

Report of the Committee on Regulations— Part I of the Federal Power Act

The major developments during 1987 in the area of hydroelectric licensing and regulation focused on the implementation of the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, which substantially amended the Federal Power Act (FPA) in a number of areas. The Federal Energy Regulatory Commission (FERC or Commission) engaged in several rulemaking proceedings designed to carry out a number of important changes in the licensing process brought about by this landmark legislation. In addition, the Commission has begun the process of interpreting the ECPA amendments on a case-by-case basis in licensing and other adjudicatory proceedings. In the environmental area, the Commission substantially revised its regulations implementing the National Environmental Policy Act of 1969 (NEPA), and changed its policy with respect to water quality certification pursuant to section 401 of the Clean Water Act. Issues involving preemption and the state-federal relationship under the *First Iowa* doctrine have been joined in several licensing proceedings and in court. In the judicial arena, the final chapter on the municipal preference dispute in the *Merwin Dam* proceeding has been written.

I. ECPA-RELATED RULEMAKINGS

A. General Licensing

1. Section 3(b) of the ECPA—Consideration of Federal and State Comprehensive Plans for a Waterway

Order No. 481, Final Rule, issued Oct. 20, 1987, 52 Fed. Reg. 39,905 (1987), *reh'g granted*, Dec. 16, 1987, 52 Fed. Reg. 48,398 (1987). ECPA requires the Commission, in issuing a hydroelectric license, to take into account any existing federal or state comprehensive plan. In *Fieldcrest Mills*,¹ the Commission held that to qualify as a state comprehensive plan, the plan must be prepared and adopted pursuant to a specific act of the state legislature and must be developed, implemented and managed by an appropriate state agency. Also, to be a comprehensive plan, a federal or state plan must consider and balance *all* relevant public use considerations.

In this interpretative rule, the Commission adopted and elaborated on these standards. New 18 C.F.R. § 2.19 provides guidelines as to what will qualify. The Commission also stressed that *all* state and regional plans are to be taken into account, whether or not they are “comprehensive,” and that the weight accorded to any plan depends on the documentation that supports it.

Interestingly, the Commission also stated that, as for its section 10(a) (now section 10(a)(1)) obligation to approve a project “best adapted to a com-

1. *Fieldcrest Mills*, 37 F.E.R.C. ¶ 61,264 (1986).

prehensive plan," the entire record of the licensing proceeding "constitutes the Section 10(a) comprehensive plan."

2. Section 7(c) of the ECPA—Payment of Fees to Fish and Wildlife Agencies that Impose Mandatory Conditions

Order No. 487, Final Rule, issued Dec. 16, 1987, 52 Fed. Reg. 48,398 (1987). ECPA section 7(c) creates a new section 30(e) of the FPA, requiring the FERC to establish fees to be paid by an applicant to reimburse fish and wildlife agencies for costs incurred in setting mandatory terms and conditions under the FPA section 30(c). The proposed regulation sets up a new subpart M to part 4 of the regulations, new 18 C.F.R. §§ 4.300-.305. The Commission interprets the fee requirement to apply to exemptions and to applications for licenses at new dams or diversions where the Public Utility Regulatory Policies Act of 1978 (PURPA) benefits will be sought and for which none of the exceptions enumerated in the ECPA is available. No fees will be assessed during the moratorium on availability of PURPA benefits.

During pre-agency consultation, the fish and wildlife agencies must provide estimates of their costs. A payment of fifty percent of this cost estimate, or posting of an approved unlimited term surety bond for 100% of the cost estimate, must accompany the application when it is filed, or the application will be rejected. Apparently, if an application is rejected or withdrawn, the fees must still be paid. Relevant agencies must file their final cost statements within sixty days after the last date of filing mandatory estimates. After all cost statements are received, the Commission will bill the applicant, which must reimburse the agencies within forty-five days.

New section 4.32(c)(4) provides sixty days from the date of notice for fish and wildlife agencies to comment on an application for a project that plans to rely on PURPA benefits. This sixty day deadline already applies to exemptions.

3. Section 8 of the ECPA—Restrictions on Availability of PURPA Section 210 (Sale of Electricity as Avoided Cost) for Projects at New Dams and Diversions

(a) Interim Rule, 52 Fed. Reg. 5,276 (1987), issued Feb. 13, 1987, effective Mar. 23, 1987. Section 8 of the ECPA restricts the availability of PURPA sales from hydro projects at avoided cost to projects meeting certain restrictions. The rule establishes new 18 C.F.R. § 292.203(c), incorporating the restrictions on availability of the PURPA set out in ECPA section 8(a), which establishes PURPA section 210(j), new section 292.208, incorporating the exceptions to restrictions set out in ECPA section 8(b), and new section 292.209, providing procedures for the filing of a petition alleging a substantial commitment of monetary resources prior to the date of passage of the ECPA.

The Commission determined that a substantial monetary commitment is fifty percent of the eventual total cost. A rebuttable presumption of substantial commitment is established for preliminary permit holders who completed environmental studies prior to October 16, 1986. The statute sets a deadline date of April 16, 1988 for all substantial commitment petitions. The interim

rule requires them to be filed *with* a license application. For licenses already filed, the commitment petitions must be filed by June 22, 1987.

As for the ECPA section 8(e) moratorium on applicability of PURPA benefits pending completion and review of a study by the Commission, the order interprets the statute to mean that a facility affected by the moratorium is not a qualifying facility until the end of the moratorium. New section 292.203(c)(2).

(b) Order, 52 Fed. Reg. 2,440 (1987). A notice of study was issued Jan. 16, 1987, as required by ECPA section 8(d), of the effects of applying the benefits of PURPA section 210 to hydroelectric facilities using new dams or diversions. The draft study found no adverse environmental effects from making the PURPA available.

(c) Proposed Rulemaking, 52 Fed. Reg. 38,460 (1987) (proposed Oct. 5, 1987). This proposed rulemaking addresses two topics. It would require all applicants for license or exemption for a project of 80 MW or less to state whether PURPA section 210 benefits will be sought. If a change in this intent is made during the license or exemption proceeding, a change of filing date pursuant to 18 C.F.R. § 4.35 would result, requiring reissuance of public notice and affecting the timeliness and the disposal of competing applications. The Commission would prohibit an applicant who reverses an intent not to seek PURPA benefits after a license or exemption is issued from obtaining PURPA benefits.

A new 18 C.F.R. § 292.210 would be added to allow an applicant for the "substantial commitment of monetary resources" exemption to seek an initial determination that there are no adverse environmental impacts from the project, after mitigation. This condition must be met to qualify for PURPA benefits under this exemption.

