
**In the United States Court of Appeals
for the Fourth Circuit**

No. 11-1333

JAMES AND POLLY LYONS,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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**BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission properly interpreted and applied the Federal Power Act and its regulations in rejecting a request for rehearing of a staff action filed past the statutory deadline.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction pursuant to section 313(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 825l(b).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

Petitioners James and Polly Lyons initiated a complaint proceeding before the Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”), against Appalachian Power Company (“Appalachian”), the licensee for the Smith Mountain Pumped Storage Project (“Project”). The complaint followed procedures outlined in the Project’s Shoreline Management Plan (“Shoreline Plan”), and concerned the Lyons’ unauthorized changes to an existing dock and other shoreline facilities at Smith Mountain Lake.

Consistent with its obligation to ensure that non-project uses of Project lands and waters comply with established guidelines, Appalachian inspected the Lyons’ dock and found the Lyons to be out of compliance with the permit Appalachian had issued to them. Appalachian required the Lyons to update their permit and take certain mitigative actions. After failing to reach a mutually acceptable arrangement with Appalachian, the Lyons brought a complaint before the Commission, alleging that Appalachian had deviated from the terms of its license and the Shoreline Plan with regard to the Lyons’ dock. Commission staff reviewed the matter and issued a decision finding Appalachian’s actions reasonable, and in compliance with its license. Letter to the Lyons from Robert Fletcher, Chief, Land

Resources Branch, Division of Hydropower Administration and Compliance, FERC Docket No. P-2210-090 (Aug. 16, 2010) (“Letter Order”), JA108.¹ The Letter Order contained Commission staff’s findings and advised the Lyons to contact a designated staff member at a designated phone number with any questions regarding the matter. *Id.* at 2-3, JA109-10.

58 days later, the Lyons’ counsel submitted a three-sentence letter requesting that the Commission accept the letter as “formal notice of the Lyons[’] Notice of Appeal claim” against the Commission regarding the Letter Order. Request for Rehearing, JA111. The Commission rejected this filing for multiple reasons, most significantly that the Lyons had missed the controlling 30-day deadline for rehearing set forth in the Federal Power Act. *Appalachian Power Co.*, 133 FERC ¶ 61,135 (2010) (“Notice”), JA118.

The Lyons sought rehearing, this time with a timely filing, alleging that the Commission had erred in failing to designate the Letter Order as a “final agency action” and to otherwise provide the Lyons with notice of the 30-day deadline. On rehearing, the Commission denied the Lyons’ claims, explaining that the Commission’s regulations directly provide for rehearing of a staff-level action of this type. *Appalachian Power Co.*, 134 FERC ¶ 61,114, at PP 9-10 (2011)

¹ In this brief, the abbreviation JA indicates the Joint Appendix, and P indicates the paragraph number in Commission orders.

(“Rehearing Order”), JA234-35. No further notice was required, as the Lyons and their counsel are charged with knowledge of the Commission’s rules. *Id.* at P 10, JA235.

In a brief that mirrors their request for rehearing, the Lyons now bring their claims before this Court.

STATEMENT OF THE FACTS

I. Statutory And Regulatory Background

Under section 4(e) of the FPA, 16 U.S.C. § 797(e), FERC has authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on federal lands and on waterways that are subject to congressional regulation under the Commerce Clause. *See generally U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 543-545 (D.C. Cir. 1992).

Section 10(a) of the FPA, 16 U.S.C. § 803(a), as relevant here, requires the Commission, in issuing hydroelectric licenses, to find that the project approved will be the “best adapted to a comprehensive plan for improving or developing a waterway or waterways” for a number of purposes, such as “the improvement and utilization of water-power development . . . the adequate protection, mitigation and enhancement of fish and wildlife . . . and for other beneficial public uses,” including, *inter alia*, recreation.

