

157 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Alaska Electric Light and Power	Project Nos. 2307-075 12379-051
Alaska Energy Authority	Project No. 8221-098
Chugach Electric Association	Project No. 2170-054
Ketchikan Public Utilities	Project Nos. 420-088 1922-048 11841-031
Copper Valley Electric Association	Project No. 2742-037
Southeast Alaska Power Agency	Project Nos. 2911-042 3015-018

ORDER DENYING REHEARING

(Issued November 17, 2016)

1. On July 8, 2016, a group of licensees of Alaska hydropower projects regulated by the Commission under Part I of the Federal Power Act (the Alaska Group) filed a request for rehearing of a June 9, 2016 letter¹ denying the Alaska Group's appeal of the 2016 federal land use bills for the licensed projects identified in the above caption. This order denies the Alaska Group's request for rehearing.

I. Background

2. Section 10(e)(1) of the Federal Power Act (FPA) requires Commission hydropower licensees using federal lands to:

pay to the United States reasonable annual charges in an amount to be fixed by the Commission . . . for recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property . . . and in fixing such charges the Commission shall seek to avoid increasing the price to the

¹ Letter from Anton Porter, Executive Director, Federal Energy Regulatory Commission, filed in dockets for Project Nos. 2307, 12379, 8221, 2170, 420, 1922, 11841, 2742, 2911, and 3015.

consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require²

In other words, hydropower licensees that use and occupy federal lands for project purposes must compensate the United States through payment of an annual fee, to be established by the Commission.³

3. Over the years, the Commission has adopted various methods to accomplish this statutory directive, including the use of project-by-project appraisals, a national average per-acre value, and a regional zone-based rental schedule for linear rights-of-way developed jointly by the Department of Agriculture's U.S. Forest Service (Forest Service) and the Department of the Interior's Bureau of Land Management (BLM).⁴ In 2008, BLM promulgated a final rule to update its rental fee schedule using agricultural statistical data published by the National Agricultural Statistic Service (NASS).⁵ The Forest Service subsequently adopted BLM's revision.⁶ By final rule issued on January 17, 2013,⁷ the Commission similarly adopted a new methodology for calculating

² 16 U.S.C. § 803(e)(1) (2012) (emphasis added). Section 10(e)(1) also requires licensees to reimburse the United States for the costs of administering Part I of the FPA. Those charges are calculated and billed separately from the land use charges at issue here, and are not in question in this proceeding.

³ Pursuant to FPA section 17(a), 16 U.S.C. § 810(a) (2012), the fees collected for use of government lands are allocated as follows: 12.5 percent is paid into the Treasury of the United States, 50 percent is paid into the federal reclamation fund, and 37.5 percent is paid into the treasuries of the states in which particular projects are located. No part of the fees discussed in this proceeding is used to fund the Commission's operations.

⁴ See *Annual Charges for Use of Government Lands*, Order No. 774, FERC Stats. & Regs. ¶ 31,341, at PP 3-20 (2013) (cross-referenced at 142 FERC ¶ 61,045) (examining the myriad methodologies the Commission has used or considered for assessing annual charges for the use of government lands since 1937) (Order No. 774).

⁵ *Update of Linear Right-of-Way Rent Schedule*, 73 Fed. Reg. 65,040 (October 31, 2008).

⁶ See *Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands*, 73 Fed. Reg. 66,591 (November 10, 2008) (adopting BLM's revised linear right-of-way fee schedule for linear rights-of-way on National Forest System lands).

⁷ Order No. 774, FERC Stats. & Regs. ¶ 31,341 (2013).

annual charges for use of government lands, based on BLM's 2008 revision, which uses a per-acre fee schedule incorporating land values published in the NASS Census.⁸

4. Specifically, in the Order No. 774 rulemaking, the Commission engaged in an independent review of the current methodology for calculating land use charges by issuing a Notice of Inquiry,⁹ and a Notice of Proposed Rulemaking¹⁰ in 2011, and a Final Rule in 2013. The purpose of the notice and comment rulemaking was to identify, evaluate, and select an administratively practical methodology for assessing annual charges for the use of government lands that would result in reasonably accurate land valuations. At the outset of the rulemaking, the Commission explained that any proposed methodology should: (i) uniformly apply to all hydropower licensees; (ii) not impose exorbitant costs on the Commission; (iii) not be subject to review on an individual case-by-case basis; (iv) reasonably reflect accurate land valuations; and (v) provide reasonable, but not excessive, compensation to the United States for the use of its lands.¹¹ By adopting a per-acre fee schedule based on land values published in the NASS Census,

