

**ORAL ARGUMENT IS SCHEDULED FOR APRIL 14, 2009**

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

\_\_\_\_\_  
**No. 08-1005**  
\_\_\_\_\_

**JOSEPH M. KEATING,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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

\_\_\_\_\_  
**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION  
WASHINGTON, DC 20426**

**JANUARY 30, 2009  
FINAL BRIEF: MARCH 6, 2009**

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## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties and Amici:

All parties appearing before this Court are listed in Petitioner's Rule 28(a)(1) certificate. There are no *amici*. In addition, Pine Creek Mine, LLC, Avocet Tungsten, Inc. and Bishop Tungsten Development LLC appeared before the Commission.

### B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Joseph M. Keating*, 120 FERC ¶ 61,246 (Sept. 20, 2007) (“Order Lifting Stay”), R.54, JA 128-37.
2. *Joseph M. Keating*, 121 FERC ¶ 61,192 (Nov. 19, 2007) (“Rehearing Notice”), R.59, JA 216-18.

### C. Related Cases:

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

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Holly E. Cafer  
Attorney

January 30, 2009  
FINAL BRIEF: March 6, 2009

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## GLOSSARY

Add.	Addendum
Br.	Petitioner Joseph M. Keating's Brief
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
JA	Joint Appendix
License Order	<i>Joseph M. Keating</i> , 60 FERC ¶ 61,016 (1992)
Order Dismissing Motion for Stay	<i>Joseph M. Keating</i> , 122 FERC ¶ 61,027 (Jan. 17, 2008)
Order Lifting Stay	<i>Joseph M. Keating</i> , 120 FERC ¶ 61,246 (Sept. 20, 2007), R.54, JA 128-37
P	Paragraph number in Commission orders
Pine Creek	Pine Creek Mine, LLC, Avocet Tungsten, Inc. and Bishop Tungsten Development LLC
R.	Record citation
Rehearing Notice	<i>Joseph M. Keating</i> , 121 FERC ¶ 61,192 (Nov. 19, 2007), R.59, JA 216-18
Stay Order	<i>Joseph M. Keating</i> , 77 FERC ¶ 61,060 (1996), R.2, JA 49-53
Water Board	California State Water Resources Control Board

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT OF THE ISSUE**

Assuming jurisdiction, whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) properly exercised its discretion in lifting the stay of the construction deadline in Petitioner Joseph M. Keating’s license for a hydroelectric project and terminating that license, where the continuing and prolonged delay, extending more than a decade, in obtaining authorizations necessary to start construction conflicted with the Commission’s statutory responsibility to ensure the prompt development of licensed projects.

## COUNTERSTATEMENT REGARDING JURISDICTION

Mr. Keating seeks review of a Commission order lifting the stay of the construction deadline in his hydroelectric project license and giving notice of termination of that license, *Joseph M. Keating*, 120 FERC ¶ 61,246 (Sept. 20, 2007) (“Order Lifting Stay”), R.54, JA 128-37, and a Commission notice dismissing his request for rehearing based upon a regulatory deficiency. *Joseph M. Keating*, 121 FERC ¶ 61,192 (Nov. 19, 2007) (“Rehearing Notice”), R.59, JA 216-18. As the Commission argued in its February 8, 2008 Motion to Dismiss, which this Court referred to the merits panel by order of April 3, 2008, the Rehearing Notice does not dispose of Mr. Keating’s request for rehearing on the merits; therefore, it is inadequate to confer jurisdiction upon this Court under Federal Power Act (“FPA”) section 313(b), 16 U.S.C. § 825l(b). *See infra* p. 19 (citing, *e.g.*, *City of Oconto Falls v. FERC*, 204 F.3d 1154, 1159-60 (D.C. Cir. 2000) (distinguishing aggrieving orders and rehearing orders); *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980) (finding judicial review under the FPA limited to, *inter alia*, FERC orders on the merits).

## STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

## INTRODUCTION

The origin of this case dates back to 1996, when the Commission stayed the start of construction deadline in Mr. Keating's license to allow him time to obtain water rights required for operation of his hydroelectric project, but did not stay other pre-construction license conditions. Order Lifting Stay at PP 7-8, JA 129-30. Now, eleven years later, Mr. Keating challenges the Commission's decision to lift the stay of the construction deadline and to terminate his license in accordance with FPA section 13, 16 U.S.C. § 806, which allows no more than four years for starting construction and requires termination when that deadline is not met. Order Lifting Stay at PP 22-23, JA 136. During the eleven-year stay, Mr. Keating encountered continuing obstacles and delays in obtaining the water rights, and repeatedly sought extensions of time from the Commission for completing the requirements not stayed. In 2007, upon learning of potential new prerequisites to securing the water rights from the state and reviewing the Project history, including Mr. Keating's failure to file an amendment application required by the 1996 order, and in light of the purpose of FPA section 13 to provide for prompt project development, the Commission lifted the stay and terminated the license. *Id.*

Mr. Keating sought rehearing before the Commission, but the Commission dismissed his request for rehearing based upon a regulatory deficiency, noting that further rehearing should be requested, if desired. Rehearing Notice at 1, 3, JA 216,

218. Mr. Keating did not seek rehearing, but instead filed the instant petition for review, and unsuccessfully sought a stay from both this Court and the Commission. *See infra* pp. 15-16.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY FRAMEWORK

Under Part I of the FPA, the Commission is authorized to issue licenses for the construction, operation and maintenance of hydroelectric projects on jurisdictional waters. *See* FPA § 4(e), 16 U.S.C. § 797(e). FPA section 13 requires a licensee to commence construction of a newly licensed hydroelectric facility within two years of license issuance. 16 U.S.C. § 806. The Commission may extend this deadline “once but not longer than two additional years.” *Id.* *See also Maine Hydroelectric Dev. Corp.*, 15 FERC ¶ 61,107, p. 61,246 (1981) (Commission will extend construction commencement deadline “so long as it is not clearly unreasonable and capricious to do so”); *Puget Sound Power & Light Co.*, 33 FERC ¶ 61,375, p. 61,734 (1985) (same). As in this case, the Commission may also stay a license order, or the terms and conditions of such an order, consistent with its general authority to carry out its statutory responsibilities under both FPA section 309, 16 U.S.C. § 825h, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 705. *See, e.g., Kings River Conservation Dist.*, 30 FERC ¶ 61,151, p. 61,320 (1985) (describing FERC’s authority to stay license orders); *see*

*also California Co. v. FPC*, 411 F.2d 720, 721-22 (D.C. Cir. 1969) (affirming Commission authority to “toll,” or stay, the statutory deadline for acting upon rehearing requests). FPA section 309 provides the Commission with the “power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders . . . as it may find necessary or appropriate to carry out the provisions of [the FPA].” 16 U.S.C. § 825h. The APA grants the Commission the specific authority to “postpone the effective date of action taken by it” upon a finding that “justice so requires.” 5 U.S.C. § 705.