Finally, section 313 of the FPA, 16 U.S.C. § 825*l*, governs review of Commission decisions. Section 313(a) provides that any aggrieved party may file a request for rehearing with the Commission no later than 30 days following issuance of an aggrieving order. 16 U.S.C. § 825*l*(a). Under section 313(b), 16 U.S.C. § 825*l*(b), any party who sought rehearing may file a petition for review in the appropriate U.S. Court of Appeals within 60 days of an order disposing of the rehearing request. Thus, a request for agency rehearing is a prerequisite to judicial review, and courts have consistently held that “the time limit must be strictly construed . . . and may not be waived by FERC or evaded by the courts.” *See Moreau v. FERC*, 982 F.2d 556, 563 (D.C. Cir. 1993) (internal citations omitted);² *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (“The 30-day time requirement of this statute is as much a part of the jurisdictional threshold as the mandate to file for a rehearing.”).

II. The Project License

Since 1998, Appalachian’s license has authorized it to “grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy,

² *Moreau* involved an identical provision of the Natural Gas Act, 15 U.S.C. § 717r(a), but courts have applied interpretations of Natural Gas Act provisions to their counterparts in the Federal Power Act because “the relevant provisions of the two statutes are in all material respects substantially identical.” *Arkansas Louisiana Gas v. Hall*, 453 U.S. 571, 577 n.7 (1981).

without prior Commission approval.” *Appalachian Power Co.*, 129 FERC ¶ 62,201, at 64,601 (Art. 415) (2009) (“Relicensing Order”); *Appalachian Power Co.*, 82 FERC ¶ 62,009 (1998) (amending original license to include standard article permitting licensee to authorize certain uses of project lands and water without prior FERC approval). “The underlying authority to regulate these uses is inherent in Congress’s grant to the Commission of the responsibility for ensuring that the project be used for the beneficial public purposes specified in [FPA] Section 10(a)(1).” *Union Elec. Co., d/b/a AmerenUE*, 90 FERC ¶ 61,249, at 61,261 (2000), *aff’d*, *Coalition for Fair & Equitable Regulation of Docks v. FERC*, 297 F.3d 771, 774-75, 778 (8th Cir. 2002) (discussing identical license condition and affirming Commission’s regulatory authority).

The licensee is charged with the responsibility of ensuring that non-project “use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project.” Relicensing Order, 129 FERC ¶ 62,201, at 64,601. As the Commission has explained, “permission for these uses may be withheld if the uses would interfere with other project purposes, contrary to the public interest.” *Union Elec. Co.*, 90 FERC ¶ 61,249, at 61,261.

In 2005, the Commission approved a Shoreline Management Plan for the Project in order to allow Appalachian to authorize additional uses of Project lands

and waters, beyond those specified in the standard license article, without the need for prior Commission approval. *Appalachian Power Co.*, 112 FERC ¶ 61,026 (2005), *amended*, 115 FERC ¶ 62,071 (2006) and 118 FERC ¶ 62,149 (2007).³

The Shoreline Plan allows for appeals of Appalachian's permitting and compliance decisions, first to Appalachian and then to the Commission.

Following approval of the Shoreline Plan, and after a special compliance inspection of certain permitted facilities, Commission staff directed Appalachian to develop a plan to ensure that all facilities permitted by Appalachian are built as approved. *See* Letter Regarding Special Compliance Inspection, FERC Docket No. P-2210 (Jan. 23, 2008). By letter dated April 9, 2008, Commission staff accepted Appalachian's subsequently filed plan. Letter Regarding Special Compliance Inspection, FERC Docket No. P-2210 (Apr. 9, 2008).

Appalachian's new license required an update to the Shoreline Plan and continued implementation. Relicensing Order, 129 FERC at 64,600 (Art. 413).⁴

³ This Court has previously considered issues arising from Appalachian's implementation of the Shoreline Plan. *See Virginia Timberline, L.L.C. v. Appalachian Power Co.*, 343 Fed. Appx. 915 (4th Cir. 2009) (finding that Appalachian retained, as required by its FERC license, sufficient property rights to implement the Shoreline Plan).

⁴ Appalachian has filed an update to the Shoreline Plan, which remains pending before the Commission. *See* Notice of Application for Amendment of License, FERC Docket No. P-2210-207 (Mar. 17, 2011).

