

Report of the Committee on Regulation Under Part I of the Federal Power Act

I. INTRODUCTION

In the area of hydroelectric regulation under Part I of the Federal Power Act ("FPA"), major developments took place in 1983 with respect to diverse matters ranging from proposals for rulemaking by the Federal Energy Regulatory Commission ("FERC" or the "Commission") designed to standardize the assessment of annual charges and headwater benefits charges (*See* Section IV, *infra*) to the FERC's accusation that an association had abused the municipal preference (*See* Section VI. B.1(b), *infra*). Among other matters, the courts wrestled with the tensions between hydroelectric regulation and Indian rights and between the licensing framework and federal bankruptcy laws. (*See* Sections VI.A.2 & 3, *infra*). By far the most important development of 1983, however, was the action taken by the FERC with respect to the controversial relicensing of the Merwin Project, which is described in Section VI.B.1(a), *infra*.

II. ADMINISTRATIVE REORGANIZATION

Early in 1983, Lawrence Anderson, Director of the Office of Electric Power Regulation, announced a reorganization of the FERC's hydroelectric office. As a result of the reorganization, a new division of hydro-license administration was created. That division now is in charge of regional offices as well as dam safety, land use, biological resources, project management and headwater benefits.

III. REQUESTS FOR CONGRESSIONAL LEGISLATION

A. *Exemption From Licensing*

In late summer of 1983, the Department of Energy submitted a bill to Congress which would give the FERC authority to exempt hydro projects of up to 15 megawatts from licensing requirements under the FPA. Pursuant to existing law, the Commission now can exempt projects of 5 MW or less located at existing dams or natural water features projects of 15 MW or less which utilize manmade conduits. The legislation, which had not been formally introduced as of December 31, 1983, was similar to a bill introduced in 1982 at the Reagan Administration's request. No action was taken by Congress on the 1982 bill.

B. *Restructuring of Licensing Preferences*

S. 2150, a bill offered by Senator Humphrey of New Hampshire, would restructure the preferences in licensing, apparently for both initial and relicensed projects, as follows: first, exemptions would be preferred, except where a competing proposal could show superior development; second, after exemptions, the owner of the necessary property would be preferred, except where a competitor shows its proposal to be superior; third, states and municipalities would receive preference. The proposed bill would also define the measure of condemnation under Section 21 of the FPA,¹ as compensation for the highest and best use.²

¹ Hereinafter references to the FPA will be by section number only.

² The comments provided along with the bill, Cong. Rec. S. 16985 at S. 16986 (November 18, 1983), indicate that *all* condemnation proceedings under the FPA would proceed under this standard. There is also some discrepancy between the comments and the present wording of the bill as to whether it addresses the scheme of preference on relicensing. The bill appears to, although the comments say it does not.

C. *Municipal Preference*

H.R. 4402, the so-called "Electric Consumers Protection Act of 1983," would reverse legislatively the Commission's determination in *City of Bountiful, infra*, that municipal preference applies in relicensing even when a new license has been applied for by the original licensee. It is the counterpart of the administrative reversal accomplished by the Commission in Opinion No. 191, pertaining to the Merwin Project, *infra*. There have been extensive lobbying efforts both for and against the bill. There are approximately sixty sponsors in the House, and hearings likely will occur in March or April of 1984.

IV. RULEMAKING

A. *Annual Hydro Charges*

The FERC announced its proposal to amend the regulations pertaining to annual charges for hydroelectric power projects that use Federal dams and other structures. FERC Docket No. RM 83-13-000, 48 *Fed. Reg.* 15,134 (April 7, 1983); 48 *Fed. Reg.* 44,579 (September 29, 1983). Pursuant to Section 10(e) of the FPA, the Commission is authorized to assess reasonable annual charges for the "use, occupancy, and enjoyment" of federally-owned lands or other property, including dams and other structures owned by the United States.

At present, the FERC calculates annual charges on a case-by-case basis, based upon a "sharing of net benefits" realized by a licensee from its use of a Federal dam or other structure. "Net benefits" are the difference between the estimated value of the power produced at the project and the estimated costs of producing project power. The FERC splits the net benefits on a 50-50 basis with a licensee. A licensee pays 50% of the estimated net benefits as its annual charge under Section 10(e). Payments are made in equal annual installments over the license term of the project, unless a readjustment of the annual charge is made pursuant to the provisions of Section 10(e).

The proposed rule retains the concept of "net benefits" as the basis for setting the annual charge; however, it uses regional estimates for the power value component, not project-specific estimates. Further, the proposed rule would not employ estimates for project construction costs in determining costs of producing project power. Instead, the rule would use the actual construction costs, verified by the developer after construction is complete.

The proposed rule has come under fire by a number of commenting parties, who have indicated support for the principle contained in bills introduced into both houses of Congress during the spring and summer. These bills, S. 1132 and H.R. 3660, establish a ceiling for the fee imposed on developers who use federally-owned dams. In July 1983, the Senate Committee on Energy and Natural Resources held hearings on the Senate bill. No action has been taken on the House bill. The FERC's proposed rule is likely to be hed in abeyance until there has been some resolution on the pending bills, which have received strong support from Commissioner Georgiana Sheldon.

B. *Headwater Benefit Charges*

Late in December 1983, the FERC issued a proposed rule to amend 18 C.F.R. Sections 11.25-11.31 and 13.1, which implement Section 10(f) of the FPA. FERC Docket No. RM 83-57-000, 49 *Fed. Reg.* 1067 (Jan. 9, 1984). Pursuant to Section

10(f), the owners of non-federal hydroelectric power projects that are directly benefited by headwater improvements constructed by another licensee or the United States, such as storage reservoirs, must pay an "equitable" portion of the annual costs of interest, maintenance and depreciation of the headwater improvements.

The proposed rule would adopt an "energy-gains" approach by apportioning headwater-benefits charges among the headwater and downstream projects, based on the relative proportions of the amount of energy produced at the headwater project attributable to the improvement versus energy gains at downstream projects.

According to the Commission, the proposed rule, which would apply to all 41 river basins with federal reservoirs upstream from non-federal hydro-power projects, would replace the patchwork of procedures currently used by FERC to determine headwater-benefits charges with a generic method of equitable apportionment.

C. *Stay of Categorical Exemption Rule*

On April 18, 1983, the FERC by motion requested that the United States Court of Appeals for the District of Columbia Circuit remand for further consideration the Commission's final rule establishing the program for categorical exemption from licensing of certain categories of small hydroelectric power projects with an installed capacity of 5 MW or less. The rule, promulgated by the Commission in Order No. 202, Docket No. RM81-7-001, had been appealed to the court in *National Wildlife Foundation, et al. v. FERC*, Docket No. 82-2434. Pursuant to the Commission's motion, the court remanded the record in the case on May 20, 1983, to afford FERC an opportunity to reconsider its categorical exemption rule.

