ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 13-1277 and 15-1307 (consolidated)

NEW ENERGY CAPITAL PARTNERS, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: APRIL 1, 2016

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 Petitioner New Energy Capital Partners, LLC.

B. Rulings Under Review

1. *Alcoa Power Generating, Inc*., Project No. 2197-073, Notice Denying Motion to Intervene (May 30, 2013) ("Intervention Notice"), R. 9, JA 47;

2. *Alcoa Power Generating, Inc*., 144 FERC ¶ 61,218 (Sept. 19, 2013) ("First Rehearing Order"), R. 42, JA 49;

3. *Alcoa Power Generating, Inc*., Project No. 2197-073, Notice Rejecting Motion to Reopen Record (Mar. 3, 2015) ("Reopening Notice"), R. 156, JA 58; and

4. *Alcoa Power Generating, Inc*., 152 FERC ¶ 61,040 (July 16, 2015) ("Second Rehearing Order"), R. 221, JA 60.

C. Related Cases

This case has not been before this Court or any other court. Counsel for the Commission is not aware of any related cases pending before this Court or any other court.

/s/ Holly E. Cafer
Holly E. Cafer

April 1, 2016

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GLOSSARY

Alcoa	Alcoa Power Generating, Inc.
Br.	Opening brief of Petitioner New Energy Capital Partners, LLC
Commission or FERC	Federal Energy Regulatory Commission
First Rehearing Order	*Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218 (Sept. 19, 2013), R. 42, JA 49
FPA or the Act	Federal Power Act
Intervention Notice	*Alcoa Power Generating, Inc.*, Project No. 2197-073, Notice Denying Motion to Intervene (May 30, 2013), R. 9, JA 47
JA	Joint Appendix
P	Denotes a paragraph number in a Commission order
Motion	New Energy's Petition to Reopen Relicensing Application Process and in the Alternative, Motion for Late Intervention in the Yadkin Project Relicensing, Project No. P-2197-073 (filed Apr. 30, 2013), R. 1, JA 195
New Energy	Petitioner New Energy Capital Partners, LLC
R.	Indicates an item in the certified index to the record
Reopening Notice	*Alcoa Power Generating, Inc.*, Project No. 2197-073, Notice Rejecting Motion to Reopen Record (Mar. 3, 2015), R. 156, JA 58
Second Rehearing Order	*Alcoa Power Generating, Inc.*, 152 FERC ¶ 61,040 (July 16, 2015), R. 221, JA 60

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STATEMENT OF THE ISSUE

In this interlocutory appeal from procedural rulings in an ongoing hydroelectric project relicensing proceeding, the issue before the Court is:

Whether the Federal Energy Regulatory Commission reasonably interpreted and applied its regulations in denying a motion to intervene in, or to "reopen," the proceeding, filed six years after the latest deadline for interventions.

COUNTERSTATEMENT OF JURISDICTION

Under Federal Power Act ("FPA") section 313(b), "any *party* to a proceeding under this Act aggrieved by an order issued by the Commission in such

proceeding" may seek judicial review of that order. 16 U.S.C. § 825*l*(b) (emphasis added). As described further, *infra* pp. 27-29, Petitioner New Energy Capital Partners ("New Energy") may seek review only of the Commission's decision to deny its late motion to intervene. As to all other issues, it lacks "party" status, and thus cannot seek judicial review. *See, e.g.*, *N. Colo. Water Cons. Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984). This is especially so when the agency proceeding (here, a hydroelectric licensing proceeding) is ongoing, New Energy can still participate in that proceeding by filing comments, and the Commission has yet to make a final decision on the merits. *See, e.g.*, *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980) (holding that the FPA permits review only of "'orders of a definitive character dealing with the merits of a proceeding'") (quoting *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938)).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

This case concerns interlocutory, procedural rulings in a hydroelectric licensing proceeding that is ongoing before the Commission. Alcoa Power Generating, Inc. ("Alcoa") holds an existing license for the Yadkin Project ("Project") in North Carolina, and began its relicensing process in 2002. At the time it was originally licensed, Alcoa used the Project's power solely to support its

aluminum smelting operations at the nearby Badin Works. With its 2002 filing to start the relicensing process, and again in 2004, 2006, and 2007, Alcoa notified the Commission that it had curtailed operations at the Badin Works and had begun selling power into the wholesale market. Alcoa continued to pursue relicensing, filing its formal license application by the deadline set by the Federal Power Act, April 24, 2006, falling two years before expiration of the existing license. No other entity filed a competing application.

In 2013, New Energy filed a motion with the Commission, seeking either permission to intervene late, or for the Commission to "reopen and restart" the ongoing proceeding. New Energy explained that it had just learned – in 2010 – that Alcoa was closing the Badin Works and selling power into the wholesale market, and it wanted to pursue a competing application for the Project, notwithstanding the statutory deadline.

In the orders on review before the Court, the Commission rejected these belated efforts on procedural grounds. *See Alcoa Power Generating, Inc*., Project No. 2197-073, Notice Denying Motion to Intervene (May 30, 2013) ("Intervention Notice"), R. 9, JA 47, *reh'g denied*, 144 FERC ¶ 61,218 (Sept. 19, 2013) ("First Rehearing Order"), R. 42, JA 49; and *Alcoa Power Generating, Inc*., Project No. 2197-073, Notice Rejecting Motion to Reopen Record (Mar. 3, 2015) ("Reopening Notice"), R. 156, JA 58, *reh'g denied*, 152 FERC ¶ 61,040 (July 16, 2015)

("Second Rehearing Order"), R. 221, JA 60. The Commission denied New Energy's late motion to intervene for failing to show good cause why the deadline should be waived. Alcoa announced its intentions for the Project in 2002 – well before New Energy attempted to enter the case. The Commission also denied New Energy's motion to reopen, explaining that such motions may be filed only by parties, and New Energy is not a party.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

Part I of the Federal Power Act constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). Section 4(e) of the Act authorizes the Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. 16 U.S.C. § 797(e).

Section 15 of the Act, 16 U.S.C. § 808, sets forth the procedures applicable to relicensing, where the Commission may issue a "new" license to an existing licensee or another entity. Section 15(c)(1) requires that "[e]ach application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license." 16 U.S.C. § 808(c)(1); *see also* 18 C.F.R. § 16.9(b)(1) (implementing FERC regulations).

As relevant here, the Commission's regulations require it to issue public notice and solicit motions to intervene when a license application is filed, 18 C.F.R. § 16.9(d), and again if the applicant files an amendment as described in section 4.35(f) of the Commission's regulations. 18 C.F.R. § 16.9(b)(3); *see also Green Island Power Auth. v. FERC*, 577 F.3d 148, 162-164 (2d Cir. 2009) (*Green Island I*) (discussing analytical framework). Section 4.35(f) provides a list of changes to an application that require the new notice provided by section 16.9(b)(3), including a "material amendment to plans of development," 18 C.F.R. § 4.35(f)(1), a change in the "status" of the applicant as a municipality or permit holder entitled to certain preferences, *id*. § 4.35(f)(3), and certain changes "in the identity of an applicant." *Id*. § 4.35(f)(4). As most relevant here, the regulations define "material amendment to plans of development proposed in an application for a license or exemption from licensing [as] any fundamental and significant change" and provide guidance in the form of examples. *Id*. § 4.35(f)(1).

When the Commission issues a licensing decision, it must license the project that is "best adapted" to a comprehensive plan for improving or developing a waterway, for a variety of beneficial public uses. 16 U.S.C. § 803(a)(1). In a relicensing proceeding, FPA section 15(a)(2) provides that the project ultimately licensed must specifically be "best adapted to serve the public interest . . . ." 16 U.S.C. § 808(a)(2).

Under the FPA and the Commission's regulations, a person may become a "party" to a proceeding, including a hydroelectric licensing proceeding, by filing a timely motion to intervene. *See* 16 U.S.C. § 825g(a); 18 C.F.R. § 385.214. A person filing a late motion to intervene must demonstrate good cause for failing to timely intervene. 18 C.F.R. § 385.214(b)(3); *see also id*. § 385.214(d)(1)(i). Only a "party" "aggrieved" by a Commission order may seek rehearing and judicial review. 16 U.S.C. §§ 825*l*(a), (b).

II. THE COMMISSION'S PROCEEDINGS ON REVIEW

A. The Yadkin Project Relicensing Proceeding

Aloca is the licensee for the existing Yadkin Hydroelectric Project on the Yadkin River in North Carolina, for which it received an original license in 1958. At the time it received its original license, Alcoa used the Project power solely to power its local aluminum smelting operations, known as the Badin Works. *See* First Rehearing Order P 14 n.11, JA 52.