If construction of a licensed project does not begin by the deadline set in the license, as extended or stayed, then, as also required by FPA section 13, “after due notice given, the license *shall*, as to such project works or part thereof, be terminated upon written order of the commission.” FPA § 13, 16 U.S.C. § 806 (emphasis added); Order Lifting Stay at P 18, JA 134. The Commission’s regulations specify the process for terminating a license, requiring ninety days notice to the licensee. 18 C.F.R. § 6.3.

## **II. EVENTS LEADING TO THE ORDERS ON REVIEW**

### **A. Project License**

This case concerns the proposed Tungstar Project (“Project”), a hydroelectric project the Commission licensed in 1992. *Joseph M. Keating*, 60



FERC ¶ 61,016 (1992) (“License Order”) (excerpts attached, Add. at B1).<sup>1</sup> The Project would be located on Morgan Creek and Pine Creek in Inyo County, California, occupying, in part, public lands within the Inyo National Forest administered by the U.S. Department of Agriculture’s Forest Service (“Forest Service”). *See* Order Lifting Stay at P 2, JA 128. As licensed, the Project would consist of the following facilities: (1) a diversion dam and intake structure on Morgan Creek; (2) a penstock from the intake to the Project’s powerhouse; (3) a powerhouse, which would contain a 990-kW turbine generator; (4) a meandering channel from the Project’s tailrace, through which water would flow before being returned to Pine Creek; and (5) a transmission line. *Id.* at P 3, JA 128-29.

Consistent with the FPA section 13, 16 U.S.C. § 806, requirement of a two-year deadline for commencement of construction, the Commission set July 1, 1994 as the deadline. *Id.* at P 5, JA 129; *see also* License Order, 60 FERC at Ordering Para. A (incorporating by reference the requirements of the FPA), Add. at B9. Upon Mr. Keating’s request, the Commission subsequently granted a two-year extension of the deadline to July 1, 1996, the maximum extension permitted under the FPA. Order Lifting Stay at P 5, JA 129.

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<sup>1</sup> This licensing proceeding has previously been before this Court. *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) (requiring FERC to reinstate previously dismissed license application and to consider whether state Clean Water Act authorization remained valid after attempted revocation).

As relevant here, the Project license included a condition imposed by the Forest Service under FPA section 4(e), 16 U.S.C. § 797(e), requiring Mr. Keating to obtain a permit from the Service before starting construction.<sup>2</sup> Order Lifting Stay at P 6, JA 129; *see also* License Order, 60 FERC at p. 61,066-67 (Article 101), Add. at B11. The Forest Service issued that permit effective November 2, 1995. Order Lifting Stay at P 6, JA 129. The permit itself provides that the start of construction is contingent upon Mr. Keating obtaining the requisite water rights for operations. *Id.*

**B. Stay Of Construction Commencement Deadline**

On the very day of the deadline to commence construction, July 1, 1996, Mr. Keating filed a request to stay the license pending the completion of legal proceedings necessary to obtain water rights for the Project. Order Lifting Stay at P 7, JA 129; *see also* Petition for Stay of License at 6-7, R.1, JA 42-43. Mr. Keating explained that the Forest Service had found inadequate his claimed riparian water rights and directed him to obtain an appropriative water right from the state. R.1 at 2-4, JA 38-40.

By order of October 21, 1996, the Commission granted, in part, Mr. Keating's stay request, staying only the deadline for commencement of

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<sup>2</sup> The Commission has no discretion to reject or modify conditions submitted pursuant to FPA section 4(e). *City of Tacoma v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006).

construction but not the other license requirements. *Joseph M. Keating*, 77 FERC ¶ 61,060, p. 61,225 (1996) (“Stay Order”), R.2, JA 49-53. The Commission explained that it has stayed the construction deadline where, “for reasons beyond its control, [the licensee] has not obtained a necessary pre-construction approval . . . .” *Id.*, JA 51. (In fact, the Commission had previously granted a stay to another licensee, controlled by Mr. Keating, pending an appeal of the same water rights provision in a Forest Service permit. *Id.* (citing *Sierra Hydro, Inc.*, 60 FERC ¶ 61,046 (1992)), JA 51; *see also* Order Lifting Stay at n.4, JA 129.) The Commission directed Mr. Keating to file annual reports on the status of his efforts to obtain water rights adequate to satisfy the terms of the Forest Service permit. Stay Order at p. 61,226, JA 53.

The Commission, however, declined to stay the remaining license requirements. Stay Order at p. 61,225, JA 52. At that time, Mr. Keating still needed to complete eleven pre-construction plans addressing a wide range of issues, from water quality to recreation. *Id.*, JA 52. And, as Commission staff had earlier advised Mr. Keating, the planned redesign of the Project, including changes to the turbines, the dam and the meandering channel, required a license amendment application. *Id.* The Commission set a 6-month deadline for the pre-construction plans and the amendment application, requiring those filings by April 21, 1997. *Id.*, JA 52; *see also* Order Lifting Stay at P 8, JA 130.

Between 1997 and 1999, Mr. Keating pursued litigation seeking to confirm the adequacy of his riparian water rights. Ultimately, his federal court case against the Forest Service was dismissed based on sovereign immunity. Order Lifting Stay at P 9 (citing decisions), JA 130. Following that dismissal, on January 27, 2000, Mr. Keating advised the Commission that he would seek a comprehensive stream adjudication from the California State Water Resources Control Board (“Water Board”) to confirm his riparian water rights, and that he anticipated filing this claim within a few weeks. Request for a Twelve Month Extension, R.15, JA 55. But, Mr. Keating waited nearly two years before actually filing his water rights application with the Water Board. Order Lifting Stay at P 9, JA 130; *see* Letter Regarding Stay Status at 2, R.29, JA 71 (discussing two applications filed in August 2001 and December 2001).