Noting that issues raised on appeal warranted a reexamination of the nature, application and usefulness of the procedures established by Order No. 202, FERC stayed further application of the rule on June 15, 1983, 48 *Fed. Reg.* 29,474 (June 27, 1983). Therefore, from that date until it indicates otherwise, the Commission will not exempt from licensing under 18 C.F.R. Sections 4.109-4.113 any small hydroelectric power project not previously exempted under those provisions. Projects which would qualify for exemption under either category described in 18 C.F.R. Section 4.109 may still qualify for the case-by-case exemption procedures set forth in 18 C.F.R. Sections 4.103-4.108.

V. JURISDICTION

A. *Litigation of Indian-Related Property Claims*

In *Washington Water Power Corp.*, 25 FERC ¶ 61,228 (1983), the Commission stated that it might at a later time entertain issues related to the title to the bedlands of the Spokane River, insofar as a decision of those issues would affect annual charges for the use of the Spokane Indian Reservation. On the other hand, in *Southern Edison Co.*, 23 FERC ¶ 61,240 (1983), the Commission refused to adjudicate claims by Indian tribes that their groundwater was being depleted by a project diversion, offering only to reserve the possibility of amending the license if the Indians' water rights were finally determined in another forum.

B. *Amendment of License While on Appeal*

The licensee and a band of affected Indians reached an agreement allowing the licensee to install additional generation at a project while the issuance of the license

to the licensee was on appeal before the Ninth Circuit. While the Commission agreed that the addition of capacity was in the public interest, it held it did not have authority to allow the installation, and would have to ask permission of the Ninth Circuit Court of Appeals. *Escondido Mutual Water Co.*, 24 FERC ¶ 61,288 (1983).

VI. LICENSING

A. *Applications and Processing of Applications*

1. *Environmental Issues*

(a) *Alaska Power Authority*

Numerous intervenors challenged the license application of the Alaska Power Authority for the \$5 billion, 1,620 MW hydroelectric project on the Susitna River in Alaska. The project, which would require the construction of two large dams, would be the most costly ever licensed by FERC.

One intervenor, the Sierra Club, questioned the need for the energy output of the project, the feasibility and adequacy of the plan to finance the project, the overall cost/benefit ratio and the viability of alternatives. Other environmental groups, including the Northern Alaska Environmental Center, Trustees for Alaska, Friends of the Earth and the American Rivers Conservation Council, consider the license application for the project to be incomplete and inadequate. Those groups have stated that they are concerned about the impact of the project on fish and big game.

Other intervenors, such as the Knik Kanoers and Kayakers, have asserted that the proposed project would directly affect irreplaceable, internationally-renowned, whitewater resources on the Susitna River. Additionally, Alaska Survival, has claimed that the hydroelectric project would reduce the availability of big game, fur-bearing animals, fish and other vital resources on which the group's members depend for their survival. The group also has stated that the project would interfere with the navigability of the river, which now gives the group's members access to their homes and to hunting and fishing grounds.

In addition to environmental groups, at least two federal agencies also plan to be involved in the licensing proceeding. The Department of the Interior stated that it would scrutinize the project to ensure that the impact on fish and wildlife in the area would be minimized during siting of the project facilities, scheduling of construction, and operation of the project. The National Marine Fisheries Service has challenged the license application on the basis that it failed to present a mitigation plan to protect Susitna River fish.

(b) *Borough of Seven Springs*

The American Canoe Association and others have protested the license application of the Borough of Seven Springs, proposing a 7 MW project at the U.S. Army Corps of Engineers' dam on the Youghiogheny River in western Pennsylvania. The river downstream of the dam is one of three whitewater rivers available to the whitewater enthusiasts in the Mid-Atlantic region. In addition, the State of Pennsylvania has estimated that whitewater boating on the river contributes about \$6,000,000 annually to the region's economy.

The American Rivers Conservation Council has asserted that any license issued for the Seven Springs hydro project should include a condition specifically prohibiting changes in the existing pattern of water releases unless public notice and an opportunity for hearing are provided.

(c) *Adverse Impact on Existing Facilities*

In 1982, the Commission granted a license to Calaveras County Water District ("CCWD") for a hydroelectric project on the North Fork Stanislaus River in California. The FERC decision permitted CCWD to proceed with the project despite the fact that it would have an adverse impact on a number of Pacific Gas & Electric Company ("PG&E") facilities.

In an appeal to the D.C. Circuit Court of Appeals, PG&E argued that Section 6 of the FPA, which states that a license "may be altered or surrendered only upon mutual agreement between the licensee and the Commission" after public notice, does not allow any negative impact on an existing project. CCWD, on the other hand, asserted that Section 10(a) of the FPA, which requires the licensing of projects "best adapted to a comprehensive plan for improving or developing a waterway," mandates the licensing of its better-adapted project despite its interference with a non-consenting existing licensee, so that Section 6 could not be used to bar comprehensive development. CCWD offered to compensate PG&E for the harm done. The Commission took a middle position, stating in effect that Section 6 does bar "substantial" alteration of the license even where it would be in the interest of more comprehensive development, unless the earlier licensee has consented in advance to the alteration. However, according to the Commission, a non-substantial alteration is not barred by Section 6.

In an opinion written by Judge Ginsburg, the appellate court upheld the Commission's authority to approve hydroelectric projects having a non-substantial impact on existing projects. *Pacific Gas & Electric v. FERC*, 720 F.2d 78 (D.C. Cir. 1983), *rehearing denied*, ____ F.2d ____ (D.C. Cir. December 29, 1983). The court, however, refused to define the "common-sense limits" of permissible harm to existing facilities. The court did state that a .3% reduction at one power plant resulting from the CCWD project, for which PG&E would be compensated, does not constitute an "alteration" of a license prohibited by Section 6. *Id.* at 89.

The court left standing the general principle that Section 6 may bar comprehensive development that would substantially alter an existing project, unless the terms of the existing project license provide otherwise, or the existing licensee consents; mere compensation for the potential injury does not satisfy Section 6. The court left open the possibility that the existing licensee's ability to veto development by another might be subject to a reasonableness safeguard against arbitrary refusal, however. *Id.* at 88.

In a companion ruling, the appellate panel sharply disagreed in its determination of whether the FERC gave sufficient consideration to alternatives to the CCWD license. *Friends of the River and Dale Myer v. FERC*, 720 F.2d 93 (D.C. Cir. 1983). The Friends of the River and Dale Meyer had appealed the FERC's granting of a license to CCWD on the grounds that the Commission had violated the FPA and the National Environmental Policy Act ("NEPA") by failing to demonstrate a need for the project. The court, however, ruled that the Commission's analysis was sufficient. On the other hand, although the FERC's "substantively unassailable" investigation was procedurally flawed under NEPA, due to the Commission's inadequate attention to alternative power purchases, the court decided not to remand the issue to the FERC for a revised environmental impact statement ("EIS"). The court's decision was based upon its assertion that the FERC had addressed the issue in its order on rehearing.

