

Report of the FEBA Committee on Regulation Under Part I of the Federal Power Act Report on Developments, 1989

I. LICENSING JURISDICTION AND RELATED MATTERS

A. *Congressional Consideration of Licensing of and Competition for Constructed But Unlicensed Projects: S. 635, H.R. 1069*

The scope of the Federal Energy Regulatory Commission's (Commission or FERC) licensing authority over unlicensed, constructed projects which had not been improved since August 26, 1935, and the possibility of competition for licenses for such projects, became a focus of Congressional attention in 1989. The issue had been set in motion by *Clifton Power Corp.*¹ and *Orange & Rockland Utilities.*² The *Orange & Rockland* case addressed the problem³ that a non-owner, by filing an initial license application on a constructed but properly unlicensed project, could force the project's owner to choose between attempting to retain the project by submitting to FERC jurisdiction, in the hope of prevailing in a licensing competition, or risking loss of the project to a non-owner willing to submit to FERC jurisdiction. There are several hundred constructed, unlicensed projects potentially susceptible to this attack by non-owners.

As originally proposed, Senate Bill 635⁴ would have added a section 32 to the Federal Power Act (FPA) addressing constructed unlicensed projects on non-navigable waters with no post-1935 construction and prohibiting the Commission from issuing a license to anyone other than the owner of such a project. Proponents of the legislation argued that Congress, in enacting the 1935 Amendments to the FPA, intended to exempt from license requirements projects on non-navigable waterways on which there has been no post-1935 construction and for which an owner-operator has not filed a declaration of intention under section 23(b)(1) of the FPA.⁵ The legislation would, in essence, extend the result of *Farmington River Power Co. v. FPC*⁶ to competitive situations.

1. *Clifton Power Corp.*, 39 F.E.R.C. ¶ 61,117 (1987), *aff'd sub nom. Cooley v. FERC*, 843 F.2d 1464 (D.C. Cir.), *cert. denied*, 109 S. Ct. 327 (1988) (the Commission has authority, pursuant to section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), to license projects on non-navigable Commerce Clause waters when such projects are voluntarily submitted to Commission jurisdiction, even when section 23(b) of the Act, 16 U.S.C. § 817(b), does not require such projects to be licensed).

2. *Orange & Rockland Utils.*, 40 F.E.R.C. ¶ 61,222 (1987), *reh'g denied*, 44 F.E.R.C. ¶ 61,236 (1988) (Commission accepts for filing initial license application by non-owner of constructed, pre-1935 project; owner is granted extension of time to file a competing license application).

3. See *Cooley v. FERC*, 843 F.2d at 1470 n.16 (anticipating problem that is addressed in *Orange & Rockland*).

4. S.635, 101st Cong., 1st Sess. (1989) [hereinafter S.635].

5. Federal Power Act, 16 U.S.C. § 817(1) (1988). See *Hydroelectric Fairness Act of 1989: Hearings on S. 635 Before the Subcomm. on Water and Power of the Senate Comm'n on Energy and Natural Resources*, 101st Cong., 1st Sess. 89-5311-53 (Comm'n 1989).

6. *Farmington River Power Co. v. FPC*, 455 F.2d 86 (2d Cir. 1972) (holding that FPC v. Union

As adopted by the Senate,⁷ however, S. 635 was considerably broader. The new proposed FPA section 32 would prohibit the Commission from licensing to anyone other than the project owner (1) pre-1935 constructed projects on navigable, as well as non-navigable, waters, and (2) projects which the Commission, after the filing of a declaration of intention under FPA section 23, had not within a year found the project jurisdictional because of its effect on the interests of interstate and foreign commerce. As amended, S. 635 would also prohibit the Commission from requiring an original license for a project with no post-1935 construction where the stream was not navigable before construction, or where the Commission had previously found that the interests of interstate or foreign commerce would not be affected. Finally, S. 635 as adopted by the Senate would also amend section 4(e) of the FPA to prohibit the Commission from licensing proposed projects to which it could not require licensing under Section 23(b).

These amendments addressed the difficulties, distinct from Orange & Rockland's situation, of some other utilities that owned pre-1935 projects.⁸ They would legislatively overrule *Connecticut Light & Power Co. v. FPC*⁹ and *Nantahala Power & Light Co. v. FPC*,¹⁰ which permitted the Commission to reverse earlier determinations of no jurisdiction under Section 23(b).

The House has yet to take action on a sister bill, House Bill 1069,¹¹ which is now before the Subcommittee on Energy and Power of the House Energy and Commerce Committee, along with S. 635 on reference from the Senate. Unlike S. 635, H.R. 1069, as of January, 1990, would not affect constructed projects on navigable waterways, nor would it prohibit the Commission from issuing an original license for proposed project works for which a license is not required by section 23(b)(1) of the Act. The bill would (1) prohibit the Commission from compelling licensing of projects on non-navigable waterways and that have been unimproved since 1935; and (2) exclude all such projects from licensing competition.

Elec. Power Co., 381 U.S. 90 (1965) (*Taum Sauk*) did not automatically make pre-1935 projects subject to mandatory licensing).

7. S.635; see S. REP. No. 133, 101st Cong., 1st Sess. (1989).

8. The Commission required Western Massachusetts Electric Co. (WMECO) to submit license applications for four constructed, unlicensed projects on the Chicopee River, reversing an earlier determination of non-navigability. *Western Mass. Elec. Co.*, 44 F.E.R.C. ¶¶ 62,185-88 (1988). When WMECO filed applications for preliminary permits, a preference entity filed competing applications for preliminary permits, thus subjecting all four constructed projects to competition under section 7 of the FPA, 16 U.S.C. § 800 (1988). *City of S. Hadley*, 54 Fed. Reg. 17,815-16 (1989); *Western Mass. Elec. Co.*, 53 Fed. Reg. 49,595-96 (1988).

Kentucky Utilities was required to submit a license application for a major hydroelectric project when the Commission reversed an earlier finding that the river on which the project was located was non-navigable. *Kentucky Util. Co.*, 45 F.E.R.C. ¶ 61,482 (1988).

9. *Connecticut Light & Power Co. v. FPC*, 557 F.2d 349 (2d Cir. 1977) (FPC section 23(b) ruling did not reach question of navigability and did not preclude subsequent orders requiring licensing).

10. *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968) (Commission may require the licensing of post-1935 construction on non-navigable waters which it has earlier found not to affect the interests of interstate commerce should there be grounds to reconsider that finding).

11. H.R. 1069, 101st Cong., 1st Sess., 135 CONG. REC. H370 (1989) [hereinafter H.R. 1069].

B. Evidence Required to Establish Navigability

In *City of Martinsville*,¹² the Commission granted an appeal by the owner of a constructed, unlicensed project of an order by the Director of the Office of Hydropower Licensing finding that the project was required to be licensed because it was on a navigable river. Some evidence of historic use of the Smith River to carry cargo interstate along the pertinent stretch had been presented, but the Commission concluded the evidence was insufficient. In addition, although the order below had stated there was recreational use, which could independently support a finding of navigability, the Commission found no evidence in the record of actual boat trips on the pertinent stretch of the river.