⁸ Prior to initiating the rulemaking, the Commission sent a letter to all of its licensees in January 2009, explaining that the Forest Service had revised its fee schedule in response to direction from Congress and notified the licensees that the federal land use charges would increase substantially for many projects. In February 2009, the Commission published its 2009 fee schedule update based on BLM's and Forest Service's land valuations, which resulted in significantly higher fees being assessed in some cases. A group of licensees requested rehearing of the notice publishing the 2009 fee schedule update, asserting that the Commission's notice amounted to a rulemaking that was improperly issued without notice and an opportunity for comment. The Commission denied rehearing. The group of licensees filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. The court granted the petition for review and vacated the Commission's 2009 fee schedule update. *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 231 (D.C. Cir. 2011) (*City of Idaho Falls*). The court directed the Commission to seek notice and comment on the methodology used to calculate annual charges for use of federal lands since the Forest Service had made changes to the methodology underlying its land value index. *Id.* On February 17, 2011, the Commission initiated that process by issuing a notice of inquiry inviting comments on methods for assessing annual charges for the use of federal lands by hydropower licensees in Docket No. RM11-6-000.

⁹ *Annual Charges for Use of Government Lands*, 134 FERC ¶ 61,111 (2011) (2011 Notice of Inquiry).

¹⁰ *Annual Charges for Use of Government Lands*, 137 FERC ¶ 61,139 (2011).

¹¹ 2011 Notice of Inquiry at PP 20-24.

the Commission concluded in Order 774 that it met the aforementioned objectives and represented the best available methodology for assessing the fair market value of the type of federal land used for hydropower projects.

5. The methodology adopted in Order No. 774 is set forth in section 11.2 of the Commission's regulations.¹² Section 11.2 instructs that annual charges for the use of government lands will be set according to an annual schedule of per-acre rental fees, which will be based on the average per-acre land and building values published in the NASS Census.¹³ Pursuant to section 11.2, the Commission publishes a fee schedule annually, which identifies per-acre rental fees by county or geographic area.¹⁴ To calculate a licensee's annual charge for use of government lands, the Commission multiplies the applicable county or geographic area fee identified in the fee schedule by the number of federal acres reported by that licensee. The annual per-acre rental fee for a particular county or geographic area is calculated by multiplying four components: (1) an adjusted per-acre land value based on the average per-acre value in the NASS Census; (2) an encumbrance factor; (3) a rate of return; and (4) an annual adjustment factor.

A. Per-Acre Land Value

6. The first component – the adjusted per-acre land value – is based on average per-acre land values compiled by the NASS Census. Specifically, the per-acre land value is derived from the applicable county or geographic area “land and buildings” category¹⁵ published in the NASS Census. This per-acre value is then adjusted downward using a state-specific reduction to remove the value of irrigated lands, plus a seven percent reduction to remove the value of buildings or other improvements, the end result being the adjusted per-acre land value.

7. The NASS Census is conducted every five years, with an 18-month delay before NASS publishes the Census data. The Commission incorporates another 18-month delay

¹² See 18 C.F.R. § 11.2 (2016).

¹³ *Id.*

¹⁴ *Id.* The fee schedule is published annually as part of Appendix A to Part 11 of the Commission's regulations.

¹⁵ The “land and buildings” category is a combination of all land use categories in the NASS Census, including croplands (irrigated and non-irrigated), pastureland/rangeland, woodland, and “other” (roads, ponds, wasteland, and land encumbered by non-commercial/non-residential buildings).

to account for revisions, consistent with BLM's implementation of its 2008 rule. Accordingly, the Commission's 2011-2015 fee schedules were based on data from the 2007 NASS Census, the 2016-2020 fee schedules will be based on data from the 2012 NASS Census, the 2021-2025 fee schedules will be based on data from the 2017 NASS Census, the 2026-2030 fee schedules will be based on data from the 2022 NASS Census, and so on. State-specific adjustments to the per-acre land value are performed in the first year data from a new NASS Census are used, and will remain the same until the subsequent NASS Census data are published.