In a vigorous dissent, Judge Bazelon declared that the order on rehearing did not include a detailed investigation into the alternatives missing from the EIS, and thus the FERC had violated both the letter and spirit of the FPA and NEPA. In light

of such "blatant statutory violations," Judge Bazelon sharply disagreed with the majority's failure to order a remand. *Id.* at 123.

2. Indian Rights

Pursuant to Section 4(e) of the FPA, the FERC is authorized to issue licenses for hydro projects on public lands or reservations, such as the land of American Indians, as long as a license will not interfere, or be inconsistent with, the purpose for which the reservation was created and as long as the license "shall be subject to and contain such conditions as the secretary of the department under whose supervision such reservation falls shall deem necessary . . ." In 1982, the Court of Appeals for the Ninth Circuit determined that Section 4(e) requires the Commission's acceptance of license conditions put forth by the Department of the Interior ("DOI") for a hydro project on Indian lands.³ *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223 (9th Cir. 1982). Using a reasonableness standard, the FERC had rejected some of the conditions sought by DOI. It found other conditions to be unlawful.

The FERC appealed the Ninth Circuit's ruling to the United States Supreme Court, which agreed to hear the case in October 1983. *Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians*, Docket No. 82-2056, *cert. granted*, 52 U.S.L.W. 3309 (October 17, 1983). In its appeal, FERC has contended that the Ninth Circuit's ruling infringes on the Commission's control over hydroelectric projects and resurrects the fragmented pattern of regulation that the FPA was intended to change. The FERC is supported by both publicly- and privately-owned utilities, which assert that one agency must have the final administrative word in this type of case.

3. Interplay of FERC Licensing with Bankruptcy Laws

In *Jordan v. Randolph Mills, Inc.*, 716 F.2d 1053 (4th Cir. 1983), the Fourth Circuit Court of Appeals resolved a matter concerning the interplay between the federal hydroelectric licensing regulatory framework and the federal bankruptcy laws.

In *Jordan*, an applicant for a FERC license to produce electric power by utilizing an abandoned dam on property of a bankrupt debtor in possession was held by the bankruptcy court to have been in violation of a broad restraining order issued by the court against interference with the debtor's possession and enjoyment of its property. The bankruptcy court held John Jordan, who had filed the application on behalf of his employer, Sellers Manufacturing Co. Inc. ("Sellers Manufacturing"), in contempt. That finding was affirmed by the district court. 29 B.R. 398 (M.D.N.C. 1983).

On appeal, the Fourth Circuit reversed, holding that the filing and processing of the license application was not a violation of the restraining order. The appellate panel stated that if the pendency of the license application had had any effect on the debtor's property or the completion of the Chapter XI proceedings, it was indirect and collateral. Instead, the appellate panel determined that the bankruptcy laws were being used to favor one license applicant at the expense of another, Sellers Manufacturing. According to the decision, the debtor's property rights had not been diminished and the debtor still was in possession of its property. The court noted that the highest and best use of the land would be for a hydroelectric project, but the debtor would have to deal with the applicant licensed by the FERC or one in a

³The Ninth Circuit also held that pursuant to a law dating back to 1891, the licensee, the Escondido Mutual Water Co., must obtain right-of-way permits from the Indians.

position to obtain a license, if the debtor decides to realize the potential value of its property.

4. Exemptions

In *Hirschey v. FERC*, 701 F.2d 215 (D.C. Cir. 1983), the court reversed an attempt by the Commission to vacate an exemption from licensing which had been granted inadvertently, despite the fact that a competing license application had been filed subsequently.⁴ The court held that the FERC's power to set aside an order pursuant to Section 313(a) of the FPA extends only until the time for judicial review has expired. In this case, the Commission had acted on July 20 to revoke an exemption granted by operation of law on June 7. Since no application for rehearing was filed, however, the period for review had expired after 30 days, on July 7. The court also stated that since comparative evaluation of competing exemption and license applications is discretionary, the general grant of powers in Section 309 does not allow the FERC to vacate final and nonreviewable exemptions. The court left open the possibility that the Commission could correct a ministerial error, even though it could not revoke an action involving the exercise of discretion — in this case, according to the court, a discretionary decision not to further examine the merits of a license application filed subsequent to Ms. Hirschey's exemption application.

5. Commission Actions

(a) Aftermath of *Hirschey*

On August 2, 1983, the Commission denied a petition for rehearing in a companion case to *Hirschey, id.*, in which the inadvertently-granted exemption was not first-filed. *Long Lake Energy Corp.*, Project No. 4356-001, 24 FERC ¶ 61,177 (1983), appeal docketed, No. 83-2032 (D.C. Cir). The FERC distinguished *Hirschey* by noting a conflict between the rule granting exemptions automatically after 120 days and the rule that the Commission will favor the first-filed application if competing license and exemption applications are filed. See 18 C.F.R. Section 4.104(e)(2).

The Commission relied on *Hirschey, supra*, to hold that it could not revoke two exemptions that had been earlier issued, despite the fact that the property interests were not sufficient; but that disability did not require it to treat the earlier issuances as precedent. *Phoenix Hydro Corp.*, 25 FERC ¶ 61,118 (1983).

In *Gerald L. and Lois R. Simms*, 25 FERC ¶ 61,132 (1983), the Commission vacated the grants of an exemption, despite the *Hirschey* rule. *Hirschey*, it held, applied only to action (or inaction, since the exemption in *Hirschey* issued automatically after 120 days that was the result of Commission discretion; whereas the issuance of the exemption here was the result of clerical error). Accord *Long Lake Energy Corp., et al., supra*.

The Commission relied on *Hirschey* to hold that once the National Marine Fisheries Service had imposed conditions on an exemption applicant, it could not modify them. *James B. Howell*, 24 FERC ¶ 61,347 (1983). This may be inconsistent with *Long Lake Energy Corp., et al., supra*, at n. 11, where the Commission stated that had it been compelled by *Hirschey* not to rescind the exemptions, it would have modified them to impose environmental conditions.

In *Power Authority of the State of New York*, 22 FERC ¶ 61,309 (1983), one of the reasons for vacating exemptions and distinguishing *Hirschey* was that the vacation

⁴Pursuant to 18 C.F.R. Section 4.105(b)(4), an exemption application is granted automatically 120 days after acceptance, unless the Commission takes other "affirmative action" on the application.

came within thirty days of the issuance of the exemption, that is, before the time for appeal had expired and the Commission order had become final.

(b) Tightening of Application Process

The Vermont Department of Public Service and the Vermont Public Service Board challenged the economic feasibility of the license applicant's proposed project in *Town of Springfield*, Project No. 2570-000, 24 FERC ¶ 61,318 (1983). The Commission ordered an evidentiary hearing at which the applicant could have demonstrated the project's economic feasibility. If the applicant could not have made this showing, its application would have been denied. The application subsequently was withdrawn, however.