4. Section 14 of the ECPA—Landowner Notification

Order No. 480, Final Rule, Sept. 30, 1987, 52 Fed. Reg. 37,284 (1987), effective Nov. 5, 1987. The Commission added a new regulation, new 18 C.F.R. § 4.32(a)(3), requiring notice by certified mail, before or at the time of filing of a license application, to owners of property within the project boundary, to the various local political subdivisions at or near the project (as defined by the Commission's 5000 population/15 miles from project criteria) and to federal, state, municipal and other local governmental agencies if there is "reason to believe [they] would likely be interested in or affected by" the application. It is not clear yet whether the agencies that must be notified under this rule are exactly the same as the agencies listed in the FERC's "Blue Book," as environmental agencies to be consulted. The Commission recently clarified, however, that notification to agencies of filing of an application, as required by 18 C.F.R. § 4.38, if done by regular mail, does *not* satisfy the new notification requirement. However, section 4.38 notice by certified mail would satisfy both requirements with one mailing.²

2. Notice of OMB Control Number, 52 Fed. Reg. 43,191 (1987) (to be codified at 18 C.F.R. pt 389).

B. Relicensing

1. Section 4(a) of the ECPA, Adding New Section 15(b)(2) to the Federal Power Act, Requiring that Existing Licensees Make Certain Information Available; and Adding New Section 15(b)(1), Notice by Existing Licensee, and Section 15(c)(1), Deadline for Filing License Applications

Order No. 467, Interim Rule, issued Mar. 30, 1987, 52 Fed. Reg. 11,035 (1987), effective May 7, 1987. The rule details information regarding existing projects to be made available, in reproducible form, at an existing licensee's principle place of business. New 18 C.F.R. § 16.16 governs information to be filed.

The rule also creates new section 16.14, establishing the deadline for a filing applications for a license of no less than two years before the expiration of the existing license, and new section 16.15, governing notice by the existing licensee of intent to pursue a new license. Notice is required five years before the expiration of the existing license as provided in the ECPA. The rule provides shorter periods for licenses expiring within the next five years.

New section 16.16(d)(1) contains a procedure whereby an existing licensee would have to file a statement with the Commission if the required information were not available. By Order No. 467-A, 52 Fed. Reg. 18,227 (1987), the effective date of this part of the interim rule was suspended.

The requirement for providing information applies to any project for which the license expires after the effective date of the ECPA, regardless of whether the deadline for competing applications has expired.³

C. Enforcement

1. Section 12 of the ECPA, Additional Enforcement Authority

Notice of Proposed Rulemaking, 52 Fed. Reg. 29,216 (1987) (proposed Aug. 3, 1987). The ECPA establishes a new section 31 of the FPA, conferring additional enforcement authority on the FERC, including the power to revoke a license or exemption and to assess a fine of up to \$10,000 per day. The proposed rule would implement new FPA section 31(c), (d), involving assessment of civil penalties. Creating new 18 C.F.R. §§ 385.1501-1511, the rule would extend civil penalty authority to licensees and exemptees. It would also apply civil penalty authority to those who operate a jurisdictional project without a license or exemption. The regulations would apply only to conduct occurring after the date of enactment of the ECPA. The regulations follow the statute, and would offer a person against whom penalties are to be assessed a choice between having the Commission assess a penalty after an administrative hearing on the record, with appeal to a United States court of appeals, or having a penalty assessed by Commission order enforceable in United States district court in a *de novo* proceeding.

3. Southern Cal. Edison Co., 40 F.E.R.C. ¶ 61,002 (1987).

II. ENVIRONMENTAL RULEMAKINGS

A. *Regulations Implementing the National Environmental Policy Act of 1969*

Order No. 486, Final Rule, issued Dec. 10, 1987, 52 Fed. Reg. 47,897 (1987), *reh'g granted*, 53 Fed. Reg. 3,584 (1988). This order establishes a new 18 C.F.R. part 380. All of the Commission's actions are put into one of three categories: those that are categorically excluded from environmental review because they almost never involve significant environmental impacts; those that require an environmental assessment (EA) because they may or may not involve significant environmental impacts after appropriate mitigation measures have been taken; and those actions generally requiring a full environmental impact statement (EIS). In the middle category, if the EA finds that there *will* be significant environmental impacts, an EIS is required.

The list of matters ordinarily requiring an EIS, contained in new section 380.6, includes licenses for construction of any unconstructed water power project with a total installed capacity of more than twenty megawatts. However, the rule provides that the Commission may decide on a case-by-case basis to do an EA from the outset.

The list of matters normally requiring an EA (unless the Commission decides to go ahead with an EIS) contained in new section 380.5 includes:

- (1) licenses for construction of a water power project at an existing dam;
- (2) exemptions for small hydro projects;
- (3) licenses for additional project works, whether styled as license amendments or original licenses;
- (4) licenses for transmission lines only;
- (5) applications for new license under section 15 of the FPA;
- (6) certain proposals for legislation; and
- (7) surrender of water power licenses and exemptions where project works exist or ground disturbing activity has occurred; and amendments to water power licenses and exemptions that require ground disturbing activity or changes to project works or operations.

The list of projects or actions categorically excluded (new section 380.4(a)) includes:

- (1) compliance and review actions;
- (2) actions concerning the reservation and classification of United States lands as water power sites and other actions under section 24 of the FPA;
- (3) transfers of water power project licenses and transfers of exemptions;
- (4) issuance of preliminary permits;
- (5) withdrawals of applications for preliminary permits, exemptions or licenses;
- (6) actions concerning annual charges or headwater benefits charges for water power projects, and fees for fish and wildlife agencies setting mandatory conditions;
- (7) approval of water power projects, and "as built" or revised drawings,

that propose no change to project works or operation or that reflect changes that have previously been approved or required by the Commission;

(8) surrender and amendment of preliminary permits, and surrender of water power licenses and exemptions, where no project works exist or ground disturbing activity has occurred; and amendment to water power licenses and exemptions that do not require ground disturbing activity or changes to project works or operation;

(9) small conduit exemptions;

(10) approval of change in land rights for water power projects if no construction or change in land use is proposed or contemplated; and

(11) approval of use of water power project lands or waters for gas or electric utility distribution lines, communications lines, drains, sewer lines, etc.

On procedural matters, the Commission makes clear in the preamble that it will consider all views on a draft EIS, whether or not the person becomes a party. New section 380.10(a)(1)(i) permits intervention within the comment period on a draft EIS. In addition, new section 380.10(a)(2)(i) provides:

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

New section 380.10(a)(2)(ii) provides that any intervenor taking a position on an environmental issue may offer evidence, and must specify any differences from the staff's and applicant's position; and that to be considered, any facts or opinions on an environmental issue set for hearing must be admitted into evidence and made part of the record.

EAs and findings of no significant impact (FONSI)s will generally be made available to the public at the time of the Commission order on a project, but in some cases the Commission may make an EA or FONSI available in advance in order to gather public comment.

B. Waiver of Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act

Order No. 464, Final Rule, issued Feb. 11, 1987, 52 Fed. Reg. 5,446 (1987), *reh'g denied*, Apr. 22, 1987, Fed. Reg. 13,234 (1987). Section 401(a)(1) of the Clean Water Act,⁴ requires an applicant to obtain certification of water quality from the appropriate state agency before the FERC may issue a license, but waives the certification requirement if the state agency does not act within a year. Previously, the Commission's practice deemed the one year waiver period to commence on the date the state agency found the request acceptable for processing—an interpretation that had resulted in some very long delays. The new rule changed the Commission's practice. The Commis-

4. Clean Water Act, § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1982).

sion will now apply the waiver provision one year after the date on which the state agency receives the request for certification.

