

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Erie Boulevard Hydropower, L.P.

Project No. 2539-023,
-024, -025, -026, -027,
-028, -029, and -030

ORDER DENYING REHEARING

(Issued November 16, 2006)

1. This order deals with several requests for rehearing relating to the ongoing relicensing proceeding for the School Street Project No. 2539. As discussed below, we deny rehearing.

Background

2. The 38.8–megawatt School Street Project, licensed to Erie Boulevard Hydropower, L.P., is located on the Mohawk River, in Albany and Saratoga Counties, New York. The project includes a 16-foot-high dam, located about 4,000 feet above Cohoes Falls, which impounds a reservoir with a surface area of about 100 acres. Water is diverted at the dam to a power canal, through which it is conveyed to a powerhouse just below Cohoes Falls, and then is returned to the river.

3. In December 1991, Niagara Mohawk Power Company, Erie Boulevard's predecessor,¹ filed applications for new licenses for the School Street Project and nine other projects, the licenses for which all expired in 1993. On November 19, 1992, the New York Department of Environmental Conservation (New York DEC) denied, without

¹ For purposes of this order, we will hereafter refer to both Erie Boulevard and its predecessor as "Erie Boulevard."

prejudice, Clean Water Act certification² for all ten projects, following which the state, Erie Boulevard, and other interested parties entered into settlement negotiations with respect to the projects, dealing with one project at a time. Settlements have been reached and new licenses issued with respect to the first nine projects. The School Street Project, the last of the ten, has been operating under annual licenses since 1993.

4. On February 11, 1993, the Commission issued public notice of the School Street relicense application. The notice established a deadline of April 12, 1993, for the filing of protests, comments, and motions to intervene in the proceeding. Various entities, including federal agencies, environmental groups, and interested individuals filed timely motions to intervene.

5. The Commission proceeded to process the license application. Commission staff sought and obtained additional information about the project, held public meetings, and issued draft and final environmental assessments. However, the Commission could not take final action on the School Street application in the absence of a state water quality certification.

6. On July 19, 2004, Green Island Power Authority (GIPA) filed an application for a preliminary permit for the proposed Cohoes Falls Project, to be located downstream of the School Street Project. According to GIPA, construction of the Cohoes Falls Project would inundate the School Street dam and also involve the decommissioning of various other facilities of the School Street Project.

7. On September 7, 2004, GIPA filed a motion to intervene in the School Street relicensing. GIPA based its motion on its desire to develop the Cohoes Falls Project, and explained its untimeliness as resulting from a late-developing interest in the project site. Erie Boulevard filed an opposition to the motion on September 21, 2004.

8. On January 21, 2005, the Commission issued an order dismissing GIPA's preliminary permit application.³ We explained that section 15(c)(1) of the Federal Power Act⁴ provides that "[e]ach application for a new license pursuant to this section shall be

² Pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341 (2000), a license applicant must obtain state certification or waiver thereof before the Commission can issue a hydropower license.

³ *Green Island Power Authority*, 110 FERC ¶ 61,034.

⁴ 16 U.S.C. § 808(c)(1) (2000).

filed with the Commission at least 24 months before the expiration of the term of the existing license.” Section 15 applies to all relicense applications, whether filed by the current licensee or by a competing applicant.⁵ We noted that GIPA had stated that construction of the Cohoes Falls Project would require the decommissioning of the School Street Project. Since the two projects cannot co-exist, any development application for the Cohoes Falls Project would in essence be a relicense application filed in competition with the School Street application.⁶ However, the section 15(c)(1) deadline for filing relicense applications for the School Street Project fell in 1991, two years before the School Street license expired. Thus, any development application GIPA might file would be more than 13 years late. That being the case, we stated, there was no reason for us to process a preliminary permit to study a project that we could not license.