C. Standard for Determining that a Project Must Be Licensed Because It Affects the Interests of Interstate Commerce

In *Fairfax County Water Authority*,¹³ the Commission stated that even though a project does not substantially affect the interests of interstate commerce, if it is on Commerce Clause waters and belongs to a national class of projects whose activities affect interstate commerce, such as small hydro projects, it is jurisdictional.¹⁴ In a number of orders issued during 1989, the Commission staff found licensing was not required because there was no effect on interstate commerce, even though the “national class of small projects” rationale might have supported a finding of jurisdiction.¹⁵

II. NEED FOR POWER

In *Idaho Power Co. v. FERC (Idaho III)*,¹⁶ the appellate court upheld the Commission’s decision to consider the need for power of a proposed project on a regional basis, notwithstanding the license applicant’s proposal to sell the power to a local utility which, in prior FERC decisions, had been found to not need power. Another appellate court had previously decided in *Idaho I* that the Commission is *not* required to consider the need for a specific project’s power in issuing an exemption for a project.¹⁷ However, a showing of a need for power *is* required for the issuance of a license.¹⁸

In *Idaho III*, the court reviewed the Commission’s issuance of a license to Horseshoe Bend Hydroelectric Company. The Commission had considered the energy needs of the entire Pacific Northwest to determine whether there was a need for power. Idaho Power Company appealed the Commission’s

12. *City of Martinsville*, 46 F.E.R.C. ¶ 61,235 (1989).

13. *Fairfax County Water Auth.*, 43 F.E.R.C. ¶ 61,062 (1988).

14. Despite the “national class of small projects” reasoning, *City of Arlington*, 46 F.E.R.C. ¶ 62,281 (1989), read *Fairfax County* not to require licensing where a project was not connected to the interstate electric grid. *Arlington*, 46 F.E.R.C. ¶ 62,281, at 63,431.

15. *Spartanburg Water Sys.*, 48 F.E.R.C. ¶ 62,199 (1989); *Graniteville Co.*, 48 F.E.R.C. ¶ 62,198 (1989); *Port of Hood River*, 48 F.E.R.C. ¶ 62,200 (1989); *Rocky Mount Mills*, 48 F.E.R.C. ¶ 62,201 (1989); *Coy Paper Co.*, 48 F.E.R.C. ¶ 62,202 (1989); *City of Niles*, 48 F.E.R.C. ¶ 62,203 (1989); *North Am. Hydro, Inc.*, 48 F.E.R.C. ¶ 62,204 (1989).

16. *Idaho Power Co. v. FERC*, 865 F.2d 1313 (D.C. Cir. 1989) [hereinafter *Idaho III*].

17. *Idaho Power Co. v. FERC*, 766 F.2d 1348 (9th Cir. 1985) [hereinafter *Idaho I*].

18. *Idaho Power Co. v. FERC*, 767 F.2d 1359 (9th Cir. 1985) [hereinafter *Idaho II*].

determination on the grounds that a regional consideration of energy need was a departure from the Commission's prior policy.

The appellate court held that although the Commission's earlier orders had considered the need for power in a narrower geographic area, a broader inquiry was not prohibited. The D.C. Circuit distinguished *Idaho I*, observing that its facts involved an applicant who had proposed "site banking" because it could not use the power.¹⁹

III. ENVIRONMENTAL MATTERS

A. State vs. Federal Authority

1. Control of the Water Resource: Federal Preemption

In 1989, a federal court of appeals decision, *California ex rel. Water Resources Board v. FERC*,²⁰ held that the FPA preempts state veto power or mandatory conditioning authority under state law with respect to nearly all aspects of hydroelectric projects subject to Commission jurisdiction.²¹ The Ninth Circuit rejected the argument that section 27 of the FPA²² should be read as an anti-preemption provision broadly granting to the states final authority over all issues connected to the control and use of water in a project licensed under the FPA.

The decision precluded the California State Water Resources Control Board (Board) from enforcing certain Board-issued water permits that conditioned the use of the water necessary for a hydroelectric project on the maintenance of minimum instream flows in the bypassed reach of the stream. The Commission had held that it has exclusive authority to determine these minimum flows.²³ The court found that the Board's authority to restrict operations of a federally licensed project was limited to certain "proprietary" powers which relate to the use of water for irrigation or municipal purposes only.²⁴ Section 27 reserves these powers to the states.²⁵

The Supreme Court has agreed to hear the case.²⁶ In its appeal, California requests the Supreme Court to find that section 27 of the FPA reserves to the states authority over the use of water for fish and wildlife as well as irrigation and municipal purposes.

2. Expanded Role of State and Federal Agencies in Consultation With the FERC: The Section 10(j) Procedure

The Commission's decision in *Henwood Associates, Inc.*²⁷ recognized the

19. *Idaho I*, 865 F.2d at 1315.

20. *California ex rel. Water Resources Bd. v. FERC*, 877 F.2d 743 (9th Cir. 1989), cert. granted, 58 U.S.L.W. 3369 (U.S. Dec. 4, 1989) (No. 89-333).

21. *Id.* at 750.

22. Federal Power Act, 16 U.S.C. § 821 (1988).

23. Rock Creek Ltd. Partnership, 38 F.E.R.C. ¶ 61,240 reh'g denied, 41 F.E.R.C. ¶ 61,198 (1987).

24. *California v. FERC*, 877 F.2d at 749.

25. *Id.*

26. *Id.* at 743.

27. *Henwood Assocs., Inc.*, 47 F.E.R.C. ¶ 61,174 (1989) (reh'g pending). On December 13, 1989, the Commission discussed and approved an order on rehearing, which has not been issued as of this writing.

need to defer to requests by a state fish and wildlife agency pursuant to authority conferred on the states by the Electric Consumers' Protection Act of 1986 (ECPA).²⁸ The Commission discussed at length the section 10(j) procedures added to the FPA by the ECPA.²⁹ In *Henwood*, the Commission applied, for the first time, a new policy³⁰ regarding late interventions by fish and wildlife agencies. The FERC granted the California Department of Fish and Game (Department) late intervention, and then found that the Department may not have properly understood that its minimum flow recommendations were viewed by the Commission as inconsistent with the purposes of the FPA.³¹ The Department was afforded a renewed opportunity through the section 10(j) process to negotiate a resolution to its disagreement with the Commission regarding minimum flows.

The standard for triggering the section 10(j) procedure, according to the Commission, is whether a fish and wildlife agency recommendation is either unsupported by any substantial evidence or is inconsistent with the purposes and requirements of the FPA, including the balancing of beneficial uses. Mere inconsistency between a Commission staff recommendation and an agency recommendation does not suffice.³² During the discussion at its December 13, 1989 public meeting, the Commission voted to approve the Department's minimum flow requests, raising the question of whether the Commission will be affording greater deference to recommendations of fish and wildlife agencies.

