ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 14-1153

WESTERN MINNESOTA MUNICIPAL POWER AGENCY, *ET AL.*
Petitioners,

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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FINAL BRIEF: APRIL 20, 2015

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties to the underlying agency proceedings and in this Court are identified in the brief of Petitioners Western Minnesota Municipal Power Agency, American Public Power Association and Public Power Council, except that FFP Qualified Hydro 14, LLC was also a party in the agency's underlying proceedings.

B. Rulings Under Review

1. *FFP Qualified Hydro 14, LLC*, 145 FERC ¶ 61,255 (2013), R. 65, JA 43 ("Permit Order"); and

2. *FFP Qualified Hydro 14, LLC*, 147 FERC ¶ 61,233 (2014), R. 70, JA 116 ("Rehearing Order").

C. Related Cases

Counsel for the Commission is not aware of any related cases.

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

April 20, 2015

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GLOSSARY

Associations	American Public Power Association and Public Power Council
Br.	Opening brief of Petitioners Western Minnesota Municipal Power Agency, American Public Power Association and Public Power Council
Commission or FERC	Federal Energy Regulatory Commission
FFP	FFP Qualified Hydro 14, LLC
FPA or the Act	Federal Power Act
JA	Joint Appendix
P	Denotes a paragraph number in a Commission order
Permit Order	*FFP Qualified Hydro 14, LLC*, 145 FERC ¶ 61,255 (2013), R. 65, JA 43
R.	Indicates an item in the certified index to the record
Rehearing Order	*FFP Qualified Hydro 14, LLC*, 147 FERC ¶ 61,233 (2014), R. 70, JA 116
Western Minnesota	Petitioners Western Minnesota Municipal Power Agency, American Public Power Association and Public Power Council, together

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STATEMENT OF THE ISSUE

Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a), accords a preference, when all other factors are equal, to States and municipalities, as opposed to private developers, in competitive proceedings to obtain preliminary permits to study the development of proposed hydroelectric projects. The question presented here is whether the Commission reasonably interpreted section 7(a) of the Act as limiting the preference to municipalities located near the project to be developed.

STATEMENT REGARDING JURISDICTION

Except as to certain arguments not properly preserved for this Court's review, Petitioners Western Minnesota Municipal Power Agency, American Public Power Association and the Public Power Council (together, except where specifically indicated, "Western Minnesota") properly invoke this Court's jurisdiction under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). As described further, *infra* pp. 27, 35, 40, the Act requires parties to preserve the Court's jurisdiction by raising all objections first before the agency on rehearing. *See* 16 U.S.C. § 825*l*(b) (limiting the Court's jurisdiction to only those objections "urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do"); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34-35 (D.C. Cir. 1992) ("Neither FERC nor this court has authority to waive these statutory requirements.") (internal citations omitted).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

This case concerns competing applications for a preliminary permit under sections 4(f) and 7(a) of the Federal Power Act ("FPA"), 16 U.S.C. §§ 797(f), 800(a). The permit allows the holder to study the development of a proposed hydroelectric project at the Saylorville Dam and Lake on the Des Moines River, in

the City of Johnston, Polk County, Iowa ("Project"), with the assurance that it has priority during the term of the permit with respect to any subsequent license application to develop the Project.

In the orders challenged here, the Commission issued the permit to a private developer which, through application of the Commission's procedures, was deemed to have the first-filed application. *FFP Qualified Hydro 14, LLC*, 145 FERC ¶ 61,255 (2013), R. 65, JA 43 ("Permit Order"), *reh'g denied*, 147 FERC ¶ 61,233 (2014), R. 70, JA 116 ("Rehearing Order"). In so doing, the Commission rejected Western Minnesota's claim that it was entitled to the permit based upon the preference accorded to municipalities under section 7(a) of the FPA, 16 U.S.C. § 800(a). Addressing the issue of the scope of the municipal preference for the first time in these orders, the Commission held that the Act is ambiguous, but that it should reasonably be construed to include a geographic limitation. Applying that limit here, the Commission rejected Western Minnesota's claim to municipal preference because – with headquarters almost 400 miles from the proposed project – Western Minnesota is not located near the proposed project site. In the Commission's view, an unlimited municipal preference conflicts with the statutory text and purpose, sound public policy, and legislative history. Western Minnesota, which urges that the Act plainly grants municipalities an absolute preference, unlimited by distance, disagrees.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

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

Under sections 4(f) and 5(a) of the FPA, 16 U.S.C. §§ 797(f), 798(a), the Commission may issue preliminary permits "for the sole purpose of maintaining priority of application for a license [for a period] not exceeding a total of three years." FPA § 5(a), 16 U.S.C. § 798(a). As the Court has explained, "[p]reliminary permits take some of the risk out of the exploration of hydroelectric power by giving developers who obtained them a preference when it comes time for the initial licensing of a project." *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1393 (D.C. Cir. 1988). Preliminary permits, as described in FPA section 4(f), 16 U.S.C. § 797(f), "enabl[e] applicants for a license . . . to secure the data and to perform the acts required by" FPA section 9, 16 U.S.C. § 802, which details the requirements for a license application. *See Energie Group, LLC v. FERC*, 511 F.3d 161, 163 (D.C. Cir. 2007) ("[t]o obtain a license, an applicant must submit a

substantial amount of data, and the preliminary permit process helps applicants gather necessary information").

This case concerns the "[m]unicipal preference[, which] is one of a limited set of preferences that give an advantage to certain applicants in what is otherwise a strictly competitive licensing scheme." *Great River Hydropower, LLC*, 135 FERC ¶ 61,151, 61,891 (2011). "Municipality" is defined in section 3(7) of the Act as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." 16 U.S.C. § 796(7).

Section 7(a) describes the rules of preference as follow:

> In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region . . . .

16 U.S.C. § 800(a). The Commission's regulations, at 18 C.F.R. § 4.37(b), track this statutory language. Only the permittee preference, accorded to holders of permits when they file an application for a license within the term of their permit, can overcome the municipal preference. *See Kamargo*, 852 F.2d at 1393 ("The statute gives a preference for a license to states and municipalities as against any

applicant *other than a permit holder* if its plans are "equally well adapted."). The municipal preference has previously been found inapplicable, however, in so-called orphaned license proceedings and in cases where a municipality seeks a permit or license jointly with a non-municipality. *See Oconto Falls, Wis. v. FERC*, 41 F.3d 671, 674 (D.C. Cir. 1994) (describing the background of section 7(a) and affirming agency's interpretation); *City of Bedford v. FERC*, 718 F.2d 1164, 1166 (D.C. Cir. 1983) (noting that hybrid applications are ineligible for the preference).

When no applicant is a municipality, section 7(a) provides that "the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region . . . ." 16 U.S.C. § 800(a). Commission regulations further specify that, in a competitive proceeding involving two or more municipalities – or no municipalities – "the Commission will favor the applicant whose plans are better adapted" and "tak[e] into consideration the ability of each applicant to carry out its plans." 18 C.F.R. § 4.37(b)(1).

Finally, if the Commission finds that the competing plans are equally well adapted, it will break the tie by awarding the permit to "the applicant with the earliest application acceptance date." 18 C.F.R. § 4.37(b)(2). The Commission's regulations provide that "[a]ny document received after regular business hours is considered filed on the next regular business day." 18 C.F.R. § 385.2001(a)(2). In

circumstances where, by operation of this rule, two permit applications are deemed filed at the same date and time, the Commission has broken the tie by means of a random drawing. *See Petersburg Mun. Power & Light v. FERC*, 409 F. App'x 364, 366 (D.C. Cir. 2011) (affirming the Commission's use of the random drawing to break a tie among three municipal permit applicants).

II. THE COMMISSION'S PROCEEDINGS ON REVIEW

A. Events Leading To The Orders On Review

This case concerns competing applications for a preliminary permit to study the feasibility of a proposed hydroelectric project to be located at the existing Saylorville Dam and Lake on the Des Moines River, in the City of Johnston, Polk County, Iowa. Permit Order P 1, JA 43. The Commission received two applications for the permit, one from FFP Qualified Hydro 14, LLC ("FFP") and one from Petitioner Western Minnesota. FFP Permit Application, R. 50, JA 1; Western Minnesota Permit Application, R. 51, JA 14; *see* Permit Order P 1, JA 43. Both applications were electronically filed between 5:00 pm on January 31, 2013 and 8:30 am on February 1, 2013. Permit Order P 1 n.2, JA 43. Under the Commission's regulations, they were deemed filed the next business day. *Id*.

FFP, a private non-municipal developer, held a prior preliminary permit for the site, which expired on January 31, 2013. *See FFP Qualified Hydro 14, LLC*, 130 FERC ¶ 62,158 (2010). Under the terms of the prior permit, FFP reported that

it had diligently pursued study of the project, by filing a preliminary report (a so-called Pre-Application Document) and a study plan with the Commission, consulting with federal and state agencies, and modifying its design concept as a result of these measures. *See* Permit Order P 4, JA 44.

Western Minnesota is a self-described "municipal corporation and political subdivision of the State of Minnesota," located in Ortonville, Minnesota. Western Minnesota Application, Initial Statement at 1, JA 17. It was "formed for the purpose of providing a means for its members to secure, by individual or joint action among themselves or by contract with other public or private entities within or outside the State of Minnesota, an adequate, economical and reliable supply of electric energy." Western Minnesota Motion to Intervene and Protest ("Intervention") at 2, R. 61, JA 33. At the time of its Intervention, Western Minnesota's membership consisted of 23 Minnesota municipalities. *Id*. Western Minnesota's Application "claim[ed] preference under Section 7(a) of the Federal Power Act" and included evidence of its municipal status under Minnesota law.[1] Application, Initial Statement at 2, JA 18.