9. We also explained that section 6 of the FPA⁷ states that hydropower licenses “may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days’ public notice.” Issuance of a license to GIPA for a project that would require decommissioning of School Street, over the licensee’s manifest objection,⁸ would constitute either a revocation or an alteration of the School Street license in a manner inconsistent with section 6. As discussed above with respect to FPA section 15(a)(1), we stated that if we could not issue a license for the Cohoes Falls Project, it would serve no purpose to issue a preliminary permit to study the project. We concluded that GIPA had presented no reason for us to depart from our long-standing policy of rejecting preliminary permit applications to study a project that would use all or part of the resources that are currently held under an existing license or would interfere

⁵ See *City of Fremont v. FERC*, 336 F.3d 910, 916 (9th Cir. 2003). (“Section 15(c)(1) applies to “*each* application for a new license, not just the applications of incumbent licensees”) (emphasis in original).

⁶ See *Skokomish Indian Tribe*, 72 FERC ¶ 61,268 at 62,181 (1995). *Skokomish* also stands for the proposition that our regulations do not allow a preliminary permit application that competes with a filed development application, as would have been the case with GIPA’s application.

⁷ 16 U.S.C. § 799 (2000).

⁸ Erie Boulevard has filed several pleadings objecting to GIPA’s efforts to promote the Cohoes Falls Project.

with the operation of an existing, licensed project. We affirmed these conclusions on rehearing.⁹

10. GIPA filed a petition for appellate review of the Commission's orders regarding the preliminary permit, but subsequently voluntarily withdrew the appeal.¹⁰ Once the appeal was dismissed, the Commission's orders became administratively and judicially final.

11. On March 9, 2005, Erie Boulevard filed with the Commission an offer of settlement in the School Street relicensing proceeding. The offer of settlement was signed by Erie Boulevard, the United States Fish and Wildlife Service, the National Park Service, New York State DEC, New York Power Authority, New York Rivers United, New York State Conservation Council, and Rensselaer County Conservation Alliance. The offer of settlement, public notice of which was issued on March 24, 2005, is currently under review by Commission staff.¹¹

12. On April 13, 2005, the Alliance for Economic Renewal filed a late motion to intervene, opposing Erie Boulevard's offer of settlement and citing the Cohoes Falls Project as a "better alternative." On April 28, 2005, Erie Boulevard filed an opposition to the motion.

⁹ *Green Island Power Authority*, 110 FERC ¶ 61,331 (2005).

¹⁰ *Green Island Power Authority v. FERC*, No. 05-1170 (D.C. Cir., *dismissed* Dec. 14, 2005).

¹¹ As noted above, the Commission has been unable to act on Erie Boulevard's application due to the lack of water quality certification, or waiver thereof, from New York DEC. New York DEC has issued certification for the project, consistent with the terms of Erie Boulevard's settlement agreement, but that certification was stayed pending an administrative appeal by GIPA. New York DEC ultimately denied GIPA's appeal, and directed its staff to issue the certification, which it did on October 10, 2006. *See* letter from William J. Madden, Jr. (counsel for Erie Boulevard) to Hon. Magalie R. Salas (Commission Secretary) (filed October 10, 2006). However, GIPA thereafter obtained a New York state court temporary restraining order prohibiting New York DEC from taking action with respect to the water quality certification. *See* letter from William J. Madden, Jr. to Hon. Magalie R. Salas (filed October 12, 2006). The temporary restraining order was lifted by order of New York appellate court on October 30, 2006. A hearing on a preliminary injunction is scheduled for November 17.