Alcoa began the relicensing process for the Project on September 23, 2002, by filing its opening document (the Initial Consultation Document) with FERC. First Rehearing Order P 2, JA 49. In that document, Alcoa explained that it had curtailed operations at Badin Works, and would either use Project power to support other operations, or sell the power in the wholesale market. *Id.* P 16, JA 53. Shortly thereafter, on March 27, 2003, it filed with FERC a formal notice of intent

to file an application for a new license by the statutory deadline. *Id*. P 2, JA 49; *see* 16 U.S.C. § 808(c)(1) (setting deadline for new license applications at two years before expiration of the existing license). FERC issued public notice of Alcoa's notice of intent, which explained that any application for a license for the Project, including competing applications, must be filed by April 30, 2006. Public Notice at 2, Project No. 2197 (Apr. 1, 2003), JA 85a. On April 25, 2006, Alcoa filed a new license application. *See* First Rehearing Order P 2, JA 49. No competing applications were filed.

As required by Federal Power Act section 15(c)(1), 16 U.S.C. § 808(c)(1), the Commission publicly noticed Alcoa's new license application. *Id*. P 3 (citing Public Notice, Project No. 2197 (Dec. 28, 2006), JA 116), JA 49. That notice established February 26, 2007 as the deadline for motions to intervene in the proceeding, as well as protests and comments on the license application. A few months later, Alcoa filed a settlement agreement on behalf of itself and 24 other entities, proposing conditions intended to resolve resource protection and enhancement issues raised in the proceeding. Relicensing Settlement Agreement, Project No. 2197-073 (May 7, 2007) ("2007 Settlement"), JA 130. The Commission publicly noticed the Settlement and solicited comments. Public Notice, Project No. 2197-073 (May 17, 2007), JA 186; *see* First Rehearing Order P 4, JA 49.

The Commission proceeded with its review under both the Federal Power Act and the National Environmental Policy Act, issuing a draft environmental impact statement on September 28, 2007. *See* First Rehearing Order P 5, JA 49. The deadline for comments on the draft was November 27, 2007. *Id*. FERC's regulations provide that any motion to intervene filed during the comment period on a draft environmental impact statement is considered timely. 18 C.F.R. § 380.10(a). Accordingly, the most recent opportunity for timely intervention expired on November 27, 2007. *See* First Rehearing Order P 11, JA 51.

FERC staff issued the final environmental impact statement on April 18, 2008. *Id*. P 5, JA 50. At that time, FERC was not able to act on the relicensing application because the State of North Carolina's decision on its water quality certification for the Project, under the Clean Water Act, remained pending. *See id*. P 5 (citing 33 U.S.C. § 1341(a)(1)), JA 50; *see also Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011) (affirming FERC orders, at earlier stage in this relicensing proceeding, which found that the State had not waived certification and which declined to act on the license application while the certification remained pending). Following federal court litigation concerning North Carolina's processing of the water quality certification, the North Carolina Department of Environmental Quality issued the certification on October 23, 2015. *See* Letter to FERC Secretary, Project No. 2197-073 (filed Oct. 23, 2015), JA 340. North

Carolina has also notified FERC of ongoing litigation, presently in the U.S. Court of Appeals for the Fourth Circuit (No. 15-2225), concerning title to the bed of the Yadkin River within the Project area. *See* Letter to FERC Secretary, Project No. 2197 (Oct. 28, 2015), JA 374.

The original license for the Project expired in 2008, and Alcoa has continued to operate the Project under the terms of that license while the proceeding remains pending. *See* 16 U.S.C. § 808(a)(1) (providing for annual licenses to govern operations while relicensing remains pending).

B. New Energy's Motion And The Commission's Orders On Review

1. New Energy's Motion

On April 30, 2013, New Energy petitioned FERC to reopen the ongoing relicensing proceeding and, alternatively, moved for late intervention in the proceeding. *See* Petition to Reopen Relicensing Application Process and in the Alternative, Motion for Late Intervention in the Yadkin Project Relicensing, Project No. P-2197-073 (filed Apr. 30, 2013) ("Motion"), R. 1, JA 195. New Energy "invests in renewable energy projects and facilities" "through private equity funds" it manages, and stated that it is interested in competing for the Project. *Id*. at 24, JA 218.

In its late motion to intervene, New Energy recognized that, under the Commission's regulations, motions for late intervention must demonstrate good

cause why the time limit should be waived. New Energy asserted that its interest as a competitor of Alcoa did not arise until late 2010, following three events: (1) Alcoa's March 2010 announcement of its decision to close the Badin Works aluminum smelting plant; (2) North Carolina's December 2010 decision to revoke Alcoa's Clean Water Act water quality certification; and (3) North Carolina's 2010 creation of the Uwharrie Regional Resource Commission. Motion at 15, 25, JA 209, 219. Further, New Energy argued that the Commission should have issued public notice of and solicited interventions following Alcoa's filing of the 2007 Settlement. Motion at 26, JA 220.

New Energy also requested that the Commission "reopen and restart" the relicensing proceeding. *Id*. at 8, JA 202. In New Energy's view, Alcoa proposes to "materially repurpose" the Project under any new license, because it no longer requires power for the Badin Works. *Id*. at 9, JA 203. It argued that the Commission's application of the public interest standard must take into account evidence that Alcoa plans to sell the Project power into the wholesale energy market, and not use it to supply Alcoa's local manufacturing operations. *Id*. at 9-14, JA 203-208. In so doing, New Energy further argued that the Commission must reopen the relicensing docket to allow competitors to file competing license applications that would better serve the public interest. *Id*. at 16, JA 210. Further, New Energy asserted that the public interest would only be served by requiring

Alcoa to turn over the Project to New Energy or a public organization, in return for payment of Alcoa's net investment in the Project as provided for by FPA section 15(a)(1), 16 U.S.C. § 808(a)(1). *Id*. at 14-15, JA 207-208.

2. The Commission's Notices and Orders on Review

a. Intervention

By notice issued May 30, 2013, the Commission denied New Energy's motion for late intervention. The Commission held that New Energy did not show good cause for waiving the deadline, noting that the motion was filed six years after the deadline. Intervention Notice at 2, JA 47. Further, "even assuming" that the 2010 events provide good cause for waiving the deadline, New Energy "offers no credible reason for waiting over two years from the last of those events to file its motion." *Id*.

New Energy sought rehearing, claiming that it could not have known that Alcoa intended to sell Project power in the wholesale market, rather than use it for local purposes, before various events occurring between 2007 and 2012, and thus after the November 27, 2007 deadline for interventions. *See* First Rehearing Order P 14, JA 52. In denying rehearing, the Commission pointed to four documents in the Commission's record of the relicensing proceeding – dated between 2002 and 2007 – indicating that Alcoa planned to start, and later had started, selling power into the market, and that it intended to close the Badin Works plant. *Id*. PP 16-19,

JA 53-54. Accordingly, New Energy had "ample notice prior to the November 27, 2007 deadline for intervening that Alcoa Power was considering closing the Badin Works plant and selling its power into the wholesale market." *Id.* P 20, JA 54. And, in any event, the Commission noted that Alcoa's decision where to sell power is not a relevant issue in the relicensing proceeding, and New Energy has not shown that it has a cognizable interest in Alcoa's power sales. *Id*. P 15, JA 53.

New Energy next claimed that the Commission erred in failing to solicit motions to intervene following the filing of three alleged "material amendments" to Alcoa's relicensing application. First Rehearing Request at 14, Project No. 2197 (filed June 27, 2013), R. 22, JA 298; *see* First Rehearing Order P 22, JA 54. Under the Commission's regulations, when an applicant materially amends its application, the Commission will issue public notice and provide an opportunity for intervention. First Rehearing Order P 23 (citing 18 C.F.R. § 16.9(b)(3)), JA 55. Applying those regulations, the Commission found that none of the identified filings are material amendments. *Id*. PP 24-26, JA 55-57. Concerning the 2007 Settlement, in particular, the Commission also noted that any failure to invite interventions would have been harmless error because there was a subsequent opportunity to intervene following issuance of the draft environmental impact statement, ending November 27, 2007. *Id*. P 24, JA 56. Accordingly, the

Commission confirmed that New Energy's late motion to intervene was properly denied.

New Energy subsequently petitioned this Court for review (No. 13-1277) of the Intervention Notice and the First Rehearing Order. On New Energy's request, the Court held the petition in abeyance pending Commission action on New Energy's alternative request to reopen the relicensing.

b. Reopening

On March 3, 2015, following New Energy's request that the Commission act on the alternative motion to reopen, the Commission issued a Notice rejecting the motion to reopen. The Notice explained that, under the Commission's regulations, only participants in a proceeding may file a motion to reopen the record. Reopening Notice at 1 (citing 18 C.F.R. § 385.716(b)(1) (motions to reopen) and 18 C.F.R. §§ 385.102(b)(1)-(2), (c) (defining participant as a party whose intervention is effective)), JA 58. New Energy is not a participant, because its late motion to intervene was denied. According, the Notice rejected the motion.