B. *Federal Agency vs. Federal Agency*

1. Conflicts Among Federal Agencies: Fishways Prescriptions Under FPA Section 18; Authority of Other Federal Agencies Operating Dams

The Commission's decision in *Eugene Water & Electric Board*³³ involved the application by the Eugene Water & Electric Board (Eugene) for a license to operate a hydro facility at an existing U.S. Army Corps of Engineers dam. In its order, the Commission examined the recommendations of a federal agency, the National Marine Fisheries Service (NMFS). The Commission's order addressed three matters: temperature control devices, fishways, and minimum flows.

With respect to temperature control devices, the Commission rejected NMFS recommendations that Eugene construct a water temperature control facility at the project, finding the recommendations to be inconsistent with the

28. Electric Consumers' Protection Act of 1986, 16 U.S.C. § 823a(c) (1988).

29. Under Section 10(j) of the FPA, 16 U.S.C. § 803(j) (1988), the Commission must include in project licenses any conditions based on the recommendations of a fish and wildlife agency unless the Commission finds the recommendations to be inconsistent with the purposes of the FPA.

30. See *Statement of Policy Permitting Limited Intervention by Fish and Wildlife Agencies at the Appeal Stage of a Licensing Proceeding*, 46 F.E.R.C. ¶ 61,161 (1989), in which the Commission announced that until completion of a rulemaking concerning section 10(j), it would be Commission policy "to permit certain appeals by fish and wildlife agencies that have not previously intervened in a proceeding." *Id.* at 61,562.

31. *Id.* at 61,595-96 (Comm'r Trabandt, dissenting).

32. *Id.* at 61,591.

33. *Eugene Water & Elec. Bd.*, 49 F.E.R.C. ¶ 61,211 (1989).

FPA.³⁴ The Commission held that its decision was consistent with the statutory dispute resolution requirements under section 10(j) of the FPA where recommendations by federal fish and wildlife agencies are found to be inconsistent with the FPA.³⁵

With respect to fishways, the Commission held that section 18 of the FPA³⁶ required the Commission to include NMFS' fishway recommendations in Eugene's license. The Commission found that the section 18 mandate applies to fish screens that are recommended as a component of a project's fish passage facilities. Moreover, the Commission explicitly stated that although a part of NMFS' recommendation was not supported by any substantial evidence, section 18 required the Commission to include NMFS' prescriptions in the license nevertheless.³⁷

The Commission also rejected NMFS' recommendations concerning maintenance of minimum flows at the project. The Commission found that due to the Corps' statutory authority over operation of the dam, hydropower generation at the dam could occur only when water releases were made by the Corps for other project purposes. Therefore, the imposition of minimum flow requirements for the project would be inconsistent with the authorized operation of the dam by the Corps and could not be included in the project's license.³⁸

2. Separate BLM Permitting Process Required

The Commission upheld in *Henwood*³⁹ its prior ruling⁴⁰ that a licensee is not required to obtain a separate right-of-way permit from the Bureau of Land Management (BLM) before commencing project construction on lands administered by BLM.

C. Cumulative Impacts: The Ohio River Basin Orders

In September, 1989, the Commission concluded its consideration of twenty-four applications for original licenses for hydroelectric projects at nineteen existing dams in the upper Ohio River basin. The Commission issued licenses for projects at sixteen of the dams and rejected the license applications for projects at the other three dams, finding it impossible to mitigate significant environmental impacts at these three dams.⁴¹ The Commission had postponed processing a number of pending license applications separately in order to pursue over two years of environmental study and analysis. These

34. *Id.* at 61,741-42.

35. *Id.*

36. Federal Power Act, 16 U.S.C. § 811 (1988).

37. *Eugene Water*, 49 F.E.R.C. at 61,743.

38. *Id.* at 61,742-43 and n.15.

39. *Henwood*, 47 F.E.R.C. at 61,587.

40. *Henwood Assocs., Inc.*, 44 F.E.R.C. ¶ 61,076 (1988).

41. The Commission discussed its overall analysis of the river basin in *Allegheny Elec. Coop.*, 48 F.E.R.C. ¶ 61,363 (1989). The Commission issued licenses for the sixteen projects in separate orders pertaining to each dam.

culminated in a final environmental impact statement (FEIS)⁴² assessing the specific and cumulative impacts of hydro development at the nineteen dams.

The Commission's order adopted the recommendations of the FEIS and rejected concerns raised by several fish and wildlife agencies.⁴³ Fish and wildlife agency concerns about water quality (preventing degradation of dissolved oxygen content), fish entrainment, recreation, wetlands, and other resources were found by the Commission to be adequately resolved through conditions to be included in the project licenses.⁴⁴

The Commission's conclusions were especially significant with respect to the balance struck among the various purposes identified in sections 4(e) and 10(a)(1) of the FPA.⁴⁵ The Commission recognized that under certain circumstances, the balancing of interests required by the FPA may call for the Commission to deny applications to develop hydro projects or to require curtailment of power operations. The Commission found⁴⁶ that with respect to three projects, the benefits afforded by increased power generation, job creation and increased local tax revenues were outweighed by the public interest in protecting particular fish, wildlife and recreational resources that would be harmed by project development. The Commission concluded, therefore, that with respect to the three projects, it could not issue licenses given the mandates of sections 4(e) and 10(a)(1) of the FPA.

In November, 1989, the Commission granted rehearing of its September order for the limited purpose of allowing the Commission more time for further consideration of several rehearing requests by state and federal agencies and environmental groups.⁴⁷

D. *Water Quality Certification Under Section 401 of the Clean Water Act*

A number of developments clarified the role of the FERC *vis-a-vis* the state agencies' authority to issue water quality certification pursuant to section 401 of the Clean Water Act.⁴⁸ These fall into two categories: (1) the extent of the FERC's role in rendering determinations on procedural matters under section 401; and (2) the scope of the states' substantive authority in issuing or denying water quality certifications.

1. Extent of the FERC's Role

The FERC's interpretation of its own rule implementing Order No. 464 was reversed in one significant respect in *City of Fredericksburg v. FERC*.⁴⁹ In that case the applicant had sent a letter to the state agency requesting water quality certification. In response the state agency sent the applicant a "joint

42. The FEIS was completed in September, 1988, and made available to the public pursuant to a FEIS Notice, 53 Fed. Reg. 39,516 (1988).

43. See *Allegheny*, 48 F.E.R.C. at 62,361-95.

44. *Id.* at 62,361-70.

45. 16 U.S.C. §§ 797(e), 803(a)(1) (1988).

46. See *Allegheny*, 48 F.E.R.C. at 62,368-70.

47. *Allegheny Elec. Coop.*, 49 F.E.R.C. ¶ 61,251 (1989).