In *Idaho Power Co.*, Project No. 2845-000, 24 FERC ¶ 61,344 (1983), the Commission dismissed a license application without prejudice, because the applicant's load forecasts had been revised significantly downward, eliminating the applicant's need for the project during the next twenty years. The Commission noted that Section 13 would require construction to begin within four years. The Commission also refused to suspend processing of the application because the record would become stale.

Finally, the FERC upheld the rejection of a license application filed by two individuals during the term of a preliminary permit, which was held by a partnership comprising only those two individuals. *Larry Pane*, Project No. 7282-000, 24 FERC ¶ 61,326 (1983). The Commission, stating that an "applicant's name is fundamental to the application," held that the partnership was not the same legal entity as the individuals, and therefore the license application could not be accepted.

(c) Termination of License

On December 2, 1983, the FERC issued a Notice of Termination of License and Order to Show Cause to the City of Vanceburg, Kentucky (the "Licensee") for failure to commence construction on the S.C. Johnson Generating Station (the "Cannelton Project") within the allotted time frame. *City of Vanceburg, Kentucky*, Project No. 2245-001, 25 FERC ¶ 61,352 (1983).

The license for the Cannelton Project was issued on March 29, 1976. Article 44 of the license required that construction of the project begin within two years. On January 9, 1978, however, the Licensee requested more time to commence construction as a result of litigation over the manner in which bids were taken for the purchase of generating equipment. The Commission granted an extension for the maximum allowable time permitted by Section 13 of the EPA, noting that only one two-year extension is permitted. Thus, the Licensee was required to begin construction of the project by March 1, 1980 and to complete work by March 1, 1983.

On February 28, 1983, the Licensee filed a request to extend for 36 months the time to complete construction. When personnel from the FERC visited the site of the proposed project to verify that substantive construction work was being performed, however, no project-related construction activities were observed. Further, it appeared that no construction progress had been made since a similar inspection in May, 1980. The question therefore arose whether construction had commenced on the Cannelton Project within the meaning of Section 13.

Prior Commission decisions have characterized the commencement of construction as: (1) activity that is coordinated, fairly continuous and reaches a sufficient degree of intensity; (2) active construction efforts on the major features of the project; and (3) actual physical construction. *Id.* at 61,787. In *City of Vanceburg*, the

Commission held that the Licensee's construction efforts, comprising some land clearing, grading and construction of guide walls, had been sporadic, insubstantial and properly would be classified as preliminary work incidental to the initiation of actual construction. No work had begun on any major features of the project. The Commission therefore ordered the Licensee to show cause within 90 days from the December 2, 1983 date of the order, if there be any, why its license should not be terminated. *See also City of Nashua*, 24 FERC ¶ 61,163 (1983), where a license applicant sought to convert the license into an exemption, so as to obtain another 18 months before having to commence construction. The Commission discussed the importance of reopening the site to competition. *See also Municipal Energy Agency of Mississippi*, 24 FERC ¶ 61,108 (1983), where the Commission, although granting an extension of time for completion of a four-development license, refused to put two of the projects on an "indefinite" completion basis. Again the issue was refusal to allow licensees to "bank" power sites. (The Commission distinguished *The Gas and Electric Department of the City of Holyoke, Massachusetts*, Project No. 3283-001, 23 FERC ¶ 61,172 (1983), on the basis that that decision involved additional development at the same dam, which might be an option available only to the licensee.)

(d) *Financing*

An important order was issued by the FERC in *Boott Mills et al.*, 25 FERC ¶ 61,386 (1983), in which the Commission for the first time approved a long-term sale and leaseback arrangement as satisfying the requirement that a licensee hold and control all real property interests necessary for project purposes. This step facilitated the financing of the project, and is particularly significant because it indicates a possible solution to a dilemma that has plagued hydro developers in recent months: how can a third party providing financing own the property as apparently required by the Internal Revenue Service in order to qualify for the special tax benefits that make the financing worthwhile, when the Commission required the licensee to own property interests sufficient to control the project. The agreement approved in *Boott Mills* apparently provides one model for a solution to this problem.

(e) *Section 6 of the FPA*

In the Commission's Order Denying Rehearing in *The Gas and Electric Department of the City of Holyoke, Massachusetts*, *supra*, the FERC confirmed that a new applicant could not obtain a preliminary permit for a third unit at an existing licensed project even though the licensee did not hold a license extending to the third unit. The basis for the decision was that the construction of the third unit would involve a "substantial alteration" of the project, and would violate Section 6 of the Federal Power Act unless the existing licensee's consent were obtained. The Commission ordered the existing licensee to conduct a feasibility study. When the study was eventually filed, the existing licensee determined that the proposed development would not be feasible for it for several years. Consequently, the third unit is not being developed.

B. *Competitive Licensing and Relicensing*

1. *Relicensing Controversy: The Merwin Project*

In June 1983, for the first time since the enactment of the Federal Water Power Act of 1920 (now Part I of the FPA), an administrative law judge ("ALJ")

decided after an evidentiary hearing which of two competing applicants, one publicly owned and one privately owned, should be granted a license to operate a hydroelectric project after the expiration of the project's original fifty-year license term. *Pacific Power and Light Co.*, Project No. 935-000; *Clark-Cowlitz Joint Operating Agency*, Project No. 2791-000, Initial Decision, 23 FERC ¶ 63,037 (1983).

The relicensed project is the 136 MW Merwin Project, a hydroelectric development located on the Lewis River along the common boundary between Clark and Cowlitz Counties in southwestern Washington State. The competing applicants are Pacific Power & Light Company ("PP&L"), the present license holder, and the Clark-Cowlitz Joint Operating Agency ("JOA").

JOA, defined as a "municipality" pursuant to Section 3(7) of the FPA, applied for a license to operate the Merwin Project upon the expiration of PP&L's initial license term claiming a "preference" over PP&L's application pursuant to Section 7(a) of the FPA. Section 7(a) states, in relevant part:

In issuing . . . licenses to new licensees . . . the Commission shall give preference to applications . . . by . . . municipalities, provided [that their] plans . . . are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region

In *City of Bountiful*, decided in 1980, the FERC had concluded that Section 7(a) "new licensees" are those applicants who may be chosen for the new or forthcoming license term. Thus, the Commission held that Section 7(a) applied to all relicensing proceedings and that it operated as a tie-breaker in favor of a municipality of its plans were found "equally well adapted" to those of the non-municipal competitor. *City of Bountiful, et al.*, Opinion No. 88, 11 FERC ¶ 61,337 (1980), *reh. denied*, Opinion No. 88-A, 12 FERC ¶ 61,179 (1980), *aff'd sub nom, Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3573 (1983).

In his Initial Decision, *supra*, after determining that the plans of JOA were "equally well adapted" as those of PP&L to conserve and utilize in the public interest the water resources of the region, the ALJ proposed awarding the new license for the Merwin Project to JOA.