B. Per-Acre Land Values for Alaska

8. Order No. 774 explained that the final rule would adopt BLM's approach to Alaska per-acre land values by designating lands in Alaska as part of one of the five NASS Census geographic area identifiers: the Aleutian Islands Area, the Anchorage Area, the Fairbanks Area, the Juneau Area, and the Kenai Peninsula Area. Several commenters asserted that a per-acre statewide value, a category also reported by the NASS Census, should be assessed for Alaska lands.

9. Order No. 774 considered the arguments supporting a statewide per-acre value. In particular, several commenters asserted that regional values for Alaska are inappropriate because Alaska does not use county designations, the number of farms surveyed for the NASS Census in the entire state of Alaska is less than the number of farms surveyed in most counties in the lower-48 states, and certain per-acre land values near Anchorage and Juneau are very high, resulting in a substantial increase in annual charges for the use of government lands by hydropower licensees in these areas.¹⁶ However, the Commission ultimately concluded that the commenters had not sufficiently explained why it was more appropriate to use a statewide value for Alaska, rather than the smallest NASS Census defined area for Alaska – the geographic area identifier.¹⁷ Although the Commission rejected the use of a statewide per-acre land value for Alaska in Order No. 774, the Commission clarified that it would not use the Anchorage Area and the Juneau Area per-acre values to assess annual charges for the use of government lands “because these high, urban-based rates would not reasonably reflect the value of government lands on which hydropower projects are located.”¹⁸ Instead, for purposes of determining a per-acre land value, the Commission decided to assess the Kenai Peninsula Area per-acre land value for projects located in the Anchorage Area or the Juneau Area.

¹⁶ Order No. 774 at PP 44-46.

¹⁷ *Id.* at P 44.

¹⁸ *Id.* at P 45.

C. Fiscal Year 2016 Fee Schedule

10. The 2012 NASS Census data, which the Commission used for the first time in calculating its fee schedule in fiscal year (FY) 2016, showed significant changes in some land values across the country, including a significant increase in Alaska values. Accordingly, land rates increased for hydropower projects located in certain geographic areas in Alaska compared to the rates assessed in FY 2015.

11. By notice issued on February 18, 2016, the Commission published its fee schedule of per-acres rates for FY 2016 through FY 2020, based on data published in the 2012 NASS Census (2016 Notice).¹⁹ The 2016 Notice stated that the 2016 fee schedule rates had significantly increased in comparison to the 2015 rates for a number of hydropower projects located in certain counties and geographic areas across several states. In particular, the 2016 Notice identified the Kenai Peninsula Area of Alaska as one such geographic region: the Kenai Area experienced a 71 percent increase in land rates in comparison to the rates assessed in FY 2015. The 2016 Notice explained that the increase in land rates was mainly attributable to the increase of per-acre values published in the 2012 NASS Census – with the Kenai Peninsula Area experiencing an increase from \$1,328 per acre in the 2007 NASS Census to \$2,423 acre in the 2012 NASS Census.²⁰

12. The Commission issued its 2016 federal land use bills on April 21, 2016. In accordance with section 11.20 of the Commission's regulations, the members of the Alaska Group paid their bills under protest, and filed a timely appeal.²¹ On June 9, 2016, Commission staff denied the appeal (June 9 Denial). The Alaska Group requested rehearing of the denial.

II. Rehearing Request

13. The Alaska Group argues that the Commission violated its obligations under section 10(e)(1) of the FPA to ensure that annual charges are reasonable, and to avoid

¹⁹ *Notice of Statement of Annual Charges for the Use of Government Lands for Fiscal Year 2016* (issued in Docket RM11-6-000).

²⁰ We note that once the per-acre land values for the Kenai Peninsula Area are adjusted to account for Alaska's state-specific reduction, the 50 percent encumbrance factor, and the 5.77 rate of return, these figures equate to an annual per-acre rental fee of \$33.28 in 2015, and \$56.78 in 2016.

²¹ *See* 18 C.F.R. § 11.20 (2016).

increasing the price to the consumer of power by such charges.²² The group asserts that the 2012 NASS Census's per-acre values significantly overvalue federal lands associated with hydropower in certain areas of Alaska. By using these per-acre values from the 2012 NASS Census to calculate federal land use charges for projects in Alaska, the Alaska Group asserts that the Commission relied "on outside cost assessments without engaging in its own independent review to ensure that, in its judgment, the resulting rates are reasonable."²³ In short, the Alaska Group contends that the Commission's action, in issuing the 2016 land use bills based on the per-acre values from the 2012 NASS Census, was arbitrary and capricious, an abuse of discretion,²⁴ and not supported by substantial evidence.²⁵

