120 FERC ¶ 61,267
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Erie Boulevard Hydropower, L.P. Project No. 2539-033

ORDER DENYING REHEARING

(Issued September 21, 2007)

1. Pending before us is a request for rehearing, filed by Adirondack Hydro Development Corporation (Adirondack), of our order approving a settlement and issuing a new license to Erie Boulevard Hydropower, L.P. (Erie Boulevard) for the 38.8-megawatt (MW) School Street Project No. 2539 (School Street Project). The project is located on the Mohawk River in Albany and Saratoga Counties, New York. For the reasons discussed below, we deny rehearing.

Background

2. A more detailed procedural history of the relicensing proceeding appears in our order issuing a new license for the School Street Project.[1] Briefly, Niagara Mohawk Power Company, Erie Boulevard's predecessor, filed applications for new licenses for the School Street Project and nine others in December 1991. Action on all ten of the applications was delayed to varying degrees, primarily as a result of the state's denial in 1992 of Clean Water Act certification for the projects, and the participants' subsequent appeals and negotiation of settlement agreements that ultimately led to the state's issuance of the required certifications.[2] The School Street Project was the last of the ten

[1] *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 2-7 (2007).

[2] Under section 401 of the Clean Water Act, 33 U.S.C. § 1341 (2000), the Commission may not issue a license for a hydroelectric project unless the license applicant has obtained certification from the state, or waiver thereof, that the project will comply with the state's water quality requirements.

for which a settlement was reached. While these matters were pending, Commission staff took what action it could to process the School Street relicense application, and completed its environmental review with issuance of a final environmental assessment in 2001. However, the Commission was unable to act on the application until after a settlement was reached and the state issued the required certification.

3. Adirondack entered the relicensing proceeding in 1997, when the Commission granted its motion for late intervention.[3] As described in the motion, Adirondack sought to intervene to protect its interests in operating the downstream New York State Dam Hydroelectric Project No. 7841.

4. As discussed in more detail in several previous orders, in 2004 Green Island Power Company (GIPA) began a series of actions designed to support its proposal to develop the Cohoes Falls Project, a new project that would inundate the School Street dam and require decommissioning of the School Street Project. In a separate proceeding, we denied GIPA's application, filed on July 19, 2004, for a preliminary permit for the Cohoes Falls Project on the grounds that it was barred by the Federal Power Act (FPA) and our regulations.[4] On September 7, 2004, GIPA filed a motion for late intervention in this relicensing proceeding, which the Secretary of the Commission denied for lack of good cause. We upheld the denial, finding that GIPA had failed to demonstrate any justification for seeking to intervene 13 years after the intervention deadline, its interest in competing for the project site was statutorily barred, and its participation would significantly delay and disrupt the proceeding.[5]

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[3] *See* Notice Granting Late Intervention (issued Aug. 19, 1997).

[4] *Green Island Power Co.*, 110 FERC ¶ 61,034 (2005), *reh'g denied*, 110 FERC ¶ 61,331 (2005). GIPA filed a petition for appellate review of these orders, but subsequently withdrew the appeal voluntarily. *Green Island Power Authority v. FERC*, No. 05-1170 (D.C. Cir., *dismissed* Dec. 14, 2005).

[5] The Secretary of the Commission denied GIPA's motion for late intervention by notice issued on June 28, 2006. GIPA sought rehearing of the denial, which we denied on November 16, 2006. *See Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 (2006); *see also Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,196 (2007) (order rejecting request for rehearing, motion for clarification, and request for reconsideration). Judicial review of these orders is pending. *Green Island Power Authority and Adirondack Hydro Development Corp. v. FERC*, No. 07-0138 (2d Cir. filed Jan. 12, 2007).

5. Erie Boulevard filed a comprehensive offer of settlement on March 9, 2005. The New York Department of Environmental Conservation (New York DEC) issued water quality certification for the project on October 10, 2006. We approved the settlement and issued a new license for the School Street Project on February 15, 2007.[6]

6. On March 15, 2007, Adirondack and GIPA jointly filed a request for rehearing of the relicensing order. On April 12, 2007, the Secretary of the Commission issued a notice rejecting the rehearing request as to GIPA on the grounds that GIPA is not a party to this proceeding, and only a party may seek rehearing.[7] No other parties sought rehearing. As a result, Adirondack's is the only request for rehearing that is now pending.

Adirondack's Interest in this Proceeding

7. Under section 313 of the FPA, any person aggrieved by a Commission order in a proceeding to which such person is a party may apply for rehearing with the Commission.[8] Similarly, any party aggrieved by a Commission order may obtain judicial review of the order in the U.S. Courts of Appeals. A party must first seek rehearing with the Commission before filing a petition for judicial review.

8. Almost without exception, Adirondack's arguments on rehearing allege errors that would affect GIPA's interests rather than its own. In the few instances where Adirondack complains of our rejection of its filings, the purpose of those filings was to advance GIPA's interest in developing the statutorily-barred Cohoes Falls Project. At no point in its rehearing request does Adirondack explain how its interests might be adversely affected by our issuance of a new license for the School Street Project.

9. As noted, Adirondack sought to intervene in this proceeding to protect its interests in operating the New York State Dam Project. In support of its motion, Adirondack stated that it was the managing general partner of New York State Dam Limited Partnership, licensee for the New York State Dam Project, which is located on the Mohawk River approximately one mile downstream from the School Street Project. Adirondack also stated that the School Street Project has a direct role in controlling flows in the Mohawk River, and that the Commission's decisions regarding the School Street Project could have an adverse impact on Adirondack's ability to operate the New York

[6] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 (2007).

[7] *Erie Boulevard Hydropower, L.P.*, 119 FERC ¶ 61,038 (2007).

[8] 16 U.S.C. § 825*l* (2000).

State Dam Project.[9] Adirondack made no further filings in the School Street relicensing proceeding related to its interests in the New York State Dam Project.[10]

10. Nothing in Adirondack's rehearing request concerns how the license we issued for the School Street Project could affect its interests in the New York State Dam Project. Instead, Adirondack's arguments on rehearing all seek to advance GIPA's interests in developing the Cohoes Falls Project. In short, it does not appear that Adirondack is aggrieved by our relicensing order within the meaning of section 313 of the FPA. Consequently, Adirondack may not seek rehearing or judicial review of that order.[11]

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[9] *See* Adirondack's motion to intervene out of time (filed Mar. 28, 1997).

[10] Adirondack Resource Management Associates, LLC (ARMA) filed comments on the draft EA in 1997, on behalf of the New York State Dam Limited Partnership (NYSDLP). ARMA did not specify what, if any, relationship it might have to Adirondack, but indicated that the New York State Dam Project No. 7481 was owned by the NYSDLP, and was operated by Adirondack, the general partner. NYSDLP's comments primarily concerned information on fish and fish passage from the draft EA for the New York State Dam Project. NYSDLP also expressed support for operating the School Street Project in a run-of-river mode, and operating two other upstream projects in a manner that would provide sufficient minimum flows for power generation and fish passage at the New York State Dam Project. As noted earlier, the new license for the School Street Project requires it to operate in a run-of-river mode, which is consistent with NYSDLP's comments. In any event, while NYSDLP remains the licensee of record for Project No. 7481, it is unclear whether Adirondack retains any current interest or involvement in the project. *See Black Hills Generation, Inc., et al.*, 104 FERC ¶ 62,098 (2003) (authorizing disposition of jurisdictional facilities under Part II of the FPA). *See also* Letter from Claude Audet, Boralex New York, Inc., to Commission Secretary (filed Dec. 19, 2003 (requesting that all communications concerning Adirondack and NYSDLP be addressed to Boralex New York, Inc., a subsidiary of Boralex Inc.); and Letter from Daniel McCarty, Boralex Operations Inc., to William Clarke, New York State Dept. of Environmental Conservation (filed Dec. 2, 2003) (filing of downstream passage report on behalf of NYSDLP by "Boralex Operations Inc. ('Boralex'), formerly Adirondack").

[11] *See Arizona Public Service Company*, 26 FERC ¶ 61,357 (1984), and section 313 of the FPA, 16 U.S.C. § 825*l* (2000). *See also City of Orrville, Ohio v. FERC*, 147 F.3d 979, 985-87 (D.C. Cir. 1979) (former permit holder's interest in developing and operating a hydroelectric project was insufficient to provide standing to challenge license amendment for existing hydroelectric project upstream). Even if Adirondack is found to be able to represent GIPA's interests, this would not establish its standing.

In any event, we have reviewed Adirondack's arguments on rehearing and have found them without merit.

Changes to the Relicense Application

11. Adirondack argues that the Commission erred in failing to issue public notice of key changes to the license application and to invite new interventions and the filing of competing applications, which Adirondack contends would have allowed GIPA not only to file a timely motion to intervene, but also to file a timely application for the Cohoes Falls Project. This argument is flawed, for several reasons.

12. Under section 4.35 of our regulations, when "material" amendments to license applications are filed, the filing date of the initial application is deemed to be the date the material amendment is filed for purposes of determining its timeliness, disposing of competing applications, and reissuing public notice of the application.[12] A material amendment is defined to mean any fundamental and significant change, including, among other things, a change in the installed capacity, or the number or location of any generating units of the proposed project, if the change would significantly modify the flow regime associated with the project.[13]

13. A different rule governs relicensing proceedings. For relicense applications, section 16.9(b)(3) of our regulations expressly states that the requirements of section 4.35 do not apply, except that the Commission will reissue a public notice of the application if a material amendment as described in section 4.35(f) is filed.[14] Thus, if a relicense application is materially amended, the only consequence is that the Commission will reissue a public notice in accordance with section 16.9(d)(1), to give notice of the application and of the dates for comment, intervention, and protests.[15] Contrary to Adirondack's arguments, there is no provision in these regulations that would trigger a new opportunity for the filing of competing applications by GIPA or others.

[12] *See* 18 C.F.R. § 4.35(c) (2007).

[13] *See* 18 C.F.R. § 4.35(f)(1)(i) (2007).

[14] 18 C.F.R. §16.9(b)(3) (2007).

[15] *See* 18 C.F.R. § 16.9(d)(9) (2007).

14. Moreover, section 4.35 specifically exempts, among other things, any corrections of deficiencies in the application, or any amendments made to satisfy the requests of resource agencies or concerns of the Commission.[16]

15. Adirondack argues that material amendments to the School Street license application were filed on December 13, 1995, by Niagara Mohawk; on May 30, 2001, by Erie Boulevard; and on March 11, 2005, by Erie Boulevard. Adirondack contends that, on each of these occasions, the Commission should have issued a public notice establishing dates for filing interventions and protests.

16. On December 13, 1995, Niagara Mohawk (Erie's predecessor) informed the Commission by letter that the new 21-MW turbine generating unit that it had originally proposed as part of its relicense application was no longer economically feasible. Niagara Mohawk therefore requested that the Commission consider, as an alternative in its environmental analysis, relicensing the School Street Project without the additional generating unit. The licensee also stated that, because it had proposed to minimize the effects of fish entrainment by routing incoming fish through the new turbine, this decision would materially affect its fish enhancement plan. The licensee therefore requested that the Commission delay its environmental review to allow additional time for consultation with resource agencies on downstream fish passage alternatives.[17] In the draft environmental assessment (EA) issued in November 1996, Commission staff analyzed both Niagara Mohawk's original proposal and a staff alternative that recommended omitting the new turbine and providing alternate means of downstream fish passage.

17. Adirondack contends that this correspondence was a material amendment, because it "represented a change in the installed capacity" and "would significantly modify the flow regime associated with the project," and that the Commission was therefore required to reissue public notice and invite comments and interventions.[18] We disagree. Niagara

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[16] *See* 18 C.F.R. §§ 4.35(e)(1) and (e)(4) (2007). Section 4.35(e)(4) refers to the pre-filing consultation requirements of section 4.38, which do not apply to relicensing proceedings. Section 16.8 governs pre-filing consultation for relicensing proceedings, and requires consultation with resource agencies and Indian tribes for proposed amendments that would be considered material under section 4.35. *See* 18 C.F.R. §16.8(a)(5)(i) (2007).

[17] *See* letter from Jerry L. Sabatis, Niagara Mohawk, to John Clements, FERC (filed Dec. 18, 1995).

[18] Adirondack's request for rehearing at 12.

Mohawk's letter did not amend the relicense application to withdraw the proposed generating unit. Instead, it informed the Commission that because economic conditions had changed, Niagara Mohawk no longer planned to build the unit and would need additional time to consult with resource agencies on alternative plans for downstream fish passage. Although the applicant informed the Commission that its plans had changed, it took no steps to alter the original application. By not requiring that a formal amendment application be filed, the Commission preserved the possibility of licensing the additional capacity if economic conditions improved. A license amendment was not required to reflect the licensee's intent to forego building an additional generating unit that was already included in its license application. In contrast, if the licensee had wanted to increase the number of proposed generating units at the site, it could not have done so without filing an amended application to reflect the increased capacity.