13. On April 28, 2006, Commission staff distributed to the parties to the School Street relicensing proceeding an appendix to the programmatic agreement dealing with historic preservation issues at the project.¹²
14. On May 15, 2006, GIPA filed what it styled an “offer of settlement” in the School Street relicensing, proposing that the Commission terminate Erie Boulevard’s license or issue a license that would terminate after construction of the Cohoes Falls Project or a similar project. GIPA included as an “informational filing” a copy of what purported to be a draft license application for the Cohoes Falls Project. The pleading was filed on behalf of GIPA, the Capital District Regional Planning Commission, the New York Association of Public Power, Adirondack Hydropower Development Corporation (Adirondack Hydro), and Friends of the Falls. Neither Erie Boulevard nor any of the federal or state agencies involved in the relicensing were party to the document.
15. Also on May 15, 2006, the New York Association of Public Power, the Capital District Regional Planning Commission, and Friends of the Falls filed late motions to intervene. Erie Boulevard filed an opposition to the motions on May 30, 2006.
16. On May 24, 2006, the Commission issued a notice rejecting the May 15, 2006 filing. The notice concluded that the settlement agreement and “informational filing” were efforts to place before the Commission GIPA’s untimely license application.
17. On May 31, 2006, GIPA filed a request for rehearing of staff’s April 28 letter distributing the appendix to the programmatic agreement. GIPA included in its filing another copy of the purported draft Cohoes Falls Project license application.
18. On June 2, 2006, the Village of Green Island, Town of Green Island, Preservation League of New York State, City of Watervliet, Public Utility Law Project, and the New York Bicycling Coalition filed late motions to intervene in the School Street proceeding, in order to support the Cohoes Falls Project.
19. On June 5, 2006, GIPA and Adirondack Hydro filed a motion to present evidence or, in the alternative, an offer of proof and, if necessary, a motion to reopen the record.

¹² On July 19, 1996, the Commission, the Advisory Council on Historic Preservation, and the New York State Historic Preservation Office executed a multi-project programmatic agreement, pursuant to section 106 of the National Historic Preservation Act, dealing with historic preservation issues at 14 New York hydropower projects operated by Erie Boulevard. As required by the Programmatic Agreement, Commission staff developed a separate appendix for each project.

The motion again sought to put into the record of the School Street proceeding GIPA's previously-rejected "offer of settlement," including the draft license application.

20. On June 20, 2006, Erie Boulevard filed a response to GIPA's and Adirondack Hydro's motion to present evidence. Erie Boulevard argued that GIPA and Adirondack Hydro were not proper parties to the relicensing proceeding, and thus should not be allowed to file the motion, that the motion did not proffer new evidence, but only GIPA's proposed license application, which the Commission had ruled could not lawfully be considered, and that the filing was barred by the May 24, 2006 notice rejecting the offer of settlement.¹³

21. On June 23, 2006, GIPA and Adirondack Hydro filed a timely request for rehearing of the May 24, 2006, notice rejecting their "offer of settlement."

22. On June 28, 2006, the Commission issued six notices in the School Street proceeding. The first four of these notices denied the motions for late intervention filed by: (1) GIPA; (2) the New York Association of Public Power, Capital District Regional Planning Commission, and Friends of the Falls; (3) Public Utility Law Project, City of Watervliet, Preservation League of New York State, and the Town of Green Island; and (4) the Alliance for Economic Renewal. These motions were denied on the basis that the movants had not shown good cause for intervening 13 years after the intervention deadline. The fifth notice rejected GIPA's and Adirondack Hydro's motion to present evidence, concluding that the purpose of the motion was to place GIPA's untimely competitive proposal before the Commission. The final notice rejected GIPA's request for rehearing of staff's April 28, 2006 letter transmitting the appendix to the programmatic agreement, on the grounds that GIPA is not a party to the relicensing proceeding and that the letter was interlocutory and not subject to Commission review until the Commission acts on the School Street relicense application.

23. On July 28, 2006, GIPA filed a request for rehearing of the notice rejecting its May 31, 2006 request for rehearing regarding the appendix to the programmatic agreement, a separate request for rehearing of the notice denying its motion to intervene, and, jointly with Adirondack Hydro, a request for rehearing of the notice rejecting the motion to present evidence. Also on July 28, 2006, requests for rehearing of notices denying motions for late intervention were filed by Alliance for Environmental Renewal,

¹³ Erie Boulevard also stated that the only way that the Cohoes Falls Project could be constructed is if Erie Boulevard was paid fair market value for the School Street Project, and that GIPA erroneously assumes a fair market value for School Street of between \$3.5 million to \$9 million, when a more accurate figure would be \$90 million.

