

**ORAL ARGUMENT SCHEDULED FOR MARCH 27, 2006**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 05-1054, 05-1093, 05-1189, and 05-1181  
(Consolidated)**

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**CITY OF TACOMA, WASHINGTON, *et al.*,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**FOR RESPONDENT  
FEDERAL ENERGY REGULATORY  
COMMISSION  
WASHINGTON, D.C. 20426**

**FEBRUARY 27, 2006**

## **CIRCUIT RULE 28(a)(1) CERTIFICATE**

### **A. Parties and Amici**

All parties appearing before the Commission and this Court are identified in Petitioners' Rule 28(a)(1) certificates.

### **B. Rulings Under Review**

The ruling under review appears in the following orders issued by the Federal Energy Regulatory Commission:

1. *City of Tacoma, Wash.*, 84 FERC ¶ 61,107 (1998):
2. *City of Tacoma, Wash.*, 85 FERC ¶ 61,130 (1998):
3. *City of Tacoma, Wash.*, 86 FERC ¶ 61,311 (1999):
4. *City of Tacoma, Wash.*, 87 FERC ¶ 61,197 (1999):
5. *City of Tacoma, Wash.*, 104 FERC ¶ 61,324 (2003):
6. *City of Tacoma, Wash.*, 107 FERC ¶ 61,288 (2004):
7. *City of Tacoma, Wash.*, 110 FERC ¶ 61,140 (2005):

### **C. Related Cases**

This case was previously before this Court on petitions for review of the pre-2003 orders listed above in Nos. 99-1143, *et al.*, and was remanded to FERC by Order dated October 30, 2000.

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John Katz  
Deputy Associate General Counsel

February 27, 2006



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**STATEMENT OF THE ISSUE**

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably balanced power and nonpower values in issuing a subsequent license that contained minimum flow and other conditions necessary to protect listed species while maintaining the benefits of hydropower offered by the project.

## PERTINENT STATUTORY PROVISIONS

Pertinent sections of the Federal Power Act (“FPA”), 16 U.S.C. § 824 *et seq.* are set out in an addendum to this Brief.

### STATEMENT OF THE CASE

#### I. Nature of the Case, Course of Proceedings, and Disposition Below

In this case, FERC issued a subsequent major license for Petitioner City of Tacoma’s (“Tacoma”) Cushman Project on July 30, 1998 with a number of conditions.<sup>1</sup> *City of Tacoma, Washington*, “Order Issuing Subsequent Major License,” 84 FERC ¶ 61,107 at p. 61,535 (1998), JA 1345 (“July 1998 Order”). The original license for the Cushman Project, issued in 1924, “was for a minor part of a complete project,” and was limited to authorizing “the flooding of 8.8 acres of U.S. lands to allow Tacoma to construct a dam on the North Fork of the Skokomish River . . . [and] did not otherwise license the construction and operation of the project.” *Id.* Later, the Commission determined that “Tacoma should obtain a license for the entire Cushman Project,” which Tacoma did as part

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<sup>1</sup> “The Commission issues a ‘subsequent’ license (as distinguished from a ‘new’ license) for a hydroelectric project after the expiration of a minor or minor part license that is not subject to Sections 14 and 15 of the [FPA]. *See* 18 C.F.R. §§ 16.2(a) and (d). The original license for the Cushman Project, issued in 1924, was for a minor part of a complete project and authorized the flooding of 8.8 acres of federal land. *See* 18 C.F.R. §§ 16.2(a) and (d).” “Order on Remand,” 107 FERC ¶ 61,288 at P 1 n. 1 (2004)(“June 2004 Order”), JA 2205; *see* July 1998 Order at n. 1, JA 1345 (same).

of the instant proceeding. *Id.*

Although Tacoma filed its application in 1974, FERC action was delayed “by a series of matters, including the lack of prerequisite water quality certification; the enactment of the Electric Consumers Protection Act of 1986; the requirements of special legislation to remove National Park status from a corner of the project reservoir; disputes over compliance with the National Historic Preservation Act; a one-year deferral of the deadline for federal agencies to refer the Commission staff’s Environmental Impact Statement (EIS) to the Council on Environmental Quality for review of the EIS’s adequacy; and an eleventh-hour Endangered Species Act issue.” *Id.* at p. 61,536, JA 1346; *see generally id.* at pp. 61,537-40, JA 1347-49 (providing a more detailed history of case to that time).

The July 1998 Order issued a 40-year license to Tacoma subject to conditions. *See id.* pp. 61,576-602, JA 1384-1410 (terms of license, including conditions). Tacoma indicated that it would not accept the license if it included certain conditions. *Id.* at p. 61,570 n. 149 and accompanying text, JA 1378. In an “Order Denying Motion for Clarification and Granting Partial Stay Pending Rehearing,” 85 FERC ¶ 61,130 (1998) (“October 1998 Order”), JA 1637, the Commission indicated “Tacoma may defer its decision on whether to accept or reject the new license” until after rehearing and judicial review, but “must either operate the project in accordance with any non-stayed provisions of the new

license or stop generating electricity at the project.” *Id.* at p. 61,478, JA 1639.

The Commission largely upheld its earlier rulings on the license in “Order On Rehearing,” 86 FERC ¶ 61,311 (1999)(“March 1999 Order”), JA 1655. Shortly thereafter, the Commission denied Tacoma’s rehearing of the October 1998 Order, and granted a stay pending review. 87 FERC ¶ 61,197 (1999)(“May 1999 Order”), JA 1697. Requests for rehearing of the May 1999 Order were denied. 89 FERC ¶ 61,273 (1999)(“December 1999 Order”), JA 1713. Petitions for review were filed with this Court (Nos. 99-1143 *et al.*), which, due to two salmon species being listed as threatened under the Endangered Species Act (“ESA”) and FERC entering formal consultation with National Marine Fisheries Service (“NMFS,” later “NOAA Fisheries”) concerning the effects of the Cushman Project on those species, the Court ordered remanded by Order of October 30, 2000.

Although the expectation was that NMFS would issue a biological opinion (“BiOp”) in late October 2000, nothing had been issued by September 2003, when the Commission ordered an expedited hearing/settlement proceeding “to develop a factual record and assist the parties in evaluating possible interim solutions to benefit threatened species pending” further FERC and court proceedings. “Order Holding in Abeyance Motion to Partially Lift Stay, etc.,” 104 FERC ¶ 61,324 at p. 62,224, ordering para. (B) (2003)(“September 2003 Order”), JA 1788. After the administrative law judge (“ALJ”) issued his report, 105 FERC ¶ 63,049 (2003) JA

1977 (“ALJ Report”), FERC, relying on the factual findings of the Report, amended the license and partially lifted its stay to require that Tacoma release a minimum flow of 240 cubic feet per second (“cfs”), or inflow (the water flow into the reservoir), whichever is less, to benefit the listed fish species. 107 FERC ¶ 61,288 at P 1 (2004)(“June 2004 Order”), JA 2205. Requests for rehearing were granted in part and denied in part. 110 FERC ¶ 61,140 (2005)(“February 2005 Order”), JA 2275.

The petitions for review followed. By order dated May 3, 2005, this Court granted a “motion for stay pending appeal of the minimum flow requirements contained in Article 407 of the challenged license.”

## **II. STATEMENT OF FACTS**

### **A. Statutory and Regulatory Background**

Under FPA § 6, 16 U.S.C. § 799, the Commission may issue hydroelectric licenses for up to fifty years. Each license "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe[.]" *Id.* Licenses "may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter and may be altered or surrendered only upon mutual agreement between the licensee and the Commission[.]" *Id.*

In this case, Tacoma’s 1924 minor license was granted under the authority of FPA § 10(i), 16 U.S.C. § 803(i), which provides that “the Commission may in its discretion waive such conditions, provisions, and requirements of this Part,” except for the 50-year license term, annual charges for use of lands within an Indian reservation, *id.*, and the provisions of FPA § 10(j). *See* FPA § 10(j)(2)(B). FERC’s “consistent practice [in 1924 and subsequently] has been to routinely waive sections 14 and 15, and [various] other provision of Part I of the FPA . . . whenever it issues a minor license.” *Hydroelectric Relicensing Regulations Under the [FPA]*, FERC Stats. and Regs. (Regulations Preambles 1986-90) ¶ 30,854 at p. 31,371 (1989). The Commission issues a “subsequent license” in relicensing cases “after a minor or minor part license that is not subject to sections 14 and 15 of the [FPA] expires.” 18 C.F.R. § 16.2(d)(2005).<sup>2</sup>

When a hydroelectric license expires: the United States may take over ("recapture") a project , *see* FPA § 14, 16 U.S.C. § 807; the current operator may seek to renew its license, or to surrender (decommission) the project; a new operator may seek to take over the project; or, the current operator may announce an intention to seek a new license, but change its mind, thereby "orphaning" the project (*see Oconto Falls v. FERC*, 41 F.3d 671 (D.C. Cir. 1994)). The

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<sup>2</sup> As noted in the June 2004 Order at P 2 n. 1, JA 2205, “a subsequent license is a particular type of new license, and [the Commission has] used these terms interchangeably in this order.”

Commission may also issue a non-power license under FPA § 15(f), 16 U.S.C. § 808(f). Under FPA § 15(a)(1), 16 U.S.C. § 808(a)(1), if the United States does not, at the expiration of the existing license, exercise its right to take over a project, FERC is authorized to issue a new license to the existing, or to a new, licensee, "upon such terms and conditions as may be authorized or required under the then existing laws and regulations."

### **B. The July 1998 Order**

The 1924 minor license issued to Tacoma "authorized the flooding of 8.8 acres of U.S. lands to allow Tacoma to construct a dam in the North Fork of the Skokomish River." July 1998 Order at p. 61,535, JA 1345. Well after that license was issued, the Commission determined "that Tacoma should obtain a license for the entire Cushman Project, and Tacoma filed an application to do so at relicensing." *Id.* (footnote omitted). The Cushman Project "consists of two dams, two powerhouses, and associated facilities." *Id.* at p. 61,536, JA 1346; *see also id.* at p. 61,540 (providing a more detailed description of facilities). The upper dam impounds Lake Cushman, "a 9.6-mile-long storage reservoir which supplies water for generation at Powerhouse No. 1, which has a capacity of 50 MW." *Id.*

A second dam, approximately two miles downstream of the first dam, impounds Lake Kokanee, which covers about 100 acres. At that point, "nearly all of the flow of the North Fork Skokomish River is diverted out of the river basin

through a 2.5-mile-long tunnel to Powerhouse No. 2” with a capacity of 81 MW. *Id.* The diverted water is not returned to the North Fork, but flows directly into the Hood Canal and then into Puget Sound. “[M]uch of the controversy in this relicensing proceeding concerns the extent of this diversion, its environmental effects, and the appropriate level of minimum flows that should be required to return water to the North Fork.” *Id.*

Two flow proposals came forward during the relicensing process, and largely remain the difference between the parties today. On one hand, “Tacoma proposes to provide a minimum in-stream flow of 100 cfs to the North Fork of the Skokomish River, or inflow, whichever is less. To stimulate downstream migration of anadromous fish, Tacoma proposes to release an additional 20 cfs in the North Fork for a total of 11 days (6 days in the spring and 5 days in the fall). To remove accumulated silts, Tacoma proposes to release a total of 300 cfs from Dam No. 2 for 3 days in November, every 3 years.” *Id.* at p. 61,540, JA 1349A.