18. In any event, even if we were to assume that the licensee's correspondence could constitute an amendment to the relicense application, we are not convinced that the amendment was material in this case. We reach this conclusion because, while for some projects a change in the number of generating units might result in significantly changed flows, we find that, in the particular circumstances of this case, omitting the additional generating unit would not significantly affect the project's flow regime. The absence of the new turbine would result in a change in flows, because more water would spill over the dam whenever flows available for generation exceeded the capacity of the existing turbines. However, the project would still be required to operate in a run-of river mode, and to provide the same minimum flows in the bypassed reach. The requirement that downstream flow be approximately equal to inflow, including spillage, releases, and leakage, would not change. Similarly, the requirements to limit reservoir fluctuations to 0.5 feet and to provide aesthetic flows over the falls would not be affected by the presence or absence of the new turbine. We therefore conclude that, in this case, the decision to forego installing the proposed generating unit would not significantly affect the project's flow regime. Accordingly, even if we were to assume that the licensee's correspondence constituted an amendment to the relicense application, the Commission was not required to reissue public notice of the application.

19. Moreover, the circumstances surrounding the licensee's correspondence suggest that Commission staff reasonably concluded that it should not be treated as an amendment to the license application. The licensee sent its letter in response to the Commission's notice that the application was ready for environmental analysis. The purpose of the letter was to request additional time for consultation with resource agencies, because the new turbine was an integral part of the licensee's fish enhancement plan to minimize the effects of fish entrainment, and omitting it would require consideration of alternative measures for downstream fish passage. In addition, because actions concerning the project's water quality certification were still pending, the

potential for additional delay might mean that economic conditions could improve by the time a license could be issued. Therefore, Commission staff analyzed in the draft EA both the licensee's original proposal and the staff's recommended alternative to omit the new turbine, thus preserving the possibility that the Commission could later authorize the additional capacity if economic conditions would warrant.

20. Finally, because the draft EA analyzed both the applicant's initial proposal to install the new turbine and the staff's proposal to omit it, the EA process provided public notice of these options and an opportunity to comment on them.[19] Thus, the only consequence of not treating the proposed change as a material amendment is the failure to invite new motions to intervene. No third-party property rights were affected that would give rise to a need to invite new interventions. Adirondack's interests were not affected, because Adirondack was admitted as a party in 1997. Nor could the failure to invite new interventions have affected the interests of GIPA and others. As we observed in our order of November 16, 2006, GIPA and others specifically stated that they had no interest in the School Street relicensing proceeding until the proposal for the Cohoes Falls Project first appeared in 2004. Therefore, it is not possible to conclude that those entities could or would have taken advantage of an additional opportunity to intervene if the Commission had provided it some eight years earlier, in 1996.[20]

21. Adirondack next argues that the application was materially amended on May 30, 2001. On that date, Erie Boulevard informed the Commission by letter that, because of changed market conditions, the addition of a new generating unit would appear to be economically feasible, and requested that the Commission evaluate the merits of the new license application as originally filed.[21] In the final EA, Commission staff evaluated the new 21-MW turbine as part of Erie Boulevard's proposal and included it as part of staff's recommended alternative.

22. For the reasons already explained, we find that Erie's request that staff reevaluate installing the new turbine based on changed economic conditions was not a material

[19] The Commission published notice of availability of the draft EA on November 20, 1996, inviting comments within 45 days of the notice.

[20] *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 45 (2006).

[21] *See* Letter from William Madden, Attorney for Erie Boulevard, to David Boergers, FERC (filed May 30, 2001).

amendment of the relicense application.[22] Because the application was already on file and still included the licensee's original proposal to install the new turbine, there was no need to amend it in order to allow the Commission to reconsider the proposal. Moreover, as we have seen, the Commission's failure to reissue public notice and invite new interventions in 2001 could not have affected Adirondack's interests, because it was already a party to the proceeding, or those of GIPA and other entities, because their interest in the School Street relicensing proceeding did not arise until 2004.[23]

23. Adirondack further contends that the application was materially amended in March 2005, when Erie Boulevard filed its proposed settlement agreement. Adirondack argues that, by filing this proposal, Erie Boulevard effectively withdrew the relicense application filed in 1991 and replaced it with an entirely different proposal. Regardless of how the parties may have characterized their filing, we would not regard the filing of a proposed settlement agreement as resulting in a withdrawal of the underlying license application.[24] A settlement agreement supplements rather than supersedes the license application, and the Commission remains free to reject all or part of a settlement agreement in favor of the applicant's original proposal.

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[22] Adirondack regards as significant the fact that Interior referred to this change as an "un-noticed amendment." *See* letter from Judith Stolfo, Interior, to David Boergers, FERC (filed Nov. 9, 2001). This has no bearing on whether the amendment was material within the meaning of section 4.35(f).

[23] Adirondack contends that the Commission was required to reissue public notice of this change under 18 C.F.R. §§ 4.32(d)(2) and 4.35(c). Section 4.32(d)(2) simply provides for public notice of license applications as required under the FPA. Section 4.35(c) does not apply to relicensing proceedings, because, as we noted previously, section 16.9(b)(3) expressly exempts relicense applications from all parts of section 4.35 except the requirement to reissue public notice if a material amendment as described in section 4.35(f) is filed.

[24] Under our regulations, a license application is a type of "pleading." *See* 18 C.F.R. § 385.201 (2007). A participant may seek to withdraw a pleading by filing a notice of withdrawal. *See* 18 C.F.R. § 285.216(a) (2007). The withdrawal becomes effective only if no one objects and the Commission does not take action to disallow it in whole or in part. 18 C.F.R. § 385.216(b) (2007). In this proceeding, no party filed a notice of withdrawal with respect to the license application. If any party had sought to do so, the Commission would have disallowed it in view of the need to keep the underlying application on file.

24. Moreover, settlement agreements that are reached after consultation with resource agencies and include changes made in response to agency requests typically fall within one of the recognized exceptions to section 4.35. Thus, they are not considered or treated as material amendments procedurally, even if they propose changes that would otherwise be regarded as material.[25] The Commission routinely publishes notice of settlement agreements and invites comments on them. In appropriate cases, the Commission may also invite new motions to intervene if a settlement agreement could significantly affect interests in a manner not contemplated by the original application. However, there is no basis in section 4.35 for Adirondack's argument that the Commission was required to treat the settlement agreement as a material amendment of the relicense application, thereby reissuing public notice of the application and inviting new protests and interventions.[26]

25. Adirondack also maintains that Niagara Mohawk's 1995 letter proposing to omit the new unit, Erie Boulevard's 2001 letter proposing to reconsider installing it, and Erie Boulevard's 2005 settlement agreement were all untimely amendments to the license application and should have been rejected, because they were filed after the final amendment deadline of April 1, 1992.[27] In essence, Adirondack argues that, once the Commission established a final amendment deadline for the relicensing proceeding, Niagara Mohawk and Erie Boulevard were bound by it, and could not make any changes to the relicense application.

26. Because no one filed a competing application for the School Street Project, we fail to understand how Adirondack or any other entity could be aggrieved by any changes to the School Street relicense application that might be allowed after the final amendment deadline. In any event, under FPA section 15(c)(1), each application for a new license

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[25] *See* 18 C.F.R. § 4.35(e)(4) (2007).

[26] Adirondack argues that, if the Commission had treated the settlement agreement as a material amendment of the application and invited new interventions, GIPA's motion to intervene would have been timely, because it renewed its motion to intervene on April 13, 2005, in its comments on the settlement agreement. As explained above, the settlement agreement was not a material amendment as defined in section 4.35, because it falls within the exception provided in section 4.35(e)(4). Therefore, the Commission was not required to solicit new interventions.

[27] *See* Applications Filings, Establishing Relicensing Processing Deadlines and Establishing Date for Submission of Final Amendments, 57 Fed. Reg. 2525 (Jan. 22, 1992).

must be filed no later than 24 months before the expiration of the existing license.[28] Within 60 days after the statutory filing deadline, the Commission is required to issue a notice establishing its procedural schedule for relicensing and a deadline for submission of final amendments, if any, to the application.[29] These provisions were part of the amendments made to the FPA by the Electric Consumers Protection Act of 1986 (ECPA).[30] The relicensing provisions of ECPA were intended to foster competition by, among other things, eliminating municipal tie-breaker preference at relicensing, establishing requirements for notices of intent, public notice, and public information concerning projects undergoing relicensing, and requiring that all relicense applications and any competing applications be filed no later than two years before expiration of the existing license.[31]

27. In 1989, the Commission promulgated revised relicensing regulations to incorporate the ECPA amendments.[32] As the Commission observed in the preamble to those regulations, the legislative history of ECPA "indicates that the final amendment provision was intended to allow an applicant to address and resolve any problems or inadequacies in its application, and to revise its application in any way it felt necessary to make its application superior to a competitor's."[33] Thus, although the final amendment

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[28] 16 U.S.C. § 808(c)(1) (2000).

[29] *Id.*

[30] Pub. L. No. 99-495, 100 Stat. 1243 (Oct. 15, 1986).

[31] *See Pacific Gas & Electric Co.*, 98 FERC ¶ 61,032 at p. 61,093 (2002).

[32] Pub. L. No. 99-495, 100 Stat. 1243 (Oct. 15, 1986).

[33] *See* Hydroelectric Relicensing Regulations Under the Federal Power Act, Order No. 513, FERC Stats. & Regs., Regs. Preambles 1986-1990 ¶ 30,854 at p. 31,421 (1989). The importance of the final amendment deadline in competitive relicensing proceedings is illustrated by the provisions that the Commission made for relicense applications filed earlier than the 24-month filing deadline. The Commission stated that it would not begin processing relicense applications until after the final amendment deadline. However, to speed the processing of applications filed earlier, the Commission indicated that an applicant could waive the right to make a final amendment pursuant to FPA section 15(c)(1). The Commission further noted that, if a competing application were eventually filed for the project, the applicant's right to file a final amendment would be automatically reinstated without further order of the Commission. *Id.* at pp. 30,853-54.

deadline is important in competitive relicensing proceedings, it is of lesser significance in proceedings such as this one, in which no competing applications were filed for the project site. In either case, the Commission can waive the final amendment deadline to the extent necessary to reflect changes that have occurred since the application was filed.[34]

28. Adirondack's argument would preclude any changes to a relicense application after the final amendment deadline regardless of the circumstances, a result that would far exceed any discernible Congressional intent in crafting the ECPA amendments. As discussed above, we have found that the licensee's correspondence in this case regarding the changed economic circumstances that affected its plans to include the additional generating unit was not a material amendment of the relicense application. Consequently, we find no basis for determining that this change should be considered barred by the final amendment deadline. Nor do we think that the final amendment deadline should be read to bar the filing of settlement agreements in relicensing proceedings. As we have seen, settlement agreements supplement rather than supersede a relicense application. Moreover, acceptance of Adirondack's view would preclude any applicant from ever filing a proposed settlement agreement in a relicensing proceeding after the final amendment deadline. This would frustrate our policy of encouraging settlement agreements in hydroelectric licensing proceedings, and would not be in the public interest. We therefore reject Adirondack's argument.

29. Adirondack argues that this proceeding involves a different applicant from the originally-filed license application, but the application has never been updated to reflect that change. Adirondack correctly points out that, in 1999, the Commission approved Niagara Mohawk's transfer of the license for the School Street Project to Erie Boulevard.[35] As a result of that transfer, Erie Boulevard assumed the responsibilities of Niagara Mohawk under the license, and replaced Niagara Mohawk as the applicant in the pending relicensing proceeding. Because Erie Boulevard did not propose any

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[34] *See Great Northern Paper, Inc.*, 77 FERC ¶ 61,068 at p. 61,267-68 and n. 11 (1996) (non-competitive relicensing; waiver of final amendment deadline to reflect conversion of five hydromechanical turbines to hydroelectric turbine generators, which increased the electrical capacity but not the overall power capacity of the project). Even in a competitive relicensing, the final amendment deadline does not bar an otherwise proper transfer of an existing license and substitution of the relicense applicant. *See Niagara Mohawk Power Corporation*, 90 FERC ¶ 61,148 at p. 61,479 (2000).

[35] *Niagara Mohawk Power Corp.*, 88 FERC ¶ 62,082 (1999), *reh'g denied*, 90 FERC ¶ 61,148 (2000).

construction or changes in project operations in its transfer application, no amendments for license exhibits were required.[36] Similarly, no amendments to the license application were required at that time, because Erie Boulevard was not proposing to make any changes to the project or its operation.