New Energy again sought rehearing, which the Commission denied by order issued July 16, 2015. Second Rehearing Order, JA 60. New Energy first argued that the Commission improperly characterized New Energy's pleading as a motion to reopen, which may only be filed by a party. New Energy captioned the pleading as a "petition," intending to invoke Commission regulations allowing a petition to

be filed by any "person." *Id*. P 16, JA 63. But the pleading does not fit the requirements of that rule, which apply to limited categories of requests, including requests for which the procedural rules prescribe no other form of pleading. *Id*. P 17 (citing 18 C.F.R. § 385.207(a)), JA 63. As the Commission held in the Notice, the pleading is in fact a motion to reopen, which is governed by Rule 716 of the Commission's Rules of Practice and Procedure. *Id*. (citing 18 C.F.R. § 385.716), JA 64.

Further, the Commission explained that, because it appropriately applied its regulations in rejecting the pleading, it was not required to address the merits. *Id*. P 18, JA 64. Nonetheless, to provide guidance, the Commission pointed out that the motion to reopen is in fact unnecessary because the ongoing relicensing proceeding remains open, and New Energy may participate by filing comments, albeit as a non-party. *Id*. P 19, JA 64. Moreover, and as explained in the First Rehearing Order, Alcoa announced its plans to close the Badin Works and sell power into the market several years prior to New Energy's motion. *Id*. P 20, JA 65. These facts thus do "not constitute new evidence that would warrant reopening the record pursuant to Rule 716(a)," 18 C.F.R. § 385.716(a). *Id*., JA 65. Finally, the Commission noted, New Energy is barred by statute from filing a competing application for the Project, as the deadline set by statute has passed. *Id*. P 21 (citing 16 U.S.C. § 808(c)(1)), JA 65.

SUMMARY OF ARGUMENT

The Commission did not abuse its discretion when it denied late intervention in a lengthy, ongoing proceeding, where the late motion came six years after the latest deadline. New Energy failed to show good cause for waiving the deadline, and Alcoa has made no changes to its proposal requiring the Commission to set a new deadline. Indeed, New Energy makes little effort to refute the Commission's findings. Rather, it bases its entire argument on a faulty factual premise. New Energy asserts that evidence of Alcoa's plan to sell power in the wholesale market and close the Badin Works "arose well after the date that any competing hydropower license could be filed in competition." Br. 11. This is false: In the orders on review, the Commission identified multiple instances in the record of the relicensing proceeding, dating back to 2002, and well before the 2006 deadline for competing applications or the 2007 deadline for interventions, where Alcoa announced its plans to curtail operations at Badin Works and sell power in the wholesale market.

If the Court affirms the Commission's decision denying New Energy's late motion to intervene, that is the end of the matter. As a non-party, New Energy may neither file a motion to reopen, due to limits in the Commission's regulations, nor appeal the Commission's denial of such a motion, due to limits in the Federal Power Act. Moreover, the agency proceeding remains open, making a motion to

reopen unnecessary in any event. As a non-party, New Energy may, like any other member of the public, continue to participate in the ongoing relicensing proceeding. That ongoing proceeding, and not this appeal on procedural matters, is the appropriate forum for New Energy's objections to Alcoa's proposal.

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)).

This Court applies a particularly deferential approach when examining the Commission's application of its own procedural rules. *See, e.g.*, *City of Orrville, Ohio v. FERC*, 147 F.3d 979, 991 (D.C. Cir. 1998) (requiring petitioner to demonstrate that FERC "abused its discretion" in denying late intervention). When considering whether an agency abused its discretion, the Court will "consider whether the [agency] decision was based on a consideration of the

relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

FERC's interpretation of its own regulations is entitled to "'controlling weight' unless it be 'plainly erroneous or inconsistent with the regulation.'" *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904-905 (D.C. Cir. 2010) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Cent. Vt. Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000) (same). Likewise, the Court gives substantial deference to FERC's interpretation of its own precedent. *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).

II. THE COMMISSION REASONABLY DENIED NEW ENERGY'S LATE MOTION TO INTERVENE

A petitioner denied party status may seek judicial review of the decision to deny it party status. Under Federal Power Act section 313(b), "any *party* to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding" may seek judicial review of that order. 16 U.S.C. § 825*l*(b) (emphasis added). As this Court long ago explained, a "would-be intervenor is a party to a proceeding in a limited sense, restricted to the proceedings upon the application for intervention; he is aggrieved by the denial of his application; he is not a party to the proceeding in the full sense of the term and is not aggrieved by the final order upon the merits of the controversy." *Pub. Serv. Comm'n of N.Y. v. FERC*, 284

F.2d 200, 204 (D.C. Cir. 1960) (construing parallel provisions of the Natural Gas Act); *see also N. Colo. Water Cons. Dist.*, 730 F.2d at 1515 ("Such a petitioner [whose party status has been denied] must obviously be considered a party for the limited purpose of reviewing the agency's basis for denying party status.").

Consistent with this precedent, all the Court need address here is whether the Commission plainly erred when it denied New Energy's late motion to intervene, as addressed in subparts A and B below. New Energy's various alternative arguments, addressed in Part III below, are beyond the scope of this appeal.

A. The Commission Reasonably Found That New Energy Lacks Good Cause To Intervene Late

New Energy has offered no explanation for why it did not act promptly on its apparent interest in competing for a new license for the Project. It relies on Alcoa's plans for selling Project power – information made publicly available between 2002 and 2010 (and, assuming relevance, 2012) – but does not explain why it failed to move to intervene until 2013. The Commission reasonably determined that New Energy failed to show good cause, as required by the Commission's regulations, for intervening so late in the proceeding. *See* Intervention Notice, JA 47-48; First Rehearing Order PP 11-21, JA 51-54.

In support of its late motion to intervene, New Energy identified various events, occurring after the November 27, 2007 deadline for interventions, as purportedly justifying its delay. In its Motion, New Energy referenced three events

in 2010, including Alcoa's decision to demolish the Badin Works. Motion at 25, JA 219. On rehearing of the Intervention Notice, New Energy pointed to four additional events occurring after November 27, 2007. These include Alcoa's idling of the Badin Works plant (August 2007), and decision to shutter the Works (March 2010), as well as the closing of Alcoa's Tapoco Smelting Operations in Tennessee (March 2009), and Alcoa's 2012 sale of the Tapoco Hydroelectric Project (FERC Project No. 2169). First Rehearing Request at 5, JA 289. New Energy claims that, prior to these events, it could not have known the extent of Alcoa's so-called "repurposing" of the Project, by closing the Badin Works and beginning to sell power in the wholesale market. Br. 4, 11, 21; First Rehearing Order P 14, JA 52.

This is factually incorrect. In the First Rehearing Order, the Commission identified four record documents – all dated before the November 2007 deadline for interventions – alerting the Commission and the public to the fact that Alcoa intended to and did start selling Project power into the wholesale market. First Rehearing Order PP 16-19, JA 53-54. In the very first document Alcoa submitted to start the pre-filing application process, back in 2002, Alcoa noted that it had "curtailed operations at Badin Works and would either use the Yadkin Project's excess power to support its other aluminum operations or sell the power on the open market." *Id*. P 16 (citing Initial Consultation Document at 1, JA 79), JA 53.

Less than two years later, Alcoa confirmed in a letter to the Commission that it had in fact curtailed operations and begun selling power into the market. *Id*. P 17 (citing Alcoa Letter to FERC Secretary (Mar. 1, 2004) at 1-2, JA 86-87), JA 53. New Energy itself noted that Alcoa's 2006 license application stated that operations at Badin Works had been curtailed, and Alcoa was selling excess power into the wholesale market. *See* First Rehearing Order P 18 (noting New Energy's citation, and citing License Application, Exh. H.2 at H-2, JA 90), JA 54. The Commission issued public notice of this document, and solicited motions to intervene. *See supra* p. 7. Finally, Commission staff also noted Alcoa's plan to close the Badin Works in a May 4, 2007 scoping document, publicly issued as part of its National Environmental Policy Act review process. *See* First Rehearing Order P 19, JA 54.

In light of these facts, New Energy has no basis to assert that Alcoa's intention to close Badin Works and sell Project power into the wholesale market "arose well after the date that any competing hydropower license could be filed in competition with Alcoa Power," in 2006. Br. 11. This is simply false. New Energy offers no evidence or argument to suggest that the four identified recordings of Alcoa's intent prior to the latest (November 2007) deadline to intervene were somehow inadequate to put the public on notice of Alcoa's plans. They were not.