Federal and state agencies and the Tribe recommended cessation of all out-of-basin diversions, except for flood control. FERC Staff, in the final environmental impact statement (“FEIS”), proposed that Tacoma “be required to provide minimum flows of 240 cfs or inflow, whichever is less, to the North Fork Skokomish River, with a 400 cfs flushing flow in November.” *Id.* at 61,541, JA 1350. “When the staff prepared the [F]EIS, no party was advocating that the

Cushman Project be decommissioned. Tacoma has since suggested in comments on the [F]EIS, that it would likely reject a new license that includes all of the staff's recommended license conditions." *Id.* at p. 61,545, JA 1354.<sup>3</sup>

As no party had advocated decommissioning prior to the FEIS, the FEIS analyzed decommissioning as an alternative, "but d[id] not do so in great detail." *Id.* The resource agencies, but not Tacoma, argued that, in light of Tacoma's FEIS comments suggesting decommissioning, "a fuller analysis" of that option should be undertaken. *Id.* The Commission disagreed, based on its policy "to reserve a detailed analysis of decommissioning for those cases in which it is a real alternative, rather than simply one possible outcome." *Id.* The better course would be to await Tacoma's decision, and assuming a rejection, FERC "regulations regarding license surrender and decommissioning will be triggered," and "a more detailed analysis of decommissioning" would be undertaken. *Id.* at p. 61,546, JA 1355.

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<sup>3</sup> In the FEIS, Staff, to offset to some degree the loss of hydropower related to its minimum flows proposal, proposed that "minimum flows would be released through a new 3-MW powerhouse at the base of Dam No. 2." *Id.* at p. 61,541, JA 1350. In response to Tacoma's comments on the FEIS, showing the cost of the new powerhouse would "substantially exceed[] the current market price of comparative power," the Commission did not authorize the new powerhouse nor did adopt the 400 cfs flushing flows. *Id.* at p. 61,542, JA 1351. Consequently, FERC did "not yet know whether Tacoma will choose to accept the new license . . . which adopts some but not all of the staff's earlier recommendations." *Id.*

The “economic benefits of the project power” must be considered in evaluating a license; the Commission uses “current costs to compare the costs of the project and likely alternative power . . . to provide a general estimate of the potential power benefits and costs of a project.” *Id.* at p. 61,570, JA 1378. FERC’s analysis does not purport to determine if a project will be profitable. Based on Staff’s proposal, there was an estimated “negative net annual benefit for the first year of operation of about \$2.5 [later revised to \$2.06] million.” *Id.* Based on that, Tacoma argued, adopting Staff’s proposed conditions “will force Tacoma to decommission the project, a result it asserts violates” various provisions of the FPA. *Id.* The Commission found Tacoma’s theory to be invalid: “Tacoma’s insistence that wholesale power prices at the time of licensing are the preeminent factor in determining the public interest is misleading and inconsistent with the FPA’s requirement that we give equal consideration to power and nonpower values in determining the public interest.” *Id.* at p. 61,571, JA 1379. On the other side, several groups argued that FERC did “not quantify economic benefits of nonpower values.” *Id.* at p. 61,572, JA 1380. The Commission found that nonpower factors “cannot be evaluated adequately only by dollars and cents,” and the inclusion of environmental enhancements “demonstrates that nonpower values weighed heavily in [its] evaluation.” *Id.*

FERC indicated it did not know “what assumptions Tacoma will choose to use in ultimately reaching a decision as to whether or not to accept the license.” *Id.* Should it decide to reject, Tacoma must “propose a plan for decommissioning the project, and the Commission will then have an opportunity to consider what conditions may be appropriate in that situation.” *Id.* at p. 61,573, JA 1381.

### **C. The October 1998, March 1999, and May 1999 Orders**

Tacoma sought clarification that it “need not elect either to accept or reject the new license until after rehearing and judicial review are completed,” along with a related argument that the “annual license remain in effect until final acceptance or rejection of the new license.” October 1998 Order at p. 61,476, JA 1637. The Commission denied the request on the basis that FPA § 15(a)(1) authorizes issuance of an annual license only until a new license is issued, not “until after completion of rehearing and judicial review.” *Id.* at p. 61,477, JA 1638. Tacoma’s reading would render FPA § 313(c), 16 U.S.C. § 825l(c), which provides that filing for rehearing does not operate as a stay, “inapplicable to all hydroelectric licensing orders,” contrary to congressional intent. *Id.*

Although Tacoma could defer its decision on whether to accept the license, “until that time, Tacoma must either operate the project in accordance with any non-stayed provisions of the new license or stop generating electricity at the project,” except in certain interim conditions. *Id.* at p. 61,478, JA 1639. The

Commission granted a stay of all license conditions, except for the minimum flow conditions, pending rehearing. *Id.* at p. 61,479, JA 1640.

Requests for rehearing of the July 1998 Order were addressed in the March 1999 Order, and were generally summarized as follows:

Tacoma and the Industry Associations argue that, because the conditions of the new license are unreasonably costly, we have issued what amounts to a *de facto* decommissioning order, in violation of the relicensing provisions of the [FPA]. Interior, NMFS, EPA, the Tribe, and the Conservation Groups also argue that the new license violates the FPA, but for the wholly opposite reason that it does not include adequate conditions to protect, mitigate, and enhance environmental resources adversely affected by the project's construction and operation. The parties also take issue with many particular aspects of [the] relicensing decision . . . .

March 1999 Order at p. 62,071, JA 1656.

Several parties argued that decommissioning should have been studied in more detail as part of the FEIS, *id.* at p. 62,073, JA 1658. The Commission found, however, that the decommissioning analysis in the FEIS “was sufficient to compare licensing the project with the range of environmental effects that could occur if the project is decommissioned.” *Id.* The Commission interpreted the parties’ requests to seek an “advisory opinion regarding our decommissioning authority and the conditions that [FERC] would impose.” *Id.* The Commission declined to give such an opinion “in the abstract,” based on several uncertainties surrounding whether and how decommissioning would occur. *Id.* A number of other alternatives were also evaluated. *Id.* at pp. 62,073-085, JA 1658-70.

Minimum flow releases were then discussed, with Tacoma maintaining its position that 100 cfs, or inflow if less, constituted the only reasonable standard supported in the record, as opposed to the 240 cfs, or inflow if less, included in the license. *Id.* at p. 62,086-87, JA 1671-72 . The Commission picked 240 cfs, in part, because “at 100 cfs, total fishery habitat will increase by about 11 percent, whereas at 240 cfs, total habitat increases by about 26 percent,” so picking 240 cfs “will better serve to help restore an anadromous fishery to the lower North Fork.” *Id.* at 62,088, JA 1673 (footnotes omitted). The remainder of the Order addresses other license conditions, *id.* at 62,088-105, JA 1673-1690.

Tacoma and Skokomish Indian Tribe (“Tribe”) rehearing requests of the October 1998 Order were denied in the May 1999 Order, JA 1697. Tacoma also sought to extend the previously-granted stay throughout the judicial review process, and offered as a stay condition “to provide minimum flows of 60 [cfs] to the North Fork . . . to begin immediately upon approval of the stay request.” *Id.* In its opposition to the stay, NMFS noted that two salmon species had been “recently listed as threatened under the ESA.” *Id.* at p. 61,734, JA 1701. NMFS argued that “any stay of fish-related license articles, without immediate consultation under Section 7 of the ESA, will increase the likelihood of adverse effects on the two salmon species recently listed as threatened.” *Id.* at 61,735, JA 1702. FERC agreed, and directed FERC Staff “to consult with NMFS regarding these species.”

*Id.* The stay was granted, in part because the 60 cfs minimum flows would provide immediate benefits, but was made subject to “any substantive changes in the factual basis upon which th[e] stay [wa]s granted.” *Id.* at 61,736, JA 1703.

The petitions for review in Nos. 99-1143, *et al.* (D.C. Cir.) followed. In a June 23, 2000 Order, this Court denied a motion for partial lifting of the stay. In an October 30, 2000 Order, this Court granted a remand to await a “full administrative record, including the biological opinion the [NMFS] plan to issue in late October 2000. A remand will enable FERC to take any action it deems appropriate in response to that opinion, and any other administrative action that may be required in order to comply with the applicable statutes.” JA 1721.

#### **D. FERC’s Post-Remand Orders**

After the case was remanded, the Tribe moved for a partial lifting of the stay, seeking to increase water flows. September 2003 Order at P 7, JA 1784. As NMFS had still not issued its biological opinion (“BiOp”) as to the listed species, FERC found it necessary “to determine whether and how the project may be affecting the species, and what changes may be needed to the project or its operation to address any adverse effects.” *Id.* at P 11, JA 1785. Normally, that process would be initiated by informal consultation among FERC Staff, NMFS, and other interested entities, *id.* Given “the delay that has occurred in completing ESA consultation” and the large amount of evidence “about the long-term effects

of the project on the listed species,” in the circumstances, FERC determined that the “best course” was to appoint “a settlement judge to conduct an expedited proceeding on interim conditions in order to develop a factual record and assist the parties in evaluating possible interim solutions.” *Id.* at P 12, JA 1785. The ALJ proceeding was placed on a fast track with a report that “provides a thorough picture of the facts, problems, and possible solutions” due within 90 days. *Id.* at P 14, JA 1786.

Despite the ALJ’s efforts to effectuate reconciliation, the parties concluded that any such attempt would be “pointless” due to “irreconcilable differences in minimum water flow assumptions” in the parties’ proposals. ALJ Report at P 13, JA 1979. The parties submitted nearly 400 proposed findings of fact, which the ALJ either adopted, adopted as modified, or rejected. *See generally id.* at pp. 65,215-51, JA 1979-2015. The ALJ also presented a summary assessment, and a review of the remediation proposals that included cost, engineering, and other information. *See id.* at pp. 65,251-67, JA 2015-31. Among other things, the ALJ found the record “*absolutely dispositive*” that a 240 cfs flow was the minimum flow for “endangered salmon viability.” *Id.* at p. 62,251 P 24, JA 2015 (emphasis in original).

During the same period, NOAA Fisheries and FWS each issued a draft BiOp in December 2003, followed by final BiOps from both in March 2004. June 2004

Order at P 6, JA 2205-06. The availability of the ALJ Report plus the BiOps enabled the Commission to respond to this Court's remand order, which it did by amending the license as needed to protect the listed species, by lifting the stay to require a release of 240 cfs, or inflow, as an interim protective measure, and by denying Tacoma's motion for reconsideration. *Id.* at P 9, JA 2206.

The BiOps contained incidental take conditions, *see id.*, Appendix C pp. 62,368-69, JA 2222-23, that "for the most part" tracked existing license conditions, although license amendments needed to satisfy the take conditions were listed. *Id.* at PP 14-21, JA 2207. The Commission summarized the grounds for lifting the interim stay: "under any reasonable scenario for continued operation of the Cushman Project, a minimum flow of 240 cfs will likely be required. . . . If the Cushman Project is to continue operating, it must also provide some additional interim protection for the endangered fish species that are currently being affected by its operation. . . . [T]he costs can be passed on to Tacoma's ratepayers with minimal effects on consumers' monthly and annual electric bills." *Id.* at P 44, JA 2210-11. The Commission found that Tacoma's motion for reconsideration presented nothing "to suggest that [FERC] ha[s] overlooked or misunderstood facts or arguments on rehearing. Moreover, Tacoma provides no new information that would compel or persuade us to reach a contrary result. We therefore conclude that Tacoma's motion does not meet the Commission's threshold requirements for

reconsideration.” *Id.* at P 54, JA 2212. Nonetheless, the Commission addressed Tacoma’s claims in light of the BiOps. *Id.*

To place the issues, particularly cost, in perspective, the Commission noted that because the original 1924 license was for a minor part of the project, not all project works, “there were no environmental requirements of any kind.” *Id.* This contrasted with the current situation in which Tacoma seeks to license the entire project in a time when environmental requirements are universally included in project licenses. Accordingly, “if the Cushman Project is to continue in operation, Tacoma must be willing to accept the change from a complete lack of environmental conditions in the 1924 license to an appropriate range of environmental measures that are necessary to address current conditions.” *Id.* at P 57, JA 2213.