The rule also revised the pre-filing consultation requirements of 18 C.F.R. § 4.38 to require early consultation with the certifying state agency.

III. EXEMPTION RULEMAKINGS

A. *Exemptions From Licensing Requirements—Categorical Exemptions*

Order No. 482, Final Rule, issued Oct. 20, 1987, 52 Fed. Reg. 39,628 (1987). The Commission has rescinded its rules providing for two categorical exemptions: (1) small hydro power projects with an installed capacity of less than 100 kw and (2) projects of between 100 kw and 5 mw. All small hydro power exemptions must now be obtained under the case-by-case exemption procedure contained in 18 C.F.R. §§ 4.101-.108. The Commission determined that site-specific comments and conditions would be useful in all cases. The rescinded regulations are 18 C.F.R. §§ 4.109-.113 (1987). This rule is prospective only and does not affect exemptions already issued under the categorical procedures.

B. *Filing Fees Related to Exemptions*

Proposed Rule, 52 Fed. Reg. 43,612 (1987) (proposed November 5, 1987). The Commission proposes to collect a filing fee for applications for exemptions. Based on current average Commission costs for processing, the fee would be \$11,010. The Commission also proposes to impose a fee of \$45 for the cost of processing a notice that a qualifying facility has met the PURPA requirements under 18 C.F.R. § 292.203. The proposed rule also delegates authority to, *inter alia*, the Director of the Office of Hydropower Licensing and the Director of the Office of Electric Power Regulation to waive the prescribed fees in appropriate circumstances.

IV. OTHER RULEMAKINGS

A. *Revision of Billing Procedures for Annual Charges*

Order No. 469, Final Rule, issued May 8, 1987, 52 Fed. Reg. 18,201 (1987), effective July 28, 1987, *reh'g denied*, Oct. 7, 1987, 52 Fed. Reg. 37,929 (1987). The Commission has changed its billing procedures to a fiscal year basis, to coincide with the fiscal year on which the Commission calculates its costs. Data from licensees must now be filed on November 1. Bills will be rendered three months earlier than previously.

The Commission has also changed its method for assessing charges for the use of federal lands, concluding that the current system did not recover costs. It will use the United States Forest Service (USFS)/Bureau of Land Management index for land values for linear rights of way. This is a county-by-county per acre land valuation. Transmission line uses will be charged at the USFS index level. Other users will be charged twice the USFS level. The most recent USFS index is published at 52 Fed. Reg. 43,320 (1987).

B. Dam Safety and Inspections

Proposed Rule, 52 Fed. Reg. 23,557 (1987) (proposed June 17, 1987). The Commission proposes to change the name of its dam classification system, and to include in the regulations new section 12.6, a codification of its existing practice on frequency of dam inspections.

V. FERC ADJUDICATIONS

A. ECPA-Related Matters

1. Licensing

a. Section 3(b)(4) of the ECPA—Consideration of Electricity Consumption Efficiency Improvement Program for State, Municipal and Electric Utility Applicants

FPA section 10(a)(2)(C), as added by ECPA section 3(b)(4), requires the Commission to consider the electricity consumption efficiency improvement program of a state, municipal or electric utility applicant. The Commission has not promulgated any general regulations as to criteria or guidelines governing the type of information that must be submitted in connection with a license or exemption application to satisfy this requirement. Letters were sent to individual applicants with pending applications requiring the information, but only in general terms. The Commission appears to be considering compliance with existing state-mandated conservation programs as part of the relevant information.

On a case-by-case basis, the Commission staff so far has been satisfied with the various kinds of evidence produced by applicants. Smaller applicants apparently may be permitted to make less effort.⁵

In the case of joint applicants where only one planned to use the power in the immediate future, only that applicant's data were considered.⁶ Similarly, where one municipal co-applicant had a distribution system and the other did not, the staff considered only the energy conservation efforts of the applicant with a distribution system.⁷ Where there was a contract to sell all the power to a utility, the staff considered the compliance record of the purchasing utility with relevant state regulations on conservation and energy management.⁸ But where the project from which the power being sold is already built and amortized, the staff found little likelihood that additional conservation measures by the purchasing utility could compete with the cheap power, and did not investigate the purchasing utility's practices.⁹ Where all the power will be sold and

5. *Compare* Connecticut Light and Power Co., 39 F.E.R.C. ¶ 62,364 (1987) with City of Mt. Pleasant, Utah, 40 F.E.R.C. ¶ 62,338 (1987) [and] City of Anoka, Minn., 39 F.E.R.C. ¶ 62,249 (1987).

6. City of Dothan, Ala., 39 F.E.R.C. ¶ 62,197 (1987).

7. City of Aberdeen, Wash., 40 F.E.R.C. ¶ 62,316 (1987).

8. Gem Irrigation Dist., 39 F.E.R.C. ¶ 62,095 (1987) (section 10(a)(2)(C) considered in EA, rather than in body of order).

9. Wolverine Power Corp., 41 F.E.R.C. ¶ 62,192, at 63,402 (1987).

the licensee did not yet hold a power purchase contract, there is no relevant energy conservation program and the Commission will not investigate further.¹⁰ The Commission has also held that an entity that sold entirely at wholesale and was not required by the state Public Utility Commission (PUC) to have an energy efficiency program would not have to undergo further consideration.¹¹

b. Section (b)(4) of the ECPA—Consideration of
Recommendations of Fish and Wildlife Agencies

New FPA section 10(j) requires the Commission to include conditions based on recommendations of the National Marine Fisheries Service, the United States Fish and Wildlife Service (FWS), and state fish and wildlife agencies and, if the Commission disagrees with the recommendation, to negotiate with the relevant agency. If agreement cannot be reached, the Commission must explain in writing the basis for its rejection and for the conditions it has chosen to impose. The Commission has not promulgated any general procedures for negotiation with agencies.

In specific orders, the Commission has indicated that it has negotiated with various agencies to achieve their goals without being overbroad or too harsh on the applicant.¹² Various orders make it clear that despite the section 10(j) procedures, the Commission, not any other agency, retains final authority to approve all license requirements.¹³ If a fish and wildlife agency makes recommendations outside the scope of protection of fish and wildlife, section 10(j) does not apply, although the Commission will still consider the agency's views.¹⁴

*Elkem Metals Co.*¹⁵ provided the Commission the first contested opportunity to deal with the interplay between the ECPA and the NEPA. On December 11, 1987, the Office of Hydropower Licensing (OHL) issued a new license to Elkem Metals Company (Elkem) for the Hawks Nest project on the New and Kanawha Rivers in West Virginia. The project produces approximately 90 MW of twenty-five-cycle power, all of which was used in Elkem's nearby ferro-alloy smelting plant. Elkem proposed to continue releasing the same minimum flow, 25 cfs, that it had pursuant to its previous license.¹⁶ The West Virginia Department of Natural Resources (WVDNR) recommended increas-

10. *E.g.*, *City of St. Johnsville, N.Y.*, 41 F.E.R.C. ¶ 62,182 (1987).