The ALJ manifested his intention to apply the principle underlying the *City of Bountiful* decision to the competing license applications of PP&L and JOA for the Merwin Project. Notwithstanding the express mandate of the *City of Bountiful* decision, however, the Initial Decision did not accord weight to PP&L's argument that the transfer of the Merwin Project would have a detrimental net economic impact upon the competing applicants' respective ratepayers. While the *City of Bountiful* decision already had explicitly identified such economic considerations as part of the "public interest" consideration set forth in Section 7(a), the ALJ held that such economic considerations are not "applicable, relevant and material." Initial Decision, *supra*, at 65,113. The ALJ's refusal to consider economic impacts was a major reason behind a request by PP&L for full Commission review of the Initial Decision.

In October 1983, however, a newly-constituted Commission, by a three-to-two vote, overruled *City of Bountiful*. *Pacific Power & Light Co.*, Project No. 935-000 et al., Opinion No. 191, 25 FERC ¶ 61,052 (1983) *reh. denied*, November 22, 1983. The Commissioners' decision was based upon their interpretation of "new licensee" in Section 7(a) to mean any applicant other than the original licensee in possession of the hydroelectric project. Thus, according to the FERC majority, the municipal preference of Section 7(a) directs the Commission to give preference to applications of states and municipalities in issuing licenses to applicants other than "original licensees" in possession of the hydroelectric project, but the municipal preference

does not apply in a hydroelectric relicensing proceeding against an original licensee seeking a new operating license.

With respect to the contradictory statutory interpretation given to Section 7(a) by the Commission in its *City of Bountiful* decision, the opinion stated:

In *Alabama Power Company v. Federal Energy Regulatory Commission, supra*, the Eleventh Circuit was not impressed with the materials on which the Commission relied in *Bountiful*, and in that light gave 'great deference to the Commission's statutory interpretation.' It is possible, therefore, that the Eleventh Circuit was misled inadvertently by the Commission's *Bountiful* decision, which we now realize was erroneous.

Id. ¶ 61,052, at 61,778.

Two vigorous dissents by Commissioners Hughes and Sheldon took the position that the overruling of the legal interpretation of *City of Bountiful* was unnecessary and perhaps improper. Nevertheless, these two Commissioners, along with the Commission majority, held that regardless of the *City of Bountiful* issue, the existing licensee should receive the new license here, because its proposal was better adapted to develop, conserve and utilize the water resources in the public interest. The Commission articulated specific criteria it would consider in the future:

(1) the short and long-term financial or economic impacts associated with allocation of the benefits of the particular water resources to the customers of one applicant or the other;

(2) enhancing the goal of economic efficiency by assigning hydropower to its highest use;

(3) the engineering efficiency of operating the project being relicensed in coordination with other projects on the same waterway, and the adversary applicant's generating system;

(4) the comparative equities of distributing the benefits of the particular water resources among the customers, owners, or other stakeholders of one applicant or the other; and

(5) the consistency of the allocation of the benefits of the particular water resources to the customers of one applicant or the other with national energy policies and the objective of the FPA to maximize the beneficial public uses of projects that were "best" adapted to such uses.

Id. at 61,205-06.

The American Public Power Association joined individual agencies and JOA in seeking a rehearing of Opinion No. 191, which was denied on November 22, 1983. Shortly thereafter, JOA, supported by other intervenors, filed an appeal of Opinion No. 191 in the Court of Appeals for the District of Columbia Circuit.

If Opinion No. 191 does not survive a legal challenge in the courts, the simple effect will be that if consideration of the foregoing five criteria produces a determination that the applicants' plans are equal, and if a municipality is involved, then the municipality under *City of Bountiful* will have a "preference" in obtaining the new license in relicensing proceedings.

This hotly-contested battle already has moved to Congress where changes in pertinent sections of the FPA have been proposed in H.R. 4402. See Section III.C. of this Report, *supra*.

In a related development, representatives of the municipalities of Santa Clara, California and Bountiful, Utah have asked the Eleventh Circuit to discipline the FERC for overturning the Initial Decision, *supra*, which had given municipalities an edge in wresting control of hydroelectric projects from private utility owners. The petition asks the appellate court to enforce its ruling in *City of Bountiful, supra*, that

the municipal preference is applicable when a hydro project comes up for relicensing. Although the petition asserts that the FERC disobeyed the Eleventh Circuit when it issued Opinion No. 191, it asks only that the court order the FERC to recognize the municipal preference with respect to the two hydro projects which the cities have for years been trying to take over: Pacific Gas & Electric's 194 MW-Mokelumne Project and Utah Power & Light's 2.5-MW Weber Project.

2. *Uncompahgre Water Users Association*

In a case of first impression, the Commission in September 1983 found that Uncompahgre Water Users Association ("UWUA") used the City of Montrose, Colorado, as a proxy to take advantage of the municipal preference and to buy time to prepare its license applications. The FERC gave UWUA thirty days to rebut the presumption of abuse, otherwise it would dismiss its license applications and refuse to consider other applications by UWUA and those associated with it for one year, in order to give other potential licensees a chance to apply. *Gregory Wilcox, et al.*, 24 FERC ¶ 61,317 (1983). UWUA filed a rebuttal of the abuse.

Additionally, in an attempt to forestall a decision by the FERC to dismiss its applications, UWUA filed an offer of settlement early in December, 1983, in which it proposed that action on the pending license applications be deferred for ninety days in order to allow time to reopen competition for the sites. In its settlement offer, UWUA asserted that its exclusion from competition for the sites would result in an "unfair and ineffective process" because other applicants could duplicate UWUA's license applications, on which the association spent \$1.8 million.

The Commission has subsequently rejected the offer of settlement and found that UWUA's proof did not rebut the presumption, and has put its earlier order into effect. *Gregory Wilcox, et al.*, 26 FERC ¶ 61,113 (1984). This order also determined that rather than go back to the original pool of competing applicants for permits, the Commission would renote the sites for a new round of competition, and that it would favor license applications over permit applications, presumably including the permit applications that were wrongfully denied years ago because of the abuse of preference.

3. *License Term: Redevelopment*

The Commission refused to extend a new license for an existing project from 30 to 50 years, based upon a redevelopment that would increase generation by 5%. The Commission said the licensing term was not a reward for the addition of generating capacity, but was based on the extent to which an extension of the license term is necessary to ensure financial feasibility of the proposed redevelopment. *Pacific Gas and Electric Co.*, 25 FERC ¶ 61,420 (1983). See also *Oakdale and South San Joaquin Irrigation Districts*, 25 FERC ¶ 61,345 (1983).

VII. TERMS AND CONDITIONS OF LICENSES

A. *Control at the Licensing stage*

In *New York State Electric and Gas Corporation*, 23 FERC ¶ 61,034 (1983), the Commission accepted an amendment to a license demonstrating that the licensee had acquired a hydroelectric easement from the State of New York, which still owned the lock and dam. This property right secured the Commission's ability to

carry out its responsibilities under Part I of the FPA by vesting sufficient control in the licensee.