Tacoma argued that inclusion of the conditions would lead to *de facto* decommissioning of the project due to allegedly high costs. *Id.* at P 59, JA 2213. In those circumstances, the Commission had recognized that “in some cases, the licensee may prefer to take the project out of service rather than continue operating it,” but that possibility “cannot preclude [FERC] from imposing the conditions it deems necessary to carry out its responsibilities under the FPA.” *Id.*, citing *Project Decommissioning at Relicensing Policy Statement* (December 14, 1994), 18 C.F.R § 2.24, 60 *Fed. Reg.* (Jan. 4, 1995), *FERC Stats. & Regs., Regulations Preamble*

*January 1991-December 1996* ¶ 31,011 (emphasis in original).

Tacoma's cost evidence, *id.* at P 47, JA 2211, challenged FERC's use of the *Mead* test (*Mead Corp.*, 72 FERC ¶ 61,027 at pp. 61,068-70 (1995)). FERC uses the *Mead* test to measure costs of the relicensed project compared to the price of least cost alternative power, leaving it to the licensee "to make a business judgment of whether it is prudent or reasonable to continue to operate the project." *Id.* at P 60, JA 2213. This dual approach recognizes "an 'uneconomic' project is simply one that generates power at a cost that is higher than the least costly source of replacement power." *Id.* Because replacement power is priced at market rates, which change over the license term, "it could make sense for a licensee to continue operating a project that costs more than replacement power" does currently. *Id.* Consequently, the Commission rejected Tacoma's claim that any test result that show "an uneconomic license for the Cushman Project is *per se* unreasonable and thus a violation of the FPA." *Id.*; *see id.* at P 62, JA 2213-14 (same).

Several parties sought rehearing. February 2005 Order at P 5, JA 2276. The parties stated that "they are renewing their earlier requests for rehearing of the 1998 license order," *id.* at P 7, JA 2276, but the Commission "den[ied] those requests for rehearing for the reasons given in [the] earlier orders" and declined to address new or different arguments in those requests "as an untimely attempt to supplement their prior requests for rehearing, which is not permitted." *Id.* at P 8,

JA 2276 (footnote omitted); *see also* P 9, JA 2277 (same).

Responding to Tacoma’s claim that the EIS should have included an analysis of decommissioning, FERC indicated that such an “analysis would not cause us to change our conclusion that the new license represents an appropriate balance of developmental and environmental values under the FPA.” *Id.* at P 12, JA 2277. In addition, before decommissioning could occur, Tacoma would have to file a surrender application, which would give Tacoma “an opportunity to develop and present a proposal for project decommissioning, and the Commission will then review the adequacy of Tacoma’s proposal,” including “whether and to what extent a supplemental environmental analysis may be required.” *Id.*

The Commission also rejected Tacoma’s argument that the new license conditions were not based on substantial evidence, particularly new evidence “concerning whether anadromous fish historically migrated upstream of the Cushman Project.” *Id.* at PP 14-15, JA 2277-78. But both NOAA Fisheries and FWS had analyzed and rejected that evidence in their BiOps, which were then examined by FERC Staff and found reasonable. *Id.* The Commission found it could reasonably rely on “the expertise of FWS and NOAA Fisheries in matters involving listed species” in deciding what conditions to implement in a license. *Id.* at P 15, JA 2278.

Tacoma argued that nothing had changed since FERC's 1999 stay was issued that would justify the partial lifting of the stay. *Id.* at P 31, JA 2281.<sup>4</sup> Tacoma argued there was no evidentiary support “for the conclusion that the minimum requisite water flow for viability of threatened salmon is 240 cfs, even on an interim basis,” and that the proceeding before the ALJ was procedurally flawed. *Id.* at P 34, JA 2281. On the latter point, the Commission found Tacoma was incorrect that the purpose of the proceeding was “to determine whether the Cushman Project was causing ‘irreparable harm to listed species.’ Rather, [FERC’s] objective was to consider whether there was a need for interim protective measures pending judicial review.” *Id.* at P 37, JA 2281-82.

While Tacoma criticized reliance on the evidence in the BiOps as addressing “only long term and not interim conditions,” the Commission found that the BiOps showed “existing conditions are inadequate to protect the listed species.” *Id.* at P 38, JA 2282. This was followed by a summary of the evidence supporting the inadequacy finding. *Id.* at PP 39-41, JA 2282-83. Thus, the BiOps “provide the evidentiary support for our partial lifting of the stay . . . These flows are needed now to address the adverse effects of the Cushman Project on the threatened fish species.” *Id.* at P 42, JA 2283.

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<sup>4</sup>The Commission had earlier addressed an unintended ambiguity regarding the minimum flow requirements to “clarify that Condition 1 of Appendix C, like Article 407 of the license, requires Tacoma to release a minimum flow of 240 cfs or inflow, whichever is less.” *Id.* at ¶ 16, JA 2278.

The Commission also found that circumstances had changed. Its earlier stay had not addressed “measures designed to protect ESA-listed species. A different balance is required when threatened species are at risk.” *Id.* at P 43, JA 2283. In addition, the Commission did not agree that the increased flows would cause irreparable economic injury. Tacoma failed “to refute [FERC’s] conclusion that [] Tacoma can pass these costs on to its ratepayers with minimal impact.” *Id.* at P 44, JA 2283. Nor did Tacoma “provide any information to suggest that [FERC’s] analysis of ratepayer impact is in error.” *Id.* Contrary to Tacoma’s claim that rate impact could not be considered, the Commission found it to be relevant as “a useful perspective for considering whether a continued stay of the minimum flow requirements is in the public interest.” *Id.*

The Commission declined to broaden the legal basis on which it granted the stay, finding that its concerns with a continued stay related to the time needed to complete “formal ESA consultation and the effects of project operation on the listed species.” *Id.* at P 46, JA 2283.

### **SUMMARY OF ARGUMENT**

Licensing decisions are reviewed on an arbitrary and capricious basis to determine whether the factual findings are supported by substantial evidence. Something more than a scintilla, but less than a preponderance, of evidence satisfies the substantial evidence standard.

While environmental matters were of no concern when Tacoma's minor part license issued in 1924, they have been at the forefront of nonpower values for the past five decades. Several sections of the FPA require the Commission to factor environmental concerns into the license, either as prescribed conditions that must be incorporated or as part of the overall public interest balancing that is required before a license can issue. The fact that inclusion of license conditions in response to such concerns may make the project more costly as compared to a license with no conditions or as compared to replacement power costs at a particular time does not make the license per se unreasonable.

Record evidence shows a negligible impact to ratepayers from the minimum flow conditions imposed here. Passing on the costs will increase Tacoma's low rates by roughly 1%. Other evidence shows that Tacoma has enjoyed a 47% annual return on investment over the entire license term, or more than Tacoma's entire investment plus its operating costs during that period, which amply satisfies congressional intent for investors to receive a return on and of their investment in projects. FERC showed that the costs of its minimum flow condition would result in a benefit of more than doubling the instream habitat as compared to Tacoma's flow proposal.

The Commission changed the test for judging economic value to reflect the change from cost-of-service ratemaking to market-based rates. The old test based

on levelized costs over the life of the project was outmoded in the face of shifting market prices, so a change to using current replacement power costs was warranted. While the new test provides a valid means to evaluate current net benefits (positive or negative), the Commission left to the licensee's business judgment whether future market conditions supported continued operation of a project under license conditions that show a current negative net benefit.

Neither FPA § 14 nor § 15 applies in this case as both were waived in accordance with FPA § 10(i) when the Commission granted a minor part license to Tacoma in 1924. The default position under FPA § 15(a) is not, as Tacoma argues, a federal takeover. Language in FPA § 15(a)(1) requiring that licenses be issued on terms mandated by then-existing laws puts licensees on notice that projects will be reevaluated at relicensing to assure compliance with changing laws and values.

The FPA does not allow FERC to favor either power or nonpower values in judging what license conditions are necessary to serve the public interest, except that FPA §§ 4(e) and 18 require FERC to incorporate certain prescriptions regardless of their economic impact. Here, considerable evidence addressing power and nonpower values was presented. On the minimum flow issues, substantial evidence showed that 240 cfs was essential to meet environmental concerns and could be achieved at negligible costs to Tacoma's ratepayers.

The case law under NEPA shows that a rule of reason applies both to the choice of which alternatives to include in an EIS and to the extent to which each alternative is studied. Decommissioning was appropriately given little weight in the FEIS here because prior to the EIS no party had suggested it as a viable option. Further, Tacoma expressly reserved making that decision until after judicial review. As no concrete proposal was in play, any ruling on decommissioning would have been advisory and non-binding. The FEIS decommissioning analysis was sufficient to address the issue at hand. Decommissioning can be more fully studied if and when Tacoma files a concrete surrender proposal.

Tacoma challenges several individual license conditions. In each case, FERC provided a reasonable explanation for what it did. FERC reasonably relied on the expertise of the resource agencies in adopting the incidental take conditions contained in the BiOps.

The Commission reasonably declined to include STLC in the consultations about lake levels. STLC can pursue other avenues for relief if Tacoma fails to comply with the minimum lake level conditions.

Turning to the Tribe's brief, the decision to treat this matter as a relicensing proceeding follows the statute, FERC precedent, and the 1986 passage of ECPA, in which Congress showed intent to distinguish between "existing" licenses and "original" licenses.

The Commission properly accepted as FPA §§ 4(e) and 10(j) prescriptions that fit within the ambit of those sections. Those conditions not fitting the statutory ambit were, nonetheless, considered, as part of the overall public interest calculus, and were largely adopted as license conditions. Some license conditions employ a collaborative process approach to mitigation measures, as suggested by the resource agencies. But those conditions include deadlines for plans to be filed as well as reserve authority to review the plans and to modify the license as needed.

This Court lacks jurisdiction to consider the Tribe's objection on appeal that it was error to reject Interior's FPA § 4(e) prescriptions as untimely. The Tribe did not seek rehearing on its objection. In any event, the Commission considered Interior's conditions as FPA § 10 (a) proposals.

The Tribe's assertion that the Commission improperly gave greater weight to Tacoma's economic concerns than to environmental values is inaccurate. The Commission found Tacoma's economic concerns to be overblown. The Orders also indicated that simply because inclusion of environmental conditions made a license more costly did not make inclusion of the condition *per se* unreasonable.

The Tribe asserts non-compliance with NHPA, but all the procedures outlined in that Act were followed. On the merits, the Commission took reasonable steps to mitigate to the extent possible any adverse effects.

The Tribe's claim that FERC ruled it lacks statutory authority to address CWA issues is inaccurate. The Commission did not say it lacked authority, but found in the present facts no reason to exercise its authority. Likewise, the Tribe's assertion that the Commission turned a blind eye to CZMA issues is inconsistent with the facts. On the Tribe's state water rights contentions, FPA § 27 expressly precludes FERC from acting on state water rights claims, and Standard License Article 5 requires a licensee to obtain within five years the water rights necessary to operate its project.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

For FERC licensing decisions, a court reviews “to determine whether the factual findings underlying the decision were ‘supported by substantial evidence.’ 16 U.S.C. § 825l(b). [This Court] also review[s] Commission licensing decisions to determine whether they were ‘arbitrary and capricious.’ In both cases, the review is quite deferential.” *State of North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir.1997)(citation omitted).

Under the arbitrary and capricious standard, a “court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency.” *ExxonMobil Gas Marketing Co. v. FERC*, 297

F.3d 1071, 1083 (D.C. Cir. 2002), *cert. denied* 124 S.Ct. 48 (2003)(citations and internal quotation marks omitted). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (citation omitted).