[1] Western Minnesota holds or has held preliminary permits for various proposed projects, some of which it has obtained in competitive proceedings through operation of municipal preference and others by random drawing. *See W. Minn. Mun. Power Agency*, 147 FERC ¶ 62,226 (2014) (awarding permit to Western Minnesota based on first-filed status as determined by random drawing); *W. Minn. Mun. Power Agency*, 136 FERC ¶ 62,005 (2011) (issuing permit to Western Minnesota based on municipal preference).

On March 15, 2013, the Commission issued a joint public notice of the two applications, establishing a deadline for comments, motions to intervene, competing applications, and notices of intent to file a competing application. Notice of Applications, R. 54, JA 29. Western Minnesota filed a timely motion to intervene, opposing FFP's permit application and arguing that it should be granted the permit based on municipal preference. Permit Order P 6, JA 45; *see also* Western Minnesota Intervention at 1, JA 32.

On October 10, 2013, the Commission issued a Notice announcing its intent to conduct a random drawing, on October 21, 2013, to determine which applicant will be considered to have the first-filed application. Notice of Drawing, R. 62, JA 37. On the day of the drawing, Western Minnesota filed a motion requesting that the Commission withdraw the Notice, arguing that the drawing was unnecessary because it is entitled to municipal preference. Motion for Withdrawal at 1-3, R. 63, JA 38-40. The Commission held the drawing, which established the following order of priority: (1) FFP; and (2) Western Minnesota. Permit Order P 9, JA 45; *see also* Notice Announcing Filing Priority, R. 64, JA 42.

B. The Orders On Review

On December 19, 2013, the Commission issued a preliminary permit to FFP for a term of three years. Permit Order, Ordering Para. (A), JA 51. The Commission first determined that FFP had pursued the requirements of its prior

permit with due diligence, and its application would be considered in competition with Western Minnesota's application. *Id*. P 14, JA 47. Turning to Western Minnesota's application, the Commission next determined that Western Minnesota is not entitled to municipal preference. *Id*. PP 15-20, JA 47-49. Because there is no claim that either application is better adapted than the other (*see* FPA § 7(a), 16 U.S.C. § 800(a)), the Commission relied upon the results of the random drawing to award the permit to FFP. *Id*. P 20, JA 49.

In examining the question of municipal preference, the Commission looked to section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a), but found that it "provides . . . no guidance as to the scope of municipal preference." *Id*. P 17, JA 48. An unlimited application of municipal preference, as advanced by Western Minnesota, is not supported by the statute, which "does not extend the same treatment to all municipalities, and in fact favors municipalities located near a project site." *Id*. P 18, JA 48. Specifically, the Commission pointed to section 4(f) of the Act, 16 U.S.C. § 797(f), which requires the Commission to "give notice of [a permit] application in writing to any State or municipality likely to be interested in or affected by such application . . . ." *See* Permit Order P 18, JA 48.

In this light, the Commission concluded that "the best reading of the statute is that municipalities should be accorded preference only with respect to the development of water resources that are located in their vicinity." *Id*. P 17, JA 48.

The Commission found support in sound public policy. While "[i]t is appropriate that a municipality be granted preference in developing nearby hydropower sites for the benefit of its citizens," it is "difficult to discern what public interest is served by giving a municipality a preference with respect" to a remote project site. *Id*. Further, the Commission invoked examples demonstrating undesirable results. Perhaps most illuminating, a distant municipality could employ municipal preference to secure a permit in competition with a local municipality – even for a project within the boundaries of the local municipality – "depriv[ing] the nearby municipality of the right to utilize a local water resource." *Id*.

Western Minnesota sought rehearing, as did two associations representing municipalities with interests in hydroelectric development, the American Public Power Association and the Public Power Council (jointly, the Associations). The Commission denied rehearing, confirming the Permit Order's holding that FPA section 7(a), either read alone or in the context of the statute as a whole, is "ambiguous as to the geographic scope of municipal preference." Rehearing Order P 18, JA 122. The text does not directly speak to the issue, but does "limit[] municipal preference" (*id.* P 20 n.25, JA 123) to those applications the Commission determines are "equally well adapted . . . to conserve and utilize in the public interest the water resources of the region." *Id*. (quoting 16 U.S.C. § 800(a)). The Commission also looked to the notice provision of FPA section 4(f), 16 U.S.C.

§ 797(f), which requires notice to a municipality "likely to be interested in or affected by" a permit application. The Commission concluded that this provision gives rise to an inference that "Congress did not intend to extend municipal preference to all municipalities without exception." Rehearing Order P 21, JA 124. Legislative history and longstanding agency policy support this interpretation. *Id*. PP 21-24, JA 123-26.

On rehearing, Western Minnesota and the Associations (having been granted late intervention, *id.* P 11, JA 119-20) claimed that the Commission was acting inconsistently with precedent, because more or equally distant municipalities had been accorded municipal preference in prior cases. But the Commission explained that "neither Congress nor the Commission has ever faced the precise question of whether preference should be given to a municipality with respect to a project that is far from the site of the municipality." *Id*. P 31, JA 130; *see also id*. P 32 ("the issue . . . has not been directly addressed by the Commission before now"), JA 131. While Western Minnesota claimed that no municipality would attempt to use the preference to secure a permit for a project outside its region, the Commission explained that "given the evolving electric market and regulatory environment, it is not unlikely that municipalities may claim entitlement to preference in a variety of circumstances beyond the uses intended by Congress, if no geographical limit exists." *Id*. P 33, JA 131-32. The statute does not "prohibit

municipalities from owning or operating distant projects; we simply believe that Congress did not intend for municipalities to be entitled to municipal preference for distant projects." *Id*. P 35, JA 133.

SUMMARY OF ARGUMENT

In the orders on review, the Commission considered for the first time whether Congress intended the municipal preference – a tie-breaker preference accorded to States and municipalities when all other factors are found equal – to be absolute in scope. Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a), does not directly address the geographic scope of municipal preference. The Commission, examining the language of section 7(a) in the context of the statute, the public interest purpose of the statute, sound public policy and the statute's legislative history, ultimately determined that the municipal preference is not unlimited.

Western Minnesota disagrees, preferring to characterize section 7(a) as clearly providing a preference for any municipality to secure a permit for any proposed project – no matter how distant. But even assuming section 7(a) is – on its own – that clear, another provision of the statute, section 4(f), 16 U.S.C. § 797(f), using the same terms and concerning preliminary permit proceedings, confirms the ambiguity, as does the statute's legislative history.

Finding section 7(a) of the Act ambiguous, the Commission examined the statutory text, the context, the legislative history and its own long-standing policies to discern a reasonable interpretation. The Commission took much guidance from section 4(f) of the Act, which requires the Commission to provide written notice to States and municipalities "likely to be interested in or affected by" a permit application. 16 U.S.C. § 797(f). That notice requirement, this Court has held, is intended to allow municipalities to assert the municipal preference in section 7(a). In practice, the Commission identifies municipalities requiring notice based upon proximity to the proposed project; the Commission thus inferred a similar geographic limit on the municipal preference.

As applied here, the Commission rejected Western Minnesota's bid for municipal preference because, at almost 400 miles from the project site, it is simply too far away. As such, the Commission looked to the results of the random drawing, and awarded the permit to Western Minnesota's competitor, FFP.

Western Minnesota raises many objections to the Commission's interpretation. Some of these objections are new. They were not preserved on rehearing before the Commission, and should be dismissed by the Court. In any event, Western Minnesota's arguments reveal no error by the Commission, just a difference in degree or opinion. In particular, Western Minnesota asserts that

section 4(f) of the Act is a mere procedural requirement, hoping to avoid this Court's holding linking that notice requirement to eligibility for the preference.

More urgently, Western Minnesota disputes the Commission's understanding of Congressional intent, garnered from the statute, the legislative history, and the Commission's experience in overseeing the development of the Nation's electric grid. But Western Minnesota has not shown that Congress envisioned that municipalities would employ the preference to seek rights to distant projects when they would be unable to make use of the power – and in some cases to the disadvantage of other, more local, municipalities. In Western Minnesota's view, a municipality in Vermont should be able to use the municipal preference to secure a permit for a project using the water resources of Hawaii, even over a competing application from a local municipality. The Commission reasonably explained that Congress likely did not share this view.

Western Minnesota also argues that the Commission ignores both its precedent and its regulations by offering a "changed" interpretation of the municipal preference in section 7(a) of the Act. There is no change, of course, because the Commission has never before interpreted the scope of municipal preference. None of the cases raised in Western Minnesota's brief, even counting those not presented to the Commission, as purportedly establishing a long history of an unlimited municipal preference, addresses or decides any litigated issue of

municipal preference. Such "precedents" do not bind the Commission, nor do they demonstrate any departure from the Commission's preference regulations, which Western Minnesota agrees simply "track" the statutory language. In this regard, Western Minnesota's wholly new claim, that the Commission needed to engage in notice and comment rulemaking, is either jurisdictionally barred or merely duplicative of the arguments that the Commission has misinterpreted the statute.