New York Association for Public Power, Capital District Planning Commission, Friends of the Falls, Town of Green Island, Preservation League of New York State, Public Utility Law Project of New York, Inc., and the City of Watervliet.

24. On August 7, 2006, the Commission issued a notice denying the Village of Green Island's and the New York Bicycling Coalition's motions to intervene.

25. On September 6, 2006, the Village of Green Island and the New York Bicycling Coalition each filed a request for rehearing of the notices denying their motions to intervene.

Discussion

26. As an initial matter, we note that the Commission has held that GIPA cannot, as a matter of law, file an application with the Commission for the Cohoes Falls Project, because that project would compete with School Street and a license application for Cohoes Falls was not filed within the statutory window for competition in the School Street proceeding. When the court granted GIPA's motion to withdraw its appeal of our preliminary permit orders, those holdings became final. In consequence, the issue of whether the Cohoes Falls Project can be pursued during the pendency of the School Street proceeding has been answered in the negative, and GIPA cannot challenge that conclusion either before us or before the courts.

27. Notwithstanding this situation, GIPA has made multiple attempts to put before us its untimely, legally-barred proposal, and seeks to have us approve that proposal as the outcome of the School Street proceeding. It attempts to justify these efforts by asserting that its true concerns are the consideration of alternatives to the School Street Project for purposes of environmental review, the protection of historic properties, and the proffer of a genuine offer of settlement. We are not persuaded. Responding to GIPA's various pleadings has cost us and the parties to the School Street proceeding significant amounts of time and expense. We look with extreme disfavor on GIPA's repeated efforts to obtain approval of that which is barred by law, and consider its efforts to cloak its proposal in various different guises as an abuse of process.

28. We now turn to the various requests for rehearing.

Motions to Intervene

29. As noted above, we issued a public notice of the School Street relicensing application, and established April 12, 1993, as the deadline for motions to intervene. Any motions filed after that date are late.

30. Our regulations dealing with motions for late intervention state that, in acting on such a motion, the decisional authority may consider: whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting the intervention.¹⁴

31. We have on many occasions denied late intervention where the movants failed to provide adequate justification to support their motions. For example, in *Florida Gas Transmission Company*,¹⁵ we denied a motion to intervene filed six months after the intervention deadline, explaining that

[i]n view of the various notices and orders issued in this proceeding and the opportunity [for the movant] to avail itself of information concerning [the matters at issue, the movant] had or should have had knowledge of [the subject matter of the proceeding]. The Commission expects parties to intervene in a timely manner based on the reasonably foreseeable issues arising from applicants' filings and the Commission's notice of proceedings.¹⁶

¹⁴ See 18 C.F.R. § 385.214(d) (2006).

¹⁵ 100 FERC ¶ 61,241 at P 31 (2002).

¹⁶ See also *Texas Eastern Transmission, LP*, 102 FERC ¶ 61,262 at P 11-12 (2003) (denying late intervention where proceeding had been underway for several years and granting late motions would be disruptive); *Southern California Edison Company*, 100 FERC ¶ 61,327 at P 7 (2002) (“[A]ny . . . party . . . must take appropriate steps to protect its interests. Choosing to focus on other matters rather than to timely respond to a filing before this Commission falls far short of the demonstration of good cause that would support a late intervention request.”); *Niagara Mohawk Power Corporation*, 100 FERC ¶ 61,247 at P 18 (2002) (fact that intervenors thought that “either there appeared to be no disputes relevant to their interests, or . . . assumed that any disputes would be resolved without their intervention” not sufficient to justify late intervention). Some of our denials of late motions to intervene have been in cases where the motions were filed after the issuance of an order disposing of an application, at which point the Commission has held that a movant bears “a higher burden to demonstrate good cause for granting such late intervention.” See, e.g., 100 FERC ¶ 61,241 at P 32. Here, no dispositive order has been issued. However, in this instance, we are not holding the movants to a higher burden, but rather concluding that they have not satisfied the normal standards established by our regulations. We also note that, regardless of whether we