Following the Stay Order, until August 2003, the Commission continued to grant Mr. Keating’s repeated requests for extension of the already-extended deadlines for filing the pre-construction plans and license amendment application. Order Lifting Stay at P 10, JA 130; *see also* R.6, R.12, R.16, R.19, R.21, R.23, R.25, R.27 (orders granting extensions of time). Then, on August 26, 2003, Commission staff sent Mr. Keating a letter reminding him of the upcoming, extended, November 1, 2003 deadline for these items. Order Lifting Stay at P 10, JA 130-31; Letter Regarding Stay Status at 2, R.29, JA 71. Staff explained that the

start of construction deadline had then been stayed for seven years and Mr. Keating had repeatedly failed to timely provide the status reports required by the Stay Order. R.29 at 3, JA 72. In light of these facts, the letter directed Mr. Keating to respond and address why staff should not recommend to the Commission that it lift the stay of the construction deadline.<sup>3</sup> *Id.*

Mr. Keating neither filed the required plans nor requested a further extension by the November 1, 2003 deadline. Order Lifting Stay at PP 10-11, JA 130-31.

In March 2004, Mr. Keating requested a further extension of the deadline for the pre-construction plans and amendment application, and sought clarification regarding which of his planned changes would require an amendment application. *Id.* at P 11, JA 131. Commission staff responded by letter of March 25, 2004, stating that, based on its preliminary review, the planned changes to the penstock, the dam, and the gaging station, and the elimination of the meandering channel would not appear to require an amendment application. *Id.* at P 12, JA 131; *see also* Letter Regarding Proposed Changes, R.36, JA 73. But, staff advised that the remaining changes, concerning recreation facilities, the transmission line and an additional turbine, would necessarily require an amendment application. R.36 at 2, JA 74. In addition, staff directed Mr. Keating to file two reports: (1) a report on

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<sup>3</sup> The letter also directed a similar filing for the project licensed to Mr. Keating's Sierra Hydro, Inc. *See supra* p. 8.

the Forest Service's schedule for approval of the pre-construction plans by April 8, 2004; and (2) a report on the status of the water rights application by April 24, 2004. *Id.* at 3, JA 75; *see also* Order Lifting Stay at P 12, JA 131-32.

On April 29, 2004, Mr. Keating responded by stating that he expected to file the required plans with the Forest Service by the end of May and that the Forest Service would take final action on the plans by July 1, 2004. Order Lifting Stay at P 13, JA 132; *see also* Response to March 25, 2004 Letter, R.38, JA 77. Also, Mr. Keating advised that he intended to amend his water rights application to reflect the elimination of the meandering channel and other changes. R.38 at 2, JA 78.

Nearly two years went by before Mr. Keating filed another status report, on February 28, 2006, including some of the pre-construction plans for Commission approval, but not the wildlife habitat mitigation plan, the water quality study plan or the fisheries resources plan. Order Lifting Stay at P 14 & n.11, JA 132; *see* Status Report, R.44, JA 80. Although this report included correspondence from the Forest Service – dated August 24, 2004 – approving the filed plans, the Service subsequently notified Mr. Keating that “with the proposal to eliminate the meandering channel, and your subsequent *pending FERC license amendment* [although no such amendment application had been filed], Forest Service approval is not required on several of the [plans] at this time.” Order Lifting Stay at P 14 (emphasis added), JA 132. Mr. Keating asserted that the omitted plans were no

longer required because they applied only to the meandering channel, which he planned to eliminate. *Id.* at n.12, JA 132. And, Mr. Keating explained that the Water Board had rejected protests to his water rights application, except to the extent based upon protection of proprietary water rights. *Id.* at P 15, JA 133. In this regard, Mr. Keating advised that he was negotiating for the purchase of lands needed at the Project's diversion site. *Id.*; *see also* R.44 at 3, JA 82. Mr. Keating also noted that the Forest Service had raised the possible need for a "point discharge" permit from the Water Board. R.44 at 3, JA 82.

Mr. Keating next filed a status report with the Commission over a year later, on March 26, 2007, reporting that: (1) his negotiations to secure property rights at the diversion site had been unsuccessful and that he intended to secure the rights using the eminent domain authority granted to licensees under FPA section 21, 16 U.S.C. § 814, if necessary; and (2) he had not yet determined if a "point discharge" permit would be required. Status Report at 1, R.46, JA 84.

In April 2007, Commission staff conducted a teleconference with Mr. Keating and the Forest Service concerning his proposed license amendment. Order Lifting Stay at P 16, JA 133. When asked why the amendment application had not yet been filed, Mr. Keating stated that his priority was to obtain the required water rights. *Id.* at P 16 & n.13 (citing Commission Staff Telephone Conversation Record (Apr. 24, 2007), R.48, JA 94), JA 133.

### III. THE COMMISSION'S PROCEEDINGS AND ORDERS

#### A. Order Lifting Stay

By order of September 20, 2007, the Commission lifted the stay of the commencement of construction deadline in the Project license and gave notice of the termination of the license ninety days from the date of the Order. Order Lifting Stay at PP 1, 23, JA 128, 136; *see also* 18 C.F.R. § 6.3 (“Termination of License”). The Order also dismissed a motion to intervene filed by Pine Creek Mine, LLC, Avocet Tungsten, Inc. and Bishop Tungsten Development LLC (collectively, “Pine Creek”), which had petitioned the Commission to lift the stay and terminate the license. Order Lifting Stay at P 17, JA 133-34; *see* Pine Creek Motion to Intervene, R.52, JA 96. The Commission did, however, consider the information contained in Pine Creek’s motion, which included recent correspondence from the Water Board to Mr. Keating. Order Lifting Stay at P 17, JA 134.