Finally, Western Minnesota laments the need to resort to "crystal ball gazing" to determine whether a municipality now qualifies for the municipal preference and whether it can secure a permit on that basis. But the rules of competition and preference are no more uncertain than they were before. The Commission's orders provide substantial guidance on the scope of the municipal preference; absolute certainty is not required.

ARGUMENT

I. STANDARD OF REVIEW

The arbitrary and capricious standard of the Administrative Procedure Act governs judicial review of Commission orders. *See* 5 U.S.C. § 706(2)(A). Under that standard, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted)).

In reviewing Commission decisions interpreting the Federal Power Act, reviewing courts apply the familiar *Chevron* framework. *See Oconto Falls*, 41 F.3d at 674 (finding section 7(a) ambiguous and deferring to agency's reasonable interpretation) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-44 (1984)). As described in *Oconto Falls*:

> The court must first determine whether "Congress has directly spoken to the precise question at issue." If Congress has so spoken, the court must "give effect to the unambiguously expressed intent of Congress." If, however, the court determines that "the statute is silent or ambiguous with respect to the specific issue," the court should defer to the agency's interpretation if its construction of the statute is reasonable. The deference owed is "considerable" where, as here, the agency is interpreting the statute that it is authorized to administer. *Kamargo Corp*., 852 F.2d at 1397. In such cases, the court should defer to the agency so long as the agency's interpretation is permissible.

Id. (citing and quoting *Chevron*, 467 U.S. at 842-44). "*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1869 (2013); *see also Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1001 (D.C. Cir. 1987).

The Commission's interpretations of its own precedents are likewise afforded substantial deference. *See Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-704 (D.C. Cir. 2010); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

Finally, the Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla," but "can be satisfied by something less than a preponderance of the evidence." *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003) (citations omitted). Merely pointing to some contradictory evidence is insufficient. *Cogeneration Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (citing cases).

II. THE COMMISSION REASONABLY DETERMINED THAT THE ACT DOES NOT SPEAK DIRECTLY TO THE SCOPE OF MUNICIPAL PREFERENCE

The Commission reasonably determined that the Federal Power Act does not speak directly to the geographical scope of municipal preference. *Chevron* requires a determination of "whether Congress has directly spoken to the precise question at issue," or whether "the statute is silent or ambiguous with respect to the specific issue." 467 U.S. at 842, 843. Here, the Commission reasonably determined that "Section 7(a) of the FPA provides [the agency] no guidance as to the scope of municipal preference." Permit Order P 17, JA 48.

Section 7(a) of the Act provides, in its entirety:

> In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, **the Commission shall give preference to applications therefor by States and municipalities**,[2] provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

16 U.S.C. § 800(a) (emphasis added). In the Commission's view, section 7(a) is silent on the issue of the geographical scope of municipal preference. Permit

[2] The Commission has not disputed that Western Minnesota provided sufficient evidence demonstrating that it is a municipality within the meaning of section 3(7) of the Act, 16 U.S.C. § 796(7). *See* Permit Order P 16, JA 47.

Order P 17, JA 48. It does not explicitly state whether the preference applies to all States and municipalities, or any State or municipality, or, conversely, just to local States and municipalities. Accordingly, the Commission concluded that Congress did not speak directly to the issue of the scope of municipal preference.

It is hardly unusual that section 7(a), part of the Federal Water Power Act of 1920, is silent on the scope of municipal power. As the Commission explained, Congress likely did not anticipate the extent and nature of competition that would occur under the Act. Rehearing Order PP 20, 29, JA 123, 129. Indeed, the Court has previously found section 7(a) to be silent, and therefore ambiguous, on the issue of whether municipal preference should apply in so-called orphaned license proceedings. *See Oconto Falls*, 41 F.3d at 677 ("The statute is simply silent on the subject of how orphaned projects should be handled."). Here, as there, "it [is] fair to say that Congress never envisioned the problem" of distant municipalities relying upon municipal preference to compete for a preliminary permit. *Id*.; *see* Rehearing Order P 33, JA 131-32.

Section 7(a)'s silence on the scope of municipal preference is adequate to support the Commission's finding of ambiguity. But should the Court require more, the Commission also pointed to sources outside of section 7(a) in support of this finding. *See* Rehearing Order PP 20-21, JA 123-24. The Commission noted that courts look to the statute as a whole, "not isolated provisions" in interpreting

statutory text. *Id*. P 21, JA 123. Indeed, the Supreme Court has specifically held that ambiguity can arise outside of the particular statutory subsection at issue:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning-or ambiguity-of certain words or phrases may only become evident when placed in context.

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

To put the use of the word "municipalities" in context, the Commission looked to another provision of the Federal Power Act concerning the participation of municipalities in preliminary permit application proceedings. Section 4(f) requires the Commission to give notice of a preliminary permit application filed by any person, association, or corporation "in writing to any State or municipality likely to be interested in or affected by such application." 16 U.S.C. § 797(f). As this Court has held, the "purpose of the written notice requirement in FPA section 4(f) was 'primarily intended to allow states and municipalities to protect and thus assert their statutory preferences'" – the very preference at issue in FPA section 7(a). Rehearing Order P 22 (quoting *N. Colorado Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1513 (D.C. Cir. 1984) (citing legislative history)), JA 124. Relying on the qualifying language in section 4(f), the Commission found

it "reasonable to infer that Congress did not intend to extend municipal preference to all municipalities without exception." Rehearing Order P 21, JA 124.

If Congress intended the preference to be absolute, there would be no need to limit the universe of municipalities receiving notice under section 4(f) to those "likely to be interested in or affected by" an application. *Id*. (finding that, absent this interpretation, "section 4(f) would be superfluous") (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting the "cardinal principle of statutory construction" that a statute should be construed to avoid rendering any part superfluous)), JA 124. Even if section 4(f) does not entirely control the interpretation of section 7(a) (addressed, *infra*, p. 26), the Commission reasoned that, at the least, "the existence of the qualifying language for municipalities in section 4(f) creates an ambiguity as to which municipalities are entitled to preference in FPA section 7(a)." Rehearing Order P 21, JA 124.

The Commission does not argue that the Act "does not mean what it says" (Br. 16), but rather that while the statutory text does not squarely address the issue, it suggests a limitation – one that is confirmed by reference to statutory context and practical consequences. *See Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) ("Although *Chevron* step one analysis begins with the statute's text, the court must examine the meaning of certain words or phrases in context and also exhaust the traditional tools of statutory construction, including examining the

statute's legislative history to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear.") (internal citations omitted). Here, the statutory context, and section 4(f) of the Act in particular, reveals an ambiguity appropriately resolved by the Commission in the first instance. Accordingly, "[e]ven if [the Court] thought the best reading was that [the Commission's interpretation] was not allowed under the plain language of [section 7(a)] standing alone, it is still a reasonable interpretation under *Chevron* step two to look at [FPA sections 4(f) and 7(a)] together and conclude that [the Commission's interpretation] is permitted." *Tesoro Alaska Co. v. FERC*, No. 13-1248, slip op. at 10 (D.C. Cir. Feb. 20, 2015).

III. THE COMMISSION REASONABLY INTERPRETED THE ACT AS LIMITING MUNICIPAL PREFERENCE BASED ON GEOGRAPHICAL SCOPE

The Commission's interpretation of FPA section 7(a), as providing that municipalities should be accorded preference only with respect to development of water resources that are located in their vicinity, is a "permissible construction of the statute," and warrants deference from this Court. *Chevron*, 467 U.S. at 842-44. In addition to the text of both sections 7(a) and 4(f) of the Act, the history of the development of the electric grid, the legislative history and purpose of the Act, and Commission policy all support the Commission's finding that Congress did not intend municipal preference to be absolute.

A. The Statutory Text And Context Support Limiting Municipal Preference

Both section 7(a) and section 4(f) support the Commission's finding that Congress did not intend municipal preference to be unlimited. Section 7(a) itself conditions entitlement to municipal preference upon a finding that the State or municipality's plans are "equally well adapted . . . to conserve and utilize in the public interest the water resources of the region." Rehearing Order P 20 n.25 (quoting 16 U.S.C. § 800(a)), JA 123. This pre-condition – while not directed to a municipality's innate qualifications – "contradicts Western Minnesota's claim that entitlement to municipal preference is absolute or unlimited." *Id.*

As discussed in Part II above, section 4(f) of the Act supports the Commission finding that section 7(a) is ambiguous as to the scope of municipal preference. It provides that notice of permit applications is limited to any "State and municipality likely to be interested in or affected by" an application. 16 U.S.C. § 797(f). Because the very purpose of that notice requirement is to allow municipalities to protect or act upon the preference offered by the Act, the Commission reasonably inferred that Congress likewise intended to limit the scope of municipalities eligible for the preference. *See* Rehearing Order P 21 (citing *N. Colorado*, 730 F.2d at 1513), JA 123-24.

For purposes of section 4(f) notice, the Commission has identified municipalities "likely to be interested in or affected by" a permit application based

upon geographic proximity to a project. *See* Rehearing Order P 25, JA 127. The Commission's "longstanding policy, as implemented in section 4.32(a)(2) of the Commission's regulations," relies upon distance from the site, and to some extent population, to determine whether section 4(f) notice is appropriate. *Id*. (citing 18 C.F.R. § 4.32(a)(2) (requiring notice, for example, for all political subdivisions in which a project is located, and all political subdivisions with a population of 5,000 or more located within 15 miles of the project dam)), JA 127. As the Commission explained, "it would be administratively impossible for the Commission to determine which municipalities were likely to be interested other than on the basis of propinquity." Permit Order P 18, JA 48. Western Minnesota clarified, on rehearing before the agency, that it is not challenging the Commission's notice practices, resting on closeness or proximity, under section 4(f). Western Minnesota Rehearing Request at 17, R. 66, JA 69.