III. The Commission's Proceeding And Orders On Review

The Lyons own a single slip dock on Smith Mountain Lake, adjacent to their property. In 2002, the Lyons received a permit from Appalachian authorizing the expansion of the then-existing dock, which prohibited changes to the structure without additional approvals from Appalachian. Letter Order at 2, JA109; 2002 Permit, JA78-79. In 2007, Appalachian reviewed the Lyons' dock and permit and determined, in 2008, that the structure did not conform to the permit specifications. Letter from Appalachian to the Lyons (Apr. 8, 2008), JA34. Appalachian directed the Lyons to either modify the structure to conform to the permit on file, or to file a new application for a dock that reflects the changes in design. *Id.* As mitigation for construction work completed without a permit, Appalachian further directed the Lyons to submit a landscape plan for the area inside the Project boundary (the 800 foot contour elevation). *Id.*

The Lyons sought a new permit for the as-built structure, but Appalachian conditioned any approval of a new permit on modifications to the structures intended to conform to the requirements of the existing permit and on mitigation consistent with the Shoreline Plan. Letter from Appalachian to the Lyons (Feb. 12, 2010), JA59. Under the terms of the Shoreline Plan, the Lyons appealed this determination to Appalachian. JA63. Appalachian denied the appeal by letter dated April 20, 2010. JA67.

The Lyons next sought Commission review of Appalachian's compliance decision. Lyons Complaint, JA1. The Lyons asserted that: 1) Appalachian's actions were inconsistent with the Shoreline Plan; 2) Appalachian failed to follow its inspection plan for ensuring that permitted uses comply with their permits; and 3) the required compliance measures would harm project waters. *Id.* at 2-5, JA5-8. Appalachian denied the Lyons' assertions. JA70.

By letter of August 16, 2010, Commission staff denied the Lyons' allegations and found Appalachian's actions consistent with the Shoreline Plan, the Project license and the compliance inspection plan. Letter Order at 2, JA109. In addition, the Letter Order provided the name and telephone number of a Commission staff person who would assist the Lyons with any questions. Letter Order at 3 ("If you have any questions regarding this matter, please contact Mark Carter at (678) 245-3083."), JA110.

The Lyons filed nothing more until October 13, 2010, when their counsel submitted a three-sentence letter requesting that the Commission "accept this letter as formal notice of the Lyons['] Notice of Appeal claim against the Federal Energy Regulatory Commission regarding your decision of August 16, 2010." JA111. Two days later, the Lyons, again through counsel, submitted a letter to the Chief of the Commission's Land Resources Branch in the Office of Energy Projects, requesting that the Commission "transform" the Letter Order "into a final Order of

the Commission, with notice to the Lyons of their right to request reconsideration of the matter (within 30 days of the date of the entry of the Final Order).” JA113.

On November 12, 2010, the Commission issued its Notice, JA118, rejecting, as untimely, the Lyons’ October 13, 2010 request for rehearing. The Notice explained that under section 313(a) of the FPA, an aggrieved party must file a request for rehearing within 30 days of issuance of a decision. *Id.* (citing 16 U.S.C. 825l(a)), JA118. “Because the 30-day rehearing deadline is statutory based, it cannot be extended.” *Id.* The Commission therefore rejected the late-filed rehearing request. Further, the Commission noted that, even if timely, the rehearing request would have been rejected for failure to specify the grounds for rehearing, as required by statute (16 U.S.C. § 825l(a)), and failing to comply with the form requirements specified in the Commission’s regulations (18 C.F.R. § 385.713(c)(2)). *Id.* at 1 n.4, JA118-19.

The Lyons filed a request for rehearing of the Notice, claiming that the Letter Order is not a “final agency action” subject to rehearing under FPA section 313(a), 16 U.S.C. § 825l(a), and the Commission’s regulations because the Letter Order: 1) is classified as “general correspondence,” and not “final agency action,” in the Commission’s online document library (known as e-library); and 2) does not include a statement that it is “final agency action” and that the Lyons may seek rehearing within 30 days. Request for Rehearing, JA120-21.