(continued)

In *Summit Hydropower*,¹⁷ we denied a motion to intervene a year out of time, explaining that “[a] key purpose of the intervention deadlines is to determine, early on, who the interested parties are and what information and arguments they can bring to bear. Interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene only when events take a turn not to their liking.”¹⁸ These holdings, which we conclude apply to the facts here, have been affirmed by the courts.¹⁹

32. In its motion for late intervention, GIPA stated that its intent was “to file an original license application of the Cohoes Falls Project and a non-power license application for the School Street Project.”²⁰ It stated that its late intervention was justified because it only developed an interest in the School Street Project when it began

apply a higher standard, the passage of time may well affect our conclusions regarding good cause. For example, while we might view with some sympathy a statement that a word processing problem caused a one- or two-day delay in filing, we would be markedly less likely to accept such a reason as an excuse for being a month late. Here, where the motions to intervene were filed 11-13 years late, the movants would have to provide an exceedingly strong reason to justify their tardiness. They have not done so.

¹⁷ 58 FERC ¶ 61,360 at 62,199-200 (1992).

¹⁸ Over the years, we have issued many similar decisions. *See, e.g., Cogeneration, Inc.*, 54 FERC ¶ 61,178 (1991) (denying intervention six years after deadline); *Mohawk Dam 14 Associates*, 52 FERC ¶ 61,232 (1990) (denying motion to intervene 11 days after deadline); *Dale L.R. Lucas and Alternative Energy Resources, Inc.*, 41 FERC ¶ 61,187 (1987) (denying intervention two years after deadline); *Georgia-Pacific Corporation*, 33 FERC ¶ 61,417 (1985) (denying motion to intervene five months after deadline).

¹⁹ *See, e.g., Covelo Indian Community v. FERC*, 895 F.2d 581, 586-87 (9th Cir. 1990) (affirming denial of late intervention where tribe alleged it had not received actual notice of proceeding and Commission found that late intervention would be burdensome). Here, none of the movants alleges that it did not have notice of the School Street proceeding.

²⁰ *See* GIPA September 7, 2004 motion to intervene at 4.

to assist the City of Cohoes in obtaining the project from Erie Boulevard and discovered that local tribes had concerns about historic properties issues related to the project.²¹

33. Given that we have held that GIPA cannot file a competing license application at this late date, it has failed to demonstrate either a cognizable interest in the proceeding or any justification for the lateness of its attempted intervention. The School Street application was filed more than 15 years ago, and, not only was public notice issued at that time, but the Commission subsequently issued numerous environmental scoping and other notices alerting the public to various milestones during the proceeding. The fact that GIPA only determined at an extremely late date that it would like to compete for the project site is not sufficient grounds to justify later intervention.

34. The other entities seeking late intervention – the Alliance for Economic Renewal, New York Association of Public Power, Friends of the Falls, the Capital District Regional Planning Commission, New York State Bicycling Coalition, Public Utility Law Project, City of Watervliet, Town of Green Island, Village of Green Island, and Preservation League of New York (collectively, along with GIPA, “movants”) -- likewise have not provided sufficient justification for their motions. They make similar arguments that the Cohoes Falls Project is superior to School Street, and state that the fact that they only recently became aware that there was what they deem to be a viable alternative to School Street is justification for late intervention.²²

35. In essence, the movants all state that they wish to support the Cohoes Falls Project. Yet, as we have explained, an application for that project is currently barred by law. Given this state of affairs, the putative intervenors have proffered no reason sufficient to support late intervention in this proceeding.