Having found that FPA section 4(f) limits the scope of municipalities entitled to notice so that they may act to "assert and thus protect" the municipal preference, the Commission reasonably construed FPA section 7(a) as also encompassing some limitation. The Act "does not extend the same treatment to all municipalities." Permit Order P 18, JA 48. Consistent with Court and Commission precedent, the Commission here identified no basis to conclude that the scope of municipalities entitled to notification, so that they might assert the

municipal preference, should differ substantially from the scope of municipalities actually entitled to that preference. *See N. Colorado*, 730 F.2d at 1516 n.7 ("we would reject any argument that 'municipality' has a different meaning for purposes of a § 4(f) notice than for purposes of a § 7(a) municipal preference").[3] And while the Commission declined to adopt precisely the same limitation for purposes of section 7(a), Rehearing Order P 26 n.37, JA 127, "its interpretation of the geographical limits inherent in municipal preference is buttressed by section 4(f)." *Id*. P 30, JA 130.

Western Minnesota discounts the relevance of section 4(f) as a mere "procedural notice requirement" (Br. 19) not to be given effect. But it cites no precedent supporting a distinction between procedural or notice provisions and substantive provisions of a statute, for purposes of statutory interpretation under *Chevron*. In any event, however, this Court's prior finding, that section 4(f) is "primarily intended to allow states and municipalities to assert and thus protect

[3] Western Minnesota seems to contradict this point with a new argument that the Commission's "long-standing policy . . . [is] to treat Section 3(7) and Section 7(a) as separate and distinct from the Section 4(f) notice provision." Br. 19. But consistent with the Court's statement in *Northern Colorado* that "municipality" has the same meaning under sections 4(f) and 7(a), the Commission likewise, in the decision Western Minnesota references, clarified that its "refusal to examine an entity's municipal competence when issuing notice under Section 4(f) is a matter of Commission policy and not, as [the applicant] argues, because the definition of municipality in Section 3(7) is inapplicable to Section 4(f)." *Allegheny Elec. Coop., Inc.*, 29 FERC ¶ 61,208, 61,423 (1984).

their statutory preferences," demonstrates that section 4(f) has more significance than Western Minnesota contends. *See N. Colorado*, 730 F.2d at 1513.

Western Minnesota also claims that, because section 4(f) requires notice only when a non-municipal applicant files a permit application, Congress did not "intend[] to protect local municipalities from distant municipalities." Br. 18. But section 4(f)'s limitation to non-municipal applicants actually supports the Commission's finding that "Congress never intended or even anticipated that a municipality would propose to develop a project at a distant location in another state (or that such municipality would claim preference)." Rehearing Order P 29, JA 129. When Congress enacted the Federal Water Power Act of 1920, the "nation's electric grid was relatively undeveloped." *Id*. Accordingly, Congress likely did not "envision[] that municipalities might seek to develop distant projects when they would be unable to make use of the power that would result from such projects." *Id*.

Western Minnesota now argues that Congress "was well aware the municipal preference would be implemented using long-distance transmission and an integrated transmission grid." Br. 25-29. This is a new argument, not presented to the Commission in any pleading. *See supra* p. 2 (discussing statutory preservation requirement). In any event, however, the statute evinces no such

awareness. While the hearing testimony and floor debates cited by Western Minnesota reflect an awareness of increasingly long-distance transmission capabilities, nothing in the cited passages refutes the Commission's findings that in 1920 the grid was "relatively undeveloped" – as compared to now – and that "it is unlikely that Congress envisioned that municipalities might seek to develop distant projects when they would be unable to make use of the power." Rehearing Order P 29, JA 129. Western Minnesota acknowledges that, even now when the grid is substantially more developed, there exist distances that would preclude a municipality from making use of the power available from a project. *See* Western Minnesota Rehearing Request at 26, JA 78.

Finally, even Western Minnesota concedes that there is some limit on municipal preference. On rehearing before the agency, Western Minnesota pointed to the requirement in FPA section 7(a) that, before applying the municipal preference, any competing municipal application must be "equally well adapted . . . to conserve and utilize in the public interest the water resources *of the region*," 16 U.S.C. § 800(a) (emphasis added). *See* Rehearing Order P 33 n.53, JA 132. Relying on that language, Western Minnesota argued that "a municipality, like any other applicant, should be entitled to exercise its rights under the statute with respect to any project located in the region." Western Minnesota Rehearing Request at 15, JA 67. If Western Minnesota continues to take this position – a

matter left unclear in its brief (*see* Br. 50) – it would eliminate any need for the Court to consider whether there should be a geographic limitation and confine the issue to whether the Commission's choice of "vicinity" or "nearby" is a reasonable limitation. *See* Rehearing Order P 33 n.53, JA 132.

B. The Purpose Of The Act And Its Legislative History Support The Development Of Local Water Resources For Local Use

In addition to the statutory text and context, the Commission reasonably relied upon its understanding of the public interest purpose of the Act, as well as the limited legislative history related to this issue. Here, Western Minnesota appears to conflate the issue of whether municipalities should pursue development of hydroelectric projects for authorized municipal purposes in their discretion, with the question at issue here – whether municipalities should be able to utilize municipal preference to secure priority for all such development activities, regardless of their location. *See* Rehearing Order P 35, JA 132. Surely Western Minnesota is correct that municipalities may develop hydroelectric projects, *see id*., as otherwise permitted, for municipal purposes of their own choosing. *See* Br. 35. The Commission merely found it unlikely that Congress intended to confer upon municipalities "super-competitor" status when they seek to develop a distant water resource for that purpose. *See* Rehearing Order PP 19, 35, JA 122, 133. The Commission's view of the Act is consistent with the overall purpose of the Act as a "legislative compromise" intended to "reassure private investors seeking

reasonable investment returns and to accommodate conservationists favoring public control of water resources." *Oconto Falls*, 41 F.3d at 672 (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366 (D.C. Cir. 1985), *vacated*, 826 F.2d 1074, 1089 (1987) (*en banc*) (affirming, on rehearing *en banc*, agency's interpretation of municipal preference in section 7(a) as excluding relicensing)).

As the Commission explained, "it is difficult to discern what public interest is served by giving a municipality a preference with respect to a project that is far from the site of the municipality." Rehearing Order P 19, JA 122; *see also* Permit Order P 17 (same), JA 48. In support of this point, the Commission provided hypothetical examples of undesirable consequences if the geographical scope of municipal preference were unlimited. In the first, a municipality on the East Coast could claim preference over a private entity seeking to develop a project in Hawaii, even though (as even Western Minnesota has acknowledged, Rehearing Order P 33, JA 131), the municipality could not make use of the power for its local needs. Permit Order P 17, JA 48; Rehearing Order PP 20, 33, JA 123, 131. In the second example, perhaps more concerning, both a distant municipality and a local or nearby municipality could claim the preference in seeking a permit; "if both entities could legitimately claim preference and filed applications at the same time, the distant municipality might win a tiebreaker drawing" and prevail over the local municipality. Rehearing Order P 20, JA 123; *see also* Permit Order P 17, JA 48.

The Commission reasonably "maintain[s] that these types of consequences were not likely intended, or anticipated, by Congress in enacting FPA section 7(a)." Rehearing Order P 20, JA 123. The state of the Nation's electric grid simply could not support the use of power from such a distance away at the time Congress enacted FPA section 7(a) – even if additional development of long distance transmission was anticipated at that time. *Id*. P 29, JA 129. And, in 1920, "access to hydroelectric power was at a particular premium for municipalities seeking to provide electric power to their communities." *Id*. P 24, JA 125.

Before the Commission, Western Minnesota argued, essentially, that no municipality would pursue development of a distant project for which it could not use the power, i.e., for "purely financial benefits." Rehearing Order P 33, JA 131-32; *see also* Western Minnesota Rehearing Request at 26, JA 78. Shifting gears, Western Minnesota now argues that the Commission has no legitimate policy concern regarding a municipality employing the preference to secure priority for a project that would not serve its local load. Br. 34-35. But if this is indeed an ordinary dispute over policy preferences, the Commission's expert judgment, as the agency charged with administering the statute, based on the history of the development of the interstate transmission grid and hydroelectric generation, should prevail. *See, e.g.*, *New England Power Generators Ass'n v. FERC*, 757

F.3d 283, 297 (D.C. Cir. 2014) ("[W]e defer to FERC's expertise, as the agency is best equipped to manage competing policy rationales.").

Western Minnesota suggests something inappropriate in any consideration of policy in the interpretation of FPA section 7(a). But there is nothing wrong with the agency entrusted to administer a federal statute considering the public policy underlying that statute. Indeed, the Supreme Court recently cautioned against "transfer[ing] any number of interpretive decisions – archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests – from the agencies that administer the statutes to federal courts." *City of Arlington*, 133 S. Ct. at 1873. Thus, the Commission appropriately relied upon its understanding of the development of the Nation's electric grid.