Moreover, the Commission's rules, 18 C.F.R. § 385.214(b)(3), task New Energy with offering good cause for its delay in moving to intervene. To date, New Energy has offered no reason why it could not have acted more promptly on its interests, in light of the public availability of Alcoa's plans for the Badin Works and Project power. Accordingly, the Commission reasonably denied New Energy's motion for late intervention. *See Power Co. of America v. FERC*, 245 F.3d 839, 843 (D.C. Cir. 2001) (petitioner did not demonstrate good cause for intervening late, "certainly not to a degree sufficient to warrant our upsetting the Commission's application of its own procedural rule").

Rather than address these plain factual shortcomings, New Energy focuses on an alternative merits discussion in the Commission's orders, concerning the relevance of power disposition in licensing determinations. *See* First Rehearing Order P 15, JA 53. In an effort to be responsive to New Energy arguments, the Commission explained that issues concerning power disposition are, under the Commission's long-standing interpretation of the Federal Power Act, "in the hands of the licensee unless Congress has made a legislative directive to the contrary, which has not occurred here." *Id*. P 15, JA 53. For this reason, issues concerning power disposition are not generally relevant at relicensing, and do not generally provide good cause for intervention. *Id*.

Notwithstanding the fact that the Commission elected to address the merits in order to be responsive to New Energy's concerns, the Court may resolve New Energy's appeal by affirming the Commission's findings that New Energy lacked good cause to intervene so late, and no further opportunities for intervention were required (*see* subpart B, below). *See Braintree Elec. Light Dep't v. FERC*, 667 F.3d 1284, 1293 n.8 (D.C. Cir. 2012) (declining to review agency's alternative merits decision where agency offered, and Court affirmed, another rationale).

B. The Commission Properly Declined To Set A New Deadline For Interventions

In the ongoing relicensing proceeding, the Commission has already offered two opportunities for interested parties to intervene. *See supra* pp. 7-8. No additional opportunities were required. New Energy claims that the Commission applied too narrow a standard in determining whether a change to a license application requires a new public notice and opportunity for new interventions. *See* Br. 18-20. But the Commission applied the standard set in its regulations and precedent. At times, New Energy confuses the applicable standard, but in no case does it demonstrate that the Commission has abused its discretion.

The Commission's relicensing regulations govern the analysis here. They require the Commission to reissue public notice of an application and provide an opportunity for new interventions when an applicant files a material amendment to its application. First Rehearing Order P 23 (citing 18 C.F.R. § 16.9(b)(3)), JA 55.

Section 4.35(f) of the Commission's regulations provides that "a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to" certain changes in generating capacity and units, certain changes in the dam, powerhouse, and reservoir, and changes in the number of developments to be included in the project boundary. 18 C.F.R. § 4.35(f); *see also* First Rehearing Order P 23 (same), JA 55. Recognizing that this is not an exclusive list, the Commission has explained that "changes that would be considered material are those that 'are of such a fundamental nature as to constitute the proposal of a different project.'" First Rehearing Order P 23 (citing *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, P 13 (2010), *aff'd, Green Island Power Auth. v. FERC,* 497 F. App'x 127 (2d Cir. 2012) (*Green Island II*) (affirming, on review after remand, the Commission's application of its material amendment rules)), JA 55.

Applying this standard to the events New Energy characterized as material amendments, the Commission found that none requires a new public notice. First Rehearing Order PP 24-25, JA 55-56. The 2007 Settlement "makes minor alterations that are ordinary and expected changes routinely occurring in hydroelectric licensing proceedings." *Id.* P 24, JA 55. And the water withdrawal agreements with municipalities are only promises to file future applications for

municipal water withdrawals, after the issuance of any new license, and make no changes to the license application. *Id*. P 25, JA 56. Further, the Commission found that even if the 2007 Settlement should have been considered a material amendment, the "failure to invite interventions would have been harmless error since there was a subsequent opportunity to intervene," following the draft environmental impact statement. *Id*. P 24, JA 56. And, at such time as Alcoa files a water withdrawal application, the Commission's rules require it to provide an opportunity for interventions and comments. *Id*. P 25, JA 56.

In its opening brief, New Energy identifies no error in the Commission's analysis of these events under the material amendment standard. Accordingly, the Court should affirm the Commission's decision not to issue a new notice and solicit new interventions as a reasonable interpretation and application of the Commission's regulations. *See City of Orrville,* 147 F.3d at 991 (FERC did not abuse its discretion in denying late intervention); *see also Green Island II*, 497 F. App'x 127 (deferring to FERC's interpretation and application of the regulatory definition of material amendment).

As noted above, before the Commission, New Energy argued that the Commission must treat the 2007 Settlement and water agreements as material amendments. First Rehearing Request at 14-15, JA 298-299. Now, New Energy argues to this Court that the material amendment standard is too narrow. *See*

Br. 19-21. It urges the Court to adopt a new rule, providing that Alcoa's post-application statements concerning sales of Project power were made "to gain a comparative competitive advantage" and must also be material amendments under the Commission's regulations. Br. 20. New Energy offered neither this argument nor the cases on which it relies on rehearing before the Commission, and the Federal Power Act bars it from raising them before this Court for the first time. *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"); *see also City of Orrville*, 147 F.3d at 990 (barring, under the strict exhaustion requirements of the FPA, petitioner from shifting argument from the application of a standard, to the applicability of the standard) (citing *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)).

Even if New Energy's new arguments are properly before the Court, they are entirely misplaced. New Energy relies, Br. 19-20, on two cases where a license or permit applicant proposed to change the status or identity of the applicant while an application was pending. *See* 18 C.F.R. §§ 4.35(f)(3), (4).

But here, Alcoa proposes no change in status or identity; therefore, the cases New Energy relies upon are irrelevant. *Bangor Hydro-Electric Co.*, 87 FERC

¶ 62,001 (1999), involved a proposed transfer of a project license while a relicensing application was pending. The Commission found the transfer request required a new notice of the license application, because it involved "a change in the identity of the applicant" under section 4.35(f)(4) of the Commission's regulations. 87 FERC ¶ 62,001 n.7. Similarly, in *John Floreske, Jr.*, 101 FERC ¶ 62,122 (2002) (which New Energy captions *Granite County, Montana*, *see* Br. 19), the Commission noted that an applicant's election to claim a preference afforded to municipalities in competitive proceedings is a "change in status" under section 4.35(f)(3) of the Commission's regulations. 101 FERC ¶ 62,122 n.4. New Energy does not explain what bearing this has here, where Alcoa has not proposed a transfer or a change in its status, and New Energy identifies no such changes. New Energy relies upon the discussion of the Commission's scrutiny of transfer applications in *Bangor Hydro*, Br. 19-20, but this applies – unremarkably so – only when the Commission scrutinizes transfer applications.

Moreover, even if New Energy were correct that the Commission must solicit new motions to intervene where an applicant modifies a "competitive advantage," New Energy would still lack good cause to intervene out-of-time. Here again, New Energy's faulty factual premise underlies its argument: "Once deadlines to compete had passed, Alcoa dropped its unique competitive advantage without the threat of competition." Br. 21. As explained above, the Commission

identified Alcoa's intention to sell power on the market and to curtail and close the Badin Works – in the record – well before the deadline for competing applications. *See supra* pp. 19-20. Thus, even assuming Alcoa had a "unique competitive advantage," Br. 21, it announced its plans well before the 2006 deadline for competing applications and the 2007 deadline for interventions. New Energy has failed to establish that the Commission should have issued a new public notice and opportunity for interventions.

III. NEW ENERGY'S REMAINING CONCERNS ARE OUTSIDE THE SCOPE OF THE COURT'S REVIEW

New Energy's remaining concerns, those it emphasizes the most in its opening brief, are not properly before the Court. Under the judicial review provisions of the Federal Power Act, New Energy may seek review of the order denying it party status, but not the order rejecting its request to reopen the proceeding. But its appeal would fail on the merits in any event: the Commission offered multiple, reasonable rationales for rejecting the motion. And New Energy, even as a non-party, may continue to present its concerns in the ongoing relicensing proceeding.