FERC’s statutory interpretation is governed by the test announced in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). If the statute is clear, then the Commission is obligated to follow the statutory language. *Id.* But where the statutory language is ambiguous, “a court will defer to th[e] agency’s interpretation so long as it is reasonable.” *FPL Energy*, 287 F.3d at 1156 (citation omitted). FERC’s reasonable interpretation of its own orders will be upheld as well. *See Texaco Inc. v. FERC*, 148 F.3d 1091, 1099 (D.C. Cir. 1998); *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D. C. Cir. 1997).

## **RESPONSE TO PETITIONERS CITY OF TACOMA AND SAVE THE LAKES COALITION**

### **II. THE LICENSE CONDITIONS ARE WITHIN FERC’S AUTHORITY**

Tacoma contends that the Commission exceeded its statutory authority by allegedly creating another option under FPA § 15(a)(1), 16 U.S.C. §808(a)(1), viz., “forc[ing] license surrender – *de facto* decommissioning, under the guise of issuing a license that it simply calls a new license upon ‘reasonable terms.’” Tacoma Br. 18. That contention fails on several levels. First, the record evidence does not

support Tacoma's allegation that it has not recovered its full investment in and return on the project at issue or is being forced into "*de facto* decommissioning" due to the economic effects of the license conditions. Second, FPA § 15(a)(1) does not apply in the instant matter. Third, Tacoma relies on its own rewrite, not the actual language, of the statute as to what options are available.

#### **A. The FPA Requires Power and Environmental Concerns Be Balanced**

Tacoma charges that FERC's policy of imposing allegedly high cost environmental and other conditions constitutes *de facto* decommissioning is "created [on] authority not delegated by Congress and [ ] further abdicated responsibilities specifically required by Congress." Tacoma Br. 19. In effect, Tacoma argues that cost concerns should be given far greater weight than environmental concerns in setting license conditions. *Id.* at 23-24. Despite its contention that the *Decommissioning Policy Statement* created non-delegated authority and abdicated specific responsibilities, Tacoma nowhere points to statutory language supporting its contention, but, instead, relies on dissenting opinions of Commissioners, and snippets of statements from witnesses during hearings held when the Act was originally passed. Tacoma Br. 20-23.

The *Decommissioning Policy Statement* compares the differences between the Act's licensing provisions when enacted in 1920 (and applicable to Tacoma's 1924 minor part license) and those present in 1994 when the policy statement

issued. *Decommissioning Policy Statement*, ¶ 31,011 at pp. 31,223-27. Among the noted changes, environmental concerns evoked almost no comment when the Act was originally passed, but have “become important factors since the 1950s, as experience with the effects of water-power project operation has grown. This has resulted in new license conditions that have generally increased the costs associated with running hydropower projects.” *Id.* at p. 31,225.

As the Commission found, the provisions of FPA § 15(a)(1) did not “necessarily mean continuation of business as usual” when a new license issued. *Decommissioning Policy Statement* at p. 31,224. Rather, by limiting licenses to 50-year terms, Congress “intended to preserve for the nation the opportunity of reevaluating the use to which each project site should be put in light of changing conditions and national goals.” *Id.* (footnote omitted). Further, while the licensee “enjoyed considerable security” during the license term, at relicensing, “the Commission would reexamine the statutory standard and make a new determination,” under FPA § 10, which states FERC “shall have the authority to require the modification of any project” based on balancing public interest factors in a way that “will be best adapted to a comprehensive scheme of improvement and utilization.” *Id.*, quoting FPA § 10. Other statutory authority to impose conditions that reasonably reflect “the then-prevailing laws and regulations: at the time of relicensing” is found in FPA §§ 6 and 15. *Id.* at pp. 31,224-25.

Contrary to what Tacoma suggests, Br. at 18-19 (as did others earlier), “[t]here is no merit to the suggestion by some industry commenters that a condition in a power license is *per se* unreasonable if, as a result of imposing the condition, the project is no longer economically viable. The statute [in FPA § 10(a), 16 U.S.C. § 803(a)] calls for a balancing of various development and nondevelopment interests, and those commenters’ position would elevate power and other development interests far above the environmental concerns.” *Decommissioning Policy Statement* at p. 31,228; *see* July 1998 Order at p. 61,574 & ns. 177-78, JA 1382 (same). Elevating power and other development interests over environmental interests would be particularly troublesome for the instant Cushman Project. The 1924 minor license applied to “a small fraction of 1% of the total project reservoir behind Dam No. 1,” compared to the instant relicensing applicable to the project in its entirety, and was granted when “[e]nvironmental measures were not so recognized” as they are today. *Id.* at pp. 61,574-75, JA 1382-83.

In short, and contrary to Tacoma’s contention, the Commission is not obligated, by either the language or the history of the FPA, when setting license conditions to elevate alleged high cost concerns over environmental concerns. Nor is the Commission obligated to rethink the balance struck in the license conditions in the event the licensee asserts the conditions amount to *de facto* decommissioning because such a “possibility *cannot* preclude [FERC] from

imposing the conditions it deems necessary to carry out its responsibilities under the FPA.” July 2004 Order at P 59, JA 2213 (emphasis in original).

### **B. The Rate Impact of The License Conditions Is Minimal**

Tacoma’s *de facto* decommissioning assertion rests largely on its view that the license conditions make the project uneconomic. “Tacoma has said since the DEIS was issued that it could not accept the license. FERC concedes that the Project – as conditioned under such license – is uneconomic.” Tacoma Br. 23 (citation omitted). From those premises, Tacoma argues the license as conditioned does not rest on “reasonable terms,” but was designed “to test [FERC’s] *de facto* decommissioning .” *Id.* at 24 (relying on a dissenting Commissioner opinion in another case). The assertion and its premises have no factual basis. Quite the opposite, both the ALJ and the Commission found substantial record evidence showed that the cost effects of the conditions were minimal on Tacoma, and could be passed on to its ratepayers with almost an imperceptible effect.

While Tacoma points to the \$2.06 million figure as the negative net benefit of the license as conditioned, *id.*, that figure resulted from a comparison of the existing 30 cfs minimum flow to 240 cfs. March 1999 Order at p. 62,095, JA 1680. Tacoma itself had proposed, however, a 100 cfs minimum flow, which results in a much lower cost differential. “The relative benefits of Tacoma’s 100-cfs minimum flow proposal and the 240 cfs [FERC] adopted are documented in the FEIS.

Adoption of a minimum flow of 240 cfs instead of 100 cfs will cost Tacoma an additional \$436,000 annually in foregone energy production, and an additional \$30,000 annually for the modification and operation of the No. 2 Dam's outlet works to accommodate the higher flow level." *Id.* at 62,087, JA 1672 (citing portions of FEIS). This comparison, which shows a cost differential over 75% lower than the \$2.06 million figure, provides a more realistic view of the costs between what Tacoma proposed and how the license was conditioned.

A cost-benefit analysis was undertaken, using FEIS evidence, of what would be gained environmentally by increasing minimum flows. "The record also provides data regarding the relationships among flow levels and instream habitat benefits. For example, at 100 cfs, total fishery habitat will increase by about 11 percent, whereas at 240 cfs, total habitat increases by about 26 percent." *Id.* at 62,087-88, JA 1672-73 (citations omitted). Thus, at an incremental annual cost of about \$450,000, the instream habitat benefits would more than double. As "[w]here to draw the line" between environmental and development values "is uniquely the Commission's statutory responsibility," *id.*, setting a condition of 240 cfs on the basis of unchallenged cost and habitat benefits evidence fits well within a "reasonable term" under the FPA, contrary to Tacoma's claim of "no reasoned explanation, that the license is 'reasonable.'" Tacoma Br. 24.

Even accepting the \$2.06 million as the negative net benefit, substantial record evidence showed that amount would not make the Project “uneconomic,” but would have a negligible effect on Tacoma and its ratepayers. The ALJ’s Report (at pp. 65,261-62, JA 2025-26) offers several analyses of the costs related to a 240 cfs minimum flow, using Tacoma’s and others’ cost estimates of replacement power and capital costs. *Id.* The resulting permutations of customer rate effects, *id.* at p. 65,262, yielded a small range of a 0.9%-1.0% increase in customer rates, with the average annual rate increase varying from \$4.77 to \$6.05. *Id.* The ALJ found also “substantial record evidence [shows] that [Tacoma’s] ratepayers currently enjoy some of the lowest rates in its (low rate) region, let alone the nation as a whole.” *Id.* at p. 65,252 at P 29, JA 2016.

The Commission relied on that evidence to conclude “the economic costs that Tacoma would pass on to its ratepayers from implementing the 240-cfs minimum flow w[ere] negligible. *Id.* at 65,261-62.” June 2004 Order at P 34, JA 2209; *see also id.* at P 41 & n. 10, JA 2210 (using Tacoma’s estimates, the “annual cost would result in a one-percent increase in consumer rates” for ratepayers with some of the lowest rates in the nation). On rehearing, “Tacoma ma[de] almost no attempt to refute [FERC’s] conclusion that Tacoma can pass these costs on to its ratepayers with minimal impact.” February 2005 Order at P 44, JA 2283. What little Tacoma attempted was off point: “Tacoma does not provide any information

to suggest that [FERC's] analysis of ratepayer impacts is in error. Although Tacoma criticizes [the] remand order for 'adopting without explanation a new economic analysis never applied previously,' Tacoma does not indicate why we might be precluded from considering this information, together with our traditional economic analysis . . . [as] provid[ing] a useful perspective. . . ." *Id.*

### **C. FERC's Economic Analysis Followed the FPA**

Tacoma raises several contentions (Br. 22-30) regarding what it sees as FERC's inadequate evaluation of the economic effects of the license conditions. As shown below, FERC properly evaluated those effects consistent with the statutory intent, and, based on substantial record evidence, concluded that the overall benefits of the conditions justified the costs.

Tacoma cites legislative history for the proposition that "licensees would be ensured their investment at the end of a license term." *Id.* at 22 (footnote omitted). Both the ALJ and the Commission directly addressed this point, and found that Tacoma has more than recovered its investment plus a reasonable return. The ALJ stated, "The record reflects substantial evidence suggesting that Tacoma's annual rate of return on investment between 1927 and 1997 averaged approximately 47%, producing total revenues significantly in excess of Tacoma's aggregate capital investment and operating costs over the period." ALJ Report at p. 65,252, P 30, JA 2016; *see* June 2004 Order at P 34, JA 2209 (noting "substantial evidence in the

record to suggest that the project generated total revenues between 1927 and 1997 that were significantly in excess of Tacoma's capital investment and operating costs"). Tacoma introduced no evidence to challenge this point.

Thus, the evidence shows that investors had received a full return of (plus a return on) their entire investment in the Cushman Project by the end of 1997 (if not sooner), consistent with congressional intent. The Commission not only considered this factor in its deliberations, but also found that it was not a reason, as Tacoma implies (Br. 24), to exclude the minimum flow condition. *See, e.g.*, June 2004 Order at P 44, JA 2210-11.

Tacoma asserts that the Commission failed to give sufficient weight to power and development values in setting the license conditions. Tacoma Br. 25-27. According to Tacoma, "FERC radically altered the scope of its analysis at relicensing. It did this by effectively removing the economic viability of a new license as an appropriate factor." Tacoma Br. 29. Tacoma contends that the *Mead* analysis (after *Mead Corp.*, 72 FERC ¶ 61,027 (1995)) brought about this change by offering only a "limited snapshot" of the financial effects of license conditions. *Id.* The Commission incorporates the *Mead* analysis into its balancing, but, due to the limitations of the analysis, where a negative benefit is shown, FERC leaves the decision of whether to continue operation with the licensee. July 1998 Order at p. 61,571 text accompanying n. 158, JA 1379.

Tacoma challenges the *Mead* analysis on the basis that it fails “to account for any future projected changes in power costs and availability, as well as transmission capability.” *Id.* The Commission chose to revamp its prior analysis, which looked to long-term costs, because of a change in the market structure.