III. Discussion

14. As discussed above, pursuant to Order No. 774, the Commission calculates annual charges for use of federal lands using a per-acre fee schedule based on land values published in the NASS Census. When calculating the 2016 federal land use bills, Commission staff properly applied the methodology adopted in Order No. 774 and set forth in section 11.2 of the Commission's regulations. The Alaska Group does not dispute this. The 2016 fee schedule update issued by the Commission's Executive

²² See 16 U.S.C. § 803(e)(1) (2012) (" . . . the licensee shall pay to the United States *reasonable* annual charges in an amount to be fixed by the Commission . . . for recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property . . . and in fixing such charges the Commission *shall seek to avoid increasing the price to the consumers of power by such charges* . . .) (emphasis added).

²³ Alaska Group July 8, 2016 Rehearing Request at 12 (quoting *City of Idaho Falls*, 629 F.3d at 229 (citing *City of Tacoma v. FERC*, 331 F.3d 106, 115-16 (D.C. Cir. 2003)).

²⁴ Specifically, the Alaska Group asserts that the Commission was arbitrary and capricious and abused its discretion by: (i) declining to determine if the annual charges, based on the per-acre 2012 NASS Census, were reasonable; (ii) failing to consider the impact of the increase to Alaskan electric consumers; (iii) establishing and issuing bills based on inaccurate information; and (iv) failing to adhere to policies/precedent requiring annual charges to be based on the fair market value of federal lands.

²⁵ The Alaska Group requests that the Commission: (i) recalculate the 2016 land use bills for each of the Alaska Group licensee using the 2015 per-acre rates with an inflationary adjustment of 2.1%; and (ii) refund to each Alaska Group licensee the difference between the recalculated bill and the amount paid under protest. Alaska Group July 8, 2016 Rehearing Request at 22.

Director reflected land value changes published in the 2012 NASS Census.²⁶ The Alaska Group takes issue with the Commission's use of the per-acre valuations published in the 2012 NASS Census as the basis for its land use charge calculations. The Commission previously considered the same arguments related to Alaska and the use of the NASS Census data in Order No. 774, and ultimately declined to adopt a per-acre statewide value for Alaska.²⁷ No entity, including Alaska Electric Light and Power, Alaska Energy Authority, and Southeast Alaska Power Agency, all of which both commented on the proposed rule and are parties here, sought rehearing of that order, which is long-since final. Renewing the same arguments now in a subsequent proceeding that merely applies the framework established in Order No. 774 is an improper collateral attack on that prior order.²⁸ It is well-established that a challenge to an earlier, final Commission order is impermissible.²⁹

15. As a separate matter, following a thorough and complete notice and comment rulemaking, the Commission concluded in Order No. 774 that a per-acre fee schedule based on land values published in the NASS Census represented the best available methodology for assessing the fair market value of the type of land used for hydropower projects. This methodology is fully set forth in section 11.2 of our regulations.³⁰ The

²⁶ Here, the Executive Director's update authority was appropriately confined to the land value changes produced according to the original methodology that the Commission reviewed and approved. *See City of Idaho Falls*, 629 F.3d at 230.

²⁷ *See supra* PP 8-9.

²⁸ This is not the appropriate venue to air grievances related to land valuations based on agricultural census data compiled by the National Agricultural Statistics Service, and used by federal land management agencies to set rent schedules for linear rights-of-way traversing public lands. Because the Alaska Group's dispute is with the per-acre valuations for federal lands in Alaska, its efforts may be better served by encouraging participant response and accurate data collection methods during forthcoming NASS Census data collection efforts in Alaska.

²⁹ *See, e.g., Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 298-99 (D.C. Cir. 2005) (impermissible collateral attack on a previously approved tariff where the Commission had only engaged in a "straightforward application" of an existing rule, and had not altered any aspect of previously approved tariffs and orders); *City of Nephi, Utah v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998) (impermissible collateral attack on Order No. 636 where a party challenged a particular aspect of the Commission's decision long after the order became final).

³⁰ 18 C.F.R. § 11.2 (2016).