48. Clean Water Act, 33 U.S.C. § 1341 (1982 & Supp. V 1987).

49. *City of Fredericksburg v. FERC*, 876 F.2d 1109 (4th Cir. 1989).

permit application" required for any applicant seeking such certification. The applicant never submitted the application. The FERC issued a license even after being notified by the state agency that water quality certification could not be issued in the absence of a proper application from the applicant. On appeal, the United States Court of Appeals for the Fourth Circuit concluded that the applicant never made a request for certification within the meaning of the FERC's regulations, because "a valid request for certification occurs only if the prospective licensee complies with the state agency's filing procedures."⁵⁰

In *Allegheny Electric Coop.*,⁵¹ the Commission discussed issues surrounding section 401 certifications for projects at sixteen sites in the Ohio River basin. In one instance, a state agency denied certification within one year, but the agency director stayed the denial and remanded the application to his staff. Because the remand order specified that it should not be deemed a waiver of the one-year period, FERC did not treat it as such, even though the order ultimately granting certification did not issue for another three years.⁵²

In *Joseph M. Keating*,⁵³ the FERC dealt with the issue of whether a state can revoke a validly issued water quality certification. The Commission ruled that, in view of the California State Water Quality Control Board's position that it had revoked a previously issued blanket 401 certification of a Corps of Engineers National Permit,⁵⁴ the FERC could not find that the project had water quality certification.

In the *Keating* rehearing order,⁵⁵ the Commission affirmed its initial ruling and dismissed the license application because the applicant had withdrawn its appeal of the denial of certification and had not filed a new request for certification within 90 days, pursuant to the policy developed in *Swift River Co.*⁵⁶ and *City of Harrisburg*.⁵⁷

2. Scope of State Authority

The United States Court of Appeals for the Third Circuit held, in *Pennsylvania Department of Environmental Resources v. FERC*,⁵⁸ that a state's authority under section 401 of the Clean Water Act is restricted by the broad scope of the FERC's licensing jurisdiction. This decision involved the attempt by the Pennsylvania Department of Environmental Resources to impose conditions on a 401 certification for a hydro project which conflicted with certain conditions imposed by the Commission in a license. The state agency chal-

50. *Fredericksburg*, 876 F.2d at 1111-12.

51. *Allegheny*, 48 F.E.R.C. at 62,325-27.

52. *Id.* at 62,326.

53. *Joseph M. Keating*, 47 F.E.R.C. ¶ 61,170, *reh'g denied*, 49 F.E.R.C. ¶ 61,343 (1989).

54. The Corps of Engineers, which pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1982 & Supp. V 1987), issues permits for the discharge of dredge and fill materials into navigable waters, authorized a number of activities without any need for a further permit. See 33 C.F.R. § 330.5(a) (1989).

55. *Keating*, 49 F.E.R.C. ¶ 61,343.

56. *Swift River Co.*, 41 F.E.R.C. ¶ 61,146 (1987).

57. *City of Harrisburg*, 43 F.E.R.C. ¶ 61,438, *reconsideration granted in part*, 45 F.E.R.C. ¶ 61,053 (1988).

58. *Pennsylvania Dep't of Env'tl. Resources*, 868 F.2d 592 (3d Cir. 1989).

lenged the FERC's issuance of a license on the grounds that conditions of the license impermissibly interfered with the state's authority over various areas, including section 401 certification.

The Court of Appeals upheld a condition of the FERC license requiring FERC review and approval of project modifications intended to maintain compliance with the state's 401 certification. The court determined that section 401 of the Clean Water Act gives states exclusive authority only to issue a certification, prior to licensing, that any discharge into navigable waters will comply with the Clean Water Act.⁵⁹ This holding with respect to the 401 issue was based on the Court's finding that section 27 of the Federal Power Act,⁶⁰ reserving certain limited matters for state oversight, does not preserve state authority over water pollution, flood control, aesthetics and recreation, or natural resource conservation if such authority conflicts with the FERC's licensing jurisdiction.

A New York Supreme Court decision issued on November 15, 1989 denied a motion by the New York State Department of Environmental Conservation to remand a certification proceeding for further state agency review based on a contention that the state agency had improperly issued the certificate without abiding by the New York State Environmental Quality Review Act.⁶¹ The court held that the state agency's attempt to implement a broad scope environmental review in an application for section 401 water quality certification was inconsistent with the state's limited authority to review water quality related issues. In *Long Lake Energy Corp. v. New York State Department of Environmental Conservation*,⁶² an unreported letter decision, a New York Supreme Court held that the state agency is by statute limited to determining whether relevant water quality standards will be met, and may not require an applicant to furnish information on anything other than water quality.

IV. CIVIL PENALTIES ASSESSED

A. Notices of Proposed Penalty Issued

Under section 31 of the FPA,⁶³ added to the FPA by the Electric Consumers Protection Act of 1986 (ECPA), hydroelectric licensees, permittees, or exemptees are subject to substantial civil penalties, up to \$10,000 per day of violation, for failure to comply with rules, regulations, or license conditions. In 1989, the Commission issued several notices of proposed penalties, including a hydroelectric project operator who had failed to submit license applications acceptable to the Commission,⁶⁴ a licensee who had failed to file

59. *Id.* at 598.

60. 16 U.S.C. § 821.

61. *Fourth Branch Assocs. and the Audubon Soc'y of New York State, Inc. v. New York State Dept. of Env'tl. Conservation*. Albany County, Special Term, RJI No. 0189SST2122 (Nov. 24, 1989) (1989 WESTLAW 162391, N.Y. Supp.).

62. Col. No. 17, (Sup. Ct. Ulster, June 27, 1989—Bradley, J.).

63. 16 U.S.C. § 823b(c).

64. *Wolverine Power Corp.*, 48 F.E.R.C. ¶ 61,112, at 61,403 (1989) (order setting hearing). The "Notice of Proposed Penalty" was issued Feb. 23, 1989. The proposed penalty was \$1,708,000.

information required to correct a deficient consultant's report,⁶⁵ an exemptee who failed to file a Dam Stability Report for a period of 129 days,⁶⁶ and a licensee whose operation of its project violated articles of the license concerning instantaneous run-of-river operation and minimum flow requirements.⁶⁷

As required by statute, the affected entities had a choice between a Commission administrative proceeding, reviewable in the federal circuit Courts of Appeals, or a Commission assessment of penalty subject to enforcement in a *de novo* proceeding in federal district court.⁶⁸ Three of the affected parties chose the administrative hearing route,⁶⁹ one the district court alternative.⁷⁰

B. Jurisdiction To Impose Penalties On Owners of Unlicensed Projects

In Order No. 502, the Commission determined that its civil penalty authority pursuant to section 31 extended not only to licensees, exemptees and permittees, but to owners of projects that ought to have been licensed but have not been.⁷¹ This authority was the basis for civil penalties in *Wolverine Power Corporation*.⁷²

C. Assessment of Penalty

Because Trafalgar Power elected the judicial procedure, the Commission assessed a penalty of \$19,000 for violation of run-of-river and minimum flow requirements, based on the notice of proposed penalty and Trafalgar's response.⁷³ Two of the forty days of alleged violation were found excusable because the deviations were caused by thunderstorm-induced shut downs. These were deemed beyond the licensee's control. The Commission refused to excuse other violations because of difficulty with utility line relay voltage, saying that this problem should have been corrected by the licensee. Although the license condition permitted insignificant deviations between inflow and outflow, the cited deviations were found to be significant. In developing the amount of the penalty, the Commission treated the violation as repetitive,

65. Flambeau Paper Corp., 49 F.E.R.C. ¶ 61,003 app. (1989) (order setting hearing). The proposed penalty was \$50,000. *Id.* at 61,005.