The Commission denied the Lyons' rehearing request. Citing its regulations, the Commission explained first that the Letter Order is in fact a "final agency action." Rehearing Order at P 9 (quoting 18 C.F.R. § 385.1902(a) (2010) ("*Any staff action . . . taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713.*")), JA234-35. Further, the Commission explained that "[n]either the FPA nor [its] regulations requires that a staff action subject to rehearing" contain a statement that it is a "final agency action." *Id.* at P 9, JA234. And, the e-library classification is not controlling. *Id.* at P 9 & n.10, JA 234-35. No further notice was required, the Commission explained, because entities practicing before the Commission – especially those represented by counsel – are charged with knowledge of the Commission's rules. *Id.* at P 10, JA235.

This appeal followed.

SUMMARY OF ARGUMENT

In this case, the Commission did nothing more than follow, as it must, the controlling provisions of the Federal Power Act and the Commission's own regulations. These long-standing provisions establish a 30-day deadline for requesting rehearing of a Commission decision. The Lyons offer no explanation for missing the deadline or, if uncertain as to their responsibilities, failing to make a simple telephone call to the designated agency official at the designated

telephone number. Rather, they claim that the Commission, in the aggrieving order, was required to provide citations to the relevant provisions to save them the trouble of seeking out their rights and obligations. But the Lyons point to nothing in the law to support such a requirement and, as the Commission explained in the Rehearing Order, none exists.

Rather, the Commission's regulations provide precisely the guidance the Lyons seek. Under Rule 1902 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.1902, a staff-level action is a final agency action subject to rehearing under section 313(a) of the FPA, 16 U.S.C. § 825l(a), and the Commission's related regulation, 18 C.F.R. § 385.713(a). In their opening brief to this Court, which is simply a word-for-word reprint of their request for rehearing before the agency, the Lyons neither acknowledge nor challenge the Commission's definitive interpretation and application of this regulation in the Rehearing Order. Consistent with this Court's rules and well-established precedent, the Lyons may not now challenge the Commission's holding in their reply brief. In any event, the Commission's interpretation of its regulations here warrants this Court's deference.

The Court's inquiry should end at this point. Nonetheless, the Commission reasonably explained that additional notice, beyond the controlling provisions of the governing statute and the Commission's implementing rules, is unnecessary and unwarranted. Due process claims are unavailing, as litigants before the

Commission, like those before this Court, must make at least a minimal effort to understand and follow, in a timely manner, governing rules of procedure.

ARGUMENT

I. Standard Of Review

“The scope of [this Court’s] review of the FERC’s action is narrow. This Court may set aside the FERC’s order only if [found] to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), or unsupported by substantial evidence, *id.* § 706(2)(E), 16 U.S.C. § 825l(b).” *Appomattox River Water Auth. v. FERC*, 736 F.2d 1000, 1002-03 (4th Cir. 1984) (affirming FERC grant of preliminary permit under the FPA).

Further, this Court affords the Commission deference for its reasonable interpretations of its own regulations. *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 193-94 (4th Cir. 2009); *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

II. The Commission Properly Determined That The Letter Order Is A Final Agency Action Subject To Timely Rehearing.

The Letter Order is a final agency action subject to rehearing under section 313(a) of the FPA, 16 U.S.C. § 825l(a), and the Commission’s regulations. The Lyons err in relying on the form of the order (“it was a letter”) and the classification of the order in the Commission’s online e-Library, rather than confronting its substance. Br.10-11. Tellingly, the Lyons do not acknowledge the

holdings of, much less identify any errors in, the Rehearing Order. Indeed, the argument section of their brief to this Court is a verbatim copy of their request for rehearing before the agency. *See* Request for Rehearing, JA120. Most particularly, the Lyons do not challenge the Commission’s interpretation of its regulations governing identification of final agency actions subject to rehearing.