²¹ Interestingly, Erie Boulevard’s March 9, 2005 offer of settlement includes a letter from the mayor of Cohoes Falls stating his support for the settlement and Cohoes Falls has not filed any pleadings supporting GIPA. With respect to tribal concerns, as GIPA itself notes, the St. Regis Mohawk Tribe has filed comments opposing the Cohoes Falls Project. Further, no tribe has demonstrated any inability to represent its own interests or expressed any desire to have GIPA act on its behalf.

²² In their motions to intervene, the Alliance for Economic Renewal and New York Association of Public Power did not address the subject of why their motions were late, so that their motions were facially deficient.

36. The movants all assert that they have interests in and are affected by the resources that are affected by the School Street Project.²³ They generally assert that they saw no reason to intervene timely in the proceeding because they saw no alternative under consideration that would meet their needs until the Cohoes Falls Project was proposed. This is hardly a convincing justification for late intervention. In fact, these entities would appear to have had strong reasons to intervene early on if they felt that the School Street Project as proposed was not in the public interest. That way, they could have timely informed the Commission of their concerns and proposed any changes they deemed necessary to the project. It is a typical feature of hydropower licensing proceedings that a wide variety of stakeholders, often with varying interests, participate in order to achieve mutually satisfactory results. Indeed, a number of entities with interests in resource protection did intervene in the early stages of this proceeding.²⁴ And while the specific proposal movants would support (Cohoes Falls) has not been at issue in the School Street proceeding, it should be noted that all of the developmental and environmental issues that movants reference (project generation, historic properties, recreation, etc.) have been under consideration from the beginning of the relicensing.

37. It is not a sufficient excuse for intervening over a decade late that a new proposal (albeit one barred by law) has appeared. We have previously explained that an entity cannot “sleep on its rights” and then seek untimely intervention.²⁵ That principle applies

²³ For example, the Village of Green Island and the Town of Green Island state that they are affected by the School Street Project because they purchase from the City of Cohoes water that travels through the School Street Project Canal. The Public Utility Law Project asserts that it wishes to protect the interests of lower-income utility ratepayers, and the New York State Bicycling Coalition expresses interest in trails and other recreation matters.

²⁴ By way of example, American Whitewater Affiliation, American Rivers, New York Rivers United, the National Heritage Institute, National Audubon Society, Adirondack Mountain Club, and City of Cohoes (which intervened one day late) all of which have general interests in the use of natural resources in the project area similar to those asserted by the movants, all intervened at the beginning of the proceeding.

²⁵ *See, e.g., San Diego Gas & Electric Co., Complainant v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents; Investigation of Practices of the California Independent System Operator and the California Power Exchange*, 112 FERC ¶ 61,226 at P 3, n.4 (2005) (finding that allegation by movant that it could not rely on other party to protect its interests did not justify late intervention in proceeding that had been pending for a number of years); *PJM Interconnection, LLC*,

(continued)

with full force here. In *Palisades Irrigation District*,²⁶ a similar case, we denied a late motion to intervene by an entity which claimed that its interest as a competitor or co-licensee did not develop until well after the intervention deadline. We explained that our rules are designed “to ensure an orderly administrative process” and that “the certainty that there will be an end to interventions which prolong the proceedings is an important consideration of parties filing before the Commission.”²⁷ Further, “it would be unfair and prejudicial to make the applicant . . . wait any longer for a very late competing proposal that was never valid to be processed.”²⁸

38. As was true in *Palisades*, allowing GIPA and its supporters intervention in the School Street relicensing would significantly disrupt the proceeding: those entities are engaged in a campaign to convince the Commission to consider the merits of the Cohoes Falls Project, notwithstanding our final orders clearly holding that to do so would be contrary to the dictates of the FPA and of our regulations. Permitting the late interventions would undoubtedly lead to a continuation of those efforts. In the same vein, allowing the late interventions indeed would result in prejudice to, and additional burdens on, existing parties. Those parties, particularly the license applicant, have already been put to the task of reviewing and, as they deem necessary, responding to the many pleadings by GIPA and its supporters. Granting the late interventions would likely only increase this burden. With respect to whether the interests of the movants are adequately represented by other parties, Adirondack Hydro, which co-signed the offer of settlement