66. Burt Dam Power Co., 49 F.E.R.C. ¶ 61,007 app. (1989) (order setting hearing). The proposed penalty was \$40,000. *Id.* at 61,024.

67. Trafalgar Power, Inc., 49 F.E.R.C. ¶ 61,140 app. (1989) (order assessing civil penalty). The proposed penalty was \$20,000. *Id.* at 61,601.

68. Federal Power Act 16 U.S.C. § 823b (1988); see 18 C.F.R. §§ 385.1507-09 (1989).

69. See *Wolverine*, 48 F.E.R.C. at 61,402; *Burt*, 49 F.E.R.C. at 61,025; *Flambeau*, 49 F.E.R.C. at 61,005.

70. See *Trafalgar*, 49 F.E.R.C. at 61,595.

71. Order No. 502, *Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act*, III F.E.R.C. Stats. & Regs. ¶ 30,828, at 31,216-18, 53 Fed. Reg. 32,035, at 32,036-37 (1988) (to be codified at 18 C.F.R. pt. 385), *reh'g denied*, Order No. 502-A, *Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act*, 45 F.E.R.C. ¶ 61,407 (1988). *But see* Order No. 502, III F.E.R.C. Stat. & Regs. at 31,222-36, 53 Fed. Reg. at 32,040-49 (Comm'r Trabant, dissenting). The Court of Appeals for the D.C. Circuit dismissed as premature an appeal based on the Commission's assertion of Civil Penalty Authority under Order No. 502 over unlicensed projects. *Orange and Rockland Utilities v. FERC*, No. 89-1032 (D.C. Cir. May 22, 1989).

72. *Wolverine*, 48 F.E.R.C. at 61,403.

73. *Trafalgar*, 49 F.E.R.C. at 61,599.

because it had occurred once a few weeks before the period for which penalties were assessed and because it occurred again on thirty-eight separate days. In view of the expected annual revenue of \$850,000, a penalty amount of \$19,000 (\$500 per day of violation) spread over the life of the project was imposed.

V. PRELIMINARY PERMITS: DISCRETIONARY DENIAL

In *Wolverine Power Corp.*,⁷⁴ the Commission found that it is not required to grant preliminary permit applications, so long as it articulates a rational basis for denial. As a result of this determination, the Commission denied permit applications for four existing projects. In 1976, the Commission found the waterway on which the projects were located to be navigable. The Commission decided that since its 1976 decision, the Wolverine Power Corporation had not filed acceptable license applications for three of the four projects. It held that the passage of twelve years without receipt of acceptable license applications warranted dismissal of the permit applications, stating that the Commission "would not condone or legitimize any more delays in complying with the mandate of section 23(b)(1) of the FPA."⁷⁵

VI. RELICENSING

A. *New Relicensing Regulations*

In Order No. 513,⁷⁶ the Commission revised parts 4 and 16 of its regulations, in part to incorporate the changes to section 15 of the FPA enacted by the ECPA.

1. Filing and Processing of Notices of Intent and Applications

An existing licensee must give notice, no later than five years and no earlier than five and one-half years before expiration of its license, whether it intends to file for a new license.⁷⁷ Failure of an existing licensee to file the required notice of intent is treated as though the licensee had filed a notice of intent indicating that it does not intend to apply for subsequent license or exemption.⁷⁸ Moreover, an existing licensee that fails to file a timely notice of intent of relicensing application may not file an application for a new license, either individually or in conjunction with other entities that are not currently licensees of the project.⁷⁹

No notice of intent is required from a competing applicant. The Commis-

74. *Wolverine Power Corp.*, 47 F.E.R.C. ¶ 61,274 (1989).

75. *Id.* at 61,958.

76. Order No. 513, *Hydroelectric Relicensing Regulations Under the Federal Power Act*, III F.E.R.C. Stats. & Regs. ¶ 30,854, 54 Fed. Reg. 23,756 (1989) [hereinafter Order No. 513] (to be codified at 18 C.F.R. pts. 4,16), *reh'g granted in part and denied in part*, Order No. 513-A, *HydroElectric Relicensing Regulations Under the Federal Power Act*, III F.E.R.C. Stats. & Regs. ¶ 30,869 (1989), 55 Fed. Reg. 4 (1990) [hereinafter Order No. 513-A] to be codified at 18 C.F.R. pt. 16.

77. Order No. 513, *supra* note 76, 54 Fed. Reg. at 23,761-63 (to be codified at 18 C.F.R. § 16.6, formerly 18 C.F.R. § 16.15). The same requirement applies to minor licenses not subject to sections 14 and 15 of the FPA. *Id.* (to be codified at 18 C.F.R. § 16.20).

78. *Id.* (to be codified at 18 C.F.R. § 16.23).

79. Order No. 513, 54 Fed. Reg. at 23,804 (to be codified at 18 C.F.R. § 16.24). The Commission

sion rejected several such suggestions as contrary to the intent of the ECPA and potentially anticompetitive.⁸⁰ However, all applications must be filed no later than twenty-four months before the existing license expires.⁸¹

An application that is rejected or dismissed may not be resubmitted if the twenty-four month deadline has passed.⁸² Nonetheless, material amendments that occur before the final amendment date will not affect the filing date of the application.⁸³ The Commission decided not to promulgate specific deadlines for the determination of deficiencies, the correction of deficiencies nor any final amendments,⁸⁴ but will establish these deadlines on a case-by-case basis in a notice to be issued for each application.⁸⁵

If the existing licensee has filed a notice of intent *not* to file for a new license and no timely license application is filed, the existing licensee must file a schedule for the filing of a surrender application.⁸⁶ If an existing licensee that filed a timely notice of intent fails to file a timely relicensing application, the Commission will solicit license applications from potential applicants.⁸⁷ If no one expresses interest, the existing licensee must prepare a surrender application.⁸⁸

2. Acceleration of Expiration Date of a License

The notice of proposed rulemaking provided for an acceleration of the expiration of a license where the licensee sought to add new capacity at the project. The Commission expanded the bases for acceleration to include any legitimate reason, including the installation of new capacity.⁸⁹ In addition to a detailed explanation of the basis for the request, the licensee must provide the information required for a notice of intent to file a new license,⁹⁰ because if the request is granted the application for the request will be treated as the notice of intent to file for a new license. The Commission will publish notice of the application and allow a 45-day period for comments. If the Commission grants the request for acceleration, the new deadline may not be earlier than 5

decided not to permit an existing licensee that had initially indicated it would not submit an application for new license to reconsider and submit an application if no one else came forward. *Id.*

80. *Id.* On rehearing, the Commission rejected a similar proposal, which would have required competitors to file a notice of intent once an application for a new license had been accepted for filing and noticed. Order No. 513-A, 55 Fed. Reg. at 12-13.