30. Adirondack next suggests that, as a result of a merger and subsequent transactions and name changes, the identity of the licensee is unclear.[37] Adirondack's concern is misplaced. As we found in our order of November 16, 2006, the licensee has at all times kept the Commission informed of these matters, and Commission approval is not required for the sale or transfer of a licensee, as long as the licensee remains the same, and neither the license nor the project is transferred to another entity.[38]

31. Adirondack maintains that the application that Niagara Mohawk filed over 15 years ago is "clearly outdated" and should have been updated to reflect current information about Erie Boulevard's plans, capabilities, and financial information. In particular, Adirondack argues that the following exhibits should have been updated: Exhibit B, which is a statement of project operation and resource utilization; Exhibit D, which is a statement of costs and financing; Exhibit G, which is a map of the project; and Exhibit H, which is the information required of relicense applicants under sections 10(a)(2)(c) and 15(a) of the FPA.[39] In support, Adirondack offers nothing more than the passage of time and the Commission-approved transfer of the license to Erie Boulevard in 1999. Adirondack does not attempt to show why the information in these exhibits is

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[36] *See Niagara Mohawk Power Corp.*, 88 FERC at 61,481.

[37] In a section of its rehearing request (at 15-22) that asks, "*Who is the Licensee?*" Adirondack recites that, in 2002, the Commission authorized a merger under Part II of the FPA that included Erie Boulevard as one of the subsidiaries being merged from Orion Power Holdings, Inc., to Reliant Resources, Inc. *See Orion Power Holdings, Inc.*, 98 FERC ¶ 61,136 at 61,393 n.2 (2002). Adirondack adds that, in 2004, Erie Boulevard's limited and general partners were changed to Brascan Power New York Corporation and Brascan Power New York GP Corporation, respectively, and that subsequently, in 2006, Brascan Power Corporation changed its name to Brookfield Power Corporation. However, notwithstanding these changes in corporate ownership, Erie Boulevard remains the licensee, and has been at all times since the Commission approved the license transfer in 1999.

[38] *See Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at n.39 (2006).

[39] *See* 18 C.F.R. §§ 16.9(b)(2), 16.10(d), and 4.51(c), (e), and (h) (2007).

deficient. Adirondack asserts that section 4.35 of the Commission's regulations, and especially section 4.35(f)(2), requires applicants to update their exhibits when significant new information becomes available. As discussed at length above, however, section 4.35 does not apply to relicensing proceedings, and section 4.35(f)(2) simply sets forth the definition of material amendments to license applications.

32. Adirondack asserts that the Commission erred in not requiring that the license application be updated when changes occurred, with public notice and an opportunity to intervene. However, the Commission did provide notice and invite interventions in connection with the license transfer in 1999. Because Erie Boulevard was not proposing any significant changes to the relicensing proposal, there was no need to require that the exhibits be updated. Subsequent transactions involving the ownership of Erie Boulevard or the name of its corporate parent did not transfer the license or change the licensee.[40] The Commission provided public notice of the changes that Erie Boulevard proposed as a result of the settlement agreement, and invited public comments on them. We analyzed those changes in our relicensing decision, and based our decision on updated information on project economics. Thus, our relicensing decision was based on relevant and current information.

33. Finally, Adirondack questions Erie Boulevard's financial ability to meet its license commitments. However, Adirondack presents no basis for its concern. Erie Boulevard

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[40] Adirondack asserts that the Commission should have required more information about Brookfield, referring to it as the "real party in interest" or the "current licensee," and suggesting that its status as a Canadian corporation raises a question of compliance with section 8 of the FPA. *See* Adirondack's request for rehearing at 12, 73, and 75, respectively. As noted, Erie Boulevard is the licensee, and its status as a domestic corporation is not in dispute. Adirondack also complains that there has been no public disclosure of the partnership agreement for Erie Boulevard, and that Erie Boulevard "may" lack sufficient property rights in the project. *Id.* at 75. Ordering paragraph (G) of the new license makes it subject to Standard License Article 5, which requires the licensee to have or to acquire within five years from the date of issuance of the license all property rights necessary or appropriate for the construction, maintenance, and operation of the project. Thus, if Erie Boulevard is lacking any necessary property rights, this article requires it to obtain them. In that regard, we reject Adirondack's repeated attempts throughout its rehearing request to suggest that something might be amiss, without providing any showing of why the Commission should be required to inquire further. Comments must meet some minimum threshold of materiality before an agency's failure to consider them becomes of concern. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1977).

has operated the School Street Project for the past eight years, since the license transfer was approved. In our relicense order, we found that Erie Boulevard's compliance history and ability to comply with the new license were satisfactory. [41] Accordingly, we have no reason to question Erie Boulevard's financial capability to meet its license commitments.

Late Intervention by GIPA and Others

34. Adirondack argues that the Commission improperly denied GIPA's motion to intervene, as well as those of other interested entities. Adirondack is a party to this proceeding, and we do not understand how Adirondack can be aggrieved by our denial of intervention to GIPA and other entities. In any event, we denied rehearing of the notices denying late intervention to GIPA and others in our order of November 16, 2006, and Adirondack may not now seek rehearing of those notices.[42]

35. Under section 313 of the FPA, requests for rehearing by the Commission must be filed within 30 days. This deadline is statutory, and the Commission may not waive it.[43] The time to seek rehearing of the June 28, 2006 notices denying late intervention is now long past. We therefore reject Adirondack's current attempt to seek rehearing of those notices as untimely.

36. Adirondack takes issue with our statement in the relicense order that "[t]he intervenors do not oppose issuance of a new license."[44] Adirondack argues that this is incorrect, because it is a party and has expressed opposition to issuance of a new license on several occasions, including its request for relief under section 15(f) of the FPA, which we denied as moot.[45] Adirondack was admitted as a party in 1997, and did not oppose relicensing in its motion for late intervention. Moreover, Adirondack did not indicate any opposition to relicensing the School Street Project until mid-2006, when it joined GIPA's efforts to promote development of the statutorily barred Cohoes Falls

[41] *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 98.

[42] *See Erie Boulevard Hydropower, L.P.*, 117 FERC 61,189 at P 29-46 (2006).

[43] *See Sierra Ass'n for Environment v. FERC*, 791 F.2d 1403, 1406 (9th Cir. 1986).

[44] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 3 (2007).

[45] *Id.* at n.11.

Project.[46] As discussed in our previous orders, we have rejected those efforts. Thus, Adirondack did not oppose relicensing of the School Street Project except in the context of seeking to support the Cohoes Falls Project. To the extent that it may be necessary, we clarify that Adirondack, an intervenor in the School Street relicensing proceeding, has sought to use its party status to promote GIPA's interest in developing the Cohoes Falls Project.

Relicensing Under the FPA

37. Adirondack argues that the Commission is required to license only the best-adapted project under the FPA, and that the record does not support a finding that the School Street Project as licensed is the best adapted. In essence, Adirondack argues that the School Street Project cannot be best adapted, because the Commission failed to consider "evidence of a reasonable, non-speculative alternative."[47] As a result, Adirondack contends that the licensing order is premised on a deficient record and should be rescinded.

38. We have already denied Adirondack's request for rehearing of our decision that the Cohoes Falls Project is legally barred, and need not be considered as an alternative in the School Street relicensing proceeding.[48] Therefore, Adirondack may not use the occasion of our issuance of a new license for the School Street Project as an opportunity to reargue those matters. However, because Adirondack's arguments challenge the validity of the license and the record on which it is based, we will discuss them here to ensure that our reasoning is clear.

39. The "best-adapted" language derives from the licensing requirements of FPA sections 4(e), 10(a)(1) and 15(a)(2). These sections require that a licensed hydroelectric project be best adapted to a comprehensive plan for improving or developing a waterway based on a balancing of a full range of public interest factors, and reflecting equal consideration of developmental and environmental values.

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[46] As far as we can determine, Adirondack's first pleading in support of the Cohoes Falls Project was its participation in the May 15, 2006 alternative offer of settlement, which the Commission rejected by notice issued on May 24, 2006. We subsequently denied rehearing of the rejection. *See Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 (2006).

[47] Adirondack's request for rehearing at 30.

[48] *See Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 (2006).

40. Section 4(e) authorizes the Commission to issue licenses for hydropower project works, and requires a finding that "the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce."[49] It further provides that "the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."[50]

41. Section 10(a)(1) similarly requires a balancing of a full range of public interest considerations. It requires:[51]

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e) if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

42. Section 15(a)(2), which specifically applies to relicensing, uses the same standard, providing that: "Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest."[52] Thus, both sections 10(a)(1) and 15(a)(2) require that the project be best adapted to a comprehensive plan for developing the waterway in the public interest. We assess a project's compliance with this standard in our

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[49] 16 U.S.C. § 797(e) (2000).

[50] *Id.*

[51] 16 U.S.C. § 803(a)(1) (2000).

[52] 16 U.S.C. § 808(a)(2) (2000).

comprehensive development analysis as part of our environmental review and licensing decision.[53]

43. Adirondack takes issue with our finding that the School Street Project as licensed in our order and consistent with the settlement agreement meets this standard, asserting that we have not justified this conclusion. The short answer is that our finding is supported by the entire record of the proceeding, the draft and final environmental assessments, the settlement agreement, and our findings and analysis of the issues in the relicense order. The comprehensive development standard requires us to use our judgment to determine the best balance of developmental and environmental resources, and to ensure that the project as licensed reflects consideration of all aspects of the public interest. This we have done. In doing so, we have evaluated alternative proposals for project operation, increased power generation, compliance monitoring, fish passage facilities, aesthetic flows to protect the scenic and cultural values of Cohoes Falls, minimum flows to protect fishery resources in the bypassed reach, and recreational and cultural resource measures.[54]

44. In essence, Adirondack maintains that the School Street Project cannot be best adapted to a comprehensive plan because the Commission failed to consider the Cohoes Falls Project as an alternative. However, the Cohoes Falls Project is not before us, and cannot be considered a reasonable alternative in this relicensing proceeding. Therefore, our task is to determine whether the School Street Project is best adapted based on the

[53] The "comprehensive plan" to which a project must be "best adapted" is not prepared in the abstract, but rather is based on a comprehensive analysis of all issues relevant to the public interest for the water system where the proposed project is to be located. *See City of Fort Smith, Arkansas*, 44 FERC ¶ 61,160 at p. 61,510 (1988), *aff'd sub nom. National Wildlife Federation v. FERC*, 912 F.2d 1417, 1475 (D.C. Cir. 1990).

[54] Adirondack argues that we did not make a public interest determination under sections 4(e) and 15(a) of the FPA. As discussed above, the public interest standard is inherent in the balancing required for determining whether a project meets the comprehensive development standard. Our findings throughout the license order reflect this consideration. *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at n.11 and P 70, 109-113 (2007).

information in the record, rather than with reference to some hypothetical and speculative alternative that the FPA has barred from consideration.[55]

45. The language and structure of section 15 of the FPA make it clear that, although some relicensing proceedings may be competitive, others may not be. As noted, section 15(a)(2) provides that any new license issued under that section "shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest."[56] It also sets forth, in subsections (A) through (G), various factors that the Commission must consider in all relicensing proceedings, in addition to the requirements of FPA section 10, "regardless of whether or not there is more than one applicant."[57] They are: the applicant's plans and capabilities; safe management, operation, and maintenance of the project; need for power and conservation efforts; transmission services; and cost effectiveness of plans. Section 15(a)(3) sets forth two additional factors that the Commission must consider when the applicant is an existing licensee.[58] They are: the licensee's record of compliance with the terms and conditions of the existing license; and actions the licensee has taken which affect the

[55] Adirondack maintains that the Commission selectively applies its rules to reject evidence in support of the Cohoes Falls proposal, thus creating a record that would support the School Street Project as the only remaining alternative. Adirondack's request for rehearing at 43. This is incorrect. As explained throughout this order, we rejected evidence in support of the Cohoes Falls proposal because the FPA precludes us from considering it in this relicensing proceeding, and we did not consider the proposal as an alternative because we found that it is not reasonable under either the FPA or NEPA. Adirondack further maintains that our rejection of the Cohoes Falls proposal is arbitrary and capricious, in violation of the Administrative Procedure Act. Adirondack's request for rehearing at 44. This is also incorrect. We offered a reasoned explanation for our decision to reject the Cohoes Falls proposal. *See Motor Vehicle Mfrs. Assn. v. State Farm Mutual*, 463 U.S. 29, 43 (1983).