11. *Guadalupe-Blanco River Auth.*, 37 F.E.R.C. ¶ 61,208 (1986), *modified*, 39 F.E.R.C. ¶ 62,337 (1987).

12. *E.g.*, *Cook Electric, Inc.*, 38 F.E.R.C. ¶ 62,034 (1987) (negotiations with Idaho Department of Fish and Game); *Guadalupe-Blanco*, 37 F.E.R.C. ¶ 61,208 (negotiations with Interior).

13. *Cook Electric*, 38 F.E.R.C. ¶ 62,034; *McDowell Forest Products, Inc.*, 37 F.E.R.C. ¶ 62,261 (1986). See *Rock Creek Limited Partnership*, 41 F.E.R.C. ¶ 61,198 (1987) (appeal pending 9th Cir.) (discussion of the ECPA and of authority reserved in the FPA to states over water rights).

14. *Idaho Natural Energy, Inc.*, 39 F.E.R.C. ¶ 62,038 (1987).

15. *Elkem Metals Co.*, 41 F.E.R.C. ¶ 62,289 (1987).

16. *Id.* at 63,657 (EA).

ing the minimum flow to 100 cfs, and the FWS recommended significantly higher flows of between 2,310 and 4,280 cfs. The Commission Staff originally proposed minimum flows ranging between 800 cfs and 2,000 cfs, but eventually adopted WVDNR's recommendation of 100 cfs.

OHL determined, pursuant to section 10(a)(1) of the FPA, that use of the river to produce power for Elkem's ferro-alloy plant was the most comprehensive use of the resources. OHL concluded that Elkem could not maintain an economically viable enterprise if minimum flows were increased beyond 100 cfs, and, consequently, rejected FWS's recommendation. Failing in an effort to resolve any inconsistency, OHL, in compliance with section 10(j) of the FPA, explained its decision:

(A) Implementation of the minimum flow regime recommended by the FWS to ensure protection of fish resources would conflict with the use of the river for production of low-cost electrical energy. The low-cost energy ensures the economic viability of the Elkem ferro-alloy plant, the benefits of which contribute significantly to the local economy. As indicated in the EA, the use of power generated from this resource for operation of the ferro-alloy plant represents the most comprehensive use of this resource. Since the establishment of the fishery provided for by the release of the flow recommended by the FWS would directly conflict with the most comprehensive development of the waterway, the FWS's minimum flow recommendation is found to be inconsistent with sections 4(e) and 10(a)(1) of the Act.

(B) Pursuant to section 10(j)(2)(B), the Commission staff finds that the conditions requiring implementation of a ramping rate and installation of fish screens protect and mitigate for the effects of continued project operation on the fish and wildlife resources of the project area.¹⁷

Several conservation intervenors appealed OHL's order. The Commission has not ruled on the appeal, which presents it with the first important opportunity to elaborate and apply the substantive and procedural balancing mechanisms created by the ECPA.

2. Relicensing

a. Section 4 of the ECPA—Relicensing Procedures

New FPA section 15(a)(2) sets out a series of factors the Commission must consider in relicensing decisions. These include ability to comply with the license, ability to operate and maintain the project, ability to provide reliable electric service, need for the electricity, existing and planned transmission services, cost effectiveness of the plans, and other factors the Commission deems appropriate. The relicensing decisions issued so far under section 15 give some indication as to how thoroughly the Commission will address these factors. None of the factors has generated lengthy discussion.¹⁸

In *Niagara Mohawk Power Corp.*,¹⁹ a licensee was not permitted to accel-

17. *Id.* at 63,647.

18. See, e.g., *Public Service Co. of N.H.*, 40 F.E.R.C. ¶ 62,220 (1987); *Utah Power & Light Co.*, 40 F.E.R.C. ¶ 61,139 (1987).

19. *Niagra Mohawk Power Corp.*, 39 F.E.R.C. ¶ 62,382 (1987).

erate the expiration date of its license where it would thereby violate the five-year notice provision for an application for a new license required by the ECPA.

3. Right to Develop

In a series of related cases, the Commission has confronted the question of who can develop unused power capacity at existing licensed projects. This was the subject of the *Kamargo Corp.* decision.²⁰ The Commission previously determined that the ECPA's five-year notification requirement prevented it from granting permits at four underdeveloped and underutilized projects owned by the Niagara Mohawk Power Corporation.²¹ The permit applicants filed for rehearing, arguing that the order discouraged development and resulted in decreased competition among applicants during relicensing, despite the fact that the ECPA was intended to encourage competition, and violated that mandate of the FPA that permits be granted prior to the commencement of original licensing proceedings. The Commission rejected these arguments, holding that project works not currently under license may be licensed in a relicensing as well as in an original licensing proceeding. Accordingly, the relicensing provisions of the FPA, as amended by the ECPA, must be respected, because the Commission's practice has been to consider the installation of additional generating capacity at the time of relicensing. In addition, the Commission found that the applicants had no right to be awarded permits. If the permits had been granted, the permittees would have a competitive advantage in the context of relicensing, effectively foreclosing any other competition at relicensing, in contravention of explicit congressional intent. The Commission denied the rehearing request:

Declining to grant the requested preliminary permits, for the installation of additional generating capacity at and within an existing licensed project, will much better enable the Commission to fulfill its responsibilities at the time of relicensing of the existing licensed projects. It will thus be much better able to make a comparative evaluation of the installation of additional capacity and the other requirements [of the FPA]. . . .²²

Commissioner Trabandt dissented from the Commission's decision, as he did in the previous *Kamargo* decision. He argued that the majority's decision to deny the permits is a

transparent attempt to preserve for any current licensee the right to develop a proposal for any unutilized additional capacity located either within or outside the boundary of a licensed project. The Commission has effectively locked up all additional generating resources at existing licensed projects and has dedicated them for the foreseeable future to the monopolistic control of the licensees of those projects.²³

Commissioner Trabandt advocated denying seven of the permit applications on the grounds that they would entail demolition of existing licensed project

20. *Kamargo Corp.*, 39 F.E.R.C. ¶ 61,226 (1987).

21. *Kamargo Corp.*, 37 F.E.R.C. ¶ 61,281, at 61,843-44 (1986).

22. *Kamargo*, 39 F.E.R.C. at 61,791.

23. *Id.* at 61,793.

works without consent of the licensee, a clear violation of section 6 of the FPA. The remaining applications, he said, should be dealt with during normal Commission licensing proceedings, with the license going to the best adapted proposal.

B. State-Federal Relations

The Supreme Court in *First Iowa Hydro-electric Cooperative v. FPC*,²⁴ held that licensees are not required to secure state permits that deal with matters which are within the Commission's exclusive purview. Nevertheless, the proper relationship between state and federal authority in hydro licensing remains controversial, and several recent adjudications have dealt with the interplay between state permitting authority and federal licensing authority.