B. Transfer of Project Property: Control by Licensee

In *Linweave, Inc.*, 23 FERC ¶ 61,391 (1983), the Commission allowed a licensee to change its property interest from a fee simple right to a leasehold right. For all project purposes, the licensee would continue to hold the necessary rights. Because these were not major licenses (where deviation from the normally-required fee ownership or right to use in perpetuity would have implications for the viability of takeover pursuant to Sections 14 and 15 of the FPA), the Commission's concern focused on the effectiveness of its regulatory authority.

C. Need for Power

Even though the region as a whole did not need power until the early 1890's the Commission found a need for power in *City of Idaho Falls, Idaho*, 25 FERC ¶ 62,345 (1983), and issued a license. Its decision was based on the fact that the project would provide a reliable power source controlled by the applicant, and would reduce reliance on power supplied by the Power Administration. It would also provide a hedge against delay in bringing new power sources on line. The Commission also noted that hydroelectric generation was one of the most cost-effective ways to add to existing generation.

The Commission in one case dismissed a license application for failure to demonstrate need for the power, but on rehearing determined that the initial data was stale, and allowed the applicant sixty days to update its forecast. *Idaho Power Co.*, 24 FERC ¶ 61,344 (1983), *on rehearing*, 25 FERC ¶ 61,436 (1983).

D. Environmental Determinations

Certain environmental issues for a project on the Columbia River had been considered in another proceeding for the immediately downstream project. The Commission held certain Indian tribes bound by the outcome of that proceeding, and precluded them from relitigating the issues, even though they were not parties in the proceeding. *Public Utility District No. 1 of Douglas County, Washington*, 24 FERC ¶ 61,328 (1983).

In *Pacific Gas and Electric Co.*, 25 FERC ¶ 61,010 (1983), the Commission refused to require, in a cultural resources study, an assessment of the effect of inundation by the existing reservoir of submerged archaeological and historical sites. The cultural resources study did have to include the effect on various non-submerged sites where project operation was to continue unchanged.

E. Annual Charges

The Commission held it was not barred from setting annual charges or headwaters benefits because of contracts between licensees and the Department of Interior's Bureau of Reclamation allowing the licensees to retain all revenue from powerplants. Charges under the Federal Power Act were based on a different legislative scheme and could not be limited. *East Columbia Basin Irrigation District*, 22 FERC ¶ 61,312 (1983); 25 FERC ¶ 61,177 (1983).

F. *Consent of an Existing Licensee: Section 6 – Substantial/Insubstantial Distinction*

In *Fluid Energy Systems, Inc., et al.*, 23 FERC ¶ 61,298 (1983), the Commission held that a potential encroachment on the tailwater of an upstream project was not a substantial alteration, and thus was outside the bounds of the prohibition of Section 6 of the FPA on alteration of a license without the consent of the licensee. The Commission rejected the request of the licensee whose project was being encroached that an agreement be required prior to issuance of the second license and instead required negotiations and payment of compensation for damages.

G. *Extension of Construction Time in License*

The Commission denied a request for an extension of the time requiring completion of construction for the purpose of negotiating transfer of the license, after the licensee determined the project would not be economically feasible for it. The Commission stressed the need to foster competition for the development of sites. *Pennsylvania Electric Co.*, 24 FERC ¶ 61,210 (1983).

VIII. TERMS AND CONDITIONS OF PERMITS

A. *Preliminary Permits and Preferences*

In the area of preliminary permits and preference, the District of Columbia Circuit Court of Appeals heard an appeal from a refusal of the Commission to investigate, at the preliminary permit stage, allegations of hidden hybrid status of two municipalities that obtained permits on the basis of their preference status. *City of Bedford v. FERC*, 718 F.2d 1164 (D.C. Cir. 1983). The court held, first, that denial of the appellants' permits was a final action that should be reviewed immediately, instead of requiring appellants to wait for an award of the license in order to appeal the FERC's denial of their competing permit applications. The court discussed at some length the value of the preliminary permit right.⁵ It upheld the FERC's decision to postpone any inquiry into the preference issue, however, until the licensing stage. The court allowed the Commission discretion in choosing the manner of enforcing the statutory preference policy, stressing that deterrence of hidden hybrids would occur because the later investigation would be "intensive," *id.* at 1169, and would "deprive misrepresentation of all value." *Id.* at 1170. The permit holders whose status was challenged submitted license applications and the Commission currently is investigating their relationship with a private developer.

B. *Extension of Preliminary Permit Periods*

In determining whether to grant a requested extension of a permit term the Commission may apply one or more of several related tests. It may examine whether the permit holder has acted in a timely manner, and with due diligence. *E.g.*, *The Village of Marissa, Illinois*, 23 FERC ¶ 62,033 (1983); *Swift River Co.*, 24 FERC ¶ 62,309 (1983). It may ask whether the reason given constitutes "unusual circumstances." *E.g.*, *Hydro Development Investigation Guidance Committee*, 23 FERC ¶ 62,152 (1983). It may ask whether the cause of delay was within the permit holder's control. *E.g.*, *Township of Conemaugh and the Borough of Saltsburg, Pennsylvania*, 22 FERC ¶ 62,270 (1983).

⁵On this point, see also, *Modesto and Turlock Irrigation District and the City and County of San Francisco, et al.*, 24 FERC ¶ 61,152 (1983).

The Commission may also require a demonstration that a license application can be prepared within the time available if the extension is granted. *E.g., Village of Marissa, Illinois, supra.*

An extension was granted in extraordinary circumstances in *Bannister Development, Ltd.*, 24 FERC ¶ 62,030 (1983). In collateral litigation a federal district court had stayed the permit holder from filing a license application. Because of this express stay the Commission acted contrary to its general rule that collateral litigation usually does not justify an extension.

C. Pre-1920 Permits

In a decision of potential importance to owners of projects built before 1920 and still unlicensed, the Commission denied rehearing of a prior opinion, found a portion of the Spokane River in Washington to be navigable, and required the Washington Water Power Company ("WWPC") to obtain a license for a project constructed pursuant to a 1908 permit issued by the Secretary of the Interior. *Washington Water Power Co.*, Project No. 2545-007, Opinion No. 117-A, 25 FERC ¶ 61,002 (1983). The Commission, interpreting Section 23, stated that it would scrutinize the terms of any pre-1920 permits to determine whether they confer sufficient authority to avoid licensing now. The Commission construed the permits narrowly and ordered WWPC to obtain a license. The opinion contains an extended discussion of the financial implications of Section 23 for the valuation of pre-1920 projects, and can be read to suggest that the Commission will recognize the continuing validity of some pre-1920 permits.

IX. TERMS AND CONDITIONS OF EXEMPTIONS

A. Property Rights

The authority of an applicant to use state-owned property transferred to it for a specific use was not the equivalent of an option, and did not satisfy the exemption regulations' ownership requirements, so as to entitle the applicant to qualify for an exemption. *Power Authority of the State of New York*, 23 FERC ¶ 61,429 (1983). Nor was an agreement to transfer lands still subject to the approval of the state a sufficient interest. *Pankratz Lumber Company*, Project No. 7187-000 (October 6, 1983).