A. The Federal Power Act Bars Review Of The Second Rehearing Order

As discussed *supra* p.17, there is no doubt that New Energy may seek this Court's review of the Commission's denial of its late intervention. But so long as

the Court affirms the Commission on the late intervention issue, New Energy may not raise other claims. *See City of Orrville*, 147 F.3d at 985, 990 n.12. Under FPA section 313(b), 16 U.S.C. § 825*l*(b), and this Court's precedent, New Energy is not an aggrieved party for purposes of anything other than the denial of its party status. *Id*. at 990 n.12 (finding petitioner Orrville had standing to challenge the denial of its late intervention motion, but not "the merits" of the order, because it was not a party); *see also California Trout v. FERC*, 572 F.3d 1003, 1016 (9th Cir. 2009) (losing the benefits of intervention, *e.g.*, eligibility to seek judicial review, does not give petitioners good cause for untimely intervention).

New Energy cites *Northern Colorado Water Conservancy District v. FERC*, 730 F.2d 1509, for the assertion that the Court may review the Commission's rejection of New Energy's motion to reopen. *See* Br. 12.[1] *Northern Colorado* involved the Commission's issuance of a preliminary permit to an applicant without providing direct notice to a municipal entity, as required by statute. After the proceeding closed, *i.e.*, after the Commission issued the permit, the municipality moved for reconsideration and reopening, explaining that it had not received timely notice. *Id*. at 1514. On review, this Court held only that "it would

[1] New Energy also cites *Green Island I*, 577 F.3d 148, but misunderstands the Second Circuit's ruling. *See infra* pp. 33-34. Relying on *City of Orrville* and *Northern Colorado*, the court agreed with the Commission that the petitioner could seek review of the order denying its late intervention, but did not permit review of any merits decisions, including the denial of petitioner's motion to present evidence. 577 F.3d at 159, 161.

be unfair to declare the denial of an untimely effort to reopen a proceeding to be unreviewable, when the basis of the effort is the contention that . . . timely objection was infeasible." *Id*. at 1515. In *Northern Colorado*, petitioner's inability to become a party was the basis of its motion to reopen. The Court did not have before it an order denying late intervention – as it does here. Absent the Court's leniency, the Commission's entire decision would have been unreviewable.

Here, the Commission ruled on New Energy's party status in final, reviewable orders denying its late motion to intervene. If the Court affirms that decision, that is the end of the matter. If, on the other hand, the Court reverses, the Commission may reassess, on remand, New Energy's party status and, if necessary, its motion to reopen. Thus, in either event, limits on judicial review in the Federal Power Act do not allow Court review of the Commission's denial of the motion to reopen.

B. The Commission Properly Rejected New Energy's Request To Reopen

If the Court determines that it can and should proceed to review of New Energy's claims, it must uphold the Commission's straight-forward application of its procedural rules. The Commission's identification of New Energy's 2013 pleading as a motion to reopen, rather than a petition, falls well within its discretion.

First, the Motion does not fit the requirements, detailed in the Commission's rules, for petitions. The Commission's Rule 207 establishes five types of petitions: the first four categories are not applicable, and the fifth category demonstrates New Energy's error. *See* Second Rehearing Order P 17 (citing 18 C.F.R. § 385.207(a)), JA 63; Reopening Notice at 1, JA 58. The first four categories concern types of proceedings not at issue here: remedial orders, declaratory orders, appeals from staff actions, and rulemakings. *Id*. The fifth category provides that a "person must file a petition when seeking: . . . (5) [a]ny other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading." 18 C.F.R. § 385.207(a)(5).

The Commission's rules in fact do "prescribe" a "form of pleading" for motions to reopen, which is the relief New Energy seeks. *See* Motion at 1 (requesting that FERC "reopen and restart"), JA 195. Rule 716, 18 C.F.R. § 385.716, permits any "participant" in a Commission proceeding to file a motion to reopen the record. *See* Reopening Notice at 1, JA 58; Second Rehearing Order PP 16-17, JA 63-64. New Energy did not dispute before the Commission and does not dispute before this Court that it is not a "participant," which the Commission's regulations define as a party or certain Commission employees. *See* Second Rehearing Request at 12-13, Project No. 2197 (filed Apr. 2, 2015), R. 164, JA 333-334; Reopening Notice at 1, JA 58. Because a "party" means only "any person

whose intervention in a proceeding is effective," 18 C.F.R. § 385.102(c)(3), New Energy cannot be a party and, therefore, cannot be a participant. Reopening Notice at 1, JA 58. For these reasons, the Commission reasonably interpreted its regulations in rejecting New Energy's motion to reopen for lack of party status.

Before this Court, New Energy focuses solely on an alternative discussion of the merits of the Motion, offered by the Commission merely as guidance. But the Commission explained that its guidance on the merits of the Motion was just that, alternative guidance, and not dispositive of any matter: "[G]iven that the Commission appropriately exercised its discretion in rejecting New Energy's pleading for lack of party status, the Commission was not required to address the merits of the pleading." Second Rehearing Order P 18, JA 64; *see also id*. P 19, JA 64. Even assuming that the Commission's discussion of the merits of New Energy's Motion is an alternative ground for denying the Motion (and not simply dictum), New Energy cannot secure review of that alternative, unless it first convinces the Court that the Commission committed plain error in rejecting the Motion on the basis of its procedural rules. *See Braintree Elec. Light Dep't*, 667 F.3d at 1293 n.8 ("When an agency offers multiple grounds for a decision, [the Court] will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.") (internal quotations and citations omitted).

In reviewing the merits of the motion, the Commission offered at least three alternative rationales for why, if it had not already rejected the motion on procedural grounds, it would deny the motion. First, the Commission explained that the motion to reopen is in fact unnecessary because the ongoing relicensing proceeding remains open, and New Energy may participate by filing comments, albeit as a non-party. Second Rehearing Order P 19, JA 64. Second, the Commission explained that "reopening" the proceeding would not secure New Energy the relief it seeks: New Energy is "barred by statute from competing" for the Project because it missed the 2006 application deadline. *Id*. P 21, JA 65. New Energy challenges neither of these explanations, and the Court may affirm the Commission on either.

And finally, arriving at the issue New Energy chooses to address, the Commission explained that even if the record were in fact closed, "Alcoa's alleged 're-purposing'" of the Project is not "new evidence that would warrant reopening the record pursuant to Rule 716(a)." Second Rehearing Order P 20, JA 65. The information is neither new nor relevant. *Id*., JA 65. As discussed above, Alcoa announced its plans to sell power in the wholesale market, as a result of limited operations at Badin Works, in 2002, 2004, 2006, and 2007, well before the latest deadline for interventions and the deadline for competing applications – so the information is not new. *See* Second Rehearing Order P 20, JA 65.

Further, the information is not relevant, consistent with Commission precedent interpreting the Federal Power Act, and holding that the disposition of project power is "in the hands of the licensee unless Congress has made a legislative directive to the contrary, which has not happened here." Second Rehearing Order P 20 (citing First Rehearing Order P 15, JA 53), JA 65. In support of this point, the Commission referenced *City of Seattle*, 143 FERC ¶ 61,247 (2013), where it declined to order a licensee to allocate power to an unsuccessful competitor for the original (first) license for the project, even where the original license included such an allocation. *See* First Rehearing Order P 15, JA 53. There, the competitor failed to persuade the Commission to depart from its uniform policy. *See* 143 FERC ¶ 61,247, PP 13-21 (citing cases). Here, while any consideration of power disposition is necessarily premature until the Commission reaches a licensing decision (as discussed in subpart C, below), New Energy's arguments before this Court do not even address *Seattle* and the Commission's precedent on this issue.

C. Other Matters Are Beyond The Scope Of This Appeal

New Energy focuses much of its attention on the standards applicable to the Commission's licensing decisions, Br. 15-17, but fails to appreciate that the Alcoa relicensing proceeding *remains pending* and is not yet before this Court. In particular, New Energy seems to confuse this case with *Green Island I*, 577 F.3d

148, where the court reviewed Commission orders that both denied late intervention *and* addressed the merits of a relicensing application.

There, the Second Circuit held that the Commission erred in applying the material amendment standard to determine whether a new opportunity to intervene was required. 577 F.3d at 164-165. Before remanding the matter, the court considered whether the error might be harmless, *i.e*., whether the Commission would reach the same result, and issue the new license to the applicant, regardless of how it might act on the late intervention request. *Id*. at 165. Ultimately, the court remanded the matter because it could not discern whether the Commission "would have denied [the late] motion to intervene even if it had considered that motion to be timely." *Id*. Further, the court reasoned that *if* the Commission, on remand, granted the motion to intervene, it would be obligated to consider the new party's evidence and arguments. *Id*. at 165-168 (citing *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965)). Thus, the court remanded the case because it could not be certain that the Commission – upon reconsidering the motion to intervene and, if necessary, the new evidence – would reach the same result on the license application. *Id*. at 168-169. On remand, the Commission again denied the late motion to intervene, and the court, on subsequent review, affirmed the Commission's reasonable construction of its regulations governing late intervention. *See supra* p. 23 (discussing *Green Island II*, 497 F. App'x 127).