[56] 16 U.S.C. § 808(c)(2) (2000).

[57] *Id.* at § 808(a)(2)(A) through (G). *See also* section 10(a)(2)(C) of the FPA, which requires the Commission to consider the applicant's electricity consumption improvement program, including conservation efforts. *Id*. at § 803(a)(2)(C) (2007). We considered these factors in the license order. *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 95-103 (2007).

[58] 16 U.S.C. § 808(a)(3). We considered these factors in the license order. *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 98, 104 (2007).

public. Thus, section 15 recognizes that some relicensing proceedings may have more than one applicant, and others may not. In either case, however, the licensing standard is the same; the project must be "best adapted to serve the public interest," as provided in section 15(a)(2).

46. In proceedings where there is only one license applicant, the Commission considers the factors set forth in section 15, in addition to those set forth in section 10, to determine whether the project is best adapted to serve the public interest. In competitive relicensing proceedings, the Commission can choose which project is best adapted. In either case, as noted earlier, section 10 allows the Commission to require changes to any applicant's proposal to ensure that the project will be best adapted to a comprehensive plan for developing the waterway. Thus, it is simply incorrect to assert that the Commission must compare the School Street Project to some hypothetical alternative in order to determine that it is the best adapted project.

47. Moreover, section 15(c)(1) expressly provides that "[e]ach application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license."[59] Thus, any competing applications must be filed very early in the relicensing process, well before the existing application is scheduled to expire. It would contravene this statutory framework to allow late-filed competing applications, or to require the Commission and the parties to expend time and effort evaluating the merits of late-filed proposals or considering them as an alternative to a timely-filed relicensing application. We therefore reject Adirondack's contention that the FPA requires us to consider the Cohoes Falls Project as an alternative in this relicensing proceeding.

48. We agree that there may be alternative means of meeting resource objectives or of balancing competing resources in this proceeding. For this reason, we have considered various alternative measures in our environmental analysis and in our license order. To the extent that there are issues in contention regarding those resources, we consider them throughout this order. However, we do so in the context of determining whether the School Street Project is best adapted to a comprehensive plan for developing the Mohawk River, rather than in comparison with the statutorily barred Cohoes Falls Project, which is not and cannot be before us in this proceeding.[60]

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[59] 16 U.S.C. § 808(c)(1) (2000).

[60] Adirondack reiterates its argument that *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir 1965); and *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956) require us to consider the Cohoes Falls Project as an alternative to the School (continued)

49. For example, Adirondack claims that the Cohoes Falls Project demonstrates that 100 MW of electric power can be generated from the relevant stretch of the Mohawk River, in contrast to the 38.8 MW that the School Street Project produces, or the 49.8 MW that the School Street Project will produce if the additional turbine is installed. Adirondack further claims that the Cohoes Falls Project can achieve this level of generation "without draining the historic Cohoes Falls for the vast majority of the year" or allowing significant seasonal variation in dissolved oxygen levels and periods of low dissolved oxygen, as Adirondack asserts that the School Street Project would do.[61] Without examining the Cohoes Falls Project in detail, which we concluded would significantly delay the proceeding and contravene the statutory framework for relicensing under the FPA, we would have no way of knowing whether Adirondack's claims have any merit. Instead, as discussed in more detail later in this order, we considered whether the School Street Project is appropriately sized, and found that it makes appropriate use of the available water resources. Similarly, we considered a range of alternatives for aesthetic flows to protect the religious and cultural values of Cohoes Falls, minimum flows to protect fishery resources in the bypassed reach, and measures to improve dissolved oxygen levels. In short, we analyzed the full range of public interest factors that must be considered in determining whether the School Street Project should be licensed, and nothing more is required under sections 10 and 15 of the FPA.

Alternatives Under NEPA

50. Adirondack argues that we were required to consider the Cohoes Falls Project as an alternative to the School Street Project under the National Environmental Policy Act (NEPA). Adirondack takes issue with our conclusion that, because the Cohoes Falls proposal is legally barred from consideration under the FPA, it is not a reasonable alternative under NEPA. Adirondack maintains that "NEPA imposes an additional, separate obligation on the Commission to consider alternatives to a project being considered for licensing."[62]

Street Project under section 10(a)(1) of the FPA. We denied rehearing of this argument in our order issued on November 16, 2006, and Adirondack may not raise it again now. *See Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 47-58 (2006).

[61] Adirondack's request for rehearing at 36.

[62] *Id.* at 39.

51. A federal agency must consider a full range of reasonable alternatives when it prepares an environmental impact statement under section 102(2)(C) of NEPA.[63] However, an environmental assessment need not include a discussion of alternatives unless section 102(2)(E) of NEPA is applicable.[64] That section requires that a federal agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[65] Because the proposed action involves relicensing an existing project in accordance with a settlement agreement, it does not appear that there are any such unresolved conflicts in this case.[66]

52. In any event, a discussion of alternatives need not be exhaustive and need only provide sufficient information to permit a reasoned choice of alternatives.[67] Furthermore, the range of alternatives that must reasonably be considered decreases as the environmental impact of the proposed action becomes less substantial.[68] Thus, an agency's finding of no significant impact permits the agency to consider a narrower range of alternatives than it might be obligated to assess before undertaking an action that would significantly affect the environment.[69]

53. In this case, the EA examined a range of reasonable alternatives that included the applicant's proposal, the applicant's proposal with staff's recommended measures, and the no action alternative. The EA also examined a range of alternative measures for minimum flows, aesthetic flows over the falls, fish passage facilities, and additional generation. The Commission also considered further alternative measures as proposed in

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[63] 42 U.S.C. § 4332(C) (2000).

[64] *See* 40 C.F.R. §1508.9(b) (2007).

[65] 42 U.S.C. § 4332(E) (2000).

[66] The only possible unresolved conflicts in this case are those which Adirondack seeks to introduce by its continued support for the legally-barred Cohoes Falls proposal.

[67] *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836-37 (D.C. Cir. 1972).

[68] *See Olmstead Citizens for a Better Community v. United States*, 793 F.2d 201, 208 (8th Cir. 1986).

[69] *See City of New York v. U.S. Dept. of Transportation*, 715 F.2d 732, 744 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

the settlement agreement. Given that the impact of the proposed action is not significant, this was a sufficient range of alternatives on which to base our decision.[70]

54. Adirondack argues that NEPA requires us to examine the Cohoes Falls proposal as an alternative notwithstanding that it is statutorily barred, relying on the principle that an agency may not ignore reasonable alternatives that are beyond its jurisdiction to require. Adirondack's argument is misplaced. NEPA requires a discussion of *reasonable* alternatives, and alternatives that are beyond an agency's jurisdiction need not be examined unless they are otherwise reasonable.[71] Alternatives that are remote and speculative need not be considered. In this case, the Cohoes Falls project could not be licensed without first passing legislation to amend the FPA relicensing procedures that Congress established in 1982. We therefore conclude that NEPA does not require us to consider an alternative that is not only beyond our licensing authority, but is currently beyond the authority of any entity, public or private, to accomplish.

55. Adirondack maintains that the assumptions underlying the alternatives that were considered in the EA are no longer accurate. Specifically, Adirondack takes issue with the EA's rejection of the alternatives of issuing a non-power license or decommissioning the project, maintaining that the existence of the Cohoes Falls proposal has rendered these options reasonable. We disagree. As we have seen, the Cohoes Falls proposal is not a reasonable alternative under NEPA. Therefore, there is no basis for reexamining the EA's treatment of the non-power license and project retirement alternatives.

56. Adirondack argues that the information proffered on the Cohoes Falls proposal required the Commission to prepare a supplement to the EA. We disagree. NEPA does not address supplementation, and implementing regulations of the Council on Environmental Quality (CEQ) do so only in connection with an EIS. Among other things, they provide that an EIS must be supplemented if an agency "makes substantial changes in the proposed action that are relevant to environmental concerns," or there are "significant new circumstances or information relevant to environmental concerns and

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[70] *See Richard Balagur*, 57 FERC ¶ 61,315 at p. 62,018 (1991), *aff'd sub nom. Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549 (2d Cir. 1992) (finding options of no action and license denial to constitute sufficient range of alternatives).

[71] As the court stated in *NRDC v. Morton*, *supra*, "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research – and time – available to meet the Nation's needs are not infinite." 458 F.2d at 836-37.

bearing on the proposed action or its impacts."[72] Like an EIS, an EA must be supplemented if there have been significant changes to the proposed action or its impacts.[73] However, supplemental documentation is only required when the environmental impacts reach the threshold of significance.[74] Therefore, an agency must initially examine the environmental impacts of proposed changes or new information and determine whether they are significant. If the analysis and conclusions of the EA and finding of no significant impact remain valid, a supplement need not be prepared.[75]

57. In this case, as we have seen, the Cohoes Falls proposal is statutorily barred under the FPA, and is not a reasonable alternative under NEPA. Therefore, the proffered information concerning this proposal is neither relevant nor significant, and would not affect the validity of the analysis and conclusions of the EA.

58. Adirondack argues that the Commission violated NEPA by improperly including new environmental analysis of the settlement agreement in its license order, with no public notice or opportunity for comment. Adirondack maintains that, if a supplemental NEPA document is required, the NEPA process must be followed.[76] However, agencies may use non-NEPA procedures to evaluate the significance of new information or changed circumstances when determining whether a supplemental EA or EIS is required.[77] In this case, the changes in the proposed action attributable to the settlement agreement are minor and within the range of alternatives examined in the draft and final

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[72] *See* 40 C.F.R. §§ 1502.9(c)(1)(i) and (ii), respectively.

[73] *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998), *citing Price Road Neighborhood Ass'n v. United States*, 113 F.3d 1505, 1509 (9th Cir. 1997).

[74] *Price Road Neighborhood Ass'n*, 113 F.3d at 1509.

[75] *Id.* at 1509-10.

[76] In support, Adirondack cites *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000) (agency may not correct deficiencies in an EA or EIS by means of a supplemental information report or other non-NEPA procedure). This case involved information that the Forest Service should have included in its original NEPA documents. The decision acknowledges that agencies may use non-NEPA procedures to evaluate the significance of new information or changed circumstances. *Id.* at 566.

[77] *See Price Road Neighborhood Ass'n*, 113 F.3d at 1510; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 383-85 (1989).

EA. Both the settlement agreement and the proposed action as examined in the final EA include similar provisions for run-of-river operation, monitoring of flows and reservoir elevations, aquatic habitat enhancement, downstream fish passage, a fish passage effectiveness study, seasonal aesthetic flows over the falls of 500 cfs, reservoir fluctuations of not more than 0.5 feet, and recreational improvements. The main differences are in the provisions for minimum flows in the bypassed reach and the addition of a new 11-MW turbine. However, the environmental effects of these differences are within the range of effects already examined in the EA, and thus would not affect staff's finding of no significant impact. As a result, it was permissible for the Commission to include its supplemental analysis of the settlement provisions in the license order.

59. The final EA examined a range of minimum flow alternatives for the bypassed reach between 60 cubic feet per second (cfs) (the applicant's original proposal) and 1,500 cfs (the highest flow recommended by Interior and the New York DEC under section 10(j) of the FPA).[78] The settlement agreement provides for seasonal minimum flows of 120, 135, and 245 cfs at different times of the year. Thus, these minimum flows are encompassed within the range of flow alternatives already analyzed in the final EA. Similarly, the settlement agreement provides for the addition of a new, 11-MW turbine. Staff had already examined the applicant's proposal to install a new 21-MW turbine in the draft and final EA. Therefore, the environmental impacts of installing the new, smaller turbine are within the range of impacts that staff had already analyzed in those documents. Consequently, the settlement agreement did not significantly amend the proposed action, and a supplemental EA was not required.

60. The Commission published notice of the proposed settlement agreement and provided an opportunity for public comment. The Commission also included in its license order new information and analysis concerning specific aspects of the measures in the settlement agreement that were either not directly assessed in the final EA or were modified from earlier-filed measures. The Commission also provided updated cost information for the project as licensed in accordance with the settlement agreement. As a result, interested parties and members of the public have had ample opportunity to review and comment on the provisions of the settlement. Because the settlement agreement did not significantly change the proposed action or its environmental impacts, nothing further is required under NEPA or the FPA.

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[78] Interior and the New York DEC recommended either a minimum flow of 1,500 cfs or a minimum flow of 300 to 500 cfs in combination with habitat enhancements to restore the bypassed reach. *See* final EA at 32.

