

Thus, while the Commission was reluctant to eliminate a source of clean, renewable energy if continued project operation and effective fish passage could be accomplished simultaneously, Surrender Order ¶ 27, JA 91, *see* Br. at 24-25, the absence of a license amendment application and the filing of a surrender application precluded consideration of the fish pump option. Rehearing Order ¶ 11, JA 110.

SOS did not challenge those rulings below. While SOS now on brief challenges the Commission's determination that it could not require FPL to continue operating the project, those arguments cannot be heard because they were never raised on rehearing, *see* Argument Section I *supra*, and, in any event, are without merit, as demonstrated below.

III. THE JURISDICTIONALLY-BARRED CLAIMS ARE IN ANY EVENT WITHOUT MERIT AS THE COMMISSION REASONABLY INTERPRETED FPA § 6.

Because SOS never challenged on rehearing the Commission's reading of FPA § 6, the Commission never had an opportunity to address SOS's arguments on that point. *See* Argument Section I *supra*. Nevertheless, SOS now argues on brief that the Commission: (1) erroneously interpreted the statute, Br. 10-15; (2)

contravened FERC precedent, Br. at 15-18; and (3) contravened the statutory scheme promoting comprehensive development of waterways, Br. 18-23, 26-30. These claims are without merit.

A. The Commission Reasonably Interpreted FPA § 6.

FPA § 6 provides that licenses “may be . . . surrendered only upon mutual agreement between the licensee and the Commission. . . .” SOS contends this language unambiguously authorizes the Commission to deny surrender and compel a licensee to continue operating a project. Br. at 13. In SOS’s view, in accepting a license, the licensee undertakes an “enduring obligation” to operate the project, even against its will, for the full length of the license term. Br. at 22.

The Commission, however, reasonably interpreted FPA § 6 to evidence Congressional intent that licensees be allowed to surrender their licenses, subject only to the Commission’s acceptance of that surrender upon appropriate conditions. *Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,003 at 61,010 n. 17 (1999). Under FPA § 6 and the Commission’s regulations, 18 C.F.R. § 6.2,⁵

⁵ 18 C.F.R. § 6.2 provides that:

Licenses may be surrendered only upon the fulfillment by the licensee of such obligations under the license as the Commission may prescribe, and, if the project works authorized under the license have been constructed in whole or in part, upon such conditions with respect to the disposition of such works as may be determined by the Commission.

appropriate conditions for surrender are designed to assure public safety and to provide for the restoration of project lands and the mothballing or removal of some or all of the project works, as appropriate. *Niagara Mohawk Power Corp.*, 85 FERC ¶ 61,420 at 62,590 (1998). While the Commission must agree to any surrender, Br. at 15-16, that authority cannot be stretched to compel a licensee to continue operating its project against its will. Rehearing Order ¶ 9, JA 109; Surrender Order ¶ 31, JA 92 (citing *Niagara Mohawk*, 83 FERC at 62,007 & n. 14; *Fourth Branch Associates*, 89 FERC at 61,596 & n. 60; *Niagara Mohawk*, 98 FERC at 61,903, *reh'g denied*, 100 FERC ¶ 61,185).⁶

FERC's interpretation of the FPA § 6 phrase, "may be . . . surrendered only upon mutual agreement between the licensee and the Commission," is reasonable, as evidenced by courts' interpretation of similar language in § 12(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78l(d). Section 12(d) provides that securities registered with a national securities exchange "may be withdrawn" from listing in accordance with the rules of the exchange and under such terms as the SEC may deem necessary for investor protection, upon application to the SEC.

⁶ Thus, SOS erroneously asserts that *Niagara Mohawk*, 100 FERC ¶ 61,185, is the "sole" authority for this proposition, and is contrary to the Commission's position here. Br. at 15-17. *Niagara Mohawk*, 100 FERC ¶ 61,185, affirmed on rehearing *Niagara Mohawk*, 98 FERC ¶ 61,277, which held that "a licensee cannot be compelled to continue operating a project, but may apply to surrender its license, as Niagara Mohawk wishes to do." *Id.* at 61,903.