As explained in the Rehearing Order, the Commission looks to its regulations to determine whether a staff level action is subject to rehearing. Rehearing Order at P 9, JA 234-35. Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.713(a), (b), sets forth the requirements for requests for rehearing, echoing the 30-day deadline found in FPA section 313(a), 16 U.S.C. § 825l(a), and establishing filing requirements. Rule 713 “applies to any request for rehearing of a final Commission decision or other final order, *if rehearing is provided for by statute, rule, or order.*” Rehearing Order at P 9 (quoting 18 C.F.R. § 385.713(a)(1)), JA235.

Thus, there are three places where a party before the Commission must look to determine whether rehearing is available: 1) the applicable statute; 2) the Commission’s rules; and 3) any order of the Commission. In this case, the Commission’s rules provide a ready answer. Rule 1902 of the Commission’s Rules of Practice and Procedure, helpfully entitled “Appeals from action of staff,” makes plain that rehearing is available:

Any staff action (other than a decision or ruling of presiding officer . . . made in a proceeding set for hearing under subpart E . . .) taken pursuant to authority delegated to the staff by the Commission *is a final agency action that is subject to a request for rehearing* under Rule 713 (request for rehearing).

Rehearing Order at P 9 (quoting 18 C.F.R. § 385.1902), JA235.

The Lyons neither mention this controlling regulation nor argue that the Commission erred in concluding that the Letter Order is a “staff action” as described in Rule 1902. Indeed, the argument section of the Lyons’ brief copies their request for rehearing of the Commission’s Notice word-for-word, and does not acknowledge the Commission’s reasoning in the Rehearing Order. That being the case, the Lyons have now waived any challenge to the applicability of Rule 1902. *See, e.g., Perez v. Mountaire Farms*, 650 F.3d 350, 372 n.13 (4th Cir. 2011) (holding that argument not raised in petitioner’s opening brief is deemed waived). In any event, the Commission’s reasonable interpretation of Rules 1902 and 713 warrants this Court’s deference. *See supra* p.13 (standard of review).

The Court’s inquiry can end at this point for, as before the Commission, the Lyons point to no statute, regulation, precedent or policy in support of their assertions that either the form of the Letter Order, or the classification of the Letter Order in the Commission’s online e-Library, controls or even factors into the qualification of the Letter Order as a final agency action. The Commission routinely uses letters as the form of “final agency action.” *See, e.g., Grand River*

Dam Authority, Letter to Licensee, FERC Docket No. P-1494-368 (Nov. 30, 2011); *PacifiCorp*, Letter to Mr. McMahon, FERC Docket No. P-9281-001 (Sept. 28, 2011). And, “[i]t is not unusual for e-library to classify as ‘general correspondence’ staff letters that issue final agency action subject to rehearing.” Rehearing Order at P 9 n.10 (citing cases), JA234.

Before this Court, the Lyons continue to rely on rules inapplicable to the proceeding at hand. Br.12. Bypassing Rule 713(a)(1) – the controlling rule discussed above – the Lyons skip to Rule 713(a)(2) but selectively, and misleadingly, edit the language. Br.12 (quoting 18 C.F.R. § 385.713(a)(2) without citation)). Rule 713(a)(2) provides, in its entirety:

(2) For the purposes of rehearing under this section, *a final decision in any proceeding set for hearing under subpart E of this part* includes any Commission decision:

(i) On exceptions taken by participants to an initial decision; (ii) When the Commission presides at the reception of the evidence; (iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710; (iv) On review of an initial decision without exceptions under Rule 712; and (v) On any other action designated as a final decision by the Commission for purposes of rehearing.

18 C.F.R. § 385.713(a)(2) (emphasis added). As the emphasized phrase plainly states, and as the Commission explained in the Rehearing Order, Rule 713(a)(2) “applies by its terms only to Commission proceedings set for trial-type hearing under Subpart E of Part 385 (18 C.F.R. §§ 385.501-385.510 (2010)) (i.e., hearings

before presiding officers with witnesses, testimony, exhibits, evidence, etc.).”

Rehearing Order at P 9 n.14, JA235.