New Turbine Generator

61. Adirondack argues that the Commission may not base its licensing decision on the expected effects of the new turbine, when the decision of whether to install it is entirely up to the applicant, and Commission staff had concluded in the final EA that the incremental cost of power from the new 21-MW turbine would exceed the value of that power. Adirondack points out that, under the terms of the license, Erie Boulevard would have the option of building the new 11-MW turbine, but would not be obligated to do so. Adirondack therefore maintains that the Commission may not assume construction of the new unit in making its comprehensive development determination or in concluding that the project will adequately use the waters of the Mohawk River.

62. The Commission did not assume that the new 11-MW turbine unit would be constructed. Rather, we concluded that, consistent with the settlement agreement, the licensee should be given the opportunity to pursue the project expansion. To that end, we included a condition in Article 301 authorizing Erie Boulevard to start construction of the new powerhouse or powerhouse addition to the existing powerhouse within two years of license issuance and, if the licensee elects to construct these facilities, requiring the licensee to complete construction within five years of license issuance. If the licensee does not commence construction within two years of license issuance, the authorization expires. Article 302 requires the licensee to provide copies of its construction plans and specifications at least 60 days prior to the start of construction, and provides that the licensee may not begin construction until the Commission's Regional Engineer has approved the plans and specifications.[79]

[79] In that regard, Adirondack's characterization of Article 301 as "allow[ing] Erie Boulevard up to five years to build anything at all" is simply incorrect. *See* Adirondack's request for rehearing at 50 n. 34. Moreover, we find nothing inconsistent between the Commission's requirement that construction of the new powerhouse or powerhouse addition must commence within two years of license issuance, and the New York DEC's requirement (in Appendix A to the license) that the licensee submit its comprehensive bedrock excavation and sediment removal plan for the power canal within one year of license issuance. *See* Adirondack's request for rehearing at 50 n. 54. Although Adirondack raises concerns about the structural integrity of the canal, these concerns are mostly conjecture, and appear to be based on nothing more than the age of the structure. *See* Adirondack's request for rehearing at 82-83. As noted in the license order, The School Street Project structures were inspected in June of 2005, and no structural deficiencies were identified. *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 75. Finally, although Adirondack claims in its specifications of error and statement of issues that the Commission failed to consider the need to "mitigate combined sewer

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63. Although Adirondack takes issue with this approach, in reality it does not differ significantly from the typical license provisions for construction of new projects. A Commission license authorizes the licensee to construct, maintain, and operate licensed project works. Under section 13 of the FPA, a licensee must commence construction of project works within the time fixed in the license, which shall not be more than two years from the date of license issuance.[80] The time for commencement of construction may be extended once, but not longer than two additional years.[81] If the licensee does not commence construction of the project works, or any specified part thereof, within the time prescribed in the license or as extended, section 13 requires the Commission to terminate the license.[82] The statutory deadline applies only to the first unit built, and not to subsequent units, whether authorized in the original license or in amendments.[83] Thus, although section 13 would not apply to construction of the new powerhouse or powerhouse addition, Article 301 of the license achieves a similar purpose by requiring that the licensee commence construction within two years and providing that, if the licensee does not do so, the authorization expires without the need for further Commission action.

64. In considering whether to issue a new license for the School Street Project, we considered a number of public interest factors, including the economic benefit of project power, both with and without the proposal to increase generation at the project, consistent with the settlement agreement. We found that both options were economically beneficial, although the proposal to increase generation would result in a reduced annual net benefit.

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overflows," this issue is not briefed and is therefore waived. *See* Adirondack's request for rehearing at 4, 8 (item 29).

[80] *See* 16 U.S.C. § 806 (2000).

[81] *Id.*

[82] *Id.* Although termination is mandatory, it is not automatic; section 13 expressly requires that the Commission issue a written decision after due notice is given. *See Idaho Power Company*, 38 FERC ¶ 61,126 at p. 61,326 (1987).

[83] *See Gas & Elec. Dept. of the City of Holyoke, Mass. v. FERC*, 629 F.2d 197, 204 (1st Cir. 1980).

We concluded that it is the applicant's responsibility to decide whether to add new capacity and to accept the license and any financial risk that entails.[84]

65. We also considered the project's maximum hydraulic capacity, both with and without the new turbine, and found that under either option, the School Street Project is properly sized to make adequate use of the available water resources of the Mohawk River.[85] In short, we considered both the existing project and the proposal to increase generation at the project in determining that the project as licensed, consistent with the settlement agreement and staff's modifications as discussed in the license order, is best adapted to a comprehensive plan for developing the Mohawk River.[86]

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[84] *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 105-108 (2007). In that regard, Adirondack erroneously asserts that Commission staff's analysis expressed the opinion that the proposed addition was unlikely, citing in support the final EA at 72. *See* Adirondack's request for rehearing at 50. In fact, staff expressed no opinion about whether the proposed expansion would be built, but included the increased capacity in staff's recommended alternative as presenting the best balance of environmental benefits and annual costs. In addition, staff found that although the incremental cost of the additional capacity would exceed its current value, the project would still have positive net annual economic benefits. *See* final EA at 65 (Table 9) and 72.

[85] *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 . at P 72, 77, 110. We noted that the capacity of a run-of river project is typically designed to correspond to average annual flows on the duration curve ranging between 15 and 30 percent exceedance, and found that flows exceed the hydraulic capacity of the existing project about 31 percent of the time annually, and would exceed the hydraulic capacity of the expanded project about 21 percent of the time annually. *Id.* at P 110. Adirondack maintains that, even assuming that the new unit will be installed, the rated capacity of the School Street Project would be "only 49 MW—i.e., less than half of the capacity that GIPA and Adirondack have demonstrated this stretch of the Mohawk River could generate." Adirondack's request for rehearing at 53. Although GIPA and Adirondack sought to introduce information concerning their proposal to decommission the School Street Project and replace it with the 100-MW Cohoes Falls Project, we rejected this information for the reasons explained in our November 16, 2006 order. *See Erie Boulevard Hydropower L.P.*, 117 FERC ¶ 61,189 (2006). Therefore, this information is not properly before us, and its validity has never been tested.

[86] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 109-113.

66. Thus, although we made reference in our order to the 49.8 MW of electric energy that the expanded project would generate, the entire discussion makes clear that our comprehensive development finding was not premised on the licensee's construction of the new turbine, but also took into account the possibility that the licensee might choose not to do so. To the extent that any further clarification of this might be needed, we so clarify.

67. Adirondack maintains that the Commission ignored the effects of the proposed new turbine when conducting its environmental, public health, safety, and other analyses. This is not the case. As discussed in the license order, we found that the effects of installing the new 11-MW turbine would be less than those for the larger 21-MW turbine already analyzed in the final EA. We noted that the new turbine would likely provide considerable improvement to fish passage success over the 21-MW turbine, and observed that, in accordance with the settlement, the new unit would not be operated until after completion of the initial effectiveness testing of the downstream fishway, so that the effectiveness of the new turbine could be studied and compared to the effectiveness of the Phase I fishway. Preference would then be given to whichever means of downstream passage proved more effective.[87] We also addressed comments raising water quality concerns about the effects of the new turbine, and noted, among other things, that installation of the new turbine would require excavation of 30 to 40 percent less material from the power canal than what would have been necessary for the originally-proposed larger powerhouse addition.[88] In short, there is no basis for Adirondack's assertion that we failed to consider the possible effects of constructing and operating the new turbine.

Project's Effects on Fish

68. Adirondack maintains that the license order does not adequately address the School Street Project's "fish kills."[89] Adirondack asserts that the School Street Project has an estimated entrainment mortality rate of 20 to 30 percent for blueback herring, and that all other hydroelectric plants on the Mohawk River are estimated to have a mortality rate of 5 percent or less. Adirondack then complains that the license order "does not include any reliable quantitative estimate of the effects of the license conditions on fish mortality," and asserts that the fish protection measures proposed in the settlement are unlikely to succeed. Adirondack concludes that these measures may reduce the mortality

[87] *Id.* at P 55-57.

[88] *Id.* at P 59-60.

[89] Adirondack's request for rehearing at 54.

rate to 10 to 20 percent, "but the School Street Project will still kill extremely large numbers of blueback herring and American eel."[90]

69. In making this argument, Adirondack ignores or distorts pertinent information in the record. As discussed in the EA, the existing project has no downstream fish passage facilities.[91] The 5 percent mortality rate Adirondack cites for other projects on the Mohawk River is based on an assumed 95 percent survival through existing fish passage facilities and pertains only to outmigrating juvenile blueback herring.[92] For outmigrating adults, the mortality rate is estimated at between 20 and 30 percent at some Mohawk River projects.[93] The EA examined passage through the originally-proposed 21-MW Kaplan turbine. As discussed in the license order, if constructed, the new 11-MW "fish friendly" turbine should provide considerable improvement to fish passage success, as studies of a scaled-down version of the turbine yielded survival rates of over 98 percent for American eel, and 94 percent or higher for other fish species up to 200 millimeters in length.[94]

70. Moreover, Interior and Commerce have prescribed downstream fish passage facilities for the project that are consistent with the settlement agreement.[95] As discussed above, the settlement agreement requires the licensee to install and test the effectiveness of the Phase I fishway facilities before operating and testing the effectiveness of the new 11-MW turbine, if the licensee decides to construct the new unit. The new unit would not be used as the primary means of fish passage unless it proved to be more effective than

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[90] *Id.* at 55.

[91] Final EA at 34.

[92] *Id.* at 35-36.

[93] *Id.* at 37.

[94] *Erie Boulevard Hydropower L.P.*, 118 FERC ¶ 61,101 at P 57 (2007).

[95] *Id.* at P 29-30. It is worthy of note that the two federal agencies with fishery responsibilities, as well as the relevant state agencies, are party to the settlement and thus appear comfortable with the project's impacts on fishery resources. It is only Adirondack, an entity with no demonstrated interest whatsoever in aquatic issues, that raises the subject.

the Phase I fishway.[96] Thus, the new license adequately provides for downstream fish passage and protection of blueback herring and American eel from entrainment mortality.

Aquatic Habitat Flows

71. Adirondack argues that the habitat flows required by the license are unsupported by the record or by any independent Commission analysis. Adirondack maintains that there is no new information to substantiate the flow levels arrived at in the settlement. Adirondack further criticizes those flow levels as different from and in many instances lower than the flows recommended in the final EA, which Adirondack also contends are inadequate. In essence, Adirondack contends that the habitat flows are supported by nothing more than the fact that they were agreed to by the entities that chose to sign the settlement agreement.

72. Adirondack overlooks or mischaracterizes the information and analysis in the license order, as well as the underlying analysis in the final EA. As discussed above, the EA examined a range of minimum flow alternatives for the bypassed reach between 60 cfs and 1,500 cfs.[97] Based on review of the instream flow study, Commission staff recommended a minimum flow of 200 cfs, with an adaptive management plan to study minimum flow releases of 200 and 300 cfs.[98]

73. The settlement agreement provided for the release of interim and permanent instream flows to the bypassed reach. During the first 18 months after license issuance, Erie Boulevard would release an interim instream flow of 90 cfs into the bypassed reach from a canal gate near the upper gatehouse at the south end of the dam. Thereafter, Erie Boulevard would maintain permanent instream flow releases into the bypassed reach from the north and south ends of the dam. The permanent instream flow releases would vary by season. During the winter season (from December 1 through March 31), Erie Boulevard would release 90 cfs and 30 cfs, respectively, from the south and north release locations, for a total wintertime flow of 120 cfs. Beginning in April, Erie Boulevard would increase flows at the north release location by 15 cfs, resulting in a total flow release of 135 cfs. For the remainder of the year (from April 15 through November 30, the primary period for fish spawning and rearing), Erie Boulevard would increase flows by 110 cfs at the south release location for a total flow of 245 cfs. Thus, the seasonal

[96] *Id.* at P 55-57.

[97] *See* P 59 of this order, *supra*.

[98] Final EA at 69.

flows provided for in the settlement agreement are within the range of flow alternatives examined in the final EA.