In *South Fork Resources, Inc.*,²⁵ the Commission, relying on *First Iowa*, refused to require a licensee to obtain a shoreline development permit from the State of Washington and three variances from the county where the project is located. In 1985, the Commission had issued a license for the Twin Rivers Project in Washington. One year later, it clarified the license to state that the licensee did not have to apply for or receive state environmental permits.²⁶ Intervenor, including the Washington Parks and Recreation Commission and the Washington Department of Ecology, appealed on the grounds that the Commission's alleged clarification constituted an amendment of the license.

The Commission denied the appeal, holding that the state permits affected aspects of project design and construction that are clearly within the Commission's exclusive purview and, thus, were not statutorily required. Specifically, the variances at issue would have required modification of the project's proposed transmission line, diversion weir, intake channel, and tailrace. Since all of these aspects of the project are subject to the Commission's control and oversight, the Commission held that the variances conflict with the license and its comprehensive regulation of the project under the FPA.²⁷

In *Rock Creek Limited Partnership*,²⁸ the California Water Resources Control Board asserted that it had jurisdiction to establish minimum flows for a licensed project pursuant to section 27 of the FPA.²⁹ Citing *First Iowa*, the Commission rejected the Board's claims, stating: "*First Iowa* clearly stands for the proposition that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a) of the FPA are pre-empted."³⁰ Furthermore, it held that it had the duty under section 10(a) to

24. *First Iowa Hydroelectric Coop. v. FPC*, 328 U.S. 152, 182 (1946).

25. *South Fork Resources, Inc.*, 39 F.E.R.C. ¶ 61,025 (1987).

26. *Id.* at 61,058.

27. *Id.* at 61,060 & n.4.

28. *Rock Creek Ltd. Partnership*, 41 F.E.R.C. ¶ 61,198 (1987) (appeal pending, 9th Cir.).

29. *Id.* at 61,514. Section 27 provides:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821 (1985).

30. *Id.* at 61,515.

consider and balance all aspects of the public interest, including minimum flows as one aspect of the project's environmental concerns. The Commission held that if it were to interpret section 27 to grant states authority over minimum flows, its comprehensive planning authority and responsibility under section 10(a) would be rendered meaningless. Thus, the Board's authority to establish minimum flows was preempted, "even if in the exercise of that authority the state does not attempt to impose minimum flow conditions drastically different from those imposed in a license."³¹

Similarly, in *Roseburg Resources Co.*,³² the Commission held that a licensee is not subject to state minimum flow requirements. The California Department of Fish and Game challenged a license on the grounds that the licensee was not in compliance with the laws of the state. The Commission, relying on *Rock Creek* and *First Iowa*, held that the imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process. As such, the Commission found:

[T]he establishment of minimum flows is a matter beyond the reach of state regulation. Allowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing, such as fishery protection and project economics, and would essentially vest a veto authority over projects in the states.³³

These cases represent the tip of the iceberg. As the states rely more heavily on their authority to issue water quality certificates containing conditions like those rejected by the FERC in these cases, the proper relationship of state and federal authority can be expected to produce further litigation. Given the Commission's more "hands-off" approach to state-issued water quality certificates, it is impossible to predict where a balance will finally be struck.

C. FERC Jurisdiction

The Commission has also decided several recent cases interpreting the scope of its jurisdiction under the FPA. In *City of Centralia, Washington*,³⁴ the Commission clarified the definition of "navigable" within sections 4(e) and 23(b) of the FPA. In a previous opinion,³⁵ the Commission determined that Centralia's Yelm Hydroelectric Project on the Nisqually River is located along "navigable waters" of the United States and, hence, required a license in order to operate. A river is "navigable" if it is being used, or is suitable for use, has been used or was suitable for use in the past, or could be made suitable for use in the future by reasonable improvements, for the transportation of persons or property in interstate commerce.³⁶ Centralia requested that the Commission reconsider its prior opinion to find that the Nisqually River is not

31. *Id.* at 61,516.

32. *Roseburg Resources Co.*, 41 F.E.R.C. ¶ 61,142 (1987).

33. *Id.* at 61,363.

34. *City of Centralia, Wash.*, 38 F.E.R.C. ¶ 61,274, at 61,917 (1987).

35. *City of Centralia, Wash.*, 33 F.E.R.C. ¶ 61,221 (1985).

36. *Centralia*, 38 F.E.R.C. at 61,918 (citing *Rochester Gas & Elec. Co. v. FPC*, 344 F.2d 594, 596 (2d Cir. 1965)).

now used for interstate commerce and that the evidence does not indicate that the river was ever used in interstate commerce.³⁷ In addition, Centralia argued that the river near the project is too shallow to permit commerce and that it does not form a "continuous highway for interstate commerce."³⁸ The Commission found, however, that evidence indicates that the river had been used at one time in connection with logging and that the "continuous highway" test is inconclusive. As a result, Centralia was ordered to file a license application within eighteen months from the date of the order.³⁹

The Commission further articulated its jurisdiction under sections 4(e) and 23(b). In *Clifton Power Corp.*,⁴⁰ the owner of a portion of project property appealed a prior Commission decision⁴¹ determining that the Clifton Mills Project, located along the Pacolet River, did not have to be licensed pursuant to section 23(b), but that it could seek a license under section 4(e). The property owner argued that sections 23 and 4 were substantively similar and that if the Commission lacked jurisdiction to require a license under section 23, it also lacked jurisdiction to issue a license under section 4.⁴² (Without a license, the project owner would not have the right of eminent domain and could not appropriate the property owner's land.) The Commission disagreed. It reasoned that Congress intended the two sections to be different and that neither was subsumed by the other.⁴³ Section 23(b) requires a license for any project on navigable waters or, if not on navigable waters, waters over which Congress has jurisdiction under the Commerce Clause if the project is determined to affect interstate commerce. Section 4(e) permits the Commission to license projects on waters over which Congress has jurisdiction pursuant to its authority to regulate interstate commerce. In addition, the Commission expanded its prior ruling to hold that the license could have been granted under section 23(b) because the project was one of several small projects that together have a substantial effect on the interests of interstate or foreign commerce. The Commission ruled that "[a] demonstrable quantitative effect is not necessary."⁴⁴

The converse issue was presented in the pending case of *Orange & Rockland Utilities, Inc.*⁴⁵ The Commission determined that the project is not required to be licensed under section 23(b), because it is an unmodified, pre-1935 project located on a non-navigable waterway. Nevertheless, the Commission has accepted a license application filed by a non-owner on the grounds

37. *Id.* at 61,919.

38. *Id.* at 61,922.

39. *Id.* at 61,923-24. On the other hand, in *Aquenergy Sys., Inc.*, 39 F.E.R.C. ¶ 61,178 (1987), the Commission concluded that a stream was not "navigable" because it is a shallow, rocky and inaccessible stream located entirely within one county, its gradient is 25 feet per mile, and its mean annual flow is approximately 187 cubic feet per second. In addition, evidence indicated no historical record of navigation on the creek. *Id.* at 61,677.

40. *Clifton Power Corp.*, 39 F.E.R.C. ¶ 61,117 (1987) (appeal pending, D.C. Cir.).