Aside from the purpose of the Act and the Commission's own expert judgment, the limited legislative history relevant on this score, on balance, supports the Commission's view of the limits of municipal preference. Western Minnesota and the Commission agree, apparently, that much of the legislative history concerns not the scope of municipal preference, but the operation of the preference and the mandatory nature of the preference vis-à-vis private developers. *See* Rehearing Order P 24 ("much of the debate focused on public versus private development"), JA 125; *see* Br. 30-31, 33. And neither the Commission nor

Western Minnesota has identified legislative history directly addressing operation of the preference when more than one municipality pursues development.

On this issue, the Commission parsed the legislative debates as best as it could to understand Congressional intent on this specific issue. *See* Rehearing Order PP 24, 27, JA 125, 128. While recognizing the Court's disinclination to rely upon statements of individual members of Congress or even legislation sponsors, *see N. Colorado,* 730 F.2d at 1518-19, the Commission did identify multiple references to development by the States or subdivisions "in which the waters are to be found" and "in which these water-power sites are situated." *See* Rehearing Order P 24 (citing, and quoting at length, legislative history), JA 125-26. Further, in the same debate exchange, the Commission identified language supporting development by "local organizations, municipalities, and State subdivisions," as well as the "people of a community." *Id*., JA 126.

Western Minnesota, for its part, cites selective exchanges which do nothing more than make clear that Congress intended the municipal preference, when applicable, to be mandatory. *See*, *e.g*., Br. 31 (citing statement of Senator Sims, in the context of discussing public versus private development, indicating that preference is to be given "in every case"). Western Minnesota has argued that this demonstrates clear Congressional intent for the municipal preference to be

absolute, but it does not address the problem of competing municipalities or geographical distance.

As the Commission explained on rehearing, "the fact is that neither Congress nor the Commission has ever faced the precise question of whether preference should be given to a municipality with respect to a" distant project. Rehearing Order P 31, JA 130. While the Commission did not place significant weight on the legislative history to support its interpretation of FPA section 7(a), the passages cited by the Commission, as opposed to the passages cited by Western Minnesota, more directly address the scope of the preference. *See id*. P 24, JA 125-26.

C. The Commission Did Not Depart From Precedent

As the Commission pointed out on rehearing, this is the first time the Commission has interpreted the geographic scope of municipal preference under FPA section 7(a). *See* Rehearing Order PP 31-32, JA 130-31. None of the decisions cited by Western Minnesota, awarding a preliminary permit to a distant municipality based upon its entitlement to municipal preference, contains any discussion whatsoever of the geographic scope of such preference. *See*, *e.g*., Rehearing Order P 32, JA 131.

In particular, Western Minnesota cites five cases in its brief as demonstrating that "FERC has a long-standing history of applying Section 7(a)

municipal preference to all municipalities, regardless of their distance from the project." Br. 13 n.2; *see also* Br. 21 n.5 (citing n.2), 45 n.9 (same). In the first four of those cases, the Commission awarded the permit to the municipal applicant based upon municipal preference, without opposition, and without discussion of the issue or reference to any distance between the municipality and the project site. Significantly, none of the petitioners before this Court cited any of these four supposedly controlling cases before the Commission in any of their submissions to the agency. Because those cases form the very core of Western Minnesota's argument that the Commission has impermissibly changed course, the Court should appropriately reject any arguments based upon these cases. *See Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1170-71 (D.C. Cir. 2007) (discussing the importance of the statutory preservation requirement in the context of *Chevron*-based statutory interpretation).

To briefly review the first four cases, in *W. Minn. Mun. Power Agency*, 136 FERC ¶ 62,005 (2011), *amended*, 147 FERC ¶ 62,123 (2014) (extending permit for two years), Western Minnesota competed for a permit against an FFP affiliate and was awarded the permit based on municipal preference, without any discussion of the issue[4] or reference to Western Minnesota's distance from the project. *City of*

[4] Each of the four orders granting a permit uses the following language (or some slight variation on it) in applying the rules of preference:

Oberlin, 132 FERC ¶ 62,155, at P 5 (2010), and *Falling Water Res., Inc.*, 38 FERC ¶ 62,184 (1987), follow this same formula. The Commission awarded the permit to the municipality based upon the municipal preference, again without discussion of the issue or reference to the municipality's distance from the project. In *City of Tacoma*, 55 FERC ¶ 62,191 (1991), the Commission again awarded the permit to the municipality, in that case a collaboration of two cities, Tacoma, Washington and Idaho Falls, Idaho, which sought the permit together. Again, the Commission awarded the permit to the municipal group without discussion of their municipal status (other than to deny a claim of collusive activity aimed at "banking" the site with successive permit terms), and without reference to the cities' distances from the project. The permit was later rescinded at the cities' request. *City of Tacoma*, 56 FERC ¶ 61,176 (1991).

Western Minnesota fares no better in its reliance on the fifth case. In *City of Seattle*, 13 FPC 1353 (1954), the permit was awarded to the only applicant, Seattle,

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> None of the competing applicants has presented a plan based on detailed studies. Consequently, there are no significant substantiated differences in the applicants' plans to support a conclusion that any one of these plans is superior to another. Consistent with section 7(a) of the Federal Power Act, which requires the Commission to give preference to municipalities or states whose plans are at least as well adapted as other applicants, and pursuant to section 4.37(b)(3) of the Commission's regulations, this permit is issued to the municipal applicant.

Falling Water Res., Inc., 38 FERC ¶ 62,184, at 63,311 (1987).

without any reference to or reliance upon municipal preference. As Western Minnesota notes in its brief, Seattle was later granted a license for the project – despite competition from another municipality – based not upon municipal preference, but upon its preference as the incumbent preliminary permit holder. Br. 42 (citing *City of Seattle*, 26 FPC 54 (1961)).[5] The *Seattle* orders appear to have no bearing upon municipal preference at all.

Finally, Western Minnesota cites cases where the Commission has granted a permit "to a first-filed non-local municipality over the application of a municipality even closer to the project site." Br. 45 & n.10 (citing three cases, only the third of which was referenced before the Commission: *City of Oglesby*, 61 FERC ¶ 62,035 (1992); *City of Redding*, 11 FERC ¶ 61,153, *reh'g denied*, 12 FERC ¶ 61,107 (1980); *Mitchell Energy Co., Inc.*, 16 FERC ¶ 62,334 (1981), *reh'g denied*, 19 FERC ¶ 61,295 (1982) (*cited in* Association Rehearing at 25, JA 114)). In those cases the Commission found the competing municipal applications otherwise equal; therefore, the Commission awarded the permits based on which was first-filed. None of those decisions addresses the issue of "whether geographical proximity is relevant to the scope of municipal preference." Rehearing Order P 32, JA 131. Indeed, none of the decisions references the relative locations of the

[5] Western Minnesota did cite this order on agency rehearing. *See* Western Minnesota Rehearing Request at 16, JA 68.

municipalities to the proposed project site at all. *Mitchell Energy* and other cases have addressed a municipality's legal competence to obtain a preliminary permit through the exercise of municipal preference, but those decisions have no bearing on the geographic scope of the municipal preference. *See Mitchell Energy*, 19 FERC ¶ 61,295, at 61,583.

Administrative agency decisions, like judicial decisions, passing on an issue "where it was not questioned and passed sub silentio" do not bind the agency, and likewise do not bind the Court. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *see City of Oconto Falls. v. FERC*, 204 F.3d 1154, 1163 (D.C. Cir. 2000) ("Commission precedent is silent on orphaned projects. Its action here, therefore, does not constitute a retroactive policy change"); *see also Midland Power Coop. v. FERC*, 774 F.3d 1, 6 (D.C. Cir. 2014) (denying precedential effect to prior D.C. Circuit opinions acting on the merits of an issue without considering the Court's jurisdiction to do so). In fact the Court has recognized that even where there are "past anomalies" where the Commission acted in a case but "the issue was not raised, and the Commission did not discuss it or rule on it," the Commission's decision to change course (and adhere to that approach) "can no longer be considered an unexplained departure from [agency] precedent." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1284 (D.C. Cir. 2007).

Here, the Commission recognized that it had not previously spoken directly to this issue. Rehearing Order P 31, JA 130; *see also id*. P 32 ("None of these decisions establishes precedent concerning the issue of whether geographical proximity is relevant to the scope of municipal preference."), JA 131. It noted that "given the evolving electric market and regulatory environment, it is not unlikely that municipalities may claim entitlement to preference in a variety of circumstances beyond the uses intended by Congress, if no geographical limits exist." *Id*. P 33, JA 131-32. As described above, the Commission fully supported its finding that the Act is ambiguous and its interpretation of the Act as requiring a geographical limit on the scope of municipal preference. The Commission did not reverse course here, but, even if it did, it "suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).

D. The Commission Did Not Ignore Its Regulations

Western Minnesota claims that the Commission ignored, and acted contrary to, the rules of preference set forth in its regulations. As Western Minnesota points out, the rules "track the language of Section 7(a)." Br. 44. Before this Court, Western Minnesota, for the first time, argues that the Commission strayed from the regulations and that its "new" interpretation requires notice and comment

rulemaking. On rehearing, Western Minnesota's[6] only reference to the Commission's regulations is the statement, on background, that "[t]he Commission has implemented the requirements of Section 7(a) in its rules of preference among competing applications at 18 C.F.R. § 4.37." Western Minnesota Rehearing Request at 5-6, JA 57-58. Western Minnesota offers no reason why it could not have raised any arguments based on section 4.37 to the agency, and it therefore has failed to preserve the Court's jurisdiction over these issues. *See supra* pp. 1, 35 (discussing 16 U.S.C. § 825*l*(b)); *see also Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005) (noting that the exception to this rule is reserved for an "extraordinary situation") (citation omitted).