In light of the significant competitive changes occurring in markets for new electric generation, as well as increasing competitive pressures on utilities to lower the costs of their electric service, the Commission [in *Mead*] determined that it would no longer use long-term, levelized cost estimates covering the terms of the prospective license. The Commission reasoned that, even under the relatively stable conditions that have characterized the electric industry historically, such forecasts could never be more than a general guide, but the new era of competition increasingly called their usefulness into question. Instead, the Commission explained that it would use current costs to compare the costs of the project and likely alternative power, leaving it for the licensee to make a business judgment of whether it is prudent or reasonable to continue to operate the project.

June 2004 Order at P 60, JA 2213; *see also* July 1998 Order at p. 61,570, JA 1378 (same).

That offers a rational explanation of why the policy changed, and comports with FERC’s continuing duty to adjust its regulatory practices to fit the realities of the market it regulates. Whatever help long-term cost estimates gave in the prior cost-of-service ratemaking regime in assisting an economic viability assessment, that help was lost in a market-based rate regime where competitive pressures, not cost recovery, would set the prices that licensees could charge for power generated

at a project.<sup>5</sup>

Tacoma charges that under this approach, “FERC violated one of its fundamental tasks at relicensing, that is, of articulating the power and nonpower values and then balancing the various interests to arrive at a decision that FERC believes is in the public interest.” Tacoma Br. 30. According to Tacoma, that result occurred because the Commission left to Tacoma the decision of whether to accept the license as conditioned to satisfy the public interest. *Id.* But that charge conflates FERC’s decision to allow Tacoma to make a business judgment about whether to accept the license with FERC’s decision as to what conditions must be in the license to satisfy the public interest. The latter decision, which FERC did not shirk here, satisfies the statutory task of balancing power and nonpower values, and thus no abdication of duty occurred here.

The Commission early on viewed the two decisions as separate, albeit interrelated. “Tacoma’s insistence that wholesale power prices at the time of licensing are the preeminent factor in determining the public interest is misleading and inconsistent with the FPA’s requirement that [FERC] give equal consideration to power and nonpower values in determining the public interest. Tacoma is

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<sup>5</sup> Tacoma asserts that the record contains alternative long-term power costs that show allegedly “substantial negative net present value.” Br. 29 n. 14, citing the March 1999 Order at p. 62,095, JA 1680. But that page shows the \$2.06 million figure that Tacoma referenced (Br. 23), and that FERC used as well. *E.g.*, June 2004 at P 47, JA 2211. Thus, all parties used the same figure.

ultimately responsible and best able to determine whether continued operation of the existing project under the conditions of this license is a reasonable business decision.” July 1998 Order at p. 61,571, JA 1379; *see id.* at p. 61,574, JA 1382 (“license conditions that result in project power costing more than current market prices for comparable power at the time of licensing are not *per se* unreasonable”).

Just as it was being tugged by Tacoma to emphasize power values, FERC was being tugged by environmental interests to give greater weight to nonpower values. *Id.* at pp. 61,571-72. The Commission is not to favor one set of values over the other, but to balance them in today’s conditions. “[T]he language of the FPA is general, leaving the Commission with the ability to accommodate to changing times and conditions. Today’s Section 10(a)(1) calls on the Commission to balance developmental and nondevelopmental (environmental) interests in a manner that did not pertain in 1920. Moreover, Sections [ ] 4(e) and 18 leave no choice but to accept the conditions prescribed thereunder by other federal agencies (or else deny the license application), regardless of whether the conditions are acceptable to the licensee or adversely affect project economics.” *Id.* at p. 61,575, JA 1383.<sup>6</sup>

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<sup>6</sup> Tacoma asserts that it “is the epitome of agency abdication” not to know whether Tacoma will accept the license pending judicial review in the face of “seven years of history and the City’s repeated, unambiguous, statements to FERC that it cannot accept” the license. Tacoma Br. 28. Apparently, Tacoma forgot one part of that seven-year history. “Tacoma adds that it has not accepted and will not accept the new license terms as issued, *and that its decision whether to do so will depend on whether it is successful in seeking to modify the license terms on*

The extent of the competing views as to what and how the values should be balanced is shown by the 14 complying and 18 non-complying FPA § 10(a) comprehensive plans for improving, developing, or conserving the waterways affected by the project. *Id.* at 61,569, JA 1377. FERC had its Staff conduct extensive studies that resulted in a DEIS and FEIS. *See id.* at 61,570, JA 1378. That evidence and analysis support the conclusion “that the terms and conditions set by the Commission in the new Cushman license are reasonable, and are necessary to meet the comprehensive development standard of the FPA.” *Id.* at p. 61,574, JA 1382.

All that was prior to the issuance of the BiOps and the ALJ’s Report, which further informed FERC’s minimum flow decision. As discussed above, the ALJ Report summarized substantial record evidence of the cost effects of a 240-cfs minimum flow, which led the Commission to conclude the rate impact on Tacoma’s customers would be negligible. *See supra* at Section II.D. The BiOps’ prescribed incidental take conditions for listed species affected by the Project that led, in turn, to amendments of the “subsequent license as needed to protect the

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*rehearing or judicial review. Tacoma therefore requests the Commission to clarify that Tacoma need not decide whether to accept or reject the new license until after completion of rehearing and judicial review.*” October 1998 Order at p. 61,476-77, JA 1637-38 (emphasis added); *see* February 2005 Order at p12, JA 2277 “Tacoma has deferred its decision on whether to accept the new license until after judicial review is completed.”). As Tacoma professed that it would not decide what to do until after judicial review, it is hardly surprising that FERC accepted that statement at face value, and indicated it did not know what Tacoma would do.

listed fish species in response to those biological opinions.” June 2004 Order at P 9, JA 2206. Both the ALJ’s Report and the BiOps supported the earlier conclusion that a 240 cfs minimum flow was needed. *See id.* at P 44, JA 2210 (“Thus, it appears that, under any reasonable scenario for continued operation of the Cushman Project, a minimum flow of 240 cfs will likely be required.”); *see also* ALJ Report at p. 65,251 P 24, JA 2015 (“The record, both here and in the principal proceedings, is *absolutely dispositive* that the minimum requisite water flow for endangered salmon viability in the lower North Fork Skokomish River below Cushman Dam No 2 is 240 cfs – even on an interim basis.”)(emphasis in original).

Against the overwhelming and consistent evidence that 240 cfs had to be the minimum flow level, the Commission again weighed Tacoma’s cost claims and found them lacking. June 2004 Order at PP 55-64, JA 2212-14; *see id.* at P 54 (FERC “examine[s] Tacoma’s arguments again below to emphasize for all concerned that we have seriously considered them in light of the recently-filed biological opinions”). Thus, the Commission met its duty to consider power and nonpower values in setting license conditions, and still remained “convinced that the new license terms are not only reasonable but necessary to serve the public interest and meet the requirements of the FPA.” *Id.*

#### **D. FPA §§ 14 and 15 Do Not Apply In This Matter**

Tacoma has not contested on brief FERC’s conclusion that “Tacoma’s

contentions regarding [FPA] Sections 14 and 15 are misplaced inasmuch as the license which Tacoma received in 1924 for this project, and which it accepted, was a minor part license that waived both sections.” July 1998 Order at p. 61,573, JA 1381 (footnote omitted); *see* June 2004 Order at P 63, JA 2214 (same). That conclusion is based on the language of FPA § 10(i), 16 U.S.C. § 804(i), which states in relevant part: “In issuing licenses for a minor part only of a complete project, . . . the Commission may in its discretion waive such conditions, provisions, and requirements of this Part” (except for certain provisions not at issue here). *Id.* FERC’s “consistent practice has been to routinely waive sections 14 and 15, and [certain] other provision of Part I of the FPA . . . whenever it issues a minor [or minor part]license.” *Hydroelectric Relicensing Regulation Under the Federal Power Act, FERC Stats. & Regs., Regulations Preambles 1986-90*, ¶ 30,854 at p. at 31,371 (1990).

#### **E. Tacoma’s Reading Contravenes The Statutory Language**

Rather than quote the language of the statute, Tacoma sets out what it thinks FPA § 15(a)(1) says: “Section 15(a)(1) of the FPA requires that FERC, upon expiration of the existing license, issue an annual license from year to year until FERC (1) issues a new license upon ‘reasonable terms’ to either the existing or a new licensee, (2) issues a non-power license to another entity, or (3) there is a federal takeover of the project.” Tacoma Br. 17 (citation and footnote omitted).

The default position under FPA § 15(a)(1)<sup>7</sup> is not, as Tacoma’s reading suggests, a “federal takeover” of a project. As the Commission found, FPA § 14, to which FPA § 15(a)(1) refers and, which gives the United States “the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects,” 16 U.S.C. § 807(a), “grants a right, but imposes no obligation. The FPA nowhere provides that the federal government is required to take over a project under any circumstances or that the Commission is ever obligated to recommend to Congress that it do so.” July 1998 Order at pp. 61,573-74, JA 1381-82. Relying on the section’s legislative history, the Commission noted “Section 14 was a concession to the early proponents of federal power. However,

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<sup>7</sup> FPA § 15(a)(1) states:

That if the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the existing license upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in Section 14 hereof: *provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

at the time there was strong resistance to any idea of the federal government being in the water power business. Consequently, most people believed that the Section 14 power would never be exercised.” *Id.* at n. 173 (internal citations omitted); *see Project Decommissioning at Relicensing: Policy Statement, FERC Stats. & Regs. Regulations and Preambles*, ¶ 31,011 at p. 31,225 (1994)(“Section 14 remains on the books, although the Federal Government has never taken over a licensed project under its terms, nor has the Commission ever recommended that it do so.”).

While Tacoma refers (Br. 17) to the “reasonable terms” phrase in § 15(a)(1), it wholly ignores the requirement that FERC must “issue a new license to the existing license upon such terms and conditions as may be authorized or required under the then existing laws and regulations.” 16 U.S.C. § 807(a)(1). The latter provision reflects congressional intent in 1920, when FPA § 15 was enacted, “that the values the nation considers important can, and almost certainly will, undergo dramatic changes over the period of a half-century (the typical licensing period).” July 1998 Order at p. 61,574, JA 1382 (footnote omitted); *see also id.* at 61,575 & n. 186, JA 1383 (quoting 1968 Senate Report: “Congress intended to preserve for the Nation the opportunity of reevaluating the use to which each project site should be put in light of changing conditions and national goals.”).

After reviewing changes that have occurred in the country’s laws and in FERC’s licensing approach, *Id.* at 61,575-76, JA 1383-84, the Commission found

that “from the outset, the [FPA] puts the licensee on notice that it will eventually be subject to a reexamination of the project’s role, and new license conditions based on the nation’s values as they exist at that time.” *Id.*

### **III. THE ORDERS FULLY SATISFY NEPA**

Tacoma asserts that “FERC’s decision to defer any detailed analysis of decommissioning violates the fundamental mandate of NEPA, 42 U.S.C. §§ 4321-4370d (2000), that an agency take a ‘hard look’ at the reasonably foreseeable impact of its decision.” Tacoma Br. 30-31. Recognizing that FERC “included decommissioning as one of the alternatives examined” in the FEIS, Petitioners, nonetheless, assert error because, in their view, FERC “failed to analyze this alternative in any great detail.” Tacoma Br. 31. But, as the cases cited by Petitioners (Br. 31-32) ruled, what alternatives to include in the evaluation, as well as how detailed the study of each must be, are guided by a rule of reason. Thus, the question presented is whether the analysis of decommissioning undertaken was reasonable in the circumstances.