74. Further, as explained in the license order, the results of the settlement parties' evaluation of flow releases corroborate the results of the flow release study examined in the final EA.[99] For the summer period, the 245-cfs minimum flow under the settlement would provide comparable benefits to flow levels recommended in the final EA for macroinvertebrates and fish during the spawning, growing, and rearing seasons.[100] At reduced flows during the winter, the habitat for fish would not change significantly, because most fish would be overwintering in the pools, which are relatively insensitive to changes in flows.[101] Although there would be some reduction in habitat for macroinvertebrates, a flow release of 120 cfs would continue to wet valuable riffle habitat, and any benthic invertebrate habitat that is dessicated during winter would be quickly colonized from populations upstream of the bypassed reach when flows are increased in the spring. Therefore, these winter reductions in habitat would not have much of an impact on the benthic resources or food supply for fish.[102]

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[99] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 46. Adirondack takes issue with our adoption of Erie Boulevard's description of the settlement parties' evaluation of flow releases as a "Delphi-type exercise" (*id.* at P 45-46), maintaining that this "is just a fancy term to obfuscate the fact that the flows were agreed-upon in the settlement process." Adirondack's request for rehearing at 58. As described by Adirondack, the method requires the use of questionnaires filled out by experts who do not interact directly with each other, and is "designed to minimize the biasing effects of dominant individuals, of irrelevant communications, and of group pressure toward conformity." *Id.* at 58-59. Obviously, the settlement process included meetings and discussions among the settlement parties. No purpose would be served in this case by our attempting to determine whether Erie Boulevard's characterization of the process was appropriate. We acknowledge that the flow releases adopted in the settlement were based on the settlement parties' evaluation, discussion, and eventual agreement based on available information on flow releases, streambed morphology, and habitat needs. As discussed above, the record supports the flow releases adopted, and nothing more is required here.

[100] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 46.

[101] *Id.*

[102] *Id.*

75. Adirondack further maintains that the Commission improperly rejected the 300-cfs minimum flows recommended by the National Marine Fisheries Service (NOAA Fisheries) under FPA section 10(j). Specifically, Adirondack argues that the Commission has no authority to reject an agency's section 10(j) conditions as late and consider them instead under FPA section 10(a). In support, Adirondack cites *City of Tacoma v. FERC*.[103]

76. In that case, the court held that the Commission may not reject as late an agency's mandatory conditions under FPA section 4(e), but instead must include them without modification in any hydropower license that it issues. The court based its decision on the mandatory language of FPA section 4(e), which provides that licenses within any federal reservation "shall be subject to and contain such conditions" as the secretary deems necessary for the protection and utilization of the reservation.[104] Unlike section 4(e) conditions, section 10(j) conditions are not mandatory, and the Commission bears the ultimate responsibility for deciding whether to adopt them. Accordingly, when it first promulgated regulations in 1991 to implement section 10(j), the Commission determined that it may set reasonable time limits for the agencies' submission of these conditions.[105]

77. As noted in the license order, NOAA Fisheries requested and obtained an extension of the comment period, but filed its section 10(j) recommendations more than nine months later than the new deadline. Two of its recommendations, for run-of-river operation and a plan to monitor run-of-river operations and minimum flows, were adopted as part of the settlement agreement. Its remaining recommendation, for a minimum flow in the bypassed reach of 300 cfs or inflow, was considered under section 10(a) and rejected in favor of the flows provided in the settlement agreement, which we found sufficient to improve aquatic habitat, as discussed above. In addition, NOAA Fisheries filed comments on the notice of settlement, indicating its support of the agreement. We conclude that the Commission was not required to adopt NOAA

[103] *City of Tacoma, Washington, v. FERC*, 460 F.3d 53, 64-65 (D.C. Cir. 2006).

[104] 16 U.S.C. § 797(e) (2000).

[105] *See* Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters (Order No. 533), 56 Fed. Reg. 23108, FERC Stats. & Regs., Regs. Preambles January 1991-June 1996 ¶ 30,921 at 30,143.

Fisheries' recommendation for a minimum flow of 300 cfs or inflow under section 10(j), and properly found under section 10(a) that the flows adopted were adequate.[106]

Water Quality

78. Adirondack argues that the license order failed to address water quality problems associated with the School Street Project. Adirondack contends that the Commission's NEPA analysis was completed in 2001, over five years before license issuance, and that the final EA relied on downstream water quality data from 1984, over 22 years before license issuance. Adirondack maintains that current water quality data is available from a USGS gage located near the School Street Project tailrace, and there is no indication that the Commission considered or analyzed this publicly available data. Adirondack also contends that the seasonal Cohoes gage data indicate problems with dissolved oxygen levels and other water quality conditions.[107]

79. While some of the data considered in the final EA was from 1979 to 1982, staff also considered information from New York DEC and other reports issued in 1997 and 2001. As discussed in the EA, dissolved oxygen (DO) levels ranged from 7.0 to 14.0 parts per million at all depths in all pools sampled, although the New York DEC reported some late summer DO stratification at the upstream Crescent Lake.[108] The only water quality issues raised during scoping and through the consultation process were the potential for construction-related impacts, and the presence of polychlorinated biphenyls (PCBs) in the impoundment and power canal at the project. Staff concluded that a Commission-approved erosion control plan would minimize construction impacts. Staff also found that the levels of PCBs indicated by the licensee's preliminary sampling were well below the threshold necessary for environmental remediation, but recommended that the licensee file the results of the ongoing remediation investigation before seeking Commission approval for any ground-disturbing activities.[109]

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[106] Adirondack also argues that, if we do not adopt NOAA Fisheries' recommendation after properly considering it under section 10(j)(1), we must justify our decision under section 10(j)(2). This is incorrect. Late recommendations that are considered under FPA section 10(a) are not treated as section 10(j) conditions, and are not subject to the procedures of that section. *See* n. 105, *supra*.

[107] Adirondack's request for rehearing at 62.

[108] Final EA at 19.

[109] *Id.* at 20.

80. The New York DEC issued water quality certification for the School Street Project, certifying its compliance with applicable water quality standards (including DO levels) and requiring conditions consistent with the settlement agreement. These conditions relate to, among other things, power canal excavation and sediment removal, erosion and sediment control, powerhouse construction, and other construction activities. The license order included the certification conditions as license conditions.[110] Although GIPA appealed the certification and sought to restrain its implementation, its contentions regarding possible DO problems and other water quality concerns were rejected as insufficient to demonstrate any substantive and significant issues requiring adjudication.[111] We similarly conclude that Adirondack's vague and unsupported allegations of DO and other water quality problems are not sufficient to require further investigation or analysis in this proceeding.

81. Adirondack maintains that the Commission may not rely on the New York DEC's issuance of water quality certification for the project as a substitute for its own analysis under NEPA and the FPA. As discussed above, the Commission analyzed pertinent water quality issues in the EA and in the license order, and nothing more is required in this case.

82. Adirondack argues that the Commission must consider whether the New York DEC properly issued water quality certification for the project. Adirondack maintains that, by signing the settlement agreement, the New York DEC impermissibly pre-judged and tainted the agency's certification proceeding, and that the certification is therefore invalid. Adirondack asserts that the settlement agreement was a "binding contract" to issue certification consistent with the settlement and, as a result, the Commission should reject the certification and vacate the license order.

83. We disagree. As noted in the license order, the New York DEC chose to use the settlement process to resolve water quality issues after it denied certification in 1992 for ten hydroelectric projects, including the School Street Project. We find nothing procedurally improper or inconsistent with section 401 of the CWA in that choice.

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[110] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at Ordering Paragraph (D) and Appendix A.

[111] See letter to Magalie Salas, FERC, from William Madden, attorney for Erie Boulevard, attaching Deputy Commissioner's decision and temporary restraining order (filed October 12, 2006); see also letter to Magalie Salas, FERC, from William Madden, attorney for Erie Boulevard, attaching order vacating temporary restraining order (filed October 31, 2006).

Section 401 does not contain any provisions that would prevent the certifying agency from meeting with the applicant and other interested participants to discuss and resolve water quality and related issues. Nor do we find any thing in section 401 that would prohibit a certifying agency from entering into a settlement agreement concerning issues related to relicensing a hydroelectric project. After reaching a settlement, the New York DEC issued public notice of its draft certification and held hearings on it. Thus, the agency complied with the public notice and hearing requirements of section 401.[112]

License Term

84. Adirondack argues that the Commission erroneously granted a 40-year license based on investment that Erie Boulevard is not required to make. In Adirondack's view, 40 years is an excessive term if the licensee does not exercise its option to construct the new generating unit. Adirondack further contends that the costs to the licensee of increasing aesthetic flows over the falls are not sufficient to justify a 40-year license.

85. As noted in the license order, the Commission's general policy is to establish a 30-year term for projects with little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; a 40-year term for projects with a moderate amount of such activities; and a 50-year term for projects with extensive measures.[113] We issued a 40-year license to Erie Boulevard in this case because the new license authorizes a moderate amount of environmental mitigation and enhancement measures.[114] In the license order, we included the cost to construct the new generating unit in our analysis of project economics. We found that, as licensed, the project would cost $3,528,210, or $18.72/MWh, less than the likely alternative cost of power.[115] If Erie Boulevard elects not to construct the new generating unit, the total cost of the

[112] Under *City of Tacoma, Washington, v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006), our responsibility is to make sure that the certification complies with the statutory requirements of section 401. Contrary to Adirondack's assertion, we are not required under that case to review a certifying agency's choice of methods for analyzing and resolving substantive issues related to water quality concerns. Thus, we lack authority to consider Adirondack's arguments that, as a result of the settlement agreement, participants in the New York DEC proceedings were denied procedural due process.

[113] *See, e.g., Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,383-84 (1994).

[114] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 114.

[115] *Id.* at P 106.

environmental mitigation and enhancement measures as proposed by Erie Boulevard and consistent with the settlement agreement, fishway prescriptions, and water quality certification conditions would be about $3,915,000.

86. Citing the final EA, Adirondack maintains that the cost to Erie Boulevard of providing increased aesthetic flows over Cohoes Falls is insufficient to justify a 40 year license term. However, Adirondack overlooks the cost of other environmental mitigation and enhancement measures, such as fish passage facilities and monitoring, run-of river operation with a 0.5-foot reservoir drawdown, minimum flows in the bypassed reach, flow monitoring, adaptive management monitoring, habitat improvement, and recreational improvements. Without the cost of constructing the new generating unit, the new license conditions result in a decrease in the project's net annual benefit of about $882,800. In our view, this clearly constitutes a moderate level of environmental mitigation and enhancement. Therefore, a 40-year license is appropriate.[116]

Alternatives to Relicensing

87. Adirondack maintains that the Commission erred in rejecting several options that would allow a superior project to be constructed on the Mohawk River. According to Adirondack, those options are: (1) license denial and decommissioning of the School Street Project; (2) issuance of a non-power license; or (3) conditioning the new license to allow a better-adapted project to proceed. Adirondack maintains that all three of these options are permissible and are amply supported by precedent.

88. All of these options are yet another attempt to promote the statutorily-barred Cohoes Falls proposal. GIPA and Adirondack first sought to promote them in their "offer of settlement," which we rejected.[117] We also considered and rejected these options in the license order.[118] They represent nothing more than an attempt to persuade

[116] Adirondack asserts that the Commission essentially deferred to the settlement agreement in selecting a license term, rather than exercising its own independent judgment. As demonstrated above, this is incorrect.

[117] *See Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 64-65.

[118] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 77.

us to do indirectly what we are precluded from doing directly; that is, considering the Cohoes Falls proposal in competition with the School Street Project.[119]

89. Although we have the authority under the FPA to deny a relicense application and require that a project be decommissioned, we will not do so unless the project fails to meet the statutory requirements for relicensing. As discussed above, in a competitive relicensing, the Commission must select the best adapted project. In a non-competitive relicensing proceeding, however, the application should be granted if the project meets the statutory standards. License denial and Commission-mandated decommissioning are very rare, and appropriately so. In this case, the statutory standards are met, and it would be arbitrary and capricious for us to deny the application and require that the School Street Project be decommissioned.

90. Similarly, issuance of a non-power license would not be appropriate in this case. A non-power license is a temporary measure, designed to allow for continued Commission authority over a non-operating project until another governmental agency can assume regulatory authority and supervision over the lands and facilities covered by the non-power license. Under section 15(f) of the FPA, before issuing a non-power license, the Commission must find that the project should no longer be used for the generation of power. On the record before us, we have no basis for making such a finding. Although Adirondack asserts that such a finding is compelled by the existence of the Cohoes Falls proposal, we disagree. We could not make such a finding without improperly considering a proposal that the FPA precludes us from licensing in this proceeding.