81. *Id.* at 23,784 (to be codified at 18 C.F.R. § 16.9(b)(1)). Similar rules apply to minor projects for which FPA sections 14 and 15 have been waived. *Id.* at 23,800 (to be codified at 18 C.F.R. § 16.20(c)).

82. *Id.* at 23,786 (to be codified at 18 C.F.R. § 16.9(b)(4)).

83. *Id.* (to be codified at 18 C.F.R. § 16.9(b)(3)) (18 C.F.R. § 4.35, which changes the filing date for material amendments, does not apply to relicensing).

84. *Id.*

85. *Id.* (to be codified at 18 C.F.R. § 16.9(d)). All competing applications will operate under the same deadlines. *Id.* (to be codified at 18 C.F.R. § 16.9(d)(3)).

86. *Id.* (to be codified at 18 C.F.R. § 16.26). Surrender applications must be prepared pursuant to the agency consultation procedure. *Id.* (to be codified at 18 C.F.R. §§ 16.25(d), 16.26(c)).

87. *Id.* (to be codified at 18 C.F.R. § 16.25(a)). Such applications must follow the agency consultation requirements applicable to relicensing. *Id.* (to be codified at 18 C.F.R. § 16.25(b)).

88. *Id.* (to be codified at 18 C.F.R. § 16.25(c)).

89. *Id.* (to be codified at 18 C.F.R. § 16.4).

90. *See id.* (to be codified at 18 C.F.R. § 16.6).

years and 90 days after the issuance of the Commission order granting acceleration.⁹¹

3. Joint Application With the Existing Licensee

If the existing licensee files in conjunction with another entity, it will not be treated as an existing licensee for purposes of FPA section 15(a)(2), which provides that a license will not be transferred when there are no significant differences between competing applications.⁹² In all other respects, a joint application involving an existing licensee must follow the procedures as though it were filed solely by the existing licensee.

4. Exemption Instead of New License

The Commission clarified that licensees could, upon expiration of their existing licenses seek exemptions rather than new licenses. All the relicensing procedures, and the standards for competition applicable to new licenses (rather than the standards applicable to initial exemption applications), apply to such exemption applications.⁹³

5. Minor Licenses

Order No. 513 clarified that a municipal preference would not apply to any relicensing, even of a minor project where sections 14 and 15 were waived.⁹⁴ Moreover, prior waivers of sections 14 and 15, while relieving minor licenses from burdensome requirements, were never intended to exclude minor licenses from the relicensing process generally.⁹⁵ The Commission determined that substantially all the relicensing procedures applicable to major licenses should also apply to minor licenses.⁹⁶ However, less information about the project would be required in an application for new license for a minor project.⁹⁷ The Commission also stated which sections of part I will be waived for minor projects; minor license applicants can request that provisions not be waived.⁹⁸

6. Agency Consultation Procedures

The Commission established rules governing the agency consultation process which must precede the filing of the application for a new license. Although the procedures are based on the three-stage agency consultation

91. ECPA requires a five-year window before expiration of the license during which information must be available to the public and potential competitors. 54 Fed. Reg. at 23,763.

92. 54 Fed. Reg. at 23,796 (to be codified at 18 C.F.R. § 16.13(c)).

93. *Id.* (to be codified at 18 C.F.R. § 16.12) (holder of major licenses may seek exemption instead of new license); *Id.* at 23,802 (to be codified at 18 C.F.R. § 16.22) (holder of minor license may seek exemption instead of new license).

94. *Id.* at 23,800.

95. *Id.* at 23,800-01.

96. *Id.* (to be codified at 18 C.F.R. § 16.20(d)).

97. *Id.* at 23,794 (to be codified at 18 C.F.R. § 4.61(f)(3)) (sets out the information requirements for new applications for license for minor projects).

98. *Id.* (to be codified at 18 C.F.R. § 4.60(c)).

process for original licenses,⁹⁹ they differ in several respects.

The regulations require pre-filing consultation with all relevant federal, state, and interstate resource agencies. Indian tribes are required to be treated as though they were a resource agency, so long as they meet certain standards for existence of tribal government and an interest in the project.¹⁰⁰ As described below, the public is provided at least one opportunity to participate in the agency consultation process.

In the first stage of consultation,¹⁰¹ a license applicant must give the Commission¹⁰² and other relevant agencies detailed information¹⁰³ and detailed descriptions of its proposed studies and study methodologies.¹⁰⁴

The applicant must then hold a joint meeting, including a site visit, for all resource agencies, thirty to sixty days after the required information has been distributed, to discuss the information and the concerns of the various resource agencies.¹⁰⁵ The joint meeting must be transcribed or audio recorded.¹⁰⁶ Members of the public must be allowed to participate in the joint meeting.¹⁰⁷ Public participation is also available to interested parties once an application is noticed, and the applicant must address in its application significant concerns raised at the joint meeting.¹⁰⁸

The next step is for agencies to provide comments and study recommendations. Each agency must set out the basis for its determination of the studies and study methodologies to be performed, must document that recommended methodologies are generally accepted, and must explain how the studies and information will be useful to the agency.¹⁰⁹ To expedite the consultation process, the regulations also provide that disputes may be resolved by the Director of the Office of Hydropower Licensing.¹¹⁰

In the second stage of consultation,¹¹¹ the applicant completes studies, prepares and distributes a draft license application, and receives written comments. If an agency and the potential applicant disagree, the applicant must convene at least one joint meeting, which must involve not only that agency but all agencies with related concerns or expertise, to attempt to reach an agreement.¹¹²

The applicant must document in its application all agency consultations,

99. *Id.* (to be codified at 18 C.F.R. § 4.38).

100. See Order No. 513-A, *supra* note 77 at 11-12 (to be codified at 18 C.F.R. § 16.2(f)).

101. Order No. 513, *supra* note 77, 54 Fed. Reg. at 23,766 (to be codified at 18 C.F.R. § 16.8(b)).

102. Providing the consultation package to the Commission is a new requirement.

103. Order No. 513, *supra* note 77 at 23,767 (to be codified at § 16.8(b)(1)). (The information is similar to that now required by 18 C.F.R. § 4.38(b)(1) (1989)).