This case is fundamentally distinct from *Green Island I*, because the Commission has not yet acted on the relicensing application. At best, if the Court here finds that the Commission erred in denying New Energy's late motion to intervene, New Energy will have additional opportunities on remand to present its arguments to the Commission. But, in any event, any review of the standards applicable at relicensing is premature, as the Commission has not yet made a licensing decision for this Court to review.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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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 8,186 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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April 1, 2016

ADDENDUM
STATUTES AND REGULATIONS

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STATUTES: **PAGE**

REGULATIONS:

Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

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

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(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(d).	June 11, 1946, ch. 324, §10(d), 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.

§ 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

''(7) while the cleanup of Boston Harbor will contribute significantly to improving the overall environmental quality of Massachusetts Bay, expanded efforts encompassing the entire ecosystem will be necessary to ensure its long-term health;

''(8) the concerted efforts of all levels of Government, the private sector, and the public at large will be necessary to protect and enhance the environmental integrity of Massachusetts Bay; and

''(9) the designation of Massachusetts Bay as an Estuary of National Significance and the development of a comprehensive plan for protecting and restoring the Bay may contribute significantly to its long-term health and environmental integrity.

''(b) PURPOSE.—The purpose of this title is to protect and enhance the environmental quality of Massachusetts Bay by providing for its designation as an Estuary of National Significance and by providing for the preparation of a comprehensive restoration plan for the Bay.

''SEC. 1005. FUNDING SOURCES.

''Within one year of enactment [Nov. 14, 1988], the Administrator of the United States Environmental Protection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities.''

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Pub. L. 100–4, title III, § 317(a), Feb. 4, 1987, 101 Stat. 61, provided that:

''(1) FINDINGS.—Congress finds and declares that—

''(A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

''(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

''(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

''(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

''(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

''(2) PURPOSES.—The purposes of this section [enacting this section] are to—

''(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

''(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

''(C) encourage the preparation of management plans for estuaries of national significance; and

''(D) enhance the coordination of estuarine research.''

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the

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.

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 waterpower 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

[1] See Codification note below.

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 proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, sub-

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

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–495 struck out first sentence which read as follows: ''No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title.''

1968—Pub. L. 90–451 designated existing provisions as subsec. (a) and added subsec. (b).

1935—Act Aug. 26, 1935, § 207, amended section generally.

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.

§ 808. New licenses and renewals

(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered

(1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 803 of this title, consider (and explain such consideration in writing) each of the following:

(A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this subchapter.

(B) The plans of the applicant to manage, operate, and maintain the project safely.

(C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.

(D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 803 of this title, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

(B) The actions taken by the existing licensee related to the project which affect the public.

(b) Notification of intention regarding renewal; public availability of documents; notice to public and Federal agencies; identification of Federal or Indian lands included; additional information required

(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.

(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation

of the licensed project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after October 16, 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

(4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this subchapter for such lands, and to provide such additional information as the Commission deems appropriate to carry out the Commission's responsibilities under this section.

(c) Time of filing application; consultation and participation in studies with fish and wildlife agencies; notice to applicants; adjustment of time periods

(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) of this section and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

(2) The time periods specified in this subsection and in subsection (b) of this section shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

(d) Adequacy of transmission facilities; provision of services to successor by existing licensee; tariff; final order; modification, extension or termination of order

(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.

(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this chapter has been executed, the Commission shall order the existing licensee to file (pursuant to section 824d of this title) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 824d of this title and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this subchapter, except that in issuing such order the Commission—

(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;

(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;

(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;

(D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and

(E) shall not order any entity other than the existing licensee to provide transmission or other services.

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.

(e) License term on relicensing

Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines

individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99–495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: ''In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action.''

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

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.

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement 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; amended Pub. L. 113–235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

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.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 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 the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

(9) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §4.32(k).

[Order 533, 56 FR 23148, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991; Order 540, 57 FR 21737, May 22, 1992; Order 596, 62 FR 59810, Nov. 5, 1997; Order 2002, 68 FR 51116, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003; Order 756, 77 FR 4893, Feb. 1, 2012]

§4.35 Amendment of application; date of acceptance.

(a) *General rule.* Except as provided in paragraph (d) of this section, if an applicant amends its filed application as described in paragraph (b) of this section, the date of acceptance of the application under §4.32(f) is the date on which the amendment to the application was filed.

(b) Paragraph (a) of this section applies if an applicant:

(1) Amends its filed license or preliminary permit application in order to change the status or identity of the applicant or to materially amend the proposed plans of development; or

(2) Amends its filed application for exemption from licensing in order to materially amend the proposed plans of development, or

(3) Amends its filed application in order to change its statement of intent of whether or not it will seek benefits under section 210 of PURPA, as originally filed under §4.32(c)(1).

(c) An application amended under paragraph (a) is a new filing for:

(1) The purpose of determining its timeliness under §4.36 of this part;

(2) Disposing of competing applications under §4.37; and

(3) Reissuing public notice of the application under §4.32(d)(2).

(d) If an application is amended under paragraph (a) of this section, the Commission will rescind any acceptance letter already issued for the application.

(e) *Exceptions.* This section does not apply to:

(1) Any corrections of deficiencies made pursuant to §4.32(e)(1);

(2) Any amendments made pursuant to §4.37(b)(4) by a State or a municipality to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a state or a municipality;

(3) Any amendments made pursuant to §4.37(c)(2) by a priority applicant to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a priority applicant;

(4) Any amendments made by a license or an exemption applicant to its proposed plans of development to satisfy requests of resource agencies or Indian tribes submitted after an applicant has consulted under §4.38 or concerns of the Commission; and

(5)(i) Any license or exemption applicant with a project located at a new dam or diversion who is seeking PURPA benefits and who:

(A) Has filed an adverse environmental effects (AEE) petition pursuant to §292.211 of this chapter; and

(B) Has proposed measures to mitigate the adverse environmental effects which the Commission, in its initial determination on the AEE petition, stated the project will have.

(ii) This exception does not protect any proposed mitigative measures that the Commission finds are a pretext to avoid the consequences of materially amending the application or are outside the scope of mitigating the adverse environmental effects.

(f) *Definitions.* (1) For the purposes of this section, a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to:

(i) A change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project;

(ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:

(A) Enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse; or

(B) Cause adverse environmental impacts not previously discussed in the original application; or

(iii) A change in the number of discrete units of development to be included within the project boundary.

(2) For purposes of this section, a material amendment to plans of development proposed in an application for a preliminary permit means a material change in the location of the powerhouse or the size and elevation of the reservoir if the change would enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse.

(3) For purposes of this section, a change in the status of an applicant means:

(i) The acquisition or loss of preference as a state or a municipality under section 7(a) of the Federal Power Act; or

(ii) The loss of priority as a permittee under section 5 of the Federal Power Act.

(4) For purposes of this section, a change in the identity of an applicant means a change that either singly, or together with previous amendments, causes a total substitution of all the original applicants in a permit or a license application.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988; Order 533, 56 FR 23149, May 20, 1991; Order 2002, 68 FR 51115, Aug. 25, 2003; Order 756, 77 FR 4893, Feb. 1, 2012]

§4.36 Competing applications: deadlines for filing; notices of intent; comparisons of plans of development.

The public notice of an initial preliminary permit application or an initial development application shall prescribe the deadline for filing protests and motions to intervene in that proceeding (the *prescribed intervention deadline*).

(a) *Deadlines for filing applications in competition with an initial preliminary permit application.* (1) Any preliminary permit application or any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than the prescribed intervention deadline.

(2) Any preliminary permit application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 30 days after the prescribed intervention deadline.

(3) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 120 days after the prescribed intervention deadline.

(b) *Deadlines for filing applications in competition with an initial development application.* (1) Any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than the prescribed intervention deadline.

(2) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than 120 days after the prescribed intervention deadline.

(3) If the Commission has accepted an application for exemption of a project from licensing and the application has not yet been granted or denied, the applicant for exemption may submit a license application for the project if it is a qualified license applicant. The pending application for exemption from licensing will be considered withdrawn as of the date the Commission accepts the license application for filing. If a license application is accepted for filing under this provision, any qualified license applicant may submit a competing license application not later than the prescribed intervention deadline set for the license application.

(4) Any preliminary permit application must be submitted for filing in competition with an initial development application not later than the deadlines prescribed in paragraphs (a)(1) and (a)(2) for the submission of preliminary permit applications filed in competition with an initial preliminary permit application.

(c) *Notices of intent.* (1) Any notice of intent to file an application in competition with an initial preliminary

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (i)(1) of this section is first published until a final order is issued on the license application.