This Court has laid out the test: “[A]n agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement. [This Court] ha[s] also held that an agency need follow only a ‘rule of reason’ in preparing an EIS, and that this rule of reason governs ‘both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.’” *Citizens*

*Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194-95 (D.C. Cir. 1991)(internal citations omitted; emphasis in original). Under that test, a court “review[s] an agency’s compliance with NEPA’s requirements deferentially,” which means a court will uphold an agency’s “discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail.” *Id.* at 196. Here, as decommissioning was an alternative, the only question is whether its discussion was in reasonable detail.<sup>8</sup>

Initially, the resource agencies, not Tacoma, argued that “a fuller analysis” of decommissioning in the FEIS was needed “because Tacoma has suggested it may reject” the subsequent license. July 1998 Order at p. 61,545, JA 1354. The Commission disagreed, noting that its “policy [is] to reserve a detailed analysis of decommissioning for those cases in which it is a real alternative, rather than simply one possible outcome that no party advocates and the Commission does not intend to pursue.” *Id.* Not only was FERC’s policy “consistent with NEPA,” which does not “require [agencies] to examine all conceivable alternatives,” *id.*, but also it was consistent with the instant facts. “When the staff prepared the EIS, no party was advocating that the Cushman Project be decommissioned.” *Id.*

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<sup>8</sup> It is worth noting that nowhere in the argument on this point (Br. 30-35) do Petitioners cite to any FERC Order or attempt to examine, much less to refute, any FERC statement concerning decommissioning.

Although Tacoma has stated that it could decline to accept the subsequent license, it also indicated that it will not make an actual decision until after judicial review. *See supra* n. 6 (noting Tacoma’s request to defer decision). In addition, the Commission “adopt[ed] some but not all of the staff’s earlier recommendations,” July 1998 Order at p. 61,545, JA 1354, which was reason to think Tacoma might accept the modified license. *Id.* Those factors support the reasonableness of the decision to defer “a more detailed analysis of decommissioning alternatives” on grounds that if Tacoma rejects the license, FERC “regulations regarding license surrender and decommissioning will be triggered,” thus giving an opportunity for a more detailed review of an actual proposal. *Id.* at p. 61,546, JA 1355; *see also id.* at p. 61,573, JA 1381 (if Tacoma rejects license, “it will have to prepare a plan for decommissioning the project, and the Commission will then have an opportunity to consider what conditions may be appropriate in that situation”).

The issue arose again on rehearing where several parties asserted that decommissioning was “a reasonably foreseeable consequence of the license order” that “should have [been] considered in more detail as an alternative in the EIS.” March 1999 Order at p. 62,073, JA 1658. The EIS sufficiently “examine[d] decommissioning as an alternative, both with and without dam removal. This analysis was sufficient to compare licensing the project with the range of environmental effects that could occur if the project is decommissioned.” *Id.*

The rehearing requests seeking more detail were nothing more than requests for “an advisory opinion regarding [FERC’s] decommissioning authority and the conditions that [FERC] would seek to impose.” *Id.* Although having authority to issue advisory opinions, the Commission declined to do so because “agreement on what conditions might be appropriate for decommissioning the project would be difficult, particularly in the abstract,” and would not preclude FERC “from reach[ing] different conclusions later, in response to a concrete” proposal. *Id.*

After the ALJ Report and the BiOps, the issue arose again in the context of whether a supplemental EIS was needed. February 2005 Order at P 12, JA 2277. The Commission found one was not needed because the subsequent license “represents an appropriate balance fo development and environmental values under the FPA.” *Id.* Further, with Tacoma deferring its decision on whether to accept the license until after judicial review, if at that time Tacoma decides not to accept, it “will be required to file a surrender application,” which will offer “an opportunity to develop and present a proposal for project decommissioning” that can be evaluated. *Id.* Part of such FERC review would be “whether and to what extent a supplemental environmental analysis may be required.” *Id.* In light of that, any present analysis of the issue “would be both speculative and premature.” *Id.*

FERC’s explanation for not examining decommissioning in greater detail satisfies NEPA’s deferential reasonableness standard. Decommissioning, although

not proposed by any party prior to issuance of the EIS, was analyzed in sufficient detail to compare its effects with other outcomes. Further examination would amount to an advisory opinion, which FERC can issue, but declined to do here because of uncertainty as to specifics and because such an opinion would not be binding. Finally, prior to decommissioning being authorized, FERC would have the opportunity to review a specific proposal, and could at that time decide whether further environmental analysis of the issue was needed. In short, FERC examined decommissioning to the degree needed for present purposes, and left further questions to another day.

#### **IV. THE LICENSE CONDITIONS ARE REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE**

Tacoma asserts that FERC “barely reviewed the record, and instead issued license terms that are not only open-ended and experimental, but also in some respects fail to address the facts.” Tacoma Br. 36. Tacoma disputes several license conditions as allegedly inadequate. *Id.* at 36-42. Tacoma’s assertions are not well taken, as each of the challenged license conditions was reasonable and supported by the record evidence.

It appears that Tacoma challenges Article 421 as requiring Tacoma to manage “several privately-owned land parcels” for wildlife enhancement, “even though” those parcels are managed for conservation purposes by another party. Br. 36. Although unstated, Tacoma apparently thinks the possible overlap is

unreasonable, as did FERC: “We agree that Tacoma should not be required to duplicate any land management actions that the [conservation plan] requires Simpson to take.” February 2005 Order at P 22, JA 2279.

Nonetheless, FERC was concerned with two possible difficulties: (1) “it is unclear whether the provisions of the Simpson [plan] and Article 421 are in any way duplicative,” and (2) as FERC has no jurisdiction over Simpson, it “could not ensure that the land is managed to meet the objectives of Article 421 by deferring to the Simpson [plan].” *Id.* The Commission offered suggestions on how to solve those difficulties, *id.*, and indicated that Tacoma can raise this issue in consultation with FWS and NOAA Fisheries, as is required by Article 421. *Id.*; see July 1998 Order at pp. 61,590-91, JA 1398-99 (setting out provisions of Article 421, including requirement for consultation with government and private parties).

Far from supporting Tacoma’s view that the Commission “gave up[,] . . . barely reviewed the record[,] . . . [and] issued license terms . . . [that] fail to address the facts,” Tacoma Br. 36, FERC’s response on Article 421 directly addressed and agreed with Tacoma’s concerns, reviewed the relevant record evidence in the BiOps, raised potential problems and offered solutions, and showed a willingness to allow a solution that avoided overlap. February 2005 Order at PP 20-22, JA 2278-79. The Commission could hardly be more engaged or responsive.

Similarly, Tacoma’s contention that Articles 414 and 415, related to

fishways (along with related Articles 416 and 419), “are neither precise nor limited in how or when they might be changed,” and lack a “showing that fish populations in the Skokomish will ever reach a level that would justify fish passage in the first place, Tacoma Br. 37 and 38, are not well founded. Articles 414 and 415 (July 1998 Order at 61,587, JA ) relate to fishways prescribed by NOAA Fisheries and FWS, the construction of which FERC is required to include as a license condition by FPA § 18, 16 U.S.C. § 811. July 1998 Order at p. 61,550, JA 1395.

Instead of a specific prescription, FWS prescribed “a ‘collaborative process’ among the licensee, the fish and wildlife agencies, and the Skokomiish Indian Tribe for identifying specific fish passage alternatives for the project, and it requested the Commission to require the licensee to participate in the process.” *Id.* at 61,550, JA 1358 (footnote omitted). The Commission found that proposal did not meet the specificity required for an FPA § 18 prescription, and so analyzed it under FPA § 10(a)(1), and concluded that Tacoma should be required to develop and to install fish passage facilities “pursuant to an approach similar to the ‘collaborative process’ requested by the agencies.” *Id.* at 61,551, JA 1359.

Far from a “build it and they will come” approach, as charged by Tacoma (Br. 38), the Commission analyzed FERC Staff’s feasibility studies examining several types of facilities that could lead to restoration of anadromous fish on the Skokomish River. *See id.* and n. 82, JA 1359-60 (estimating that “fish passage to

the upper North Fork could produce an annual run of about 129,000 anadromous fish, including Chinook, coho, sockeye, and steelhead”). Staff was concerned, however, that low Lake Cushman water levels could adversely affect spawning, and thus questioned the need for fish passage. *Id.* at 61,552, JA 1360; *see* Tacoma Br. 38 (pointing to this recommendation “against fish passage”). The federal agencies disputed Staff’s claims about Lake Cushman, and FERC agreed they presented “a persuasive argument that a Skokomish River anadromous fish restoration could be successful” with fish passage at the Project. *Id.*<sup>9</sup>

Virtually every aspect of the fish passage rulings was the subject of rehearing, and the Commission devoted considerable discussion to them all. *See generally* March 1999 Order at pp. 62,078-84, JA 1663-69. Turning to the point Tacoma raises before this Court – “equivocal data on whether significant anadromous fish runs ever existed pre-Project” (Br. 38) – and raised on rehearing, the Commission did “not accept Tacoma’s characterization of the evidence.” March 1999 Order at p. 62,082, JA 1667. Notwithstanding the lack of reliable pre-Project records, “the FEIS concluded that not only Chinook and steelhead, but probably other anadromous species as well, historically ranged upstream as far as

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<sup>9</sup> Article 416 requires monitoring of the fish passages once they are built “[b]ecause monitoring the effectiveness of such facilities is important to establish that they are functioning properly.” *Id.* at p. 61,553, JA 1361. Article 419, added at the federal agencies’ request, follows a general FERC practice of reserving authority “to require such fishways as Interior or Commerce may prescribe in the future.” *Id.*

old Lake Cushman. The FEIS concluded that there was no basis for the assertion that the Upper Falls had blocked all potential anadromous fish runs upstream before construction of the project.” *Id.* After reviewing the record evidence, FERC concluded that “even taking Tacoma’s criticism of the evidence into consideration, there is sufficient support in the record for the conclusion that anadromous fish species were present in the North Fork above the project site before construction.” *Id.* In other words, the Commission took the hard look required by NEPA at all the evidence before deciding the issue. Nothing more is required.

Tacoma challenges monitoring conditions with a FERC reservation to modify the license as needed, claiming “these requirements undoubtedly are experimental.” *See* Tacoma Br. 40 (referring to Articles 413 and 404). FERC’s discussion of Article 404 on rehearing dispels those claims. Article 404 was put in place as a way “to alleviate flooding on the mainstem of Skokomish River, and to determine if North Fork flushing flows will aid in maintaining the conveyance capacity of the mainstem.” March 1999 Order at p. 62,089, JA 1674. Monitoring was needed, not because flushing was experimental, but because that would allow the Commission to determine if Tacoma has met “specific performance goals and a schedule for implementation” that were included in the condition. *Id.* at p. 62,090, JA 1675. Monitoring for performance is hardly experimental, but a normal part of FERC’s regulatory responsibility, as is a reserved right to require modifications.

Tacoma cites Article 412 (July 1998 Order at p. 61,585, JA 1393) as an example of an experimental condition whose premises, Tacoma asserts, “are highly questionable under the higher flow regime.” Tacoma Br. 41. The Commission did not, as Tacoma implicitly suggests, force Tacoma to accept the condition. Rather, it stated that Tacoma’s concerns would be considered along with “comments of the parties required to be consulted in developing the plan, on what specific adaptations of that plan are appropriate in light of the flow regime prescribed in the license order.” March 1999 Order at p. 62,097, JA 1682. Thus, assuming Tacoma has a valid point, the requirements of Article 412 could be changed prior to implementation. Far from being an irrational experiment, *see* Tacoma Br. 42, the Commission provided a means for this condition to be adjusted as needed. Such a pragmatic approach reasonably responds to changing circumstances.