104. *Id.* at 23,768 (to be codified at 18 C.F.R. § 16.8(b)(1)(vi)). (This requirement is new.)

105. *Id.* at 23,766 and 23,770 (to be codified at 18 C.F.R. § 16.8(b)(2)).

106. *Id.* at 23,769-71 (to be codified at 18 C.F.R. § 16.8(b)(3)).

107. *Id.* at 23,756 (to be codified at 18 C.F.R. § 16.8(i)).

108. *Id.* at 23,771-73 (to be codified at 18 C.F.R. § 16.8(f)).

109. *Id.* at 23,768-71 (to be codified at 18 C.F.R. § 16.8(b)(4)). (This requirement applies to all agency requests.)

110. *Id.* at 23,771-73 (to be codified at 18 C.F.R. § 16.5(b)(5)).

111. *Id.* at 23,773-77 (to be codified at 18 C.F.R. § 16.8(c)).

112. *Id.* at 23,756 and 23,809 (to be codified at 18 C.F.R. § 16.8(c)(6)).

attempts at consultations, remaining disagreements, waivers,¹¹³ comments from the public, and compliance with the certification requirement of section 401 of the Clean Water Act.¹¹⁴ For the first time, the regulations also require an explanation of proposed compliance or non-compliance with any relevant comprehensive plan for the resource, and an explanation of how the proposal addresses significant resource issues raised by the public during the initial joint meeting.¹¹⁵

7. Further Guidance On Studies, Procedures and Agency Requirements

a. Access of Competitors to Information

The new regulations require an existing licensee to allow a potential license applicant (competitor) to visit project land, buildings, and other project property “at a reasonable time and under reasonable conditions.”¹¹⁶ A licensee is allowed to limit its liability with respect to such visits, and may secure compensation from the competitor for costs incurred in providing access. A competitor may gain access pursuant to these regulations only after it has complied with the first stage of the agency consultation procedure. Again, disputes over access are to be promptly resolved by the Director of the Office of Hydropower Licensing.¹¹⁷

b. Joint Studies

The proposed regulations had included statements that each potential applicant must conduct studies independently, unless it had agreed to do otherwise, and would not have to share the results of its studies.¹¹⁸ These provisions were deleted from the final rules. The Commission stated that independent studies are generally encouraged, but that in some instances a joint study might be appropriate.¹¹⁹

113. The regulations permit any affected resource agency or Indian tribe to waive its participation in the consultation process. *Id.* (to be codified at 18 C.F.R. § 16.8(e)).

114. *Id.* at 23,810 (to be codified at 18 C.F.R. § 16.8(f)(1)-(5), (7)). The applicant must also include in its application a written report as to areas of continuing disagreement with the agencies, as well as any agreements reached. *Id.* at 23,809 (to be codified at 18 C.F.R. § 16.8(c)(8)).

115. *Id.* at 23,810 (to be codified at 18 C.F.R. § 16.8(f)(6), (8)).

116. *Id.* at 23,807 (to be codified at 18 C.F.R. § 16.5)).

117. *Id.* (to be codified at 18 C.F.R. § 16.5(b)(1)) (relying on the general dispute resolution mechanism to be codified at 18 C.F.R. § 16.8(b)(5)). *Id.* at 23,756 and 23,808. Disputes as to access must be resolved promptly, but disputes as to compensation can be resolved later and may not be permitted to delay access. *Id.* (to be codified at 18 C.F.R. § 16.5(b)(2)).

118. 53 Fed. Reg. 21,844, 21,847 (1988) (to be codified at 18 C.F.R. § 16.8(c)(1), (2)) (proposed May 24, 1988).

119. For example, when interviewing elderly persons regarding cultural information or when tagging and monitoring a limited deer population. Order No. 513, *supra* note 77 at 23,756, 23,774.

c. Copying of Material

The Commission referred to *WV Hydro, Inc. and the City of St. Marys*,¹²⁰ in which the FERC held that it will not reject an application that contains material duplicated from another application.¹²¹ The fact that a competitor has copied material may be relevant to a decision on the merits of competing applications, however, and the weight to be given to copying will be decided on a case-by-case basis.¹²²

d. Confidentiality

An applicant may request confidential treatment of pre-application information it submits to the Commission.¹²³ The Commission will process any such request in accordance with the confidentiality provisions of the Freedom of Information Act (FOIA).¹²⁴ This limited confidentiality provision applies only during the pre-application stage, and is not intended to keep an applicant's general plans secret from potential competitors.¹²⁵

e. Pre-project Conditions

The Commission rejected requests that studies concerning pre-project conditions be required. The Commission stated that the evaluation of the appropriateness of environmental enhancement measures must be done in the context of today's environmental needs and problems, and not based on the world of fifty years ago. Applicants will not have to do such studies if such studies are routinely requested by resource agencies.¹²⁶

f. Imposition of Conditions By Federal Agencies: FPA Sections 4(e) and 18

Section 18 of the FPA¹²⁷ requires *inter alia* that the Commission insert a license provision mandating the construction, maintenance, and operation of fishways as prescribed by the Secretary of the Interior or the Secretary of Commerce. The Commission determined that the Departments of the Interior and Commerce have the authority to prescribe fishways when projects receive new licenses.¹²⁸

120. *WV Hydro, Inc. and the City of St. Marys*, 45 F.E.R.C. ¶ 61,220 (1988).

121. Order No. 513, *supra* note 77 at 23,756, 23,774.

122. *Id.*

123. *Id.* at 23,756, 23,810 (to be codified at 18 C.F.R. § 16.8(g)).

124. Freedom of Information Act, 5 U.S.C. § 552 (1982) (implemented in 53 Fed. Reg. 1,469, 1,477 (1988), amended by 54 Fed. Reg. 47,760 (1989) (to be codified at 18 C.F.R. § 388.112)).

125. Order No. 513, *supra* note 77 at 23,756, 23,780 (1989).

126. *Id.* at 23,775-76; 55 Fed. Reg. 4, 8 (1989).

127. Federal Power Act, 16 U.S.C. § 811 (1988).

128. Order No. 513, *supra* note 77 at 23,756, 23,760. (Commissioner Trabandt dissented vigorously, *Id.* at 23,819; *on rehearing* 55 Fed. Reg. 4, 18-20 (1989), Comm'r Trabandt, dissenting).