The right to eminent domain did not in itself satisfy the requirement for property ownership. The applicant could either exert its eminent domain power to acquire the property rights, and then reapply; or could apply for a permit or license, where ownership of property rights at the outset is not required. *City of Ogdensburg*, 22 FERC ¶ 61,313 (1983).

Property rights must be documented in the exemption application itself, not on appeal. *Phoenix Hydro Corp.*, 25 FERC ¶ 61,118 (1983). Where an agreement was not approved until after the date of filing of the exemption application, and was not filed until after that date, the exemption application was held patently deficient for failure to demonstrate the property interests required. *Pankratz Lumber Co.*, 25 FERC ¶ 61,437 (1983). In *Central Vermont Public Service Corp.*, 25 FERC ¶ 61,183 (1983), the Commission held an application deficient where an agreement subsequently submitted was effective as of the date of the exemption application.

If an application for an exemption is filed jointly, it does not matter how the property rights are divided. *Winchester Water Control District and Elektra Power Corp.*, Project No. 6775-002 (July 18, 1983).

B. Exemptions: Agency Consultations

Even though an applicant for exemption had consulted with all the proper agencies, and had so indicated on a checklist included in the application, its application was rejected because two of the agencies' responses were inadvertently omitted. *Ronald Rulofson*, 23 FERC ¶ 61,190 (1983). This conclusion is puzzling, because if the agencies had not responded to all within thirty days, presumably the application would have been complete and acceptable.

It is not necessary to *complete* the agency consultation process before filing an exemption application. *Douglas Water Power Co.*, 25 FERC ¶ 61,034 (1983).

The FERC rejected a condition imposed by the National Marine Fisheries Service that prohibited issuance of an exemption until certain conditions had been met. The Commission stated that, although agencies may impose binding conditions in certain circumstances, a condition of the type proposed by NMFS is beyond the express authority conferred by statute on the agencies. The Commission said Congress left the decision whether to issue an exemption solely with the FERC. *Winchester Water Control District and Elektra Power Corp.*, 24 FERC ¶ 61,080 (1983). The Commission also held that NMFS was not one of the agencies authorized by Congress to impose binding conditions, and that NMFS' authority derived solely from Commission regulations. *Id.*

C. Transfer of Exemption Pending Application

The Commission would not allow the substitution of one exemption applicant for another three months after a transfer of the property interests took place. The exemption application was defective as of the date the initial exemption applicant transferred the property. The applicant should have filed a petition for withdrawal. *Gordon Ravenscroft*, 24 FERC ¶ 61,234 (1983).

D. Extension of Exemptions

The Commission has stressed that a basic purpose of the exemption program is to provide an expeditious authorization procedure for projects with no unresolved problems. Thus it will extend the time within which construction under an exemption must commence only under exceptional circumstances, and will only grant one extension before revoking an exemption. *Pabst Brewing Company*, 25 FERC ¶ 61,195 (1983). The Commission has also required that the exemptee demonstrate that there is a reasonable likelihood the project can be constructed within the extended time frame. *E.g.*, *Thornton Lake Resource Co.*, 25 FERC ¶ 61,443 (1983). The Commission has also denied indefinite extensions of the construction commencement date for exemptions. *E.g.*, *The Bar 717 Ranch, Inc.*, 23 FERC ¶ 62,302 (1983). The Commission has required a demonstration of due diligence in obtaining permits and making other necessary arrangements. *E.g.*, *Resource Investments*, 23 FERC ¶ 62,093 (1983).

X. COMPETING APPLICATIONS

A. Best Adapted Determination, Section 10(a) - Property Rights

In *Franklin Falls Hydro Electric Corp., et al.*, 24 FERC ¶ 61,348 (1983), the Commission rejected the argument that as between similar proposals for a preliminary permit, the owner of the site and water rights should be preferred. Preferring property owners would have a chilling effect on competition, and would

be based on expediency, not necessarily on a determination of the best-adapted project. The Commission noted that the Federal Power Act does not provide for a preference for site-owners. (*But see* S. 2150, a bill sponsored by Senator Humphrey of New Hampshire that would amend the Federal Power Act to insert such preference, ahead of state and municipal preference, *supra* Sect. III B.)

B. "Significantly Greater Flexibility – Uniquely Qualified" Test Distinguished

Preliminary permit applicants continue to attempt without success to place themselves in the category defined by *Marsh Island Hydro Associates, et al.*, 16 FERC ¶ 61,236 (1981) and *City of Ukiah, et al.*, 18 FERC ¶ 61,108 (1982), the only two cases in which a competing preliminary permit was awarded to a second-in-time applicant on the basis of the better adapted standard. In *Cook Electric Co.*, 22 FERC ¶ 61,311 (1983), for example, one applicant submitted computer studies demonstrating its proposal would result in significantly more generation. The Commission noted that most of the increase was not due to control of the water flows, and that a difference in installed capacity is not dispositive at the permit stage.

C. Preference: Definition of Municipality

The Commission stated, in a footnote in *Onondaga County Water Authority*, 24 FERC ¶ 61,323 (1983) at footnote 6, that the requisite authority to carry on the business of developing, transmitting, utilizing or distributing power (16 U.S.C. § 797(7)) could not be inferred from the power to construct and develop property incidental to or included in a water system.

D. Competition: Exemption/License

In *Suncook Power Corp., et al.*, 24 FERC ¶ 61,107 (1983), the Commission awarded an exemption over a first-filed license application, because the exemption applicant had shown its project superior in several respects, including 5.9% more generation annually, and differences in penstock design.

An exemption filed in competition with a license was not required to have the "better adapted" statement required in competing permit and license applications by 18 C.F.R. § 4.33(d)(2). *Douglas Water Power Company*, 23 FERC ¶ 61,088 (1983).

E. Competition: License/Permit

The Commission interpreted its regulation favoring a license over a permit, 18 C.F.R. § 4.33(f), as creating a rebuttable presumption in favor of the license applicant. The permit holder may be able to demonstrate that its proposal is superior. *Morgan City Corp.*, 25 FERC ¶ 61,046 (1983). This approach, which is a new way of describing the impact of this Section, follows the earlier-articulated principle treating permit/exemption competition in the same way.

In *Fluid Energy Systems, Inc., et al.*, 24 FERC ¶ 61,298 (1983), the fact that one of the permit applicants proposed 12 MW of capacity, compared to the license applicant's proposed 7.12 MW, was not dispositive. The results of the detailed studies the permit applicant would carry out under the permit are needed to substantiate the claimed project capacity.

F. *Competition: Exemption/Permit*

The Commission has developed a two-part test when exemption and permit applications compete. The regulations provide that the exemption application will prevail. 18 C.F.R. § 4.104(e)(i). This is a rebuttable presumption carried out through a two-part test: 1) whether the permit applicant has shown through substantiating information that its proposal is superior to that of the exemption applicant; and 2) whether the exemption application proposes adequate use of the water resources of the site. *E.g., Boulder River Power Co., et al.*, 25 FERC ¶ 61,435 (1983). In one case, the preliminary permit did prevail over the exemption application, which was limited to one-tenth the generation of the project proposed in the permit because of the exemption applicant's limited property ownership. *Fairview Orchards Associates*, 24 FERC ¶ 61,022 (1983).