## **V. FERC’S RELIANCE ON THE BIOPS WAS REASONABLE**

Tacoma contends that “FERC acted arbitrarily and capriciously in relying upon biological opinions that are legally flawed and, moreover, known by FERC to be incorrect.” Tacoma Br. 43. As Tacoma states, “ultimate responsibility for compliance,” *id.*, particularly the incidental take statement, falls on FERC, which means for all practical purposes that FERC disregards a biological opinion only “at its own peril.” *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

Tacoma's assertions that FERC acted erroneously on BiOps that are flawed (*e.g.*, Br. 44) amount to collateral attacks on the validity of the BiOps themselves, and do not challenge laws or regulations that fall within FERC's statutory purview. *See id.* (citing as purported support for one allegation "16 U.S.C. § 1536(B)(4)(c); 50 C.F.R. § 402.14(I)(2005)"). As FPA § 313 restricts judicial review to FERC action under the FPA, such claims are not validly raised in this appeal, but should be pursued consistent with the statutory review plan for BiOps.

To the extent that Tacoma brought evidence to FERC's attention for consideration in the BiOps, FERC passed such information on for consideration. *See* February 2005 Order at P 15, JA 2278 (stating new evidence submitted by Tacoma was considered and found lacking in the BiOps, followed by FERC Staff review that reached the same conclusion). In any event, "the Commission may reasonably rely on the expertise of FWS and NOAA Fisheries in matters involving listed species, and need not conduct a detailed substantive review of a biological opinion before deciding whether to implement its conditions in connection with a proposed action." *Id.* (footnote omitted).

## **VI. FERC REASONABLY DECLINED TO REQUIRE CONSULTATION WITH STLC**

Save The Lake Coalition ("STLC") argues that FERC unreasonably denied STLC's request that it be consulted on changes to lake levels that might occur under certain license conditions. Tacoma Br. 49. STLC's asserts that FERC

“inappropriately assumed that Article 405 permits temporary lake level changes only for flood control.” *Id.* at 49, citing February 2005 Order at P 58, JA 2285-86. But the only mention of Article 405 in P 58 refers to how that Article, along with several other Articles, was “described in [STLC’s] rehearing request,” and consists solely of a parenthetical phrase. *Id.* Such a brief parenthetical of what STLC said cannot be transformed, as the brief (at 49) suggests, to an inappropriate assumption by FERC of the full scope of Article 405. There was no reason to think FERC would rely on a party’s summary description of the Article, rather than simply refer to the actual Article (July 1998 Order at pp. 61,581-82, JA 1389-90) to identify its scope and meaning.

Further, the Commission found no need for STLC to consult because if Tacoma does not comply with the minimum lake levels specified in Article 405, STLC “can file a complaint or request that the Commission initiate compliance investigation.” February 2005 Order at P. 59, JA 2286. That offers STLC adequate protection against reduced lake levels. STLC argues that changes in lake levels might occur “if, based on the Article 413 fish monitoring reports, FERC determines that change (presumably lowering the lakes) are need[ed].” Tacoma Br. 49. But even assuming that lowering the lakes was a possibility (the minimum flow condition is 240 cfs, or inflow, whichever is less), “the Commission could not require these measures without first providing notice and an opportunity for a

hearing in which [STLC] could seek to intervene.” February 2005 Order at P 59, JA 2286. As STLC has options to contest lower lake levels, FERC found “no reason to include [STLC] as a consultant for purposes of the specified license articles.” *Id.* That is a reasonable basis on which to deny consultant status.

## **RESPONSE TO SKOKOMISH INDIAN TRIBE’S INITIAL BRIEF**

### **VII. A SUBSEQUENT LICENSE WAS PROPERLY ISSUED**

Skokomish Indian Tribe (“Tribe”) contends that “[n]owhere does the FPA grant FERC authority upon minor part license expiration to treat a previously unlicensed project as licensed and conduct a relicensing instead of original licensing.” Tribe Br. 25. The Tribe asserts that the action taken here “subverts FPA §[§] 4e)[,] 10(a), and NEPA, which require reasonable and proportional mitigation and protection of reservations,” *id.* at 26, and “depart[s] from an historical agency position.” *Id.* at 27-28. All those contentions were rejected by the Commission.

Issuance of Tacoma’s 1924 minor part license was “consistent with [the Commission’s] interpretation of its jurisdiction at the time.” *Declaratory Order on Nature of Proceeding on Application for a Subsequent License*, 67 FERC ¶ 61,152 at p. 61,440 (1994), JA 500 (“Declaratory Order”). Since that time, “[e]xcept for transmission lines, the Commission no longer issues minor part licenses.” *Id.* at p. 61,441, JA 501. Given that history, the Commission saw some logic to the Tribe’s position: “Conceptually, [FERC] might consider characterizing the proceeding as

part relicensing (for the portion of the project previously under license) and part original licensing (for the project works not previously licensed).” *Id.* (footnote omitted). But, rather than such compartmentalization, the Commission characterized proceedings addressing subsequent licenses as relicensing.

The Tribe’s citation to cases that show the Commission moving away from issuance of minor part licenses, Tribe Br. 26-27, does not address the question here: whether this matter should be treated as a relicensing. On that question, the precedent shows “the Commission has generally treated the subsequent licensing of major projects following expiration of their minor part licenses as relicensing proceedings.” Declaratory Order at p. 61,441, JA 501 (footnote listing cases omitted). In addition, FERC’s relicensing regulations are applied in the same manner to subsequent licenses as to new licenses. *Id.* & ns. 22 and 23.

The Commission also found that the changes to the FPA enacted by passage of the Electric Consumer Protection Act of 1986 (ECPA), Pub. L. 99-495, 100 Stat. 1243 (October 16, 1986), support a view that subsequent licenses should be considered in relicensing proceedings. “The revision in section 7(a) of the FPA [eliminating municipal preference at relicensing] together with Congress’ changing of all references in section 15(a)(1) of the FPA from ‘original’ licensee or licenses to ‘existing’ licensees or licenses, indicates that Congress was attempting to differentiate between ‘original’ licenses and those to be issued following the

expiration of an existing license.” *Id.* at p. 61,442, JA 502 (alteration in original; citation omitted); *see also id.* at pp. 61,442-43 (noting ECPA reference that showed “Congress intended the subsequent licensing of major projects with existing minor part licenses to be handled in the same manner as other relicensing proceedings”).

As to the Tribe’s charge that this approach subverts NEPA (Br. 26), the Commission stated: “for purposes of our environmental analysis, it would make no difference whether we labeled this proceeding original licensing or relicensing. The environmental baseline would be the same in either type of proceeding.” *Id.* at p. 61,444, JA 504 (footnote omitted). Further, questions arising under FPA §§ 4(e) and 10(a) and under NEPA were hotly contested during this proceeding, and thus the subject of considerable discussion in the Orders as to what were proper mitigation conditions for the license. Thus, contrary to the Tribe’s assertion (Br. 26), treating this matter as a relicensing proceeding did not subvert those statutory requirements.

## **VIII. THE LICENSE CONDITIONS ARE REASONABLE**

The Tribe makes a number of assertions about the environmental analysis and license conditions apparently to the effect that FERC’s actions were arbitrary and capricious. *See* Tribe Br. 30-40. To the extent that it is possible to discern what

aspects of the Orders the Tribe might be addressing,<sup>10</sup> the Tribe's assertions are invalid.

#### **A. FPA §§ 4(e) and 10(j) Recommendations Were Considered**

The Tribe asserts that FERC “violated NEPA by unreasonably eliminating the cooperating agencies’ proposed alternative” from the EIS, stating that the alternative “largely reflected Interior’s and NOAA’s § 4(e) and § 10(j) conditions.” Tribe Br. 31 & n. 165. That assertion is refuted by the Commission’s statement that it “decided to accept some, but not all, of the agencies’ Section 10(j) recommendations. We are including the Forest Service’s and some of Interior’s Section 4(e) conditions.” July 1998 Order at p. 61,543, JA 1352. As to the FPA § 4(e) conditions that were not accepted, the Commission explained, many of them “are applicable only to aquatic resources, and cannot be applied to the reservation land on which the transmission line and access road are located, and [the Commission] therefore do[es] not include them in the license.” *Id.* at p. 61,549, JA 1357. As to other § 4(e) conditions, they “duplicated” the FPA § 10(j) recommendations related to fish passage; the fish passage license requirements support the restoration of anadromous fish in response to “a number of the resources issues that were the subject of Interior’s Section 4(e) conditions.” *Id.*

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<sup>10</sup> The Tribe refers only once to a challenged FERC order in this section, *see id.* at ns. 195-96, and then without a pinpoint citation, thus forcing one to guess what findings or conclusions are at issue. *See generally id.* at ns. 159-209.

The FPA § 10(j) recommendations were likewise largely included as part of the license conditions. Certain recommendations were “not within the scope of Section 10(j) because they are not specific measures to protect fish and wildlife resources, or do not propose to protect or enhance resources affected by the project. [FERC] instead considered such recommendations under [FPA § 10(a)(1)], and [ ] incorporated most of them, in one form or another, as conditions of this license.” *Id.* at p. 61,553, JA 1361; *see also id.* at pp. 61,553-59, JA 1361-67 (discussing in depth various § 10(j) recommendations and FERC action).

In short, and contrary to the Tribe’s assertion (Br. 31), FERC did not unreasonably eliminate the agencies’ §§ 4(e) and 10(j) recommendations, but gave them appropriate consideration in determining license conditions.

### **B. Mitigation Measures Adequately Address Concerns**

The Tribe asserts that the Commission unreasonably deferred mitigation to post-licensing with no numerical standard and unclear reopener authority. Tribe Br. 54 (section heading); *see id.* 35-36 (same). The Tribe’s assertion contrasts with Tacoma’s assertions that many of the same license conditions were too specific and gave FERC too much authority to reopen. *See* Section IV, *supra* (addressing Tacoma’s assertions).

The Tribe’s assertion of deferred mitigation fails to acknowledge that this grew out of FWS FPA § 18 conditions that “prescribe[ed] a ‘collaborative process’

among the licensee, the fish and wildlife agencies, and the Skokomish Indian Tribe for identifying specific fish passage alternatives for the project.” July 1998 Order at p. 61,550, JA 1358. While the Commission did not accept this proposal as an FPA § 18 prescription, it did, under FPA § 10(a)(1), adopt “an approach similar to the ‘collaborative process’ requested by the agencies.” *Id.* at p. 61,551, JA 1359. That prescription specifically addressed fish passage; the Commission employed a similar process regarding other environmental measures. *See, e.g., id.* at p. 61,583, JA 1391 (Articles 408 (minimum flow) and 409 (intake valve) both requires their respective plans be prepared “after consultation with” various resource and other governmental agencies “and the Skokomish Indian Tribe”).

Further, while the mitigation measures were to be developed post-license, limits were imposed. *See* July 1998 Order at pp. 61,584-88, JA 1392-96 (Articles 410-17 – cited by the Tribe (Br. 55) – all require filings within 180 days of license issuance). Also contrary to the Tribe’s allegation that they “omit mechanisms for changing the license or flows,” Tribe Br. 55, Articles 410-17 all included a FERC reservation of right to change a proposed plan, and require that “upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.” *Id.* at p. 61,584, JA 1392 (Article 410). All this provides for orderly development of workable conditions in a collaborative process in which the Tribe is a participant, and thus is reasonable.

### **C. The Tribe Did Not Raise Its FPA § 4(e) Claims On Rehearing**

The Tribe argues that “FERC acted *ultra vires* by rejecting Interior’s mandatory conditions as untimely.” Tribe Br. 37; *see id.* 36-40 (further argument). The Tribe did not present this argument on rehearing. *See* March 1999 Order at p. 62,074, JA 1659 (noting only Interior raised untimeliness). Under FPA § 313 only a person that raised an objection on rehearing may raise it on appeal. The Tribe’s failure to raise the issue of whether Interior’s conditions were untimely on rehearing means this Court lacks jurisdiction to hear the issue.