8. Standards and Factors on Relicensing

Order No. 513 clarifies that the Commission is required by FPA section 15(a)(3) to take an existing licensee's track record into account in *every* case, even when there was no competition; not only where there are no significant differences between the applications.¹²⁹ Order No. 513 also contains some discussion of each of the FPA sections 15(a)(2) and (a)(3) factors.¹³⁰ Of particular note, the Commission will not consider as part of the existing licensee's "need for power" power supplied to a wholesale customer competing for the license.¹³¹ General cost implications of a transfer, and the wholesale customer's need for power in light of its contractual rights to supply from the project, will be considered.¹³²

The Commission pointed out that it is prohibited by FPA section 15(a)(2)(G) from undertaking a comparative analysis of fish and wildlife mitigation plans.¹³³

The Commission stated that it would not subject competing applications to evaluation on antitrust grounds, citing to ECPA legislative history.¹³⁴

Concerning evaluation of an existing licensee's conduct, pursuant to FPA § 15(a)(3), the Commission declined to adopt the suggestion that a licensee's exercise of its right pursuant to FPA section 6 to withhold consent to modification of its existing license could be considered in relicensing.¹³⁵

9. Miscellaneous

a. Federal Takeover

FPA section 14 provides for federal takeover of licensed projects under certain circumstances. The new regulations provide that a federal department or agency may file a recommendation for federal takeover no earlier than five years before the license expires and no later than the end of the comment period related to an application.¹³⁶ A recommending must provide information as if it were applying for a license.¹³⁷

b. Annual Licenses

The regulations codify the Commission's practice pursuant to the annual licensing provision of Section 15 the Federal Power Act.¹³⁸ The Commission provided for automatic renewal of annual licenses without further order of the Commission in cases where no application for relicense or other relevant pro-

129. Order No. 513, *supra* note 77 at 23,788-89.

130. *Id.* at 23,789-94.

131. *Id.* at 23,791.

132. *Id.*

133. *Id.* at 23,791-92.

134. *Id.* at 23,792.

135. *Id.* at 23,794; 55 Fed. Reg. at 13.

136. *Id.* at 23,796 (to be codified at 18 C.F.R. § 16.14).

137. *Id.* (to be codified at 18 C.F.R. § 16.14(a)(6)).

138. *Id.* at 23, 797 (to be codified at 18 C.F.R. § 16.18). For minor projects for which Sections 14 and 15 may be waived, authority to continue operation is now addressed in new 18 C.F.R. § 16.21.

ceedings have been completed before the expiration of the current annual license.¹³⁹ The Commission initially took the view that it had no authority to impose additional terms and conditions on annual licenses.¹⁴⁰ In view of the subsequent decision in *Platte River Whooping Crane Critical Habitat Trust v. FERC*,¹⁴¹ the Commission, on rehearing, reserved the right in issuing an annual license to incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.¹⁴²

c. Nonpower Licenses

As provided in section 15(b) of the FPA, nonpower licenses are temporary and will be terminated when the Commission determines that a state, municipality, interstate agency, or federal agency is authorized and willing to assume regulatory supervision.¹⁴³ The new regulations provided specific requirements for the contents of an application for non-power license,¹⁴⁴ and recast the regulations governing termination of proceedings involving nonpower licenses and termination of nonpower licenses.¹⁴⁵

d. Annual List of Expiring Licenses

The Commission will publish annually a table providing detailed information on all projects whose licenses will expire in the succeeding six years. The table will also include those projects where licensees have requested an acceleration of the expiration date of particular licenses. The information will be published in both the Commission's *Annual Report* and the *Federal Register*.¹⁴⁶

B. Annual Licenses—Conditions

The D.C. Circuit's decision in *Platte River*¹⁴⁷ raises several issues concerning the FERC's conditioning authority and the annual license process. The Commission's response to the decision is also noteworthy.

Platte River involved FERC's refusal to assess the need for wildlife protection conditions in interim annual licenses issued following the expiration of initial licenses for a pair of Nebraska hydroelectric projects in June and July of 1987.¹⁴⁸ One of these licenses reserved authority to the FERC to impose environmental conditions; the other did not. However, the court noted that noth-

139. *Id.* (to be codified at 18 C.F.R. § 16.18(c)).

140. *Id.* at 23,979.

141. *Platte River Whooping Crane Critical Habitat Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989).

142. Oder No. 513, *supra* note 77 at 23, 797 (to be codified at 18 C.F.R. § 16.18(d)).

143. *See Id.* at 23,798.

144. *Id.* at 23,795 (to be codified at 18 C.F.R. § 16.11(a)).

145. 18 C.F.R. § 16.11(b), (c)); *Compare* 18 C.F.R. § 16.7 (1989).

146. *Id.* at 23,793 (to be codified at 18 C.F.R. § 16.3).

147. *Platte River*, 876 F.2d at 109.

148. Central Nebraska Pub. Power & Irrigation District, 39 F.E.R.C. ¶ 61,378 (1987), *order on reh'g*, 43 F.E.R.C. ¶ 61,225 (1988).

ing would bar the Commission from formulating appropriate conditions and then seeking cooperation in implementing them.¹⁴⁹ The Court also found that the Commission's refusal to assess the need for interim conditions for these projects was an abuse of discretion in light of the projects' history, which indicated that the environmental issues raised had at least some substance.¹⁵⁰

The Commission responded to *Platte River* by adding a new subsection (d) to § 16.8 of its hydro regulations, providing that, in issuing annual licenses, "the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment."¹⁵¹

C. *Federal Agency Authority to Condition Licenses Pursuant to FPA Section 4(e) Applies on Relicensing*

In *City of Pasadena Water & Power Dep't*,¹⁵² the Commission held that section 4(e) of the FPA¹⁵³ authorizes federal agencies to impose conditions on licenses at relicensing as well as in original licensing proceedings.¹⁵⁴ The Commission reasoned that the language of section 4(e) is not limited to original licenses, and also forms the basis for Commission authority to issue new licenses and renewals of licenses.

VII. DELAY IN ISSUING A LICENSE

In *Platte River*,¹⁵⁵ the petitioner challenged FERC's delay in issuing new licenses. The court declined to hear the argument, on the ground that the plaintiff had failed to comply with section 313 of the Federal Power Act¹⁵⁶ by seeking rehearing of the delay when the FERC granted an extension of time to respond to a deficiency letter.¹⁵⁷ In the past, the Commission has viewed such extension orders as non-final and non-appealable.¹⁵⁸ However, *Platte River* indicates that such orders must be treated as final for purposes of section 313, if a party is to seek relief in court.

Regulations—Part 1, Federal Power Act

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149. *Platte River*, 876 F.2d at 113-14.

150. *Id.* at 114-19.

151. Order No. 513-A, *supra* note 77, at 31,624, 55 Fed. Reg. at 14.

152. *City of Pasadena Water & Power Dep't*, 46 F.E.R.C. ¶ 61,004 (1989).

153. 16 U.S.C. § 797(e) (1988).

154. *City of Pasadena*, 46 F.E.R.C. at 61,012. Section 4(e) makes licenses issued for projects on federal reservations subject to whatever conditions the Secretary of the relevant department deems necessary for the adequate protection and utilization of the reservation. 16 U.S.C. § 797(e) (1988).

155. *Platte River*, 876 F.2d 109.

156. 16 U.S.C. § 825l (1988).

157. *Platte River*, 876 F.2d at 113 & n.3.

158. *Cf. Mitex, Inc.*, 40 F.E.R.C. ¶ 61,216 (1987).