(ii) The provisions of §16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section the information specified in paragraph (b)(2) of this section.

(j) *Critical Energy Infrastructure Information.* If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §16.7(d)(7).

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513–A, 55 FR 16, Jan. 2, 1990; Order 533, 56 FR 23154, May 20, 1991; 56 FR 61156, Dec. 2, 1991; Order 2002, 68 FR 51140, Aug. 25, 2003; Order 643, 68 FR 52095, Sept. 2, 2003; 68 FR 61743, Oct. 30, 2003; Order 769, 77 FR 65475, Oct. 29, 2012]

§16.9 Applications for new licenses and nonpower licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an applicant for a new license or nonpower license for a project subject to sections 14 and 15 of the Federal Power Act.

(b) *Filing requirement.* (1) An applicant for a license under this section must file its application at least 24 months before the existing license expires.

(2) An application for a license under this section must meet the requirements of §4.32 (except that the Director of the Office of Energy Projects may provide more than 90 days in which to correct deficiencies in applications) and, as appropriate, §§4.41, 4.51, or 4.61 of this chapter.

(3) The requirements of §4.35 of this chapter do not apply to an application under this section, except that the Commission will reissue a public notice of the application in accordance with the provisions of §16.9(d)(1) if an amendment described in §4.35(f) of this chapter is filed.

(4) If the Commission rejects or dismisses an application pursuant to the provisions of §4.32 of this chapter, the application may not be refiled after the new license application filing deadline specified in §16.9(b)(1).

(c) *Final amendments.* All amendments to an application, including the final amendment, must be filed with the Commission and served on all competing applicants no later than the date specified in the notice issued under paragraph (d)(2).

(d) *Commission notice.* (1) Upon acceptance of an application for a new license or a nonpower license, the Commission will give notice of the application and of the dates for comment, intervention, and protests by:

(i) Publishing notice in the FEDERAL REGISTER;

(ii) Publishing notice once every week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies, Indian tribes, and non-governmental organizations, by electronic means if practical, otherwise by mail.

(2) Within 60 days after the new license application filing deadline, the Commission will issue a notice on the processing deadlines established under §4.32 of this chapter, estimated dates for further processing deadlines under §4.32 of this chapter, deadlines for complying with the provisions of §4.36(d)(2)(ii) and (iii) of this chapter in cases where competing applications are filed, and the date for final amendments and will:

(i) Publish the notice in the FEDERAL REGISTER;

(ii) Provide the notice to appropriate Federal, state, and interstate resource agencies and Indian tribes, by electronic means if practical, otherwise by mail; and

(iii) Serve the notice on all parties to the proceedings pursuant to §385.2010 of this chapter.

(3) Where two or more mutually exclusive competing applications have

the NEPA process, including the studies or other information the Commission may require on these projects, can contact this office.

[Order 689, 71 FR 69471, Dec. 1, 2006, as amended by Order 756, 77 FR 4895, Feb. 1, 2012]

§ 380.9 Public availability of NEPA documents and public notice of NEPA related hearings and public meetings.

(a)(1) The Commission will comply with the requirements of 40 CFR 1506.6 of the regulations of the Council for public involvement in NEPA.

(2) If an action has effects of primarily local concern, the Commission may give additional notice in a Commission order.

(b) The Commission will make environmental impact statements, environmental assessments, the comments received, and any underlaying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552 (1982)). The exclusion in the Freedom of Information Act for interagency memoranda is not applicable where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Such materials will be made available to the public at the Commission's Public Reference Room at 888 First Street NE., Room 2A, Washington, DC 20426 at a fee and in the manner described in Part 388 of this chapter. A copy of an environmental impact statement or environmental assessment for hydroelectric projects may also be made available for inspection at the Commission's regional office for the region where the proposed action is located.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended by Order 603–A, 64 FR 54537, Oct. 7, 1999]

§ 380.10 Participation in Commission proceedings.

(a) *Intervention proceedings involving a party or parties*—1) *Motion to intervene.* (i) In addition to submitting comments on the NEPA process and NEPA related documents, any person may file a motion to intervene in a Commission proceeding dealing with environmental issues under the terms of §385.214 of this chapter. Any person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion, in accordance with §385.214, as long as the motion is filed within the comment period for the draft environmental impact statement.

(ii) Any person that is granted intervention after petitioning becomes a party to the proceeding and accepts the record as developed by the parties as of the time that intervention is granted.

(2)(i) *Issues not set for trial-type hearing.* An intervenor who takes a position on any environmental issue that has not yet been set for hearing must file a timely motion with the Secretary containing an analysis of its position on such issue and specifying any differences with the position of Commission staff or an applicant upon which the intervenor wishes to be heard at a hearing.

(ii) *Issues set for trial-type hearing.* (A) Any intervenor that takes a position on an environmental issue set for hearing may offer evidence for the record in support of such position and otherwise participate in accordance with the Commission's Rules of Practice and Procedure. Any intervenor must specify any differences from the staff's and the applicant's positions.

(B) To be considered, any facts or opinions on an environmental issue set for hearing must be admitted into evidence and made part of the record of the proceeding.

(iii) Commission pre-filing activities commenced under §§157.21 and 50.5 of this chapter, respectively, are not considered proceedings under part 385 of this chapter and are not open to motions to intervene. Once an application is filed under part 157 subpart A or part 50 of this chapter, any person may file a motion to intervene in accordance with §§157.10 or 50.10 of this chapter or in accordance with this section.

(b) *Rulemaking proceedings.* Any person may file comments on any environmental issue in a rulemaking proceeding.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended by Order 689, 71 FR 69471, Dec. 1, 2006]

§ 385.102 Definitions (Rule 102).

For purposes of this part—

(a) *Decisional authority* means the Commission or Commission employee that, at the time for decision on a question, has authority or responsibility under this chapter to decide that particular question.

(b) *Participant* means:

(1) Any party; or

(2) Any employee of the Commission assigned to present the position of the Commission staff in a proceeding before the Commission.

(c) *Party* means, with respect to a proceeding:

(1) A person filing any application, petition, tariff or rate filing, complaint, or any protest under section 19a(i) of the Interstate Commerce Act (49 U.S.C. 19a(i));

(2) Any respondent to a proceeding; or

(3) Any person whose intervention in a proceeding is effective under Rule 214.

(d) *Person* means an individual, partnership, corporation, association, joint stock company, public trust, an organized group of persons, whether incorporated or not, a receiver or trustee of the foregoing, a municipality, including a city, county, or any other political subdivision of a State, a State, the District of Columbia, any territory of the United States or any agency of any of the foregoing, any agency, authority, or instrumentality of the United States (other than the Commission), or any corporation which is owned directly or indirectly by the United States, or any officer, agent, or employee of any of the foregoing acting as such in the course of his or her official duty. The term also includes a foreign government or any agency, authority, or instrumentality thereof.

(e) *Presiding officer* means:

(1) With respect to any proceeding set for hearing under subpart E of this part, one or more Members of the Commission, or any administrative law judge, designated to preside at such hearing, or, if no Commissioner or administrative law judge is designated, the Chief Administrative Law Judge; or

(2) With respect to any proceeding not set for hearing under subpart E, any employee designated by rule or order to conduct the proceeding.

(f) *Respondent* means any person:

(1) To whom an order to show cause or notice of tariff or rate examination is issued by the Commission;

(2) Against whom a complaint is directed; or

(3) Designated as a respondent by the Commission or by the terms of this chapter.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 606, 64 FR 44405, Aug. 16, 1999]

§ 385.103 References to rules (Rule 103).

This part cross-references its sections according to rule number, as indicated by the section titles. Any filing with the Commission may refer to any section of this part by rule number; for example, ''Rule 103.''

§ 385.104 Rule of construction (Rule 104).

To the extent that the text of a rule is inconsistent with its caption, the text of the rule controls.

[Order 376, 49 FR 21705, May 23, 1984]

Subpart B—Pleadings, Tariff and Rate Filings, Notices of Tariff or Rate Examination, Orders To Show Cause, Intervention, and Summary Disposition

§ 385.201 Applicability (Rule 201).

This subpart applies to any pleading, tariff or rate filing, notice of tariff or rate examination, order to show cause, intervention, or summary disposition.

§ 385.202 Types of pleadings (Rule 202).

Pleadings include any application, complaint, petition, protest, notice of protest, answer, motion, and any amendment or withdrawal of a pleading. Pleadings do not include comments on rulemakings or comments on offers of settlement.

§ 385.203 Content of pleadings and tariff or rate filings (Rule 203).