In any event, even though the Commission ruled that Interior’s conditions were untimely, it incorporated them into the license. “In other words, [FERC] adopted and incorporated into the license, pursuant to Section 10(a), all of the conditions that [FERC] determined to be within the scope of Section 4(e).” *Id.*

FPA § 4(e) allows FERC to issue licenses within reservations “only after finding that the license will not interfere with or be inconsistent with the purpose for which the reservation was created or acquired.” *Id.* at p. 62,076, JA 1661. The Tribe contends “FERC illegally rejected” certain Interior § 4(e) conditions related to water flows as inapplicable “to Reservation land occupied by the transmission line and access road.” Tribe Br. 38; *see* July 1998 Order at p. 61,548, JA 1356 (describing conditions).

But FERC’s action validly conforms to a license involving a “project located entirely on private land except for a small segment of the transmission line right-of-way and access road” located on the Reservation. March 1999 Order at p. 62,076, JA 1661; *see* July 1998 Order at p. 61,547, JA 1355A (describing segment). In view of this, FERC did not find “the need to make a finding of no interference of inconsistency with respect to the entire project.” March 1999 Order at p. 62,076, JA 1661 (footnote omitted); *see* July 1998 Order at p. 61,549, JA 1357 (“Interior is authorized to prescribe, and the Commission is required to include in the license, only those conditions that relate to project works actually located on a reservation.”)(footnote omitted). The conditions at issue apply “only to aquatic resources,” and thus “cannot be applied” to the segment, which is on land. *Id.* In any event, those FPA § 4(e) conditions “for the most part duplicated” the FPA § 10(j) conditions that were largely adopted, thus responding to Interior’s concerns. *Id.*

#### **D. FERC Properly Balanced Power and Nonpower Values**

The Tribe contends that “FERC’s public interest finding for this Project . . . is unsupported by substantial evidence and driven by economics.” Tribe Br. 41. As the Tribe sees it, there are five problems with the finding: (1) “FERC illegally granted Tacoma the economic benefits of an unlicensed project,” *id.*; (2) “FERC failed to conduct a rate impacts analysis of alternative flow regimes, which would

have shown that Tacoma could recoup new license costs through affordable rate increases,” *id.* 42; (3) “FERC illegally excluded . . . all costs except Tacoma’s out-of-pocket costs, and all benefits other than providing (a sliver of) regional power,” *id.* 43; (4) FERC’s analysis “excluded Tacoma’s past windfall profits,” *id.* 44; and (5) “FERC’s finding that License Flows would not ‘compromise the public interest’ is unsupported by the record.,” *id.* 45. Those contentions are invalid factually, and reflect nothing more than the Tribe’s view of how it would have interpreted those factors. As the Commission reasonably balanced power and nonpower factors at issue, its public interest finding must be upheld.

The Tribe’s first three contentions are variations on the same theme: that FERC improperly gave greater weight to power (economic) values than to nonpower (environmental) values in its public interest analysis. The contrapuntal take of this theme is demonstrated by Tacoma’s argument that FERC gave too much weight to nonpower values. *See* Sections II.A-C, *supra* (addressing Tacoma’s opposite arguments). The Commission rejected claims that power values were overemphasized:

Although dollar values can sometimes be used to compare potential benefits and impacts, when recreational cultural, aesthetic, native plant and wildlife habitat, or other environmental values are present, such as here, the public interest cannot be evaluated adequately only by dollars and cents. That we are requiring environmental enhancements which will result in project power costing more than potentially available alternative power at this time demonstrates that *nonpower values weighed heavily in our*

*determination of the overall public interest.*

July 1998 Order at p. 61,572, JA 1380 (emphasis added). Further, and contrary to the Tribe's implication that FERC's public interest finding was designed to assure Tacoma a profit (Br. 41), the Commission concluded "licensing conditions that result in project power costing more than current market prices for comparable power at the time of licensing are not *per se* unreasonable," because the FPA anticipated that as the values the Nation "considers important" change, license conditions must reflect those changes. July 1998 Order at p. 61,574, JA 1382. Finally, the Commission did not exclude, as the Tribe contends (Br. 43), all costs but Tacoma's, but, rather, weighed the costs of higher minimum flows against the environmental benefits. March 1999 Order at pp. 62,087-88, JA 1672-73.

The Tribe's assertion that FERC failed to conduct rate impact analysis (Br. 42) is untrue. Relying on the ALJ Report, the Commission found a narrow range of rate impact. June 2004 Order at PP 41-42, JA 2210. From that record evidence, FERC concluded that Tacoma "could pass the costs of the new license on to its ratepayers without a substantial impact on rates." *Id.* at P 55, JA 2212. Nor did FERC ignore Tacoma's past profits (Tribe Br. 44). *See* June 2004 Order at P 34, JA 2209. (Noting Tacoma's past revenues "were significantly in excess of Tacoma's capital investment and operating costs"); *see also id.* at P 57, JA 2213 (recognizing that greater costs of operating under the new license as conditioned

reflects “the change from a complete lack of environmental conditions in the 1924 license”).

### **E. FERC Complied with NHPA § 106**

The Tribe asserts FERC violated Section 106 of the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470f, which “requires federal agencies to assess the effects of their actions on historic properties and provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment.” *City of Tacoma*, 76 FERC ¶ 61,173 at p. 61,977(1996), JA 1078. The Tribe contends that FERC’s rejection of certain mitigation conditions proposed by the Advisory Council “was wholly disproportionate to Project impacts on historic properties.” Tribe Br. 47-48. The Tribe also contends that FERC improperly “limit[ed] the impacts analysis and mitigation to only the marginal changes from existing Project operation.” *Id.* at 46 (footnote omitted).

Turning to the latter point, there was extensive consultation regarding the scope of sites within the project subject to NHPA mitigation. *See generally* July 1998 Order at pp. 61,564-66, JA 1372-74. The principal dispute was whether “the North Fork Skokomish TCP District was also eligible for inclusion in the National Register,” as the Washington SHPO claimed, or whether only certain sites within the District were eligible as FERC Staff claimed. *Id.* at 61,565, JA 1373. Ultimately, that question was sent to the Keeper of the National Register, who

found “that the District as a whole was not eligible, and that only one of the sites comprising it (No. 58) is individually eligible as a traditional cultural property.” *Id.*

While that determination came after the Advisory Council’s comments, *id.*, it shows that the Commission followed NHPA procedures to resolve a disputed issue. The Advisory Council, assuming that the entire District was eligible, recommended that “to mitigate [possible adverse] effects, the Commission adopt the recommendations, conditions, and prescriptions of the Interior and Commerce for fish passage, substantial restoration of pre-project flows in the North Fork, and hatchery support for the restoration of anadromous fish resources above the dam.” *Id.* at p. 61,566, JA 1374. As explained above, the Commission adopted most, but not all, Interior’s and Commerce’s recommendations, conditions, and prescriptions.

FERC found that the measures it had taken “provide sufficient protection for historic properties. The NHPA does not require that all adverse effects on historic properties be avoided or mitigated. Accordingly, to the extent that the Advisory Council’s comments may be read [as the Tribe apparently does] to suggest that nothing short of complete mitigation for all past effects would be acceptable in this case, [FERC] reject[s] that view.” *Id.* All the steps taken by the Commission followed NHPA procedures. As the Commission stated, “[n]othing further is required for compliance with Section 106 of the NHPA.” *Id.* (footnote omitted);

*see also* March 1999 Order at p. 62,102, JA 1687 (same).

#### **F. FERC Considered CWA, CZMA, and Water Rights Issues**

The Tribe asserts that the Commission erroneously issued a license without proper consideration of Clean Water Act (“CWA”), Coastal Zone Management Act (“CZMA”), or water rights issues. Tribe Br. 48-54.

The Tribe challenges the validity of a state CWA determination, which it claims FERC refused to address “largely on grounds that it lacks authority.” Tribe Br. 49. That latter comment is misleading: FERC did not claim that it lacks authority to correct any CWA issue; rather, it determined that *in the particular circumstances of this case*, there was no reason for FERC to exercise its authority. As the Commission noted, the Washington agency charged with CWA compliance (“Ecology”) “initially raised” questions about the continuing validity of Tacoma’s CWA certification, much as the Tribe does here (Br. 48-49), but then dropped the issue. FERC interpreted that as meaning Ecology was no longer troubled by the issue. “Because Ecology was apparently satisfied that a new certification was not required, [FERC] need not consider this issue further.” March 1999 Order at p. 62,073, JA 1658. The Tribe argued that the certification “violated *state law*.” *Id.* (emphasis added). But as the Commission properly ruled, it has “no authority to review a state’s compliance with its own laws and regulations regarding

certification.” *Id.* Further, the Commission did not agree that the state’s certification was interim, but found that it covered relicensing. *Id.*

Thus, the Commission’s ruling here did not, as the Tribe contends (Br. 49), rule it lacked any authority to rectify a CWA problem, but simply that the facts did not present grounds for FERC to take action. *See* September 2003 Order at P 26, JA 1788 (“The courts have made it clear that the Commission lacks the authority to alter or reject a state’s certification conditions to review their validity. Issues concerning a state’s procedural compliance with Section 401 should be brought to the state’s attention through its appeals process and reviewed in the state’s courts.”) (footnote omitted). As presented, the Tribe argued state, not federal, law had been violated, an area over which FERC has no review authority or any special expertise. Second, FERC disagreed with the Tribe’s characterization of the existing state CWA permit as interim, finding that it covered the relicensing.

The Tribe challenges FERC’s ruling on CZMA compliance arguing “FERC passively turned a blind eye” to alleged defects in the state process. Tribe Br. 51-52. The Commission did not turn a blind eye, but, at the time of the relicensing order, found that other appeal avenues had been taken. “[T]he Tribe has appeal this issue not only to Commerce, which administers the CZMA, but also to state court. Commerce denied the Tribe’s approval, and the Tribe’s petition for review is pending” in state court. March 1999 Order at p. 62,074, JA 1659.

After this Court's remand, the CZMP issue arose again. By that time, Ecology had issued a letter that explained its position" "Ecology has already indicated that, although Tacoma's original relicensing proposal would not be consistent with the state's CZMP, Tacoma should be required to implement the conditions of the new license with respect to minimum flows, flood control, and adaptive management. As a result, no purpose would be served by requiring Tacoma to submit a new consistency certification for Ecology's review. In short [FERC] regard[s] Ecology's letter as concurrence that the new license terms are consistent with the state's CZMP." September 2003 Order at P 19, JA 1787 footnote explaining futility of Tacoma's filing for new permit omitted).

That was not turning a blind eye, but realistically viewing the situation to see that the CZMA would be satisfied under FERC's license conditions.

The Tribe's contentions regarding state water rights (Tribe Br. 53-54) are unfounded. FPA § 27, 16 U.S.C. § 821, expressly precludes FERC from "affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or other distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." *Id.* As the Commission noted, "Tacoma filed an application for additional water rights in 1998. To date, Ecology has taken no action on the application." February 2005 Order at P 57, JA 2285.

Thus, FERC properly found that “the Tribe’s first requested license article would require [FERC] to determine whether and how to enforce Washington’s water rights laws, which [FERC] is without authority to do.” *Id.* Nevertheless, the Standard License Article 5, which requires a licensee within five years from the date of license issuance to obtain, among other things, all water rights necessary to operate the project. *See* March 1999 Order at p. 62,106, P (M), JA 1691 citing “Terms and Conditions for License for Constructed Major Project Affecting Lands of the United States,” 54 FPC 1799 (1975)(Article 5 is set out 54 FPC at 1801)). That Article provides a means for FERC review of any changed water rights situation.

## **CONCLUSION**

For the reasons stated, the Commission submits that the challenged Orders should be upheld in all respects, and the petitions for review denied.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 17,327 words, not including the table of contents and authorities, the certificate of counsel, this certificate and addendum.

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