Commission's Executive Director properly used this methodology to calculate the 2016 annual charges for use of federal lands. The Alaska Group alleges no error in the calculation of the 2016 charges, nor has it shown that the methodology of setting land use charges based on the NASS Census is not a reasonable policy choice by the Commission. We also note that the Alaska Group has not shown that an annual charge of \$56.78 for the right to use an acre of federal land is unreasonable on its face. For these reasons, we maintain that these charges are reasonable and do not amount to a change in Commission procedure or policy.³¹

16. With respect to the Alaska Group's claim that the 2016 land use bills will increase the price to consumers of power,³² while we acknowledge the energy infrastructure challenges faced by the state of Alaska, the increase in land use bills for certain hydropower projects in Alaska does not equate to a violation of our obligations under section 10(e)(1) of the FPA.³³ Just as market values change from year to year, annual charges based on land valuations can also be expected to fluctuate. Our current

³¹ Annual charges for use of government lands for hydropower projects located in Alaska's Kenai Peninsula Area increased by 71 percent in comparison to land rates assessed in 2015. However, the 2016 Notice explained that this increase reflected a per-acre land value increase for land in the Kenai Peninsula Area from \$1,328 in the 2007 NASS Census to \$2,424 in the 2012 NASS Census. Adjusting these per-acre land values to account for the state-specific reduction, the 50 percent encumbrance factor, and the 5.77 rate of return, results in annual per-acre rental fees of \$33.28 in 2015, and \$56.78 in 2016. Despite a 71 percent increase in land use rates for the Kenai Peninsula Area, the Commission remains satisfied that the valuation methodology reviewed and adopted in Order No. 774 results in a reasonable charge for use of government lands by hydropower projects in the Kenai Peninsula (i.e., an annual rental fee of \$56.78 per acre).

³² The Alaska Group states that because hydropower projects in Alaska are typically located in towns and municipalities characterized by low population densities, small rate bases, isolated electric grids, and no organized markets, any increase in project costs directly impacts Alaska ratepayers. Therefore, the Alaska Group contends that the increase in 2016 land use charges have a direct impact on ratepayers in Alaska. *See* Alaska Group July 8, 2016 Rehearing Request at 17-18.

³³ Commission staff calculated the cost increase per kilowatt hour (kWh) for the five projects for which the relevant data is available (i.e., FY 2015 generation data and the monetary increase in land use charges from FY 2015 to FY 2016). For these projects, the increase per kWh is not significant – i.e., \$0.000287 per kWh (P-2307); \$0.00267 per kWh (P-2170); \$0.000397 per kWh (P-2742); \$0.000109 per kWh (P-2911); and \$0.000425 (P-3015).

methodology for calculating land use bills involves a per-acre fee schedule based on land values published in the NASS Census, which is updated every five years. 2016 was the first year in which the land valuations from the 2012 NASS Census were used to calculate the land use bills. Such updates were anticipated in Order No. 774, and licensees that benefit from the use of government lands should anticipate and plan for periodic increases in federal land use charges. Moreover, we previously rejected similar arguments requesting unique treatment for hydropower projects in Alaska, concluding that commenters advanced no meaningful justification for treating federal lands in Alaska any differently from other federal lands administered by land management agencies throughout the county.³⁴

17. Although we deny rehearing for the reasons discussed above, the Alaska Group can, as it in fact has, petition the Commission to revise the rule at issue. Specifically, the Alaska Group filed a petition for rulemaking, requesting that the Commission revise its method for calculating federal land use charges for hydropower projects in Alaska.³⁵ Concurrent with this order, the Commission is issuing a Notice of Inquiry inviting comments on its current methodology for calculating annual charges for use of government lands for hydropower projects in Alaska.³⁶

³⁴ *See supra* PP 8-9. The Alaska Group contends that by failing to analyze and explain evidence in the record filed by the Alaska Group and Senator Murkowski stating that the NASS Census land valuations do not accurately reflect the market value of hydropower lands in Alaska, the Commission failed to support its decision with substantial evidence. Because we previously considered these arguments and rejected requests for a statewide average per-acre land value for Alaska in Order No. 774, this is an impermissible collateral attack on an earlier, final order. *See supra* P 15. Therefore, we did not respond to these arguments in the June 9 Denial, nor were we required to do so.

³⁵ *See* Alaska Group, Petition for Rulemaking, Docket No. RM16-19-000 (filed June 6, 2016).

³⁶ While we are willing to request public and agency comment on our current methodology for calculating land use charges for hydropower projects in Alaska, the Commission may or may not decide to revise its existing regulations as a result.

The Commission orders:

The request for rehearing, filed on July 8, 2016, by the Alaska Group, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.