Under § 12(d), courts have found, upon compliance with the exchange rules, the SEC has no power to deny an application for delisting, even if the SEC believes trading in the stock should continue, but the SEC may impose conditions upon the delisting. *Atlas Tack Corp. v. New York Stock Exchange*, 246 F.2d 311, 316 (1st Cir. 1957). *See also Exchange Buffet Corp. v. New York Stock Exchange*, 244 F.2d 507, 510 (2nd Cir. 1957); *Shawmut Association v. SEC*, 146 F.2d 791, 795 (1st Cir. 1945).

The permissive “may be surrendered” language of FPA § 6 contrasts with the obligatory language of § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), requiring utilities to continue operations and service until the Commission determines that “the available supply of natural gas is depleted to the extent that continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.”⁷ *Fourth Branch*, 89 FERC at 61,596 & n. 60; *Niagara Mohawk*, 83 FERC at 62,007 & n. 14. Where Congress

⁷ § 7(b) of the Natural Gas Act provides that:

No natural gas company shall abandon all or any part of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuation of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

intended to hold utilities to their service obligations until the public convenience and necessity no longer requires such service, Congress so specified.

Thus, the Commission's interpretation of FPA § 6 is reasonable and should be afforded deference. *Pacific Gas & Elec.*, 720 F.2d at 84 (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)).

B. The Commission Has Been Consistent in Its Interpretation of FPA § 6.

SOS argues that the Commission's interpretation is not entitled to deference because the Commission has interpreted its § 6 authority inconsistently. Br. at 14-15. However, the case on which SOS primarily relies, *Arizona Public Serv. Co.*, 97 FERC ¶ 61,315 (2001),⁸ expressly held, as did the Commission here, that “[a] licensee is not compelled to continue to operate its project; rather it is free to surrender its license.” *Id.* at 62,454 (citing *Niagara Mohawk*, 83 FERC at 62,007). SOS asserts, nevertheless, Br. at 14-15, that a further statement made in *Arizona* turns this clear holding on its head and recognizes the Commission's authority to deny surrender and require continued project operation.

[T]he filing of a surrender application is no guarantee that surrender would be approved, or, even if surrender were approved, that a project would be removed in whole or in part, even if the application so

⁸ *PacifiCorp*, 97 FERC ¶ 61,348 at n. 24 (2001), cited Br. at 17 as additional “contrary” authority, is a companion case to *Arizona*, and in cited part merely repeats the *Arizona* holding.

proposed. License surrender and project removal are two distinct matters. The alternative of continued project operation would be considered in the analysis of the surrender application, as would the alternative of no hydroelectric project but retention of, for example, the project dam and reservoir for other public purposes. Finally, surrender of the license pursuant to a settlement does not preclude the filing of applications for a new license after the surrender is effective.

Id. at 62,454.

The quoted statement does not contradict the *Arizona* holding that licensees cannot be compelled to continue project operations against their will. Rather, the statement responded to a third-party request that competition for the license be opened during the pendency of the surrender application, which sought project removal, for the benefit of competitors who might wish to obtain a license for the project. The quoted statement rejected this request on the grounds that any particular surrender application or request for project removal, such as the one filed in *Arizona*, may not be approved as filed, and that granting a surrender application for one license does not preclude consideration of operation of the project *by others*. That does not support SOS's contention that a licensee may itself be denied surrender entirely and forced to continue operating the project.

SOS also points to a statement in *Arizona*, Br. at 17 (citing 97 FERC at 62,456), that:

If the Commission were to find that removing a project is in the public interest, delaying removal for a substantial period of time would entail the risk that the public interest factors might change by the time removal begins. In such a case, the Commission would likely deny

surrender now, without prejudice to a surrender application being filed closer to the proposed date of project removal.

This statement likewise does not support SOS's claim that the Commission has recognized its authority to deny surrender altogether. Rather, the Commission simply held that it could deny a surrender application *temporarily* until closer to the time that the licensee is prepared to remove the project. Thus, SOS fails to show that the Commission has, in fact, interpreted § 6 differently from its interpretation here. *See* Br. at 17-18.

C. The Commission Reasonably Declined to Read Into FPA § 6 the “Comprehensive Development” Standard Used to Evaluate License Applications Under FPA §§ 4(e) and 10(a)(1).