Nonetheless, the Court can readily dispose of this claim by reference to the Commission's statutory interpretation. Western Minnesota claims that "once an agency has definitively interpreted its regulations, it cannot significantly revise its interpretation without a notice and comment rulemaking." Br. 47. As explained above, the Commission considered this issue for the first time in this case. While it had previously applied its regulations without considering the issue, those orders offered no interpretation, and plainly no "definitive" interpretation, from which it can be said the Commission has strayed. On the other hand, the Commission

[6] The Associations' request for rehearing does not reference section 4.37 of the Commission's regulations.

plainly understood that its interpretation here would apply equally to both the statute and its regulations. After quoting FPA section 7(a) in its entirety, the Commission noted that "Section 4.37 of the Commission's regulations, 18.C.F.R. § 4.37 (2013), implements the rules of preference among competing applications." Rehearing Order P 15 n.18, JA 121. Thus, the Commission's support for its statutory interpretation – by reference to statutory text, legislative history and Commission policy – equally supports application of this interpretation to section 4.37.

E. The Scope Of Municipal Preference Is Not Impermissibly Vague

Western Minnesota claims that the Commission's decision that municipalities should be accorded preference only with respect to the development of water resources located in their "vicinity" or "nearby," for the benefit of their citizens, is impermissibly vague. Br. 48-50. To the contrary, the facts of this case and the Commission's reliance on its regulations provide adequate guidance. Complete certainty did not exist prior to the Commission's orders on review here, nor is it required.

As the Commission explained, here the proposed site is "clearly not 'in the vicinity' or 'nearby' Western Minnesota's registered office located in a different state almost 400 miles away or any of its members, all of which are located in Minnesota." Rehearing Order P 36, JA 133. Further, the Commission, citing its

notice regulation (*see supra* p. 25), held that "[t]he municipalities defined in section 4.32(a)(2)(ii) of the Commission's regulations would obviously" satisfy the standard. *Id*. P 36, JA 133. But, consistent with Western Minnesota's concerns that the Commission not inappropriately limit the scope of the preference, the Commission left open the possibility that "other municipalities located nearby, but outside the limits of section 4.32(a)(2)(ii), might also be entitled to municipal preference." *Id*. More precise specification could unduly restrict the scope of municipal preference in a manner inconsistent with the statute. *See id*. ("Any more precise definition would eliminate the flexibility which may be necessary in any particular situation."); *see Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 235 (D.C. Cir. 2000) ("because the Secretary was reasonably concerned that more precise specification might cause harm, it was entirely reasonable under the statute for him to choose a relatively flexible standard").

Western Minnesota's primary concern here seems to be that a permit applicant may not know with complete certainty – at the time it commits resources to developing an application or even at the time the application is filed – whether it will prevail and receive a permit. But municipal preference has never truly been a trump card. As described above, section 7(a) of the Act requires that a municipal applicant submit an application that is "equally well adapted" before preference will be awarded. Moreover, now that the Commission has finally, squarely

addressed this issue for the first time, potential applicants have more guidance than they previously did. Further, the Commission's interpretation here does not eliminate competition between municipalities – which is most likely to be broken (assuming the applications are filed, as here, simultaneously) by a random drawing. *See Petersburg Mun. Power & Light*, 409 F. App'x at 366 (affirming the Commission's use of the random drawing as the tiebreaker when its procedures are otherwise exhausted).

And, finally, municipalities are not "disenfranchised," as Western Minnesota suggests. Br. 42. While they may not have "super-competitor" status if they lack municipal preference, they still may choose in their discretion to own or operate distant projects. *See* Rehearing Order PP 19, 35, JA 122, 132-33.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be upheld.

Respectfully submitted,

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February 23, 2015
FINAL BRIEF: April 20, 2015

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 9,946 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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FINAL BRIEF: April 20, 2015

ADDENDUM
Statutes & Regulations

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§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by oper-

general counsel, a solicitor, and a chief accountant, and to appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries, and authorizing the detail of officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officers, or in any other capacity, in field work outside the seat of government, and the detail, assignment or transfer to the commission of engineers in or under the Departments of the Interior or Agriculture for work outside the seat of government for provisions which required the commission to appoint an executive secretary at a salary of $5,000 per year and prescribe his duties, and which permitted the detail of an officer from the United States Engineer Corps to serve the commission as engineer officer; and inserted provisions permitting the commission to make certain expenditures necessary in the execution of its functions, and allowing the payment of expenditures upon the presentation of itemized vouchers approved by authorized persons.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 793a. Repealed. Pub. L. 87–367, title I, § 103(5), Oct. 4, 1961, 75 Stat. 787

Section, Pub. L. 86–626, title I, § 101, July 12, 1960, 74 Stat. 430, authorized the Federal Power Commission to place four additional positions in grade 18, one in grade 17 and one in grade 16 of the General Schedule of the Classification Act of 1949.

§§ 794, 795. Omitted

CODIFICATION

Section 794, which required the work of the commission to be performed by and through the Departments of War, Interior, and Agriculture and their personnel, consisted of the second paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063, which was omitted in the revision of said section 2 by act June 23, 1930, ch. 572, § 1, 46 Stat. 798. The first and third paragraphs of said section 2 were formerly classified to sections 793 and 795 of this title.

Section 795, which related to expenses of the commission generally, consisted of the third paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063. Such section 2 was amended generally by act June 23, 1930, ch. 572, § 1, 46 Stat. 798, and is classified to section 793 of this title. The first and second paragraphs of said section 2 were formerly classified to sections 793 and 794 of this title.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) ''public lands'' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include ''reservations'', as hereinafter defined;

(2) ''reservations'' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) ''corporation'' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include ''municipalities'' as hereinafter defined;

(4) ''person'' means an individual or a corporation;

(5) ''licensee'' means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) ''municipality'' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) ''navigable waters'' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) ''municipal purposes'' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) ''Government dam'' means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) ''project'' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) ''project works'' means the physical structures of a project;

(13) ''net investment'' in a project means the actual legitimate original cost thereof as defined and interpreted in the ''classification of investment in road and equipment of steam

tions 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:[1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of ma-

[1] So in original. The colon probably should be a period.

terial fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, 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 (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided*, *however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, pt. I, §4, 41 Stat. 1065; June 23, 1930, ch. 572, §2, 46 Stat. 798; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§202, 212, 49 Stat. 839, 847; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501; Pub. L. 97–375, title II, §212, Dec. 21, 1982, 96 Stat. 1826; Pub. L. 99–495, §3(a), Oct. 16, 1986, 100 Stat. 1243; Pub. L. 109–58, title II, §241(a), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

2005—Subsec. (e). Pub. L. 109–58, which directed amendment of subsec. (e) by inserting after ''adequate protection and utilization of such reservation.'' at end of first proviso ''The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.'', was executed by making the insertion after ''adequate protection and utilization of such reservation:'' at end of first proviso, to reflect the probable intent of Congress.

1986—Subsec. (e). Pub. L. 99–495 inserted provisions that in deciding whether to issue any license under this subchapter, the Commission, in addition to power and development purposes, is required to give equal consideration to 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 environmental quality.

1982—Subsec. (d). Pub. L. 97–375 struck out provision that the report contain the names and show the compensation of the persons employed by the Commission.

1935—Subsec. (a). Act Aug. 26, 1935, §202, struck out last paragraph of subsec. (a) which related to statements of cost of construction, etc., and free access to projects, maps, etc., and is now covered by subsec. (b).

Subsecs. (b), (c). Act Aug. 26, 1935, §202, added subsec. (b) and redesignated former subsecs. (b) and (c) as (c) and (d), respectively.

Subsec. (d). Act Aug. 26, 1935, §202, redesignated subsec. (c) as (d) and substituted ''3d day of January'' for ''first Monday in December'' in second sentence. Former subsec. (d) redesignated (e).

Subsec. (e). Act Aug. 26, 1935, §202, redesignated subsec. (d) as (e) and substituted ''streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations

[2] So in original. The period probably should be a colon.

tives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

§ 797c. Dams in National Park System units

After October 24, 1992, the Federal Energy Regulatory Commission may not issue an original license under Part I of the Federal Power Act [16 U.S.C. 791a et seq.] (nor an exemption from such Part) for any new hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal lands within any such unit. Nothing in this section shall be construed as repealing any existing provision of law (or affecting any treaty) explicitly authorizing a hydroelectric power project.

(Pub. L. 102–486, title XXIV, § 2402, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

The Federal Power Act, referred to in text, is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Act is classified generally to this subchapter (§ 791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Federal Power Act which generally comprises this chapter.

§ 797d. Third party contracting by FERC

(a) Environmental impact statements

Where the Federal Energy Regulatory Commission is required to prepare a draft or final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit, at the election of the applicant, a contractor, consultant or other person funded by the applicant and chosen by the Commission from among a list of such individuals or companies determined by the Commission to be qualified to do such work, to prepare such statement for the Commission. The contractor shall execute a disclosure statement prepared by the Commission specifying that it has no financial or other interest in the outcome of the project. The Commission shall establish the scope of work and procedures to assure that the contractor, consultant or other person has no financial or other potential conflict of interest in the outcome of the proceeding. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(b) Environmental assessments

Where an environmental assessment is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 and following) in connection with an application for a license under part I of the Federal Power Act [16 U.S.C. 791a et seq.], the Commission may permit an applicant, or a contractor, consultant or other person selected by the applicant, to prepare such environmental assessment. The Commission shall institute procedures, including pre-application consultations, to advise potential applicants of studies or other information foreseeably required by the Commission. The Commission may allow the filing of such applicant-prepared environmental assessments as part of the application. Nothing herein shall affect the Commission's responsibility to comply with the National Environmental Policy Act of 1969.