The Lyons do not acknowledge the Rehearing Order’s explanation or otherwise argue that this proceeding qualified as a trial-type hearing under the Commission’s regulations at Subpart E of Part 385. As noted above, the Lyons have now waived any such arguments. *Perez*, 650 F.3d at 372 n.13. And, the Commission’s reasonable conclusion that it was not necessary for the Letter Order to be “designated” as final agency action as contemplated in the Commission’s trial-type hearing rule, 18 C.F.R. § 385.713(a)(2)(v), merits deference from this Court.

III. The Lyons Had Adequate Notice Of Their Statutory Rights And Responsibilities.

The Lyons charge the Commission with failing to provide adequate notice of their rights and obligations relating to rehearing. But the Lyons’ rights and obligations are spelled out in the controlling statute, the Federal Power Act, and the Commission’s regulations. In any forum, ignorance of the law is never an excuse, but ignorance of the law by an attorney is particularly inexcusable. Rehearing Order at P 10, JA235. Nonetheless, to the extent that the Lyons and their counsel needed assistance in identifying the deadline and filing requirements for a request for rehearing, the Commission helpfully provided the name and telephone number

of an agency official available to provide such assistance. Letter Order at 3, JA110.

The Lyons first assert that the Commission “violated the Code of Federal Regulation[s]” by failing to include a statement in the Letter Order specifying that the Order is a “final agency action” and providing the 30-day deadline specified in FPA section 313(a), 16 U.S.C. § 825l(a), and Rule 713(b), 18 C.F.R § 385.713(b). Br.13. But, “[n]either the FPA nor our regulations requires that a staff action subject to rehearing contain a statement to that effect.” Rehearing Order at P 9, JA234-35. (As noted above, 18 C.F.R. § 385.713(a)(2), which provides for certain staff actions to be “designated” as final agency actions, applies only to trial-type hearings.) Consistent with the Commission’s conclusion, the Lyons point to nothing in support of their argument.

Any additional notice in the Letter Order itself is unnecessary not only as a matter of law, but also as a matter of fact. The Lyons’ obligation to file any request for rehearing of the Letter Order within 30 days was readily ascertainable from a variety of published, accessible sources. The 30-day deadline is set forth in both section 313 of the FPA, 16 U.S.C. § 825l(a), and the Code of Federal Regulations in the Commission’s Rules of Practice and Procedure at Rule 713, 18 C.F.R. § 385.713(b). These provisions can be found not only through the usual legal research avenues available to attorneys, but also on the Commission’s

website (www.ferc.gov) and other government websites, without charge for service. The Commission’s decision here merely enforces this statutory deadline, a matter in which neither the Court nor the Commission has discretion. *Moreau*, 982 F.2d at 563; *Granholm ex rel. Michigan Dep’t of Natural Res. v. FERC*, 180 F.3d 278, 282 (D.C. Cir. 1999) (“Section 313(a) speaks in absolutes. It brooks no exceptions. . . . As the saying goes, ‘rules is rules.’”) (internal citation omitted) (dismissing petition for review where petitioner failed altogether to file prerequisite rehearing request with the Commission).

To the extent the Lyons and counsel encountered difficulty or confusion in identifying the deadline and form requirements applicable to any request for rehearing, the Commission provided the name and telephone number of a staff person assigned to provide assistance. Letter Order at 3 (“If you have any questions regarding this matter, please contact . . .”), JA110. The Lyons do not claim that they attempted to contact the Commission for assistance. Nor do they even assert that they attempted to identify the requirements for seeking rehearing of the Letter Order and were unable to do so.⁵ The Letter Order is filled with indicia of finality. *See* Letter Order at 2 (“We *find* that the licensee’s actions and treatment of your case are not inconsistent with the license We do not *find*

⁵ Indeed, a simple web search for the terms “appeal FERC order” reveals much useful information, including links to the Commission’s website and practitioner guides.

that the licensee’s mandated mitigation measure to remove the driveway would harm project waters We *find* that the licensee’s actions are consistent with the procedures [in its] . . . plan.”) (emphasis added), JA109. Accordingly, the Letter Order left the Lyons with no reasonable cause to believe that it was anything less than final. Yet, the Lyons have provided no excuse for their failure to seek rehearing in a timely manner.