SOS criticizes the Commission's interpretation of § 6 as “directly contradictory to the statutory scheme,” Br. at 18, because, in acting on FPA § 6 surrender applications, the Commission does not apply the “comprehensive development” standard applicable to initial licensing applications under FPA §§ 4(e) and 10(a)(1).⁹ Br. at 20. In SOS's view, the Commission can only permit

⁹Section 4(e) provides, in deciding whether to issue a license, that:

the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . , the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

surrender of a license for an operating project upon finding that the surrender is the alternative best adapted to the comprehensive plan of development of the nation's waterways. Br. at 24.

In surrender applications, however, the “no-action” alternative of continued operation under the existing license is not properly considered because the licensee cannot be compelled to continue operating the project against its will. *Niagara Mohawk*, 98 FERC at 61,903. Moreover, while §§ 4(e) and 10(a)(1) expressly list factors that the Commission shall consider in granting a license, including the “comprehensive development” of the waterways, FPA § 6 specifies neither the standard to be imposed nor the factors to be considered in approving a surrender application.¹⁰ Surrender Order ¶ 20, JA 89. Accordingly, the Commission

Section 10(a)(1) similarly provides that all licenses issued shall be on the following condition:

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 waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife . . ., and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e).

...

¹⁰ Compare, for example, § 7(b) of the Natural Gas Act which prohibits abandonment of natural gas service or facilities unless the Commission determines that “the available supply of natural gas is depleted to the extent that continuance of service is unwarranted, or that the present or future public convenience or

reasonably applies a broad public interest standard when considering surrender applications under FPA § 6, rather than adopting the express comprehensive development standards applied to licensing proceedings under FPA §§ 4(e) and 10(a)(1). *Id.* at ¶ 20 & n. 10, JA 89 (citing *Niagara Mohawk*, 100 FERC ¶ 61,185 at ¶¶ 12-13). As the Commission explained in *Niagara Mohawk*, “in the absence of any further statutory standard [in FPA § 6], we apply a broad ‘public interest’ standard. That standard could hardly be the same as the Section 4(e)/10(a) standard applicable to license applications, inasmuch as a license surrender is a very different proposal.” 100 FERC ¶ 61,185 at ¶ 13.

This interpretation, moreover, is fully consistent with the “architecture” of the FPA. *Br.* at 21-22, 26-30. A principal goal of the FPA was to encourage private investment in waterway development. *Pacific Gas & Elec. Co.*, 720 F.2d at 80. The licensee protections and limitations on the Commission’s regulatory authority enacted in FPA § 6 were intended by Congress to encourage such investment. *Id.* at 83. Thus, FPA § 6 is reasonably interpreted to reflect Congressional intent that licensees be permitted to surrender their licenses, subject only to the Commission’s authority to impose conditions on such surrenders.

necessity permit such abandonment.” *Fourth Branch*, 89 FERC at 61,596 & n. 60; *Niagara Mohawk*, 83 FERC at 62,007 & n. 14.

Escanaba Paper Co., 2 FERC ¶ 61,090 (1978) (quoted Br. at 22), does not support application of the FPA §§ 4(e) and 10(a)(1) comprehensive development standard to license surrenders. In *Escanaba*, the Escanaba Paper Company applied for a license for a newly-constructed project. *Id.* at 61,212. Escanaba sought to have included in that license a provision that would allow Escanaba unilaterally to cease operation of the project facilities and terminate its obligation under the license. *Id.* at 61,215. The Commission found this request contrary to FPA § 6’s requirement that the Commission agree upon any surrender, and found allowing “abandonment at will” contrary to the comprehensive development standard. *Id.* Thus, *Escanaba* concerned the issuance of *a new license* for a recently constructed project, *see id.* at 61,212, to which the comprehensive development standard of FPA §§ 4(e) and 10(a)(1) applied, and therefore *Escanaba* does not support application of this standard at surrender. Further, the Commission’s interpretation of FPA § 6 in the challenged orders does not allow abandonment at will as claimed, Br. at 22; rather, the Commission must approve any plan for surrender and may impose thereon any conditions required in the public interest.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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July 26, 2005

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 8595 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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July 26, 2005