The Commission conducted a comprehensive review of the Project history and determined that “15 years after the issuance of his license and 11 years after the stay of the deadline to commence construction of his project, Mr. Keating’s ability to commence construction is *still* dependent upon approval of his now six-year-old state water rights application, his yet-to-be-filed pre-construction license amendment application, and Forest Service approval of certain pre-construction plans.” *Id.* at P 22 (emphasis added), JA 136. For these reasons, the Commission



concluded that “there is no reasonable assurance that Mr. Keating will be able to commence project construction anytime in the foreseeable future.” *Id.* Thus, relying on the purpose of FPA section 13 to “provide for the prompt development of licensed projects,” the Commission lifted the stay and gave notice of termination of the license. *Id.*

### **B. Rehearing Notice**

Mr. Keating filed a timely request for rehearing of the Order Lifting Stay. Request for Rehearing, R.56, JA 160. By notice issued November 19, 2007, the Commission dismissed Mr. Keating’s request as deficient under the Commission’s regulations. Specifically, the Commission determined that Mr. Keating’s request failed to include a section entitled “Statement of Issues,” as required by 18 C.F.R. § 385.713(c)(2), listing each issue presented to the Commission for rehearing along with relevant precedent. Rehearing Notice at 1, JA 216. Because any issue not so listed is deemed waived under the Commission’s regulations, the Notice dismissed Mr. Keating’s request for rehearing. *Id.*

Briefly addressing the merits of Mr. Keating’s request, the Commission explained that “Mr. Keating’s diligence (or lack of diligence) was not the deciding factor in the Commission’s decision.” *Id.* at 2, JA 217. The Commission reiterated the findings of the Order Lifting Stay: the ongoing delay in Mr. Keating’s attempt to obtain water rights and other authorizations, and the lack of a

reasonable assurance that construction could commence in the foreseeable future, supported lifting the stay and terminating the license. *Id.* Nevertheless, the Commission explained that rehearing of the Rehearing Notice would be available: “Request[s] for rehearing of this notice must be filed within 30 days of the date of issuance of this notice, pursuant to 18 C.F.R. § 385.713 (2007).” *Id.* at 3, JA 218. In other words, Mr. Keating had thirty days to ask the Commission to reverse its dismissal of his request for rehearing.

Mr. Keating did not seek rehearing of the Rehearing Notice, but, fifteen days later, filed a motion for stay of the Commission’s decisions pending judicial review. Mr. Keating filed the petition now before this Court on January 7, 2008.

The Commission subsequently, in an order not on review here, dismissed Mr. Keating’s motion for stay, finding that Mr. Keating would not be entitled to judicial review because he had failed to seek rehearing of the Rehearing Notice and therefore had not exhausted his administrative remedies. *Joseph M. Keating*, 122 FERC ¶ 61,027 (Jan. 17, 2008) (“Order Dismissing Motion for Stay”) (attached, Add. at B22). Mr. Keating renewed his request for a stay before this Court on January 28, 2008.

Finally, the Commission moved to dismiss this case for lack of jurisdiction under FPA section 313(b), 16 U.S.C. § 825l(b), on February 8, 2008. By order of April 3, 2008, the Court denied Mr. Keating’s motion for stay and referred the

Commission's motion to dismiss to the merits panel, directing the parties to address in their briefs the issues presented in the motion to dismiss.

## SUMMARY OF ARGUMENT

In 1996, the Commission exercised its discretion to stay Mr. Keating's license to allow him time to satisfy pre-construction conditions required by the Forest Service. Nearly eleven years later, the Commission's review of the record revealed continuing, prolonged delays in Mr. Keating's efforts to satisfy those conditions, which led the Commission to again exercise its discretion, this time to lift the stay and, as a consequence, terminate the license.

This Court, however, need not delve into the complex and protracted history of Mr. Keating's Project, as Mr. Keating has failed to satisfy the jurisdictional prerequisites to judicial review under FPA section 313(b), 16 U.S.C. § 825l(b). Mr. Keating timely sought rehearing of the Commission's initial order, but the Commission dismissed that request for failure to comply with the Commission's regulations. Mr. Keating did not seek rehearing of the dismissal notice. Because the FPA requires a Commission order upon the merits of a rehearing request in order for this Court's jurisdiction to attach, Mr. Keating's petition should be dismissed.

In any event, however, the Commission's orders are consistent with its long-established precedent and well-supported by the lengthy record of delay in this case. Reflecting the purpose of FPA section 13, 16 U.S.C. § 806, to encourage the prompt development of licensed hydroelectric projects, the Commission will grant

or continue a stay of a construction deadline (beyond the four years contemplated in FPA section 13) only in narrow circumstances, and it will not allow for indefinite stays. Here, the Commission found record evidence of expected additional, protracted delays due to Mr. Keating's failure, after eleven years, to obtain, in particular, water rights and property rights necessary for Project operation. Mr. Keating's mantra – that he is “closer than ever” to completing the pre-construction requirements – simply rings hollow in light of the Commission's findings of continuing complications and delays.

The Commission understands that Mr. Keating has invested time – indeed more than 16 years – into developing this Project; however, the Commission never assured Mr. Keating that the stay could continue indefinitely. And, while the Commission has been patient in allowing Mr. Keating to pursue project development, its patience cannot now be recast as inequity to the licensee (or as the basis for an extraordinary claim of estoppel). In light of the purpose of FPA section 13 to encourage expeditious development, the Commission reasonably drew the line, based upon substantial record evidence of past and continuing delays, at eleven years.

## ARGUMENT

### I. MR. KEATING’S PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Mr. Keating has failed to satisfy the jurisdictional prerequisites for judicial review because the Commission dismissed his request for rehearing based upon a regulatory deficiency<sup>4</sup> and did not dispose of the request on the merits. It is well-established that an aggrieving order and a rehearing order are prerequisites to judicial review under FPA section 313(b), 16 U.S.C. § 8251(b). *See City of Oconto Falls*, 204 F.3d at 1159-60 (distinguishing aggrieving orders and rehearing orders); *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423 (1st Cir. 2001) (same). Further, under the FPA, review is limited to “orders of a definitive character *dealing with the merits* of a proceeding . . . .” *Papago Tribal Util. Auth.*, 628 F.2d at 239 (emphasis added) (addressing requirements for finality) (quoting *FPC v. Metropolitan Edison Co.*, 304 U.S. 365, 384 (1938)).