Litigants in any forum are charged with knowledge of the relevant statutes and regulations. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) (“Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.”) (citation omitted); *see also Duncan v. Peninger*, 624 F.2d 486, 489 (4th Cir. 1980) (holding agency regulation valid against petitioner despite lack of actual knowledge of regulation). To this end, the Commission explained in the Rehearing Order that “[e]ntities practicing before the Commission are charged with knowledge of the Commission’s rules.” Rehearing Order at P 10 (citing *Northeast Hydrodevelopment, LLC*, 131 FERC ¶ 61,151, at P 7 (2010)), JA235.

The Lyons and counsel have thus far, it appears, identified and substantially complied with this Court’s procedural rules. This Court requires no less of litigants before it. And the Commission’s procedural rules – particularly where

derived from mandatory statutory provisions – merit equal attention. *See Boston Gas Co. v. FERC*, 575 F.2d 975, 979 (1st Cir. 1978) (“The fact that a 30 day limit is included in the statute clearly indicates that the Act requires not only administrative exhaustion but immediate action on the part of those aggrieved. All the parties to a proceeding before the Commission, as well as the Commission itself, have the statutory right to be free from prolonged uncertainty resulting from delayed efforts to resolve an issue.”). Minimal effort would have revealed the controlling provisions and avoided the mandatory consequences of the missed deadline.

The Lyons’ effort to frame their notice argument in due process terms fails as well. The Lyons have not offered a reason why, upon receipt of an aggrieving order, they were unable to ascertain the procedure for rehearing and appellate review in a timely manner. Litigants, particularly those who commence a proceeding, may not bury their heads in the sand, thereby avoiding learning of their obligations, and subsequently claim inadequate notice. *See Federal Crop Ins. Corp.*, 332 U.S. at 384-85.

The Lyons do not claim that the 30-day deadline set forth in FPA section 313(a) itself violates due process. Rather they claim that due process required the Commission to, effectively, serve them with a copy of the statute and regulations under which they were proceeding. The Lyons, however, point to no law or

precedent in support of the notion that the Commission must provide litigants before it with notice of the same statutory rights and obligations that are printed in the pages of the U.S. Code and the Code of Federal Regulations. Parties have at least some duty to seek out the next step in a legal proceeding in a reasonably prompt manner. *See United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (“The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.”) (finding defendant charged with knowledge of regulation governing shipment of hazardous materials); *see also, e.g., Mt. Lookout - Mt. Nebo Prop. Protection Ass’n v. FERC*, 143 F.3d 165, 170 (4th Cir. 1998) (rejecting claim of inadequate notice of a proposed license amendment where the record demonstrated that petitioner “necessarily must have known of the proceeding’s existence”). Here, there is no evidence or even suggestion that the Lyons made any effort to ascertain their rights.

Finally, granting the Lyons the relief sought – vacating the Letter Order and reentering it on the docket contemporaneously – amounts to an extension of the 30-day statutory deadline which reviewing courts, as explained above, have held fixed and absolute. *See Moreau*, 982 F.2d at 563. Such extraordinary relief, unsupported by any of the Lyons’ claims, amounts to an unlawful circumvention of the controlling statute.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be affirmed in their entirety.

Respectfully submitted,

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December 7, 2011

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 4,999 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

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December 7, 2011

ADDENDUM
STATUTES AND REGULATIONS

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, §10(a), 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 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. 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. 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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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 judi-

cial 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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

Sec.	
801.	Congressional review.
802.	Congressional disapproval procedure.
803.	Special rule on statutory, regulatory, and judicial deadlines.
804.	Definitions.
805.	Judicial review.
806.	Applicability; severability.
807.	Exemption for monetary policy.
808.	Effective date of certain rules.

§ 801. Congressional review

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

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

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

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

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

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

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

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

- (A) the later of the date occurring 60 days after the date on which—
 - (i) the Congress receives the report submitted under paragraph (1); or
 - (ii) the rule is published in the Federal Register, if so published;

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

- (i) on which either House of Congress votes and fails to override the veto of the President; or
- (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

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

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

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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 licenses 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 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.² *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United

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

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

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 and among the several States” for “navigable waters of the United States” and “subsection (f)” for “subsection (e)”. Former subsec. (e) redesignated (f).