(c) Effective date

This section shall take effect with respect to license applications filed after October 24, 1992.

(Pub. L. 102–486, title XXIV, § 2403, Oct. 24, 1992, 106 Stat. 3097.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (a) and (b), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Federal Power Act, referred to in subsecs. (a) and (b), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended. Part I of the Act is classified generally to this subchapter (§ 791a et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Federal Power Act which generally comprises this chapter.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation

(a) Purpose

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.

(b) Extension of period

The Commission may extend the period of a preliminary permit once for not more than 2 additional years beyond the 3 years permitted by subsection (a) if the Commission finds that the permittee has carried out activities under such permit in good faith and with reasonable diligence.

(c) Permit conditions

Each such permit shall set forth the conditions under which priority shall be maintained.

(d) Non-transferability and cancellation of permits

Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

(June 10, 1920, ch. 285, pt. I, § 5, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 203, 212, 49 Stat. 841, 847; Pub. L. 113–23, § 5, Aug. 9, 2013, 127 Stat. 495.)

AMENDMENTS

2013—Pub. L. 113–23 designated existing first, second, and third sentences as subsecs. (a), (c), and (d), respectively, and added subsec. (b).

1935—Act Aug. 26, 1935, § 203, amended section generally, striking out ''and a license issued'' at end of second sentence and inserting ''or for other good cause shown after notice and opportunity for hearing'' in last sentence.

§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

(June 10, 1920, ch. 285, pt. I, § 6, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 204, 212, 49 Stat. 841, 847; Pub. L. 104–106, div. D, title XLIII, § 4321(i)(6), Feb. 10, 1996, 110 Stat. 676; Pub. L. 104–316, title I, § 108(a), Oct. 19, 1996, 110 Stat. 3832; Pub. L. 105–192, § 2, July 14, 1998, 112 Stat. 625.)

AMENDMENTS

1998—Pub. L. 105–192 inserted at end ''Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.''

1996—Pub. L. 104–316 struck out at end ''Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.''

Pub. L. 104–106 struck out at end ''Copies of all licenses issued under the provisions of this subchapter and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.''

1935—Act Aug. 26, 1935, § 204, amended section generally, substituting ''thirty days'' for ''ninety days'' in third sentence and inserting last sentence.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 2302 of Title 10, Armed Forces.

§ 800. Issuance of preliminary permits or licenses

(a) Preference

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

(June 10, 1920, ch. 285, pt. I, § 7, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 205, 212, 49 Stat. 842, 847; Pub. L. 90–451, § 1, Aug. 3, 1968, 82 Stat. 616; Pub. L. 99–495, § 2, Oct. 16, 1986, 100 Stat. 1243.)

CODIFICATION

Additional provisions in the section as enacted by act June 10, 1920, directing the commission to investigate the cost and economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, and also in connection with such project to submit plans and estimates of cost necessary to secure an increased water supply for the District of Columbia, have been omitted as temporary and executed.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–495 inserted ''original'' after ''hereunder or'' and substituted ''issued,'' for ''issued and in issuing licenses to new licensees under section 808 of this title''.

1968—Subsec. (c). Pub. L. 90–451 added subsec. (c).

1935—Act Aug. 26, 1935, § 205, amended section generally, striking out ''navigation and'' before ''water resources'' wherever appearing, and designating paragraphs as subsecs. (a) and (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 801. Transfer of license; obligations of transferee

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial

sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

(June 10, 1920, ch. 285, pt. I, § 8, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3)[1] Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

(June 10, 1920, ch. 285, pt. I, § 9, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Pub. L. 99–495, § 14, Oct. 16, 1986, 100 Stat. 1257.)

CODIFICATION

Former subsec. (c), included in the provisions designated as subsec. (a) by Pub. L. 99–495, has been editorially redesignated as par. (3) of subsec. (a) as the probable intent of Congress.

AMENDMENTS

1986—Pub. L. 99–495 designated existing provisions as subsec. (a), redesignated former subsecs. (a) and (b) as pars. (1) and (2) of subsec. (a), and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title[1] if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for

[1] See Codification note below.

[1] So in original. Probably should be followed by ''; and''.

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No 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 so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon

§ 4.31 Initial or competing application: who may file.

(a) *Application for a preliminary permit or a license.* Any citizen, association of citizens, domestic corporation, municipality, or state may submit for filing an initial application or a competing application for a preliminary permit or a license for a water power project under Part I of the Federal Power Act.

(b) *Application for exemption of a small conduit hydroelectric facility*—(1) *Exemption from provisions other than licensing.* Any citizen, association of citizens, domestic corporation, municipality, or state that has all of the real property interests in the lands necessary to develop and operate that project, or an option to obtain those interests, may apply for exemption of a small conduit hydroelectric facility from provisions of Part I of the Federal Power Act, other than licensing provisions.

(2) *Exemption from licensing.* Any person having all the real property interests in the lands necessary to develop and operate the small conduit hydroelectric facility, or an option to obtain those interests, may apply for exemption of that facility from licensing under Part I of the Federal Power Act.

(c) *Application for case-specific exemption of a small hydroelectric power project*—(1) *Exemption from provisions other than licensing.* Any qualified license applicant or licensee seeking amendment of its license may apply for exemption of the related project from provisions of Part I of the Federal Power Act other than licensing provisions.

(2) *Exemption from licensing*—(i) *Only Federal lands involved.* If only rights to use or occupy Federal lands would be necessary to develop and operate the proposed small hydroelectric power project, any person may apply for exemption of that project from licensing.

(ii) *Some non-Federal lands involved.* If real property interests in any non-Federal lands would be necessary to develop and operate the proposed small hydroelectric power project, any person who has all of the real property interests in non-Federal lands necessary to develop and operate that project, or an option to obtain those interests, may apply for exemption of that project from licensing.

[Order 413, 50 FR 11678, Mar. 25, 1985]

§ 4.32 Acceptance for filing or rejection; information to be made available to the public; requests for additional studies.

(a) Each application must:

(1) For a preliminary permit or license, identify every person, citizen, association of citizens, domestic corporation, municipality, or state that has or intends to obtain and will maintain any proprietary right necessary to construct, operate, or maintain the project;

(2) For a preliminary permit or a license, identify (providing names and mailing addresses):

(i) Every county in which any part of the project, and any Federal facilities that would be used by the project, would be located;

(ii) Every city, town, or similar local political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That has a population of 5,000 or more people and is located within 15 miles of the project dam;

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That owns, operates, maintains, or uses any project facilities or any Federal facilities that would be used by the project;

(iv) Every other political subdivision in the general area of the project that there is reason to believe would likely be interested in, or affected by, the application; and

(v) All Indian tribes that may be affected by the project.

(3)(i) For a license (other than a license under section 15 of the Federal Power Act) state that the applicant has made, either at the time of or before filing the application, a good faith effort to give notification by certified mail of the filing of the application to:

permit or an initial development application must be submitted for filing not later than the prescribed intervention deadline for the initial application.

(2) A notice of intent must include:

(i) The exact name, business address, and telephone number of the prospective applicant; and

(ii) An unequivocal statement of intent to submit a preliminary permit application or a development application (specify which type of application).

(d) *Requirements for competing applications.* (1) Any competing application must:

(i) Conform to all requirements for filing an initial application; and

(ii) Include proof of service of a copy of the competing application on the person(s) designated in the public notice of the initial application for service of pleadings, documents, or communications concerning the initial application.

(2) *Comparisons of plans of development.* (i) After the deadline for filing applications in competition against an initial development application has expired, the Commission will notify each license and exemption applicant of the identity of the other applicants.

(ii) Not later than 14 days after the Commission serves the notification described in paragraph (d)(2)(i) of this section, if a license or exemption applicant has not already done so, it must serve a copy of its application on each of the other license and exemption applicants.

(iii) Not later than 60 days after the Commission serves the notification described in paragraph (d)(2)(i) of this section, each license and exemption applicant must file with the Commission a detailed and complete statement of how its plans are as well or better adapted than are the plans of each of the other license and exemption applicants to develop, conserve, and utilize in the public interest the water resources of the region. These statements should be supported by any technical analyses that the applicant deems appropriate to support its proposed plans of development.

[Order 413, 50 FR 11680, Mar. 25, 1985; 50 FR 23947, June 7, 1985]

§ 4.37 Rules of preference among competing applications.

Except as provided in § 4.33(e), the Commission will select among competing applications on the following bases:

(a) If an accepted application for a preliminary permit and an accepted application for a license propose project works that would develop, conserve, and utilize, in whole or in part, the same water resources, and the applicant for a license has demonstrated its ability to carry out its plans, the Commission will favor the license applicant unless the permit applicant substantiates in its filed application that its plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region.