The Rehearing Notice *dismissed*, but did not *deny*, Mr. Keating’s request for rehearing for failure to comply with “Rule 713(c)(2) of the Commission’s Rules of Practice and Procedure[, which] requires that a rehearing request must include a separate section entitled ‘Statement of Issues’ listing each issue presented to the Commission in a separately enumerated paragraph that includes representative

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<sup>4</sup> Mr. Keating does not challenge the dismissal on this basis.

Commission and court precedent on which the participant is relying.” Rehearing Notice at 1 (citing 18 C.F.R. § 385.713(c)(2) and *Revisions of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 Fed. Reg. 55,723 (Sept. 23, 2005), FERC Stats. and Regs. ¶ 31,193 (2005)) (footnote omitted), JA 216. Thus, the Rehearing Notice was merely a procedural ruling, rejecting Mr. Keating’s request for rehearing as deficient.

Highlighting the procedural nature of the dismissal, and unlike an ordinary final Commission order on the merits of a request for rehearing, the Rehearing Notice gave Mr. Keating a roadmap to pursuing his rights: “This notice constitutes final agency action. Request[s] for rehearing of this notice must be filed within 30 days of the date of issuance of this notice, pursuant to 18 C.F.R. § 385.713 (2007).” Rehearing Notice at 3, JA 218. Commission orders on the merits of requests for rehearing do not contain this instruction. *See, e.g., Homestead Energy Resources, LLC*, 122 FERC ¶ 61,148 (2008); *Garkane Energy Coop., Inc.*, 121 FERC ¶ 61,172 (2007).

To be sure, the Commission did indicate that Mr. Keating’s rehearing request “is without merit.” Rehearing Notice at 2, JA 217. But that discussion was not dispositive of Mr. Keating’s request. The Commission could have simply stopped after rejecting Mr. Keating’s faulty rehearing request. Instead, out of an abundance of caution, the Commission reiterated the conclusions in the Order

Lifting Stay, without offering any new findings. *Id.* Because the Rehearing Notice disposed of Mr. Keating's rehearing request based on a regulatory deficiency, it is not a final order on the merits of his request. Mr. Keating, who did not follow the roadmap for seeking further review provided in the Rehearing Notice, should not be rewarded because the Commission provided more process than it was obligated to provide under its rules.

By disregarding the Commission's directive in the Rehearing Notice, instructing Mr. Keating to seek rehearing of the Notice if he disputed it, Mr. Keating has failed to exhaust his administrative remedies. Rehearing Notice at 3, JA 218; Order Dismissing Motion for Stay at P 3, Add. at B23; *see Granholm v. FERC*, 180 F.3d 278, 282 (D.C. Cir. 1999) ("A party's belief that nothing would change on rehearing is irrelevant. Section 313(a) [16 U.S.C. § 825l(a)] speaks in absolutes."); *see also Tesoro Refining & Mktg. Co. v. FERC*, 552 F.3d 868, 872, 874 (D.C. Cir. 2009) (holding that "[n]o one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted" and the futility exception to this rule requires the "certainty of an adverse decision") (quotations omitted). As the Commission noted in dismissing Mr. Keating's stay request as moot, the Commission has reinstated rehearing requests suffering from the same regulatory deficiency as Mr. Keating's. Order Dismissing Motion for Stay at P 3 n.9 (citing *Duke Power Co., LLC*, 117 FERC ¶ 61,300 (2006) (reinstating



rehearing request where party was, *inter alia*, not represented by counsel and was appearing before FERC for the first time)), Add. at B23. Here there was no “certainty” that the Commission would not reinstate Mr. Keating’s rehearing request if he had sought rehearing of the Rehearing Notice. Therefore, Mr. Keating was obliged to seek rehearing of the Rehearing Notice in order to exhaust his administrative remedies.

The Commission’s reliance on procedural regulations for rejecting Mr. Keating’s request for rehearing without ruling on the merits does not alter the controlling analysis. *See Granholm*, 180 F.3d at 282 (“As the saying goes, ‘rules is rules.’”) (citation omitted). While the Commission or this Court may waive regulatory requirements for requests for rehearing, Mr. Keating sought neither rehearing of the Rehearing Notice nor waiver of the Commission’s rule, and hence the Commission’s decision is final and non-appealable. Moreover, court-directed waiver is inappropriate absent a finding that the Commission unreasonably applied its regulation in this case. *Rainsong Co. v. FERC*, 151 F.3d 1231, 1234 (9th Cir. 1998) (relying on FERC regulation to determine the starting date for the period for filing an appeal where there was no cause to believe it was unreasonably applied). Given the Commission’s application of the Statement of Issues requirement in like circumstances, its application here is not unreasonable. Rehearing Notice at n.5 (citing *South Carolina Elec. & Gas Co.*, 116 FERC ¶ 61,218 (2006) (rejecting

request for rehearing on same basis); *Duke Power Co., LLC*, 116 FERC ¶ 61,171 (2006) (same)), JA 217.

Finally, the Court’s acceptance of jurisdiction in this case could undermine the Commission’s procedural rules, which place reasonable requirements on the parties appearing before it, thus fostering the same uncertainty those rules are designed to avoid. As the Commission explained in applying its rules here,

the purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues. Having a clearly articulated Statement of Issues ensures that the issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission.

Rehearing Notice at n.4 (citing Order No. 663 at PP 3-4), JA 216-17; *compare Duncan Point Lot Owners Ass’n v. FERC*, 522 F.3d 371, 377-78 (D.C. Cir. 2008) (citing, *e.g.*, Fed. R. App. P. 28(a)(9)(A) and holding that the Court “will not address an asserted but unanalyzed argument because appellate courts do not sit as self-directed boards of legal inquiry and research . . . .”) (quotation omitted)).