(a) *Requirements for a pleading or a tariff or rate filing.* Each pleading and

(2) A complainant may request Fast Track processing of a complaint by including such a request in its complaint, captioning the complaint in bold type face ''COMPLAINT REQUESTING FAST TRACK PROCESSING,'' and explaining why expedition is necessary as required by section 385.206(b)(11).

(3) Based on an assessment of the need for expedition, the period for filing answers, interventions and comments to a complaint requesting Fast Track processing may be shortened by the Commission from the time provided in section 385.206(f).

(4) After the answer is filed, the Commission will issue promptly an order specifying the procedure and any schedule to be followed.

(i) *Simplified procedure for small controversies.* A simplified procedure for complaints involving small controversies is found in section 385.218 of this subpart.

(j) *Satisfaction.* (1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file:

(i) A statement setting forth when and how the complaint was satisfied; and

(ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 602, 64 FR 17097, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999; Order 647, 69 FR 32440, June 10, 2004; Order 769, 77 FR 65476, Oct. 29, 2012]

§ 385.207 Petitions (Rule 207).

(a) *General rule.* A person must file a petition when seeking:

(1) Relief under subpart I, J, or K of this part;

(2) A declaratory order or rule to terminate a controversy or remove uncertainty;

(3) Action on appeal from a staff action, other than a decision or ruling of a presiding officer, under Rule 1902;

(4) A rule of general applicability; or

(5) Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.

(b) *Declarations of intent under the Federal Power Act.* For purposes of this part, a declaration of intent under section 23(b) of the Federal Power Act is treated as a petition for a declaratory order.

(c) Except as provided in § 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984]

§ 385.208 [Reserved]

§ 385.209 Notices of tariff or rate examination and orders to show cause (Rule 209).

(a) *Issuance.* (1) If the Commission seeks to determine the validity of any rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant which is demanded, observed, charged, or collected, the Commission will initiate a proceeding by issuing a notice of tariff or rate examination.

(2) The Commission may initiate a proceeding against a person by issuing an order to show cause.

(b) *Contents.* A notice of examination or an order to show cause will contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth issues to be considered by the Commission.

(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to § 385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the FEDERAL REGISTER, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999; Order 769, 77 FR 65476, Oct. 29, 2012]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by

statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 2002, 68 FR 51142, Aug. 25, 2003; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may be amended or modified only as provided in the regulations under this chapter. A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

(iii) If, in a proceeding, or part of a proceeding, that is set for hearing under subpart E, a written amendment is filed after the time for filing provided under paragraph (a)(3)(ii) of this section, or if an oral amendment is made to a presiding officer during a hearing or conference, the amendment becomes effective as an amendment

(6) If the presiding officer does not issue an order under paragraph (b)(1) of this section within 15 days after the motion is filed under paragraph (b)(1) of this section, the motion is denied.

(c) *Appeal of a presiding officer's denial of motion to permit appeal.* (1) If a motion to permit appeal is denied by the presiding officer, the participant who made the motion may appeal the denial to the Commissioner who is designated Motions Commissioner, in accordance with this paragraph. For purposes of this section, ''Motions Commissioner'' means the Chairman or a member of the Commission designated by the Chairman to rule on motions to permit interlocutory appeal. Any person filing an appeal under this paragraph must serve separate copies of the appeal on the Motions Commissioner and on the General Counsel by Express Mail or by hand delivery.

(2) A participant must submit an appeal under this paragraph not later than 7 days after the motion to permit appeal under paragraph (b) of this section is denied. The appeal must state why prompt Commission review is necessary under the standards set forth in paragraph (c)(5) of this section. The appeal must be labeled in accordance with § 385.2002(b) of this chapter.

(3) A participant who appeals under this paragraph must file with the appeal a copy of the written order denying the motion or, if the denial was issued orally, the relevant portions of the transcript.

(4) The Motions Commissioner may, in considering an appeal under this paragraph, order the presiding officer or any participant in the proceeding to provide additional information.

(5) The Motions Commissioner will permit an appeal to the Commission under this paragraph only if the Motions Commissioner finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or to prevent irreparable harm to a person. If the Motions Commissioner makes no determination within 7 days after filing the appeal under this paragraph or within the time the Motions Commissioner otherwise provides to receive and consider information under this paragraph, the appeal to the Commission under paragraph (b) of this section will not be permitted.

(6) If appeal under paragraph (b) of this section is not permitted, the contested ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(7) If the Motions Commissioner permits an appeal to the Commission, the Secretary will issue an order containing that decision.

(d) *Commission action.* Unless the Commission acts upon an appeal permitted by a presiding officer under paragraph (b) of this section, or by the Motions Commissioner under paragraph (c) of this section, within 15 days after the date on which the presiding officer or Motions Commissioner permits appeal, the ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(e) *Appeal not to suspend proceeding.* Any decision by a presiding officer to permit appeal under paragraph (b) of this section or by the Motions Commissioner to permit an appeal under paragraph (c) of this section will not suspend the proceeding, unless otherwise ordered by the presiding officer or the Motions Commissioner.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 402, 49 FR 39539, Oct. 9, 1984; Order 725, 74 FR 41039, Aug. 14, 2009]

§ 385.716 Reopening (Rule 716).

(a) *General rule.* To the extent permitted by law, the presiding officer or the Commission may, for good cause under paragraph (c) of this section, reopen the evidentiary record in a proceeding for the purpose of taking additional evidence.

(b) *By motion.* (1) Any participant may file a motion to reopen the record.

(2) Any motion to reopen must set forth clearly the facts sought to be proven and the reasons claimed to constitute grounds for reopening.

(3) A participant who does not file an answer to any motion to reopen will be deemed to have waived any objection to the motion provided that no other participant has raised the same objection.

(c) *By action of the presiding officer or the Commission.* If the presiding officer or the Commission, as appropriate, has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest, the record in the proceeding may be reopened by the presiding officer before the initial or revised initial decision is served or by the Commission after the initial decision or, if appropriate, the revised initial decision is served.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984]

Subpart H—Shortened Procedures

§ 385.801 Waiver of hearing (Rule 801).

In any proceeding in which the Commission is authorized to act after opportunity for hearing, if the parties waive hearing, such opportunity will be deemed to have been afforded by service or publication in the FEDERAL REGISTER of notice of the application or other initial pleading, request, or other filing, such notice fixing a reasonable period of time within which any person desiring to be heard may file a protest or petition. Upon the expiration of such period of time, in the absence of a request for hearing, the Commission may forthwith dispose of the matter upon the basis of the pleadings and other submittals and the studies and recommendations of the staff. A party not requesting oral hearing in its pleadings will be deemed to have waived a hearing for the purpose of such disposition, but will not be bound by such a waiver for the purposes of any request for rehearing with respect to an order so entered.

§ 385.802 Noncontested proceedings (Rule 802).

Noncontested proceedings. In any proceeding required by statute to be set for hearing, the Commission, when it appears to be in the public interest and to be in the interest of the parties to grant the relief or authority requested in the initial pleading, and to omit the intermediate decision procedure, may, after a hearing during which no opposition or contest develops, forthwith dispose of the proceedings upon consideration of the pleadings and other evidence filed and incorporated in the record: *Provided*, (a) The applicant or other initial pleader requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission; and (b) no issue of substance is raised by any request to be heard, protest or petition filed subsequent to publication in the FEDERAL REGISTER of the notice of the filing of an initial pleading and notice or order fixing of hearing, which notice or order will state that the Commission considers the proceeding a proper one for disposition under the provisions of this subpart. Requests for the procedure provided by this subpart may be contained in the initial pleading or subsequent request in writing to the Commission. The decision of the Commission in such proceeding after noncontested hearing, will be final, subject to reconsideration by the Commission upon request for rehearing as provided by statute.

Subpart I—Commission Review of Remedial Orders

§ 385.901 Scope (Rule 901).

(a) *Proceedings to which applicable.* The provisions of this subpart apply to proceedings of the Commission held in accordance with section 503(c) of the Department of Energy Organization Act (42 U.S.C. 7193(c)) to review orders issued by the Secretary of Energy pursuant to section 503(a) of the Department of Energy Organization Act (42 U.S.C. 7193(c)), and initiated by notices of probable violation, proposed remedial orders, or other formal administrative initiating documents issued on or after October 1, 1977, which are contested by the recipient.

(b) *Relationship to other rules.* (1) Where a provision of this subpart is inconsistent with a provision in any other subpart of this part, the provision in this subpart controls.

(2) Subpart F of this part, except Rule 601, does not apply to proceedings under this subpart.

§ 385.902 Definitions (Rule 902).

For purposes of this subpart:

New Energy Capital Partners, LLC v. FERC **Docket No. P-2197**
D.C. Cir. Nos. 13-1277, 15-1307

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 1st day of April 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system as indicated below:

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