91. The third option, conditioning the School Street Project license to allow for the development of a better-adapted project, would simply circumvent the relicensing

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[119] Adirondack contends that the Commission improperly rejected the Cohoes Falls proposal because of its belief that it would be "'fundamentally unfair' *not* to give Erie a license." Adirondack's request for rehearing at 73 (emphasis in original). Adirondack maintains that, as a result, the Commission allowed this "feeling" to override the record evidence and the FPA. This is most certainly not the case. As discussed in the license order, we found that it would be fundamentally unfair to use the requested license conditions to circumvent the ECPA relicensing procedures, in other words, "to allow GIPA or some other applicant to take over the School Street Project via an untimely competing application, a result that we have found is legally barred." *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 77. Moreover, we do not presume that a new license should be issued in any case. We judge each case on its merits, under the standards set forth in the FPA.

procedures of the FPA to allow consideration of a proposal that is statutorily barred. It would involve issuing a new license for the School Street Project with conditions that would require its decommissioning in favor of a project to be developed at some time in the future. These conditions would allow another applicant, presumably GIPA, to file an application for a project, presumably the Cohoes Falls project, and would require that the School Street Project be decommissioned in favor of the new project if the Commission decided to license it. In the absence of such provisions, it is clear that section 6 of the FPA would protect an existing licensee from any subsequent development that would constitute a substantial alteration of the license.[120] Accordingly, the Commission must carefully consider whether the inclusion of such provisions is appropriate in a particular case. Although the Commission has used such conditions in limited circumstances in the past, the only post-ECPA cases in which they were used have involved original licensing. The Commission has never sought to include such conditions in the manner urged here, to allow consideration of a proposal that is otherwise time barred under the ECPA relicensing procedures. In light of the clear statutory provisions precluding late-filed competing applications, it is doubtful whether any applicant would be willing to accept such a new license. In our view, absent significant public interest considerations calling for such a condition, including it in a license would greatly undercut the licensee's certainty as to the viability of the project, would consequently discourage investment in renewable hydropower, and would be bad policy.[121]

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[120] *See Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78, 89 (D.C. Cir. 1983). Significantly, in that case, there was no need to consider the effect of the ECPA relicensing procedures.

[121] Adirondack cites without any discussion a number of cases in which it asserts that the Commission included such conditions in licenses it issued. *See* Adirondack's request for rehearing at 107 n. 64. Those cases involved significantly different circumstances. Most of the earlier cases involved issuance of an original license for an existing, unlicensed project that had remained unlicensed for many decades, raising concerns that the Commission might not be able to carry out its FPA section 10(a) responsibilities in the same manner as it would for an unconstructed project. *See, e.g.*, *Duke Power Co.*, 55 FPC 677 (1976). Several earlier cases also involved pre-existing plans by the U.S. Army Corps of Engineers for federal development of power projects that would more completely develop the available water resources. In the few pre-ECPA cases that involved relicensing, the Commission had already issued short-term licenses of only five or ten years to account for the possibility of future development that might adversely affect the existing projects. More recently, the Commission has included such provisions infrequently to address unique circumstances, and only in cases involving

(continued)

Comprehensive Plans

92. Adirondack maintains that the Commission improperly rejected comprehensive plans identified by GIPA and Adirondack. As discussed in the license order, the final EA examined eight comprehensive plans and found that the School Street Project as proposed under the staff alternative was generally consistent with the elements of those plans.[122] Adirondack and GIPA filed a list of what they assert are 24 additional relevant comprehensive plans, beyond those evaluated in the final EA, and requested that Erie Boulevard be directed to provide copies of these plans and an analysis of them. We noted that, under our regulations, a comprehensive plan must be a federal or state plan that: (1) is a comprehensive study of one or more of the beneficial uses of a waterway; (2) includes a description of the standards applied, data relied on, and methodology used in preparing it; and (3) is filed with the Secretary of the Commission.[123] We added that GIPA and Adirondack had simply provided a list of plans that they alleged should be considered, without demonstrating that the plans would qualify as comprehensive plans under the Commission's regulations. A participant may not wait until a proceeding is nearly complete before asserting that additional plans must be considered, yet take no steps to file the plans in accordance with our regulations, or otherwise seek to demonstrate their relevance.

93. We nevertheless reviewed the proffered list and found that three of these plans had been filed with the Commission and would qualify as comprehensive plans under FPA section 10(a)(2) and our regulations. We then proceeded to review the new license as

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original licensing. For example, in *Moon Lake Electric Association, Inc.*, 46 FERC ¶ 62,203 (1989), Interior had recommended various projects to fully develop the Colorado River Basin, in which the licensed project was located, and Congress had authorized, although not yet funded, a Bureau of Reclamation dam that would have prevented any flows from reaching the project. Accordingly, the license took into account the possibility that future, government-recommended or –sponsored development might adversely affect the project, or that federal takeover might occur. These circumstances are not present in the School Street relicensing proceeding. Instead, we have a private entity that is seeking to decommission the School Street Project so that its own plans of development may proceed, in complete disregard of the ECPA relicensing procedures.

[122] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 88; *see also* final EA at 75, 83.

[123] *See* 18 C.F.R. § 2.19(b) (2007).

conditioned, consistent with the settlement, and found that the School Street Project is consistent with these plans. All of the other plans on the proffered list had not been filed with the Commission, and many of them were local or regional rather than federal or state plans. Thus, they did not constitute comprehensive plans as defined in our regulations. In short, of the list of plans that GIPA and Adirondack provided, we considered the three that qualify as comprehensive plans and are relevant to the School Street Project.

Equivalent Benefits

94. Adirondack maintains that the Commission should consider whether Erie Boulevard is willing to provide benefits equivalent to those of the Cohoes Falls Project. Adirondack acknowledges that we dismissed this suggestion as "nothing more than yet another attempt to resurrect the legally barred Cohoes Falls proposal."[124] However, Adirondack maintains that, even assuming that the Cohoes Falls proposal is legally barred, the Commission must consider it as an alternative to the School Street Project, and must also consider whether aspects of that proposal would be appropriate conditions for a new School Street Project license.

95. In fact, the Commission did consider whether some aspects of the Cohoes Falls proposal would be appropriate for the School Street Project license. In the final EA, Commission staff examined a range of minimum flows for habitat purposes between 60 cfs and 1,500 cfs.[125] Staff also reviewed the flow analyses and visual representations of various flows over the falls, and concluded that flows of at least 500 cfs create a "full waterfall effect," with the associated sounds and spray necessary to significantly improve the scenic quality of Cohoes Falls.[126] Staff therefore recommended supplementing the minimum flows provided for aquatic resources with sufficient additional flows to provide flows of 500 cfs over the falls during prime viewing times (on weekends and holidays during daylight hours) from May 15 through October 15.[127] The settlement agreement adopted a similar approach, extending the schedule for the release of these flows until October 31.[128]

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[124] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 114.

[125] *See* final EA at 32, 62-64.

[126] *Id.* at 71.

[127] *Id.*

[128] *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 18.

96. In the final EA, staff also analyzed the effects of increasing generation at the site by adding a new, 21-MW turbine. The settlement agreement adopted a similar approach, allowing for the addition of an 11-MW "fish-friendly" turbine that could potentially provide an alternative means of fish passage. In the license order, we also reviewed staff's analysis of the project's maximum hydraulic capacity, both with and without the new turbine, and found that under either option, the School Street Project is properly sized to make adequate use of the available water resources of the Mohawk River.[129] Thus, we have considered whether the School Street Project can provide benefits that are similar to those that might be possible under the Cohoes Falls proposal in two major areas; aesthetic flows and power generation.

97. To go further, and examine whether the School Street Project could be reconfigured to duplicate all of the supposed benefits of the Cohoes Falls proposal is neither feasible nor necessary in the context of this relicensing proceeding. In essence, providing equivalent benefits would involve requiring Erie Boulevard to abandon its School Street Project in favor of constructing and operating a new project that would mimic the Cohoes Falls proposal in all respects. While the FPA authorizes the Commission to require modifications to an applicant's proposal to ensure that the project is best adapted to a comprehensive plan for developing or improving a waterway, we do not believe that we could require an applicant to construct and operate an entirely different project that it never sought to develop. In short, requiring Erie Boulevard to decommission the School Street Project in favor of the late-filed and statutorily-barred Cohoes Falls proposal would exceed our authority under the FPA.

National Historic Preservation Act

98. Adirondack argues that the license order violates section 106 of the National Historic Preservation Act (NHPA).[130] Adirondack maintains that the Commission erred in conducting an inadequate process under that section, failing to comply with the consultation and public participation requirements of the NHPA and regulations of the Advisory Council on Historic Preservation (Advisory Council). Adirondack further maintains that the Commission should have granted GIPA's request for consulting party status, held a public hearing, and considered GIPA's supplemental comments. As we noted at the outset of this order, it does not appear that Adirondack has standing to raise these issues, which bear no relation to its stated interests in the New York State Dam Project. Indeed, it appears clear that Adirondack's only interest in the environmental

[129] *Id.* at P 72, 77, 110.

[130] 16 U.S.C. § 470f (2000).

issues it raises is promoting the Cohoes Falls proposal, given the fact that it has not provided any explanation of how it is affected by the project's impacts on environmental resources. Nevertheless, as discussed below, we find that all of these contentions are without merit.

99. Under section 106 of the NHPA and its implementing regulations,[131] the Commission must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the *National Register* (defined as historic properties) and afford the Advisory Council a reasonable opportunity to comment. This generally requires the Commission to consult with the State Historic Preservation Officer and others, as appropriate, to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

100. To satisfy these responsibilities, on July 19, 1996, the Commission executed a multi-project Programmatic Agreement (PA) for 14 hydroelectric projects, including School Street, located in the State of New York.[132] In preparing the PA, the Commission consulted with the Advisory Council, the New York State Historic Preservation Officer (SHPO), and the project licensees. At that time, the participants had not identified any other interested parties. The PA established a procedural framework for further identification of historic properties, consideration of the effects of licensing the projects on those properties, and development of plans for managing historic properties within the projects' areas of potential effect. Among other things, the PA required in Stipulation II D that a separate Appendix A for each project be prepared and provided to the signatories for their consideration prior to license issuance. It also provided in Stipulation I A for the development of a cultural resources management plan (CRMP) for each project, to be prepared in consultation with the SHPO and interested persons and filed for Commission review and approval within one year of license issuance.

101. On April 11, 1997, the Commission issued a separate Appendix A for the School Street Project. At the time, the participants had identified the School Street Project itself

[131] 36 C.F.R. Part 800 (2006).

[132] *See* letter to Fred Springer, FERC, from Don Klima, Advisory Council, attaching the executed PA (filed Aug. 5, 1996).

and any as yet unknown archaeological sites that might exist within the project area as historic properties affected by the School Street relicensing.[133]

102. During the development of the settlement agreement, Erie Boulevard consulted with the New York State Office of Parks, Recreation and Historic Preservation (New York SHPO) and various American Indian Nations, including the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, Saint Regis Mohawk Tribe, and Stockbridge-Munsee Community Mohican Nation. As a result of this consultation, Erie Boulevard conducted archaeological reconnaissance studies that identified two additional *National Register* eligible sites on the island between the School Street power canal and the river. Erie Boulevard also recognized the importance of Cohoes Falls, located within traditional Mohawk Nation territory, as a sacred site and historic property of traditional religious and cultural importance to several Indian tribes. Consequently, Erie Boulevard and the settlement parties included specific cultural resource measures in section 3.8 of the settlement agreement, and also included a proposed revision of Appendix A to the PA as Attachment C to the agreement. Among other things, these measures provided for inclusion of information about the religious and historic significance of Cohoes Falls in Appendix A, as well as continued consultation with the Mohawk Council of Chiefs, Mohawk Council of Akwesasne, Saint Regis Mohawk Tribe, and Stockbridge-Munsee Community Mohican Nation, in developing both a revised Appendix A to the PA before

[133] *See* letter from Kevin Madden, FERC, to Don Klima, Advisory Council, attaching the revised Appendix A for the School Street Project (filed April 11, 1997). As discussed in the final EA, the School Street Project structures are historic properties. The lower gatehouse, powerhouse, and portions of the power canal are listed in the *National Register* as contributing components for the Harmony Hills Historic District. The project's stone dam, upper head gatehouse, and the remainder of the power canal are included in the National Register as contributing components of the Town of Colonie Multiple Resource Area nomination. *See* final EA at 49. In that regard, despite its apparent concern for historic preservation issues, Adirondack nowhere mentions in its request for rehearing that, if we were to accept any of its alternatives to relicensing in order to allow the Cohoes Falls proposal to proceed, portions of the historic School Street Project would have to be destroyed. Moreover, insofar as Appendix A recognizes the importance of the School Street Project in relation to the Harmony Hills Historic District, Harmony Hills National Landmark District, and Erie Canal Historic District, and provides for consideration of these districts in the HPMP for the School Street Project, we reject Adirondack's contention that the Commission failed to undertake actions to minimize harm to National Historic Landmarks under section 110 of the NHPA, 16 U.S.C. § 470h-2(f) (2000). *See* Adirondack's request for rehearing at 123-24.

license issuance, and a Historic Properties Management Plan (HPMP) to be filed within one year of license issuance.[134]

103. On March 24, 2005, the Commission issued public notice of the settlement agreement and solicited comments on it. As discussed in the license order, a number of agencies, organizations, and individuals filed comments.[135] However, no one specifically addressed the cultural resource measures of the settlement agreement or the proposed revision of Appendix A to the PA.