As the Commission noted when it promulgated the statement of issues requirement, this filing requirement advances the statutory requirement of “specificity” in raising issues to the Commission on rehearing. Order No. 663 at P 4 (“There have been numerous instances where appeals have been denied because

an appellant failed to clearly raise an issue before the Commission on rehearing.”) (citing, *e.g.*, *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1282, 1285 (D.C. Cir. 2003) (concluding that the court lacked jurisdiction to address an issue because a “general and vague statement” does not satisfy the statutory requirement for specificity in the analogous provision of the Natural Gas Act)); *see* FPA § 313(a), 16 U.S.C. § 825l(a) (“application for rehearing shall set forth specifically the ground or grounds upon which such application is based”). *See also Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (discussing the specificity requirement and rejecting petitioner’s attempt to rely on arguments incorporated into its request for rehearing by reference). Dismissing Mr. Keating’s petition will confirm the Commission’s authority to enforce its procedural rules in a reasonable, consistent manner for the benefit of parties, the Commission, and the courts.

## **II. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION TO LIFT THE STAY OF THE CONSTRUCTION DEADLINE AND THUS TERMINATE MR. KEATING’S LICENSE BASED UPON A LENGTHY, AND CONTINUING, RECORD OF DELAY**

### **A. Standard Of Review**

Generally, this Court “review[s] the Commission’s licensing decisions, such as those taken in this case, under a deferential standard and will set aside FERC’s orders only if they are arbitrary and capricious.” *Duncan Point Lot Owners Ass’n*, 522 F.3d at 375 (citing *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997)); 5 U.S.C. § 706(2)(A)). Under that standard a petitioner “bears a heavy

burden” as “[t]he court may not substitute its judgment for that of the [agency], and must consider only ‘whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . .’” *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453, 461 (D.C. Cir. 2004) (citation omitted).

This Court should review the Commission’s decision to lift the stay under the same standard applied to agency decisions to grant or deny stays: the abuse of discretion standard. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968) (“the issuance of a stay of an administrative order . . . is a matter committed . . . to the Commission’s discretion”); *see also Louisiana Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (FERC’s discretion is at its zenith when fashioning remedies). The courts have long applied this deferential standard of review to lower court stay decisions, recognizing that such decisions require an exercise of judgment. *See, e.g., Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (“[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket” and “calls for the exercise of judgment”); *Bledsoe v. Crowley*, 849 F.2d 639, 645-46 (D.C. Cir. 1988) (citing *Landis* in describing lower court’s broad authority to stay judicial proceedings pending arbitration); *see also White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (relying on Fed. R. Civ. P. 26(c) (“the court . . . may make

any order which justice requires”) in applying abuse of discretion standard of review to lower court’s decision not to stay discovery). These same considerations support application of the abuse of discretion standard to the Commission’s decision to lift the stay here. *See supra* pp. 4-5 (discussing Commission’s broad authority under FPA section 309, 16 U.S.C. § 825h, and the APA, 5 U.S.C. § 705, to grant stays and take other remedial action).

The Commission’s factual findings “if supported by substantial evidence, shall be conclusive.” FPA § 313(b), 16 U.S.C. § 825l(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (citation omitted).

**B. The Commission Will Not Hold Licenses In Abeyance Indefinitely**

Under FPA section 13, 16 U.S.C. § 806, the Commission’s statutory mandate is to ensure the “prompt development” of licensed hydroelectric projects. Order Lifting Stay at P 22, JA 136. In accord with this mandate, the Commission’s established precedent and policy provides that it will stay the start of construction deadline in a hydroelectric project license, beyond the four years contemplated in the statute, only in narrow circumstances and will not permit a stay to continue indefinitely. *Id.* at P 18, JA 134. Mr. Keating does not challenge the Commission’s standard, but only the application of it in this case.

As the Commission first explained in the Stay Order and reiterated in the Order Lifting Stay, it

grants a stay of the commencement of construction deadline only in narrowly prescribed circumstances, including, as pertinent here, where a post-license authorization required by another agency to commence construction has not yet been obtained, for reasons beyond the control of the licensee.

Order Lifting Stay at P 18, JA 134. The Commission granted Mr. Keating a stay of the Project license based upon this principle. Stay Order at p. 61,225 (citing cases), JA 51.

But, “while the Commission is willing to make reasonable accommodations to afford licensees the time needed to resolve such issues with other agencies, [it] will not hold licenses in abeyance indefinitely.” Order Lifting Stay at P 18, JA 134 (citing *Sierra Hydro, Inc.*, 116 FERC ¶ 61,060 at P 7 (2006) (relying on same standard, one year earlier, in lifting stay and terminating license held by Mr. Keating’s Sierra Hydro, Inc.)). Thus, the Commission has held that “there may be predicates to project construction which, although beyond a licensee’s control, may require unreasonable delay in starting construction, and regarding which it is unreasonably speculative to conclude that they will ultimately be resolved.” *Id.* The Commission applies this same standard in determining both whether to grant a stay and, as here, whether to allow a stay to continue in effect. *Id.* (citing *East Bench Irrigation Dist.*, 59 FERC ¶ 61,277, p. 62,006 n.16 (1992) (noting the

Commission’s policy in granting a temporary stay and requesting additional information to determine whether a further stay was warranted)).

Upon lifting a stay, the Commission is constrained by the mandate of FPA section 13 to terminate a license where construction has not commenced by the applicable deadline. Order Lifting Stay at P 22, JA 136; *see also, e.g., Arkansas Power & Light Co. v. FPC*, 125 F.2d 982, 986 (8th Cir. 1942) (“the Commission rightfully and in obedience to the mandate of the statute terminated petitioner’s license”); *Electric Plant Bd. of the City of Augusta, Ky.*, 112 FERC ¶ 61,342 at P 27 (2005) (denying a stay of the start of construction deadline and holding that “[a]fter a licensee has held a license for such a length of time without making substantial progress toward project construction, the public interest requires that the license be terminated, thus freeing the site for development by other entities, or for other beneficial public uses”).