Although the "adequate use" standard applicable to exemptions had not been defined, the Commission has stated that it may require modifications to an exemption proposal to make a project compatible with the public interest; and may deny an exemption application not compatible with the public interest. This suggests a link to the "adequate use" standard. *The City of Arcata, California, et al.*, 25 FERC ¶ 62,049 (1983).

Where an exemption applicant did not demonstrate adequate use, even though neither competing permit applicant had demonstrated a superior proposal, the Commission awarded a permit to one of the permit applicants. *Western Power, Inc.*, 23 FERC ¶ 61,343 (1983).

In contrast to a license application, which may be filed at any time in competition with a permit application until the permit is actually issued, *Georgia Pacific Co.*, 17 FERC ¶ 61,174 (1981), an exemption application must be filed within the time for competing applications set in the notice of an initial preliminary permit application. *Milton and Morris Zack*, 23 FERC ¶ 61,121 (1983).

G. *Competition: Exemption/Exemption*

The Commission has recognized that the filing of competing, mutually exclusive exemption applications may occur and is proper when the project is entirely on federal land. *Douglas Pagar, et al.*, 23 FERC ¶ 61,110 (1983). Perhaps the first order actually deciding between competing applications for exemption is *Rainsong Company*, 24 FERC ¶ 62,239 (1983). The Commission found one proposal "better adapted to develop, conserve and utilize in the public interest the water resources of the region," on the basis of 85% more installed capacity and 28% greater estimated annual energy.

Conduit exemptions, which come under separate regulations, 18 C.F.R. §§ 4.90-4.94, have also been held subject to competition, and the Commission will provide in the notice of a conduit exemption 30 days to file a competing application or a notice of intent. *City of Gridley, California*, 22 FERC ¶ 61,256 (1983).

H. *Copyright and the Copying of a Competing Application*

The Commission stated that it would not reject a competing application simply because portions of it were reproduced from or relied upon a copyrighted initial license application; nor would it reject an application that had been copyrighted. It was concerned only that the application comport with the requirements of the regulations and present the highest quality proposal feasible. *Southern California Edison Co.*, 23 FERC ¶ 61,082 (1983).

XI. PROCEDURAL ISSUES

A. *Staff Advice*

Erroneous reliance on advice of Commission staff — in this case as to where to file a competing license application — will not excuse failure to abide by the Commission's rules. *New York State Energy Research and Development Authority*, 22 FERC ¶ 61,309 (1983); *see also Bluestone Energy Design, Inc.*, 24 FERC ¶ 61,118 (1983).

B. *Final/Interlocutory Orders*

A deficiency letter providing an applicant ninety days to upgrade its application is an interlocutory order and cannot be appealed. *Androscoggin Water Power Company*, 22 FERC ¶ 62,308 (1983).

C. *Identify of Parties: Notice of Intent Followed by Application*

In *Western Power, Inc.*, 22 FERC ¶ 61,296 (1983), the Commission allowed the filer of a notice of intent to add new parties to the application in addition to itself. However, an earlier, stricter rule requiring absolute identity would not be reversed as to actions based on the earlier rule, because at that time there was no other deterrent to the development of "hybrid" applications. *Noah Corporation*, 25 FERC ¶ 61,041 (1983).

XII. HYDRO ALLOCATION

In a controversial hydropower allocation order, the Commission in 1982 held that the Power Authority of the State of New York ("PASNY") did not set aside enough power from the Niagara Project for municipal customers when it signed contracts with several investor-owned utilities in 1961. Opinion No. 151, Declaratory Opinion and Order Affirming with Modification Initial Decision on Niagara Preference, 21 FERC ¶ 61,021 (1982). According to the Niagara Redevelopment Act, 16 U.S.C. Section 836 *et seq.*, PASNY must provide for withdrawal of enough power to meet the "reasonably foreseeable needs" of preference customers, *i.e.*, "public bodies and non-profit cooperatives", which are entitled to 50% of the project's output when it sells preference power currently in excess of preference customer needs to privately-owned utilities. *See* 16 U.S.C. Section 836(b)(2). In Opinion No. 151, however, which essentially affirmed an administrative law judge's 1980 ruling, the FERC found that when PASNY initially considered the municipalities' foreseeable needs, PASNY's conduct was "so unreasonable in certain respects as to be arbitrary." The Commission ordered the voiding of the contracts with the investor-owned utilities in order that preference power needed by public bodies within New York State could be reallocated to them.

In the course of its opinion, the FERC also interpreted the Niagara Redevelopment Act's preference provision, which accords "preference and priority" with respect to 50% of the project's output to publicly-owned utilities. The FERC found that this provision was intended to foster the growth of "yardstick competition" between publicly and privately-owned systems, and that the preference customers were entitled to power for all of their needs, whether residential, commercial or industrial.

On rehearing, the Commission affirmed much of Opinion No. 151. The FERC confirmed its earlier finding regarding the nature of the preference provision, and

held once more than PASNY violated its certificate in 1961 by failing to set aside enough power for the foreseeable needs of municipal users. Opinion No. 151-A, 23 FERC ¶ 61,031 (1983). In a surprising move, however, the FERC also ruled that municipal users had not been harmed by PASNY's conduct. According to the Commission's ruling, which was based on a staff analysis of the municipalities' needs through 1985, PASNY rectified its initial failing by delivering low cost hydropower from the St. Lawrence Project to the municipalities so that PASNY effectively satisfied foreseeable needs. If permitted to stand, the Commission's decision means that the municipalities, represented by the Municipal Electric Users Association of New York State ("MEUA"), will not be entitled to the approximately \$75 million in damages sought from PASNY. The case currently is on review before the Second Circuit Court of Appeals.

Before the FERC issued its decision on rehearing, MEUA filed a motion asking the Commission to deny rehearing in the case, arguing that the decisionmaking process had been tainted by interference from President Reagan, certain members of Congress and the Commission's Chairman, C.M. Butler III. The motion charged the aforementioned public officials with *ex parte* contracts and attempts to influence the outcome of an adjudicatory proceeding. MEUA's motion further charged the defendants with violations of the Administrative Procedure Act and the Commission's own rules and regulations for their roles in circulating a number of letters and for the statements which they made in a news conference in which they advocated the reversal of Opinion No. 151. As a result of the motion, Chairman Butler recused himself from the rehearing decision. The Commission denied MEUA's motion and proceeded to consider the merits of the various petitions for rehearing in Opinion No. 151-A, *supra*. See Supplemental Opinion Explaining Denial of MEUA Motion, 23 FERC ¶ 61,064 (1983). The issue of *ex parte* contracts also is on review before the Second Circuit.

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