104. Thereafter, on January 26, 2006, Commission staff prepared and circulated for comment a revised Appendix A to the PA, sending it to the New York SHPO, the Advisory Council, and interested Indian tribes.[136] Comments were filed by the New York SHPO, the Advisory Council, the Saint Regis Mohawk Tribe, the Mohawk Nation Council of Chiefs, and Erie Boulevard.[137] In response, staff made further changes and issued a revised Appendix A on April 28, 2006.

105. As the foregoing history demonstrates, the revised Appendix A was prepared in consultation with the SHPO, the Advisory Council, and interested Indian tribes. In addition, the PA and Article 403 of the new license require Erie Boulevard to develop its HPMP in consultation with the National Park Service, New York SHPO, and American Indian Nations, consistent with section 3.8 of the settlement agreement (Appendix B to the license order). In this context, Adirondack's assertion that the Commission did not adequately consult with interested Indian tribes is baseless.

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[134] As noted above, the PA provides for development of a CRMP for the management of cultural resources during the license term. The Commission now prefers to use the term historic resources management plan (HPMP), to emphasize the historic nature of the resources that are subject to the plan, as provided by section 106 of the NHPA.

[135] *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 68-77.

[136] In addition to the New York SHPO and the Advisory Council, staff sent the appendix to the Stockbridge-Munsee Community Mohican Nation, the Saint Regis Mohawk Tribe, the Mohawk Council of Akwesasne, and the Mohawk Nation Council of Chiefs.

[137] These comments are discussed in more detail in the license order. *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 35-35.

106. Adirondack cites the Advisory Council's letter of March 1, 2006, which expressed concern that interested tribes "do not appear to have been consulted on development of any aspect of the proposed Appendix A, including project modifications, development of the Settlement Agreement (filed March 9, 2005) or determination of anticipated effects."[138] In that letter, the Advisory Council recommended that the Commission consult with interested Indian tribes as well as the Advisory Council, SHPO, and others regarding these matters prior to the approval of Appendix A. The Advisory Council also requested copies of the views of the SHPO, Indian tribes, and other consulting parties on the final EA and the draft Appendix A. Adirondack contends that "there was no specific activity" taken in response to this letter "that has resulted in an improvement in regard to these Native American concerns."[139] However, Adirondack neglects to mention that, after receiving the requested information and Commission staff's revised Appendix A in response to the participants' comments, the Advisory Council made no further comments on the matter.

107. Adirondack asserts that, despite the Commission's "expression of commitment to its trust responsibilities, the Commission and Applicant have consistently failed to include Native American groups in the decision-making process, instead allowing them only an opportunity to object (and be brushed off) after the fact."[140] In support, Adirondack cites comments of the Saint Regis Mohawk Tribe that, from its perspective, the damage to Cohoes Falls has been ongoing since the river was initially diverted, and the Tribe accepted "as a beginning" the option of calling in advance to arrange for the falls to be "turned on for a short period of time" because it was "the only option available to the Mohawk people."[141] The Tribe added: "An uninterrupted water flow is needed. The wires that span the falls need to be moved."[142]

108. As discussed above, the new license includes provisions for increased flows over Cohoes Falls. This will benefit not only aesthetics, but also the religious and cultural

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[138] Letter from Don Klima, Advisory Council, to Magalie Salas, FERC, at 2 (filed Mar. 13, 2006).

[139] Adirondack's request for rehearing at 111.

[140] *Id.* at 112.

[141] Letter from Chief James Ransom, Saint Regis Mohawk Tribe, to Magalie Salas, FERC, at 1 (filed Mar. 20, 2006).

[142] *Id.* at 2.

value of the falls. In addition, the new license provides for continued consultation with interested Indian tribes in developing and implementing the HPMP. As we found in the license order, the most prominent power lines in the area are part of the regional transmission system and are not part of the School Street Project. Because the project's transmission lines are short and do not cross the Mohawk River, burying them would do little to improve the view of Cohoes Falls.[143]

109. As we have seen, the Commission and Erie Boulevard have consulted with interested Indian tribes in developing the revised Appendix A, and Erie Boulevard will continue to do so in developing and implementing its HPMP. While the views of the Saint Regis Mohawk Tribe have been considered, they have not been fully accommodated. This does not in any way negate the consultation that has occurred. The Mohawk Nation Council of Chiefs expressed a more favorable view, stating that it "has built a positive relationship" with Erie Boulevard and is "working towards an agreement with Erie that fosters the cultural importance of the falls, one that will be culturally sensitive and educationally beneficial to all."[144] Significantly, none of the participants with a direct interest in these matters has sought to intervene or filed a request for rehearing to raise these issues.

110. The Commission recognizes the unique relationship between the United States and Indian tribes as defined by treaties, statutes, and judicial decisions. We carry out our responsibilities towards Indian tribes in the context of the FPA and other statutes that govern the Commission's actions.[145] In our section 106 process, we have taken into account the concerns of interested Indian tribes and have considered the effects of the School Street Project on the Tribes' rights and interests. Nothing more is required in this case.

111. Adirondack argues that the 1992 amendments to the NHPA impose specific duties on the Commission to consult with Indian tribes concerning historic properties that are of traditional religious or cultural significance to them, and that the Commission has not complied with this obligation "to the extent that consultations with Indian tribes remain

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[143] *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 68.

[144] Letter from Barbara Gray, Mohawk Nation Council of Chiefs, to Magalie Salas, FERC, at 1 (filed Mar. 31, 2006).

[145] *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303 (9th Cir. 1997).

incomplete."[146] As discussed above, the Commission has consulted with interested Tribes concerning the religious and cultural significance of Cohoes Falls in preparing Appendix A to the PA. Thus, consultation for issuance of the School Street license has been completed. The fact that Erie Boulevard will continue to consult with the Tribes in preparing its HPMP does not render such consultation incomplete. Rather, it affords the Tribes additional opportunities to express their views and help determine how historic properties will be managed throughout the term of the new license.

112. Adirondack considers it significant that, in 2001, the Advisory Council and Interior urged the Commission to consult with the Saint Regis Mohawk Tribe and other Indian tribes to amend the PA, and that the Commission staff did so with respect to four other projects on the Raquette River. Adirondack also points out that, in 2004, the Mohawk Nation Council of Chiefs filed a request to consult with the Commission under section 106 on any project affecting Cohoes Falls. Commission staff determined that, because the PA established a procedural framework for considering historic preservation issues, with the project-specific information to be developed in Appendix A, these consultation requests could be accommodated by consulting with the Saint Regis Mohawk Tribe, the Mohawk Nation Council of Chiefs, and other interested Tribes with regard to preparation of the appendix. As noted, these entities participated in the consultation and none of them sought rehearing of any historic preservation matters.

113. Adirondack also finds it significant that the New York SHPO recommended consideration of the Cohoes Falls proposal as an alternative to relicensing the School Street Project. Adirondack concludes: "The Final Appendix A does not address, in any fashion, the comments of [the] SHPO regarding means of avoiding damage to historic properties, nor does it solicit comments from the associated [Tribal Historic Preservation Officers] THPOs, as a way to be inclusive about Traditional Cultural properties."[147]

114. This is incorrect. As discussed in the license order and Commission staff's letter transmitting the Final Appendix A to the participants, the Commission considered the comments of the SHPO, the Advisory Council, the Mohawk Nation Council of Chiefs,

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[146] Adirondack's request for rehearing at 114. See section 101(d)(6) of the NHPA, 16 U.S.C. § 470a(d)(6) (2000), which provides that properties of traditional religious or cultural importance to Indian tribes may be determined to be eligible for inclusion in the *National Register*, and requires federal agencies to consult with Indian tribes that attach religious or cultural significance to such properties in carrying out their responsibilities under section 106.

[147] Adirondack's request for rehearing at 118.

the Saint Regis Mohawk Tribe, and Erie Boulevard in revising the Appendix.[148] The THPO provided the comments on behalf of the Saint Regis Mohawk Tribe.

115. Adirondack argues that the Commission violated the Advisory Council's regulations with respect to public participation in the section 106 process, by sanctioning "the use of closed settlement negotiations and other private settings to discourage public input."[149] We disagree. There is nothing in the Advisory Council's regulations that would prevent parties to a Commission proceeding from conducting settlement negotiations and reaching an agreement on historic preservation matters. The Commission issued public notice of the settlement agreement and invited public comments on it. Some of the comments received concerned the historic nature of Cohoes Falls and requested that the Cohoes Falls proposal be considered as an alternative to the School Street Project. For the reasons discussed above, we determined that the Cohoes Falls proposal was not a reasonable alternative and could not be considered as such under NEPA and the FPA. Unlike those statutes, the NHPA does not require consideration of alternatives to the proposed action. Rather, it requires the Commission, in consultation with the SHPO, the Advisory Council, and affected entities, such as Indian tribes, to seek ways to avoid or mitigate any adverse effects to historic properties. Thus, contrary to Adirondack's assertion, the Commission was not required to hold a public hearing or conduct broader consultation to consider the Cohoes Falls proposal in this proceeding.[150]

116. Adirondack maintains, without elaboration, that the PA was not prepared with the requisite public involvement, citing the Advisory Council's regulations in section

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[148] *See Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101 at P 34-37. *See also* letter to the parties from Vince Yearick, FERC (April 28, 2006).

[149] Adirondack's request for rehearing at 119.

[150] Adirondack argues that the Commission erred by rejecting requests for a public hearing and broader consultation to address changes in the Advisory Council's regulations since the PA was executed in 1996, identification of Cohoes Falls as a property of religious and cultural significance to Indian tribes, designation of the Harmony Mills Historic District and a National Historic Landmark, and establishment of the Erie Canalway National Heritage Corridor. As noted above, a hearing was not required to address these matters. The consultation in this case on the revised Appendix A considered all of these changes, as well as the historic status of the School Street Project works. Thus, Adirondack's contention that the Commission deferred "all serious consideration of implementation issues" concerning these changes until after license issuance is without basis. *See* Adirondack's request for rehearing at 122-23.

800.13(c).[151] That section requires the Council, with the assistance of the federal agency, to "arrange for public notice and involvement appropriate to the subject matter and the scope of the program." Adirondack also cites section 800.13(f) of the Advisory Council's regulations, which requires the Council to publish notice of an approved PA in the Federal Register and make copies available to the public.[152] Without attempting to show how the procedures for developing the PA were inadequate, Adirondack simply asserts: "GIPA does not believe that either of these requirements was met" during the course of preparing the PA or the appendix.[153] GIPA is not a party to this proceeding, and its belief cannot, therefore, be relevant here. More importantly, however, given that the PA established a procedural framework for addressing historic preservation issues, to be followed later by an appendix specific to the School Street Project, the Advisory Council and the Commission reasonably concluded that it was sufficient at that stage to involve the Council, the SHPO, and the various license applicants for the 13 projects at issue in developing the PA. Nor are we troubled by the fact that "GIPA has located no reference in the Federal Register to the [PA] in question during the relevant timeframe."[154] If, in fact, the Advisory Council did not publish the requisite notice, the error was harmless with respect to the Commission's issuance of a license for the School Street Project, because interested participants have had ample notice of historic preservation issues throughout this proceeding.

117. Adirondack contends that the Commission erred in denying GIPA's request for consulting party status, included in its comments filed on January 10, 2005.[155] Adirondack neglects to mention that the comments in question were GIPA's filing in response to the Commission's December 9, 2004 Licensing Status Workshop, and that GIPA first made its request for consulting party status in its motion to intervene in this proceeding, which the Commission denied.[156] Thus, this is no more than an attempt by Adirondack, on behalf of GIPA who is not a party, to seek rehearing of a matter on which we already denied rehearing. In any event, as we found in our earlier order, GIPA's sole

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[151] *See* 36 C.F.R. § 800.13(c) (2007). Adirondack's request for rehearing at 121.

[152] *See* 36 C.F.R. § 800.13(f) (2007). Adirondack's request for rehearing at 121.

[153] *See* Adirondack's request for rehearing at 121.

[154] *Id.*

[155] *Id.*

[156] *See Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 32-33, 76-77.

interest in the School Street relicensing proceeding has been to develop its own hydroelectric project.[157] Accordingly, we find no basis for concluding that GIPA should have been granted consulting party status for historic preservation matters in the School Street relicensing proceeding. Moreover, as we have noted with regard to other issues raised here, GIPA has not even alleged that it has an interest in cultural resource issues.

The Commission orders:

The request for rehearing filed in this proceeding on March 19, 2007, by Adirondack Hydro Development Corporation is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

[157] *Id.* at P 77.