Subsec. (f). Act Aug. 26, 1935, § 202, redesignated subsec. (e) as (f) and substituted “once each week for four weeks” for “for eight weeks”. Former section (f), which related to the power of the Commission to prescribe regulations for the establishment of a system of accounts and the maintenance thereof, was struck out by act Aug. 26, 1935.

Subsec. (g). Act Aug. 26, 1935, § 202, added subsec. (g). Former subsec. (g), which related to the power of the Commission to hold hearings and take testimony by deposition, was struck out.

Subsec. (h). Act Aug. 26, 1935, § 202, struck out subsec. (h) which related to the power of the Commission to perform any and all acts necessary and proper for the purpose of carrying out the provisions of this chapter.

1930—Subsec. (d). Act June 23, 1930, inserted sentence respecting contents of report.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Sec-

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 paras. (1) and (2) of subsec. (a), and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

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

§ 803. Conditions of license generally

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

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

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in

¹ See Codification note below.

section 797(e) of this title¹ 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”.

ation, 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 Public Printer 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 Printing 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.)

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.

§ 825l. 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 unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

- (1) acting as an officer or director of an electric utility; or
- (2) engaging in the business of purchasing or selling—
 - (A) electric energy; or
 - (B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, §314, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, §32(b), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 109-58, title XII, §1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted "the district court of the United States for the District of Columbia" for "the Supreme Court of the District of Columbia", and act June 25, 1948, as amended by act May 24, 1949, substituted "United States District Court for the District of Columbia" for "district court of the United States for the District of Columbia". However, the words "United States District Court for the District of Columbia" have been deleted entirely as superfluous in

proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, § 17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

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 21, 1938, ch. 556, § 18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

REFERENCES IN TEXT

The civil-service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

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” are omitted as obsolete and superseded.

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 by 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, Government Organization and Employees. 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.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 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.

“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.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, 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 person unless such person 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) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission

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(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled "Statement of Issues," listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after

the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

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(h) *Appeal*. There is no appeal to the Commission of an interpretation.

(i) *Interpretative rules*. Upon the petition of any person or upon its own motion, the Commission may publish in the FEDERAL REGISTER an interpretative rule regarding any question arising under the NGPA or a rule promulgated thereunder. Any person is entitled to rely upon an interpretative rule.

(j) *Applications for adjustments treated as requests for interpretations*. Except for the notification provisions of paragraph (d)(5) of this section, the provisions of this section apply to any petition for an adjustment which is deemed a request for an interpretation under Rule 1117. Notice to all parties to an adjustment proceeding under subpart K of this part that is deemed to be a request for an interpretation will be given under Rule 1117(d)(1).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 394, 49 FR 35366, Sept. 7, 1984; Order 737, 75 FR 43405, July 26, 2010]

§ 385.1902 Appeals from action of staff (Rule 1902).

(a) Any staff action (other than a decision or ruling of presiding officer, as defined in Rule 102(e)(1), made in a proceeding set for hearing under subpart E of this part) taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713 (request for rehearing).

(b) All appeals of staff action that were timely filed prior to December 3, 1990 and that had not been acted upon by the Commission on their substantive merits are deemed to be timely filed requests for rehearing of final agency action. All notices issued by the Commission prior to December 3, 1990 stating the Commission's intent to act on appeals of staff action such that they are not deemed denied by the expiration of a 30-day period after the filing of the appeal, are deemed to be orders granting rehearing of final agency action for the sole purpose of further consideration, unless the Commission issued an order on the substantive merits of the appeal prior to December 3, 1990. No later than January 2, 1991, persons who had timely filed appeals of staff action prior to December 3, 1990

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which were pending before the Commission on that date may file additional pleadings to update or supplement those appeals.

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

§ 385.1903 Notice in rulemaking proceedings (Rule 1903).

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

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

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

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

§ 385.1904 Copies of transcripts (Rule 1904).

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

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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