**C. The Commission Reasonably Found That The Prolonged, Continuing Delay In Mr. Keating’s Attempt To Obtain Water Rights And Other Pre-Construction Approvals Justifies Lifting The Stay**

In deciding to lift the eleven-year stay of Mr. Keating’s license, the Commission did not, as Mr. Keating claims (*e.g.*, Br. 11), disregard the progress he has made in resolving the water rights issue, nor did it fault Mr. Keating’s diligence. Rather, the Commission comprehensively reviewed the ongoing proceedings and identified a number of outstanding matters:

- The now six-year-old water rights application remains pending before the Water Board (Order Lifting Stay at PP 19-20, 22, JA 134-35, 136);
- An additional permit, a “point of discharge” permit, may be required before the Water Board will act on his pending application (*id.* at P 19, JA 135);
- Access rights to the Project’s diversion site, which may be required before the Water Board will act on his pending application and were required to be obtained by 1997 by the license, have not yet been obtained despite at least one year of negotiations (*id.* at PP 19-20, JA 134-35);
- Mr. Keating’s planned license amendment application, which may require a new analysis of the Project’s impact on minimum flows and fisheries – a contentious issue in the original licensing proceeding – has yet to be filed (*id.* at P 21, JA 135-36); and
- Other pre-construction plans, including the recreation plan as well as the plans pertaining to the meandering channel – which remains part of the licensed Project until the license is amended – have yet to be approved by the Forest Service (*id.* at n.23, JA 136).

The Commission reasonably concluded, based upon the information in the record, that each of these matters will not be resolved on a definitive timeline, rendering speculative the possibility of construction in the foreseeable future.

Mr. Keating’s arguments that he is “closer now than he ever was to commencing project construction” (Br. 8), and that the water right proceeding is “near resolution” (Br. 11), find no support in the record. The Commission identified the potential need for a “point of discharge” permit and the necessity of obtaining property rights at the Project’s diversion site as outstanding matters that “could require additional prolonged proceedings” before the Water Board. Order Lifting Stay at P 19, JA 135. For support, the Commission specifically pointed to



inquiries from Mr. Keating and his counsel to the Water Board in March and April 2007 seeking information regarding these requirements. *Id.* at P 19, JA 135; *see supra* p. 12 (potential need for a “point of discharge” permit also noted in Mr. Keating’s February 2006 status report). With regard to property rights, the Commission relied on a July 30, 2007 letter from the Water Board to Mr. Keating indicating that it will not move forward with Mr. Keating’s application, by holding a hearing, until Mr. Keating demonstrates “that [he has] the ability, and [is] actively pursuing obtaining the [diversion point] property.” Order Lifting Stay at P 20, JA 135 (citing Pine Creek Motion to Intervene, R.52, Ex. F at 2, JA 127).

Mr. Keating’s opening brief does not rebut, address, or even mention the Commission’s findings concerning the need for a “point of discharge” permit and property rights.<sup>5</sup> On rehearing before the Commission, Mr. Keating argued that the permit and property rights are not necessary, but provided no support for this assertion. Request for Rehearing, R.56 at 6, JA 166. Mr. Keating also noted that the license authorizes him to use eminent domain authority to obtain necessary property rights (*id.*), but this does not resolve the fact that Mr. Keating had not

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<sup>5</sup> Because Mr. Keating has declined to dispute these findings in his initial brief, he has waived these contentions on appeal. *See, e.g., Environmental Defense v. EPA*, 467 F.3d 1329, 1339 n.5 (D.C. Cir. 2006) (“[i]ssues may not be raised for the first time in a reply brief”) (quoting *Rollins Env’tl. Services, Inc. v. EPA*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991)).

apparently filed such a claim and had been negotiating to obtain title to the diversion site for some time (*see supra* p. 12), without success. Order Lifting Stay at P 20, JA 135; *see* Pine Creek Motion to Intervene, R.52 at 11 (noting that in 2002 Pine Creek filed a protest to Mr. Keating’s water rights application based, in part, upon Pine Creek’s ownership of the Project’s diversion site), JA 106; *see also id.* at 4-5, JA 99-100 (describing Project history). Nor does the existence of eminent domain authority suggest, and Mr. Keating has not argued, that he could obtain the property rights promptly. *See* R.52, Ex. F at 2 (Water Board letter explaining that eminent domain authority is inadequate to provide assurance necessary for Board to act on Mr. Keating’s application), JA 127. Thus, Mr. Keating has not refuted the Commission’s finding that his “ongoing failure to obtain these property rights would further delay [his] obtaining necessary water rights and commencing project construction.” Order Lifting Stay at P 20, JA 135.

Further, as the Commission noted, Mr. Keating was in fact required to obtain all necessary property rights, including water rights, by exercise of eminent domain or otherwise, within five years of license issuance, *i.e.* by 1997. *Id.*; *see also* Letter Regarding Stay Status, R.29 at 2 (reminding Mr. Keating of this requirement, which was not stayed, in 2003), JA 71.

The Commission also based its decision to lift the stay and terminate the license on Mr. Keating’s decision to delay filing the required amendment

application. Order Lifting Stay at P 21, JA 136. Mr. Keating recognizes that an amendment application is required to amend the transmission line route and location of recreation facilities, and to eliminate the meandering channel. Br. 11-12. The Stay Order directed Mr. Keating to file any necessary amendment application by April 21, 1997. By granting extensions of this deadline, the Commission never endorsed the suggestion that it would be duplicative, as Mr. Keating now argues (Br. 12), to require the amendment application prior to a decision by the Water Board. Order Lifting Stay at P 21, JA 136 (“Mr. Keating’s decision to delay . . . the filing of his pre-construction license amendment application is . . . inconsistent with the 1996 stay order”). Mr. Keating’s assertion that the nature of the water right received could necessitate additional changes lacks the detail and support necessary to overcome the Commission’s findings. Moreover, the Commission here not only required the amendment application to be filed by a date certain, but it also has the discretion to determine the proper ordering of its own proceedings. *See, e.g., Tennessee Valley Mun. Gas Ass’n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (“An agency has broad discretion to determine when and how to hear and decide the matters that come before it.”) (citing cases); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 274 n.12 (D.C. Cir. 1986) (recognizing “the inherent powers of an agency to control its own docket”) (citing cases).