(b) If two or more applications for preliminary permits or two or more applications for licenses (not including applications for a new license under section 15 of the Federal Power Act) are filed by applicants for project works that would develop, conserve, and utilize, in whole or in part, the same water resources, and if none of the applicants is a preliminary permittee whose application for license was accepted for filing within the permit period, the Commission will select between or among the applicants on the following bases:

(1) If both or neither of two applicants are either a municipality or a state, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans.

(2) If both of two applicants are either a municipality or a state, or neither of them is a municipality or a state, and the plans of the applicants are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant with the earliest application acceptance date.

(3) If one of two applicants is a municipality or a state, and the other is

not, and the plans of the municipality or a state are at least as well adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will favor the municipality or state.

(4) If one of two applicant is a municipality or a state, and the other is not, and the plans of the applicant who is not a municipality or a state are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will inform the municipality or state of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the municipality or state to render its plans at least as well adapted as the other plans. If the plans of the municipality or state are rendered at least as well adapted within the time allowed, the Commission will favor the municipality or state. If the plans are not rendered at least as well adapted within the time allowed, the Commission will favor the other applicant.

(c) If two or more applications for licenses are filed for project works which would develop, conserve, and utilize, in whole or in part, the same water resources, and one of the applicants was a preliminary permittee whose application was accepted for filing within the permit period (*priority applicant*), the Commission will select between or among the applicants on the following bases:

(1) If the plans of the priority applicant are at least as well adapted as the plans of each other applicant to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the priority applicant.

(2) If the plans of an applicant who is not a priority applicant are better adapted than the plans of the priority applicant to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will inform the priority applicant of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the priority applicant to render its plans at least as well adapted as the other plans. If the plans of the priority applicant are rendered at least as well adapted within the time allowed, then the Commission will favor the priority applicant. If the plans of the priority applicant are not rendered as well adapted within the time allowed, the criteria specified in paragraph (b) will govern.

(3) The criteria specified in paragraph (b) will govern selection among applicants other than the priority applicant.

(d) With respect to a project for which an application for an exemption from licensing has been accepted for filing, the Commission will select among competing applications on the following bases:

(1) If an accepted application for a preliminary permit and an accepted application for exemption from licensing propose to develop mutually exclusive small hydroelectric power projects, the Commission will favor the applicant whose substantiated plans in the application received by the Commission are better adapted to develop, conserve, and utilize in the public interest the water resources of the region. If the substantiated plans are equally well adapted, the Commission will favor the application for exemption from licensing.

(2) If an application for a license and an application for exemption from licensing, or two or more applications for exemption from licensing are each accepted for filing and each proposes to develop a mutually exclusive project, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region. If the plans are equally well adapted, the Commission will favor the applicant with the earliest application acceptance date.

(e) A municipal applicant must provide evidence that the municipality is competent under applicable state and local laws to engage in the business of developing, transmitting, utilizing, or distributing power, or such applicant will be considered a non-municipal applicant for the purpose of determining

action for the sole purpose of further consideration, unless the Commission issued an order on the substantive merits of the appeal prior to December 3, 1990. No later than January 2, 1991, persons who had timely filed appeals of staff action prior to December 3, 1990 which were pending before the Commission on that date may file additional pleadings to update or supplement those appeals.

[Order 530, 55 FR 50682, Dec. 10, 1990, as amended by Order 606, 64 FR 44405, Aug. 16, 1999]

§ 385.1903 Notice in rulemaking proceedings (Rule 1903).

Before the adoption of rule of general applicability or the commencement of hearing on such a proposed rulemaking, the Commission will cause general notice to be given by publication in the FEDERAL REGISTER, such notice to be published therein not less than 15 days prior to the date fixed for the consideration of the adoption of a proposed rule or rules or for the commencement of the hearing, if any, on the proposed rulemaking, except where a shorter period is reasonable and good cause exists therefor; *Provided however*, That:

(a) When the Commission, for good cause, finds it impracticable, unnecessary, or contrary to the public interest to give such notice, it may proceed with the adoption of rules without notice by incorporating therein a finding to such effect and a concise statement of the reasons therefor;

(b) Except when notice or hearing is required by statute, the Commission may issue at any time rules of organization, procedure or practice, or interpretative rules, or statements of policy, without notice or public proceedings; and

(c) This section is not to be construed as applicable to the extent that there may be involved any military, naval, or foreign affairs function of the United States, or any matter relating to the Commission's management or personnel, or to United States property, loans, grants, benefits, or contracts.

§ 385.1904 Copies of transcripts (Rule 1904).

The Commission will cause to be made a stenographic record of public hearings and such copies of the transcript thereof as it requires for its own purposes. Participants desiring copies of such transcript may obtain the same from the official reporter upon payment of the fees fixed therefor.

§ 385.1907 Reports of compliance (Rule 1907).

When any licensee, permittee, or any other person subject to the jurisdiction of the Commission is required to do or perform any act by Commission order, permit, or license provision, there must be filed with the Commission within 30 days following the date when such requirement became effective, a notice, under oath, stating that such requirement has been met or complied with; *Provided*, *however*, That the Commission, by rule or order, or by making specific provision therefor in a license or permit, may provide otherwise for the giving of such notice of compliance. Five conformed copies of such notice must be filed in lieu of the fourteen conformed copies required by Rule 2004 (copies of filings).

Subpart T—Formal Requirements for Filings in Proceedings Before the Commission

§ 385.2001 Filings (Rule 2001).

(a) *Filings with the Commission*. (1) Except as otherwise provided in this chapter, any document required to be filed with the Commission must comply with Rules 2001 to 2005 and must be submitted to the Secretary by:

(i) Mailing the document to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426;

(ii) Hand delivering the document to Room 1A, 888 First Street, NE., Washington, DC; or

(iii) By filing via the Internet pursuant to Rule 2003 through the links provided at *http://www.ferc.gov*.

NOTE TO PARAGRAPH (a)(1): Assistance for filing via the Internet is available by calling (202) 502–6652 or 1–866–208–3676 (toll free), or by e-mail to *FERCOnlineSupport@ferc.gov*.

(2) Any document is considered filed, if in paper form, on the date stamped by the Secretary or, in the case of a document filed via the Internet, on the date indicated in the acknowledgment that will be sent immediately upon the Commission's receipt of a submission, unless the document is subsequently rejected. Any document received after regular business hours is considered filed on the next regular business day.

(b) *Rejection.* (1) If any filing does not comply with any applicable statute, rule, or order, the filing may be rejected, unless the filing is accompanied by a motion requesting a waiver of the applicable requirement of a rule or order and the motion is granted.

(2) If any filing is rejected, the document is deemed not to have been filed with the Commission.

(3) Where a document is rejected under paragraph (b)(1) of this section, the Secretary, or the office director to whom the filing has been referred, will notify the submitter and indicate the deficiencies in the filing and the reason for the rejection.

(4) If a filing does not comply with any applicable requirement, all or part of the filing may be stricken. Any failure to reject a filing which is not in compliance with an applicable statute, rule, or order does not waive any obligation to comply with the requirements of this chapter.

[Order 619, 65 FR 57091, Sept. 21, 2000, as amended by Order 2002, 68 FR 51143, Aug. 25, 2003; Order 647, 69 FR 32440, June 10, 2004; Order 703, 72 FR 65664, Nov. 23, 2007]

§ 385.2002 Caption of filings (Rule 2002).

A filing must begin with a caption that sets forth:

(a) The docket designation, if any;

(b) The words ''INTERLOCUTORY APPEAL'' underneath the docket designation if the filing is an appeal under Rule 715(c) of a presiding officer's denial of a motion for an interlocutory appeal;

(c) The title of the proceeding if a proceeding has been initiated;

(d) A heading which describes the filing; and

(e) The name of the participant for whom the filing is made, or a shortened designation for the participant.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 402, 49 FR 39539, Oct. 9, 1984]

§ 385.2003 Specifications (Rule 2003).

(a) *All filings.* Any filing with the Commission must be:

(1) Typewritten, printed, reproduced, or prepared using a computer or other word or data processing equipment;

(2) Have double-spaced lines with left margins not less than 1½ inch wide, except that any tariff or rate filing may be single-spaced;

(3) Have indented and single-spaced any quotation that exceeds 50 words; and

(4) Use not less than 10 point font.

(b) *Filing by paper.* (1) Any filing with the Commission made in paper form must be:

(i) Printed or reproduced, with each copy clearly legible;

(ii) On letter-size unglazed paper that is 8 to 8½ inches wide and 10½ to 11 inches long; and

(iii) Bound or stapled at the left side only, if the filing exceeds one page.

(2) Any log, graph, map, drawing, or chart submitted as part of a filing will be accepted on paper larger than provided in paragraph (b)(1) of this section, if it cannot be provided legibly on letter-size paper.

(c) *Filing via the Internet.* (1) All documents filed under this Chapter may be filed via the Internet except those listed by the Secretary. Except as otherwise specifically provided in this Chapter, filing via the Internet is in lieu of other methods of filing. Internet filings must be made in accordance with instructions issued by the Secretary and made available online at *http://www.ferc.gov*. Provisions of this chapter or directions from the Commission containing requirements as to the content and format of specific types of filings remain applicable.

(2) The Secretary will make available on the Commission's Web site a list of document types that may not be filed via the Internet, as well as instructions pertaining to allowable electronic file and document formats, the filing of complex documents, whether paper

Western Minnesota Municipal Power Agency, et al. v. FERC **FERC Project No. 13579, *et al.***
D.C. Cir. No. 14-1153

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 20th day of April 2015, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Holly E. Cafer
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