41. *Clifton Power Corp.*, 35 F.E.R.C. ¶ 61,303 (1986).

42. *Clifton Power*, 39 F.E.R.C. at 61,447.

43. *Id.* at 61,450.

44. *Id.* at 61,455.

45. *Orange & Rockland Utils., Inc.*, 40 F.E.R.C. ¶ 61,222 (1987).

that section 4(e) permits the issuance of non-mandatory licenses. Citing to *Clifton Power*, it concluded, "Because the Commission's authority under section 4(e) to issue licenses is broader than the prohibition against unlicensed construction or operation contained in section 23(b)(1), there are projects for which licensing is not required but for which the Commission may issue a license."⁴⁶

In *Aquenergy Systems, Inc.*,⁴⁷ the Commission further expanded its definition of Commerce Clause waters. It held that a project located on non-navigable waters that is operated for the sole purpose of selling power to an independent utility company affects interstate commerce. Consequently, project operation was suspended pending submission of a license application pursuant to section 23(b).⁴⁸ The Commission stated:

We believe the foregoing demonstrates the effect of the Coneross Project on electricity as a basic element of interstate commerce. However, . . . the issue of whether a project has an effect on interstate commerce can also be considered in the context of the nation as a whole. . . . [T]he Coneross Project, as part of a national class of small projects, has a substantial effect on the interests of interstate commerce.⁴⁹

D. Preliminary Permits

In *Feldspar Energy Corp.*,⁵⁰ the Commission decided to dismiss a preliminary permit application as well as competing license applications for a project on a site under study for inclusion in the Wild and Scenic Rivers System. Where competing applications for licenses and permits are concerned, the Commission found that it would be inequitable to grant a permit while a competing license application was required to be dismissed, and therefore, it refused to entertain competing applications of any type until the river study period had expired.

After a license application was dismissed, a preliminary permit application that had been dismissed without prejudice was reinstated with its original filing date, not subject to further competition.⁵¹

In *Carry Falls Corp.*,⁵² the Commission recently refused to grant a preliminary permit for a project that would develop unused capacity at an existing licensed project, despite the fact that the proposed project would not alter the existing project's operation or project works.⁵³ The existing license

46. *Id.* at 61,764.

47. *Aquenergy Sys., Inc.*, 39 F.E.R.C. ¶ 61,178 (1987).

48. *Aquenergy* applied for a stay pending rehearing on the grounds that it would suffer irreparable economic injury as a result of stopping its operations. The Commission denied the request, holding that monetary or economic injury is insufficient to warrant a stay, especially in this case where the shut-down of the project stemmed entirely from the fact that the operator chose to finance and construct the project in violation of section 23(b).

49. *Aquenergy*, 39 F.E.R.C. at 61,678.

50. *Feldspar Energy Corp.*, 38 F.E.R.C. ¶ 61,296 (1987).

51. *Bath County, Ky.*, 41 F.E.R.C. ¶ 61,144 (1987).

52. *Carry Falls Corp.*, 37 F.E.R.C. ¶ 61,283 (1986), *aff'd*, 41 F.E.R.C. ¶ 61,069 (1987).

53. The project had never generated power and was used to regulate flows for downstream projects. *Id.* at 61,856-57.

included a special article that provided that the licensee "shall at such time as the Commission may direct and to the extent it is economically sound and in the public interest to do so . . . initiate and complete the power installation in connection with the project." The Commission held that this phrase gave the licensee the exclusive right to the staged development of the area's capacity:

Thus, although [the proposed project] would not alter either the operations or constructed project works of [the existing project], [it] could not be developed without entailing an alteration of license requiring the licensee's consent under Section 6 of the Act. The license . . . includes as project works under license the generating facilities for which Carry Falls has applied and specifically reserved to the Commission the authority to require the licensee itself to install these generating facilities. To date, [the licensee] has declined to give its consent. Accordingly, [the permit] application must be denied without prejudice to its being refiled in the future evidencing [the licensee's] consent.⁵⁴

E. *Post Licensing Compliance Filings*

A number of cases developed Commission policy on attempts of parties to a licensing proceeding to challenge post-licensing filings or determinations. The Commission reiterated that party status of any intervenor expires upon issuance of a license or exemption. Notice of subsequent filings is required only to the extent that such filings entail material changes in the plan of development or could affect adversely the rights of property holders in a manner not contemplated in the license.⁵⁵

In *Pacific Gas & Electric Co.*,⁵⁶ the Commission expanded this principle, adding that agencies or entities given a specific consultatory role by the license should be allowed to intervene and take an appeal in post-licensing proceedings dealing with matters on which they were to be consulted. Such entities are to be served with relevant filings. Normally, there will be no notice, so there will be no intervention deadline, and intervention may precede or accompany an appeal.

In *Goose Creek Hydro Associates*,⁵⁷ the Commission held that affected property owners could not intervene in a post-licensing motion to extend the time for commencement of construction, because they had no interest in the matter. In *City of Nashville, Arkansas*,⁵⁸ even though issuance of the license was still under appeal, the appealing party was not permitted to intervene separately in order to challenge a request for extension of several deadlines imposed in the license. This was held not to be a material change in the design of the license or its terms and conditions.

In *Delmar Wagner*,⁵⁹ the National Marine Fisheries Service (NMFS) sought to challenge drawings because the fishways criteria had not been followed. Although the NMFS had been a party to the licensing proceeding, it

54. *Id.* at 61,858.

55. Joseph M. Keating, 40 F.E.R.C. ¶ 61,254 (1987) (citing Kings River Conservation Dist., 36 F.E.R.C. ¶ 61,365 (1986)).

56. Pacific Gas & Elec. Co., 40 F.E.R.C. ¶ 61,035 (1987).

57. Goose Creek Hydro Assocs., 40 F.E.R.C. ¶ 61,279 (1987).

58. Order Dismissing Appeal, Project No. 3657, (FERC issued Oct. 21, 1987).

59. Order Dismissing Appeal, Project No. 6568, (FERC issued Oct. 13, 1987).

should have filed another intervention here. It did not, and its appeal was dismissed.

In *New York State Electric & Gas Corp.*,⁶⁰ a separate intervention was required for the losing applicant to participate in a proceeding to modify a license that had been issued, even though the licensing decision was still subject to pending rehearing.

F. Cluster Impact Assessment Procedures

On January 20, 1988, the Commission issued two related orders on seven applications for licensing of small hydroelectric projects in the Owens River Basin based upon a Final Environmental Impact Statement (FEIS) prepared in accordance with the Cluster Impact Assessment Procedures (CIAP).⁶¹ The CIAP was commenced in 1985 when the Commission issued a directive to staff to implement such procedures for review of multiple license applications in the Owens, Snohomish and the Salmon River Basins.⁶²

In the Owens River proceeding, four of the license applications were denied, two licenses were issued, and action on one application was deferred pending submission of additional information by the Applicant. The Commission's decision to grant or deny these applications was based on several factors. These factors included the impact on area resources with recommended mitigation measures, the financial feasibility of the projects and the need for the potential power generated. It was determined that two of the projects had unacceptable potential for adverse impact on local resources. The most notable resources affected were resident trout and riparian vegetation. Two other projects were denied because recommended mitigation measures would have made the projects financially infeasible. In all of the determinations, the Commission found that while there was no specific energy deficiency, there was a need to displace fossil-fueled electric generation. This goal, however, was outweighed by environmental and economic factors in four of the six applications decided.