Mr. Keating also asserts – again without reference to record evidence – that “it is very likely [he] can obtain the requisite amendments expeditiously.” Br. 11. But, Mr. Keating’s brief – again – does not address or refute the Commission’s finding that in fact his plan to propose an additional turbine “would require reanalyzing the project’s impact on minimum flows and fishery resources in Pine Creek, which was a contentious issue in the licensing proceeding.” Order Lifting Stay at P 21 (citing License Order, 60 FERC at p. 61,063-64 (declining to adopt state agency recommendation for higher minimum flows than those required by federal agency), Add. at B4 – B6), JA 135-36; *see supra* p. 10 (discussing Staff’s 2004 letter advising Mr. Keating that the additional turbine would require a formal amendment). Thus, the Commission reasonably concluded that Mr. Keating’s unilateral decision to delay filing the amendment application “has ensured further substantial delay in commencing project construction.” *Id.* at P 21, JA 136.

Also, as the Commission noted, it is not clear whether Mr. Keating has even notified the Water Board of the planned additional turbine or reconfiguration of the dam. *Id.* at P 19 n.19, JA 136. Thus, the Commission reasonably questioned “whether those changes would *further* delay a decision on [Mr. Keating’s] water rights application.” *Id.* (emphasis added).

Finally, the Commission also relied on the outstanding need for Forest Service approval of some pre-construction plans, specifically the recreation plan,

and three plans relating to the meandering channel. *Id.* at P 22 n.23, JA 136. Mr. Keating argues that the plans are no longer necessary due to his intention to eliminate the meandering channel. Br. 12. But, Mr. Keating’s failure to file an amendment application to eliminate the meandering channel and any related requirements compounds his difficulties since, as the Commission held, he “must comply with the requirements of the named license articles as long as they are in effect . . . .” *Id.* at P 14 n.12, JA 132; *see also supra* p. 11 (Forest Service understood that amendment application was “pending” when it notified Mr. Keating that its approval was not required).

To the extent the plans will be required even without the meandering channel, Mr. Keating asserts that these plans too may be affected by the Water Board decision and so complying with the Commission’s directive would be premature and potentially duplicative. Br. 13. But, the Commission noted that Mr. Keating has not even addressed Forest Service comments on the recreation plan. Order Lifting Stay at P 14 n.12, JA 132. And, as noted above, the Commission’s ordering of proceedings so as to ensure license compliance and satisfaction of the Commission’s statutory goal, including the prompt development of licensed projects under FPA section 13, is not only reasonable in this case, but falls well within its discretion.

### **III. THE COMMISSION’S DECISION TO TERMINATE MR. KEATING’S LICENSE AFTER AN ELEVEN-YEAR STAY IS NOT INEQUITABLE, NOR DOES IT WARRANT THE EXTRAORDINARY REMEDY OF ESTOPPEL**

Mr. Keating tries to take advantage of the Commission’s eleven years of patience and leniency by characterizing the Commission’s decision to lift the stay, and therefore terminate the license, as inequitable or misleading. Br. 14-15. But, Mr. Keating cannot be permitted to disclaim responsibility for compliance with license terms he chose to accept. And, “[a]t some point an agency must be able to say, ‘Enough is enough.’” *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988) (finding the Commission did not abuse its discretion in refusing to reopen the record to take additional evidence). The Commission’s decision to draw the line here is well-supported by the record; therefore, Mr. Keating’s claims of inequity and estoppel necessarily fail.

As the Commission discussed in *UAH-Braendly Hydro Associates*, 47 FERC ¶ 61,448 (1989), cited by Mr. Keating in support of his estoppel argument (Br. 14), “[e]quitable estoppel is applied against the government ‘only in a rather narrow possible range of circumstances.’” *Id.* at p. 62,394 (quoting *Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 68 (1984)); *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) (explaining *Heckler* and noting that the Supreme Court has “reversed every finding of estoppel that [it has] reviewed”). At a minimum, a private party must establish the traditional elements

of estoppel: the party claiming estoppel must have reasonably relied on the conduct of the party to be estopped and have changed its position to its detriment. *See Heckler*, 467 U.S. at 59.

Here, Mr. Keating merely asserts that the Commission's issuance of the "license . . . constituted an affirmative representation that the Commission would not terminate that license for reasons related directly to the licensee's diligent attempted compliance with the license's terms." Br. 14-15. But the license contains no such representation and in fact clearly establishes the deadline for start of construction, as did the Commission's later orders – with reference to FPA section 13 – granting Mr. Keating a stay of that deadline and extending the other deadlines. *See supra* p. 6 (discussing deadlines incorporated by reference into license); Stay Order at p. 61,224 (citing FPA section 13, 16 U.S.C. § 806), JA 51. Thus, Mr. Keating has not established that the Commission represented it would not terminate the license and cannot claim that his reliance on any such representation is reasonable, for he certainly was aware of the deadlines. *See also* Order Lifting Stay at P 7 n.4 (noting that in 2006 the Commission lifted the stay and terminated the license held by Mr. Keating's Sierra Hydro, Inc., based upon the licensee's failure to pursue the water rights required by the Forest Service), JA 129; *Arkansas Power & Light Co.*, 125 F.2d at 986 (finding claim inadequate for estoppel where Commission terminated license despite licensee's expenditures

in support of starting construction, which “were made with the full knowledge of the law and of the regulations of the Commission”).

Moreover, the Commission’s action here is far from “inequitable.” Br. 14. The Commission patiently waited eleven years since issuing the Stay Order – fifteen years since issuing the License Order – for Mr. Keating to fulfill the Forest Service’s requirement for obtaining water rights. Order Lifting Stay at P 19, JA 135. Upon reviewing the record in 2007, the Commission reasonably concluded that outstanding prerequisites to the Water Board’s decision, and Mr. Keating’s failure to file the amendment application the Commission required in the 1996 Stay Order, were resulting in a seemingly indefinite abeyance of the start of construction deadlines mandated by FPA section 13, 16 U.S.C. § 806.

Under the circumstances and in observance of the statutory objective of prompt development of a project site, the Commission reasonably exercised its discretion to lift the stay, and thus terminate the license, after eleven years of patience. *See, e.g., ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1085 (D.C. Cir. 2002) (“We are generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.”) (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (quotation omitted)). The Commission’s relative leniency with the licensee’s progress – or



lack thereof – cannot reasonably be characterized as inequity to the licensee in light of the substantial record of continuing delays in project development.

### **CONCLUSION**

For the foregoing reasons, the petition for review should be dismissed or denied in its entirety.

Respectfully submitted,

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January 30, 2009  
FINAL BRIEF: March 6, 2009