During 1987 the FERC staff also completed an FEIS based upon the CIAP for the Snohomish River Basin⁶³ and for the Salmon River Basin.⁶⁴ However, future use of the CIAP to assess cumulative impacts in other river basins is uncertain. In the *Joseph M. Keating* order, the Commission stated that the CIAP's use in the foregoing three basins should not be construed as an indication that the Commission has determined that it is appropriate to use the CIAP in all river basins where cumulative impact issues have been raised. The prior directive adopting the CIAP was "intended as an experiment" and the Commission will continue to use other procedures consistent with the requirements of NEPA and the FPA to analyze cumulative environmental impacts. For example, in proceedings on the Snake River Basin⁶⁵ and the

60. *New York State Elec. & Gas Corp.*, 39 F.E.R.C. ¶ 61,177 (1987).

61. *Joseph M. Keating*, 42 F.E.R.C. ¶ 61,030 (1988); *Camille E. Held*, 42 F.E.R.C. ¶ 61,032 (1988).

62. 31 F.E.R.C. ¶ 61,095 (1985).

63. 52 Fed. Reg. 25,066 (1987).

64. 52 Fed. Reg. 28,601 (1987).

65. 51 Fed. Reg. 39,912 (1986).

Ohio River Basin,⁶⁶ the FERC has issued notices of intent to prepare an environmental impact statement to assess cumulative impacts without reliance on the CIAP.

In *National Wildlife Federation v. FERC*,⁶⁷ and *Washington State Department of Fisheries v. FERC*,⁶⁸ the court held that in the context of the Salmon River Basin and numerous proposed power projects, the Commission's refusal (a) to develop a comprehensive plan prior to issuance of the preliminary permits, (b) to require preliminary permittees to conduct cumulative impact studies, and (c) to impose uniform study guidelines to collect baseline data was not adequately supported by substantial evidence based on the record of the proceedings. In *Skykomish River Hydro*,⁶⁹ the Commission responded to the court's directive and explained that the proposed cumulative impact assessment requirements would be burdensome because of the potential substantial cost of the studies and may not be useful because of the high attrition rate from permit to development proposal. In the Commission's view, an additional requirement at the permit stage for cumulative studies is not the appropriate method of obtaining the necessary cumulative data on projects proposed for development. The Commission stressed that the earlier cases had been decided prior to the Commission's promulgation of its pre-filing agency consultation regulations for development applications.⁷⁰ According to the FERC, the section 4.38 procedures have clarified and standardized information requirements and have proven effective in gathering the necessary data for an informed decision on projects proposed for development.

G. Miscellaneous Orders

In *Swift River Co.*,⁷¹ the Commission announced a policy that when a state agency denies a section 401 certificate, the Commission will wait ninety days before dismissing the license application. If an appeal is filed, the Commission will defer action on the license application until administrative and judicial appeals have been exhausted, so long as the applicant demonstrates, through periodic reports, diligence in pursuing its remedies.

In *Lynchburg Hydro Associates*,⁷² the Commission set forth its interpretation of the authority of the Department of the Interior, pursuant to section 18 of the FPA, to prescribe "fishways" as part of a licensed project.⁷³

In *Northern Lights, Inc.*,⁷⁴ the Commission denied a license for a proposed 144 MW project on the Kootenai River in Montana on environmental grounds. The project would have dewatered a waterfall and would have

66. 52 Fed. Reg. 15,984 (1987).

67. *National Wildlife Fed'n v. FERC*, 801 F.2d 1505 (9th Cir. 1986).

68. *Washington State Dep't of Fisheries v. FERC*, 801 F.2d 1516 (9th Cir. 1986).

69. *Skykomish River Hydro*, 39 F.E.R.C. ¶ 61,361 (1987).

70. 18 C.F.R. § 4.38 (1988).

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

72. *Lynchburg Hydro Assocs.*, 39 F.E.R.C. ¶ 61,079 (1987).

73. See also, *Clearwater Hydro Ltd. Partnership*, 41 F.E.R.C. ¶ 61,382 (1987).

74. *Northern Lights, Inc.*, 39 F.E.R.C. ¶ 61,352 (1987).

affected scenic and recreational values, as well as the religious practices of the Kootenai Indians.

In *Central Maine Power Co.*,⁷⁵ the Commission examined whether fees charged by a licensee to commercial whitewater rafters for use of project lands were reasonable. The fees also included charges for use of nonproject lands, and the Commission made it clear that it had no jurisdiction over this portion of the fees.

VI. JUDICIAL REVIEW

The most significant recent cases involving part I of the FPA dealt with what may be the last chapter of the dispute concerning municipal preference in relicensing, with the property ownership requirement applicable to an exemption applicant and with applicable permit requirements under the Clean Water Act.

In *Clark-Cowlitz Joint Operating Agency v. FERC*,⁷⁶ the Court of Appeals for the District of Columbia Circuit finally decided the only *Bountiful*-related issue left open by ECPA's elimination of the municipal preference.

The Commission ruled in 1980 in *City of Bountiful*⁷⁷ that the municipal preference in section 7(a) of the FPA applied in the case of relicensing as well as licensing. Although this decision was upheld by the Court of Appeals for the Eleventh Circuit in *Alabama Power Co. v. FERC*,⁷⁸ the Commission explicitly overruled its prior holding the next year in *Pacific Power & Light Co.*, commonly referred to as *Merwin*,⁷⁹ and held that the municipal preference in relicensing would apply only in the case of "new licensees," and not against original licensees in possession of project works.⁸⁰ Furthermore, the Commission concluded that when the projects were judged on the merits, which included economic injury to each of the applicants' ratepayers, Pacific Power presented the best adapted plan and should be allowed to retain the license over Clark-Cowlitz.⁸¹

The D.C. Circuit originally reversed the Commission's decision.⁸² It held that the Commission was precluded by the Eleventh Circuit's *Alabama Power* decision from changing its position. The court also held that the municipal preference applied to relicensings as well as licensings and that when comparing competing applicants, the Commission may not employ an "economic impact analysis" to determine which application is superior. However, within three months the court vacated its original decision and scheduled the case for rehearing.⁸³

Upon rehearing, the court reversed itself and found that the Eleventh

75. *Central Maine Power Co.*, 40 FERC ¶ 61,075 (1987).

76. *Clark-Cowlitz Joint Operating Agency v. FERC*, 825 F.2d 1074 (D.C. Cir. 1987).

77. *City of Bountiful*, 11 F.E.R.C. ¶ 61,337 (1980).

78. *Alabama Power Co. v. FERC*, 682 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

79. *Pacific Power & Light Co.*, 25 F.E.R.C. ¶ 61,052 (1983).

80. *Id.* at 61,176.

81. *Id.* at 61,199-200.

82. *Clark-Cowlitz Joint Operating Agency v. FERC*, 775 F.2d 366 (D.C. Cir. 1985).

83. *Clark-Cowlitz Joint Operating Agency v. FERC*, 787 F.2d 674 (D.C. Cir. 1986).

Circuit's affirmance of the Commission's initial *Bountiful* decision did not prevent the Commission from changing its policy with regard to Clark-Cowlitz.⁸⁴ The court also concluded, over a strong dissent by Judge Mikva,⁸⁵ that the FERC did not violate the principles of retroactivity by applying its change of policy to Clark-Cowlitz.⁸⁶ Therefore, the court ultimately agreed with the Commission's conclusion that the FPA intended the municipal preference to apply only to "new licensees," not to original licensees seeking a renewed license.⁸⁷ The municipal preference remains applicable when the Commission is issuing preliminary permits or original licenses where no preliminary permit has been issued, as provided in section 7 of the Act. (The ECPA changed section 7 so that municipal preference is no longer applicable in relicensing proceedings. As for the competing relicensing proceedings that were in progress at the time the ECPA was passed, the ECPA made special provisions, as discussed below.)

Having concluded that the Commission was not required to afford Clark-Cowlitz, a municipality, a preference over Pacific Power, the court examined the Commission's comparison of the two applications to determine which was the "best adapted." The court held that the Commission was free to examine the economic consequences of the award of the license, but that its examination in this case was in error. The Commission had concluded that denying Pacific Power, the incumbent, the license would not only be disruptive but that Pacific Power would be more negatively affected by denial than Clark-Cowlitz, because Clark-Cowlitz has access to alternate sources of inexpensive power. This analysis, the court found, "would appear invariably to favor the *status quo* and (other things being equal) all but guarantee an award to the incumbent licensee where a competing state or municipal applicant has preferential access to subsidized power."⁸⁸ Moreover, energy needs and supply within the region would remain constant, the court noted, so that the Commission's decision as to a licensee would merely shift the benefits of the less expensive power among different groups of consumers. The court therefore determined that a remand of the case to the Commission on the issue of whether Pacific Power's higher alternative costs justify the award of the license was appropriate.⁸⁹ The petition for certiorari filed by Clark-Cowlitz was denied by the Supreme Court on February 29, 1988.⁹⁰

The recent D.C. Circuit *Merwin* decision may be of primarily historical interest, because the *Merwin* relicensing proceeding is the only competing relicensing now subject to the version of section 7 interpreted by the FERC and the court. The ECPA changes section 7 so that there is no preference in any future relicensing proceeding. Section 10 of the ECPA also provided special procedures for nine other relicensing proceedings in which competing municipi-

84. Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1080-81 (D.C. Cir. 1987).

85. *Id.* at 1092-1101.

86. *Id.* at 1081.

87. *Id.* at 1087-90.

88. *Id.* at 1074, 1091.

89. *Id.* at 1092.

90. Clark-Cowlitz Joint Operating Agency v. FERC, 108 S. Ct. 1088 (1988).

pal applicants had asserted preference.⁹¹ For these projects, but not Merwin, section 10 of the ECPA in essence provides for an election by the existing licensee of the old or new relicensing procedures, and then, if the new relicensing procedures are followed, gives the competing applicants the option of continuing to compete or of electing to withdraw their competing application and seek compensation from the existing licensee. The competing applicants must first attempt to negotiate a settlement of the compensation amount. If this is not achieved within a set period defined by the Commission, section 10 requires the Commission to determine the appropriate amount of compensation, applying criteria set forth in section 10 of the ECPA. None of the nine proceedings is going forward with competing applications; some have been settled, and some are being negotiated or are in the early stages of Commission determination.

The Commission's exemption regulations require that an applicant for an exemption possess all property interests necessary to develop and operate the project or an option to obtain those interests.⁹² In addition, the applicant must document its ownership or the application will be rejected as patently deficient, and the applicant will not be given an opportunity to cure this deficiency. In *Pankratz Lumber Co. v. FERC*,⁹³ the Ninth Circuit approved the Commission's denial of an exemption application based on the fact that the applicant did not possess sufficient property interest in the project.⁹⁴

Pankratz submitted a Memorandum of Agreement from the Washington Department of Natural Resources (WDNR) to document its ownership interest in its proposed project on Boulder Creek in Washington. Under Washington law, however, an agreement for a land exchange is not binding until after approval at a public hearing before the State Board of Natural Resources. At the time that Pankratz applied, none of these steps necessary to achieve the transfer had been completed. As a result, the Commission rejected the application.

Pankratz appealed to the circuit court, arguing that the Memorandum of Agreement was a promise to convey, and therefore, it constituted a valid option to purchase the property. The court disagreed, stating that even if the WDNR wanted to effectuate an immediate transfer, it lacked authority to do so under state law, because the transfer was subject to Board approval. "These conditions," the court said, "which were not within the discretion of either Pankratz or the Department, preclude any finding that the Memorandum was an unconditional grant of a property interest exercisable at the option of Pankratz."⁹⁵

Pankratz also argued that its submission fell into one of the *Tulalip*

91. The nine projects are: Mokelumne, California; Phoenix, California; Rock Creek/Cresta, California; Haas-Kings River, California; Poole, California; Olmsted, Utah; Weber, Utah; Rush Creek, California; and Shawano, Wisconsin. ECPA, Pub. L. No. 99-495, § 10(a), 100 Stat. 1252, 1253 (1986).

92. 18 C.F.R. § 4.31(b) (1988).

93. *Pankratz Lumber Co. v. FERC*, 824 F.2d 774 (9th Cir. 1987).

94. *Id.* at 779.

95. *Id.* at 778.

*Tribes v. FERC*⁹⁶ exceptions.⁹⁷ In *Tulalip Tribes*, the Ninth Circuit found that the FERC's exemption authority did not extend to the type of exemption for which Pankratz, and many other applicants, had applied. As a result, the FERC permitted applicants whose applications were accepted for filing on or before the date of the decision to convert their exemption applications to license applications.⁹⁸ In this case, however, the court ruled that none of the exceptions applied to Pankratz because his application had been denied as patently deficient prior to the *Tulalip* decision.⁹⁹

In *Monongahela Power Co. v. Marsh*,¹⁰⁰ the court held that a permit from the Secretary of the Army (through the Corps of Engineers) to discharge dredged or fill materials into navigable waters was required by section 404(a) of the Clean Water Act. There was no implied exception from or preemption of this requirement under the FPA for FERC-licensed projects.

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96. *Tulalip Tribes v. FERC*, 732 F.2d 1451 (9th Cir. 1984).

97. *Pankratz Lumber*, 824 F.2d at 779-80.

98. *Snowbird, Ltd.*, 28 F.E.R.C. ¶ 61,062, at 61,119-20 (1984).

99. *Pankratz Lumber*, 824 F.2d at 780.

100. *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.), cert. denied 108 S. Ct. 68 (1987).