112 FERC P61,031 at P 10 (2005) (denying late intervention where issued raised by movant had always been at issue in proceeding); *Williams Energy Marketing & Trading Company California, et al. v. Cabrillo Power I LLC, et al.*, 105 FERC ¶ 61,165 (2003) at P 8 (unsupported late intervention would result in disruption to proceeding and prejudice to parties); *Southern Company Services*, 87 FERC ¶ 61,097 at 61,416-17 (1999), *citing Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995) (equity ministers to the vigilant, not to those who sleep upon their rights); *Russell Canyon Corporation*, 58 FERC ¶ 61,288 at 61,922 (1992) (mistaken belief that intervention unnecessary to protect rights not good cause for late intervention); *BP Gas Transmission Company*, 45 FERC ¶ 61,475 (1988) (those who sit on their rights "passively anticipating a regulatory outcome favorable to their own interests" will be denied permission to intervene out of time).

²⁶ 34 FERC ¶ 61,377 (1986).

²⁷ 34 FERC at 61,702.

²⁸ *Id.* (Footnote omitted).

and appears aligned with GIPA and the other movants, is already a party to the School Street proceeding. Thus, the interests of that group of entities can be represented by an existing party.²⁹

39. GIPA and its fellow movants focus on the length of the School Street proceeding. We agree that this proceeding has gone on for far too long, but the reasons for this are entirely beyond our control. We cannot control the timing of a state's issuance of water quality certification. In an instance such as this, where the licensee and the state have agreed on a process that substantially delays issuance of certification, we are left in limbo. We have expressed our dissatisfaction with this type of action,³⁰ but have no jurisdiction to require the state to act.³¹

40. The movants suggest that the Commission has been unfair in its actions with respect to the motions to intervene, granting only those motions of entities that support the School Street Project and denying those of opponents. This is patently false. As demonstrated in a chart appended by all of the movants to their requests for rehearing, we granted all motions to intervene during the first several years of the proceeding, including

²⁹ Mr. James Besha, the president of Adirondack Hydro, which is a party and which has joined GIPA in a number of its pleadings, is also an agent authorized to act for GIPA. *See* GIPA application for preliminary permit at 3 (filed July 19, 2004). In addition, both entities are represented by the same law firm, which also filed the requests for rehearing for all of the other movants. There is no reason to suppose, then, that Adirondack Hydro will not adequately represent GIPA's and the other movants' interests. This is particularly true given that all of the late motions to intervene and related requests for rehearing are virtually identical and that most, if not all of them, appear to have been prepared and filed by the law firm that represents GIPA, and which filed GIPA's and Adirondack Hydro's joint request for rehearing.

³⁰ *See Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167 at P 16, n.14 (2005).

³¹ While it may be correct that we could take some preemptive action, such as dismissing or denying an application for want of water quality certification, that is not a practical or palatable alternative in the case of an existing project, where doing so would then require that the project be shut down (section 23(b)(1) of the FPA, 16 U.S.C. § 817(b)(1) (2000), precludes, with exceptions not relevant here, the generation of electricity at hydropower projects subject to our jurisdiction, in the absence of a license), thus cutting off a supply of renewable energy. This is particularly true where, as here, the major parties to a relicensing proceeding have engaged in fruitful settlement negotiations.

Adirondack Hydro's late motion, filed in 1997.³² At the time those motions were acted on, we had no way of knowing what position any entity (save the licensee) would ultimately take with respect to the School Street Project. Moreover, we have not denied the late-filed motions because of the position the movants would take in the case, but because they have failed to show good cause to excuse their tardiness and because of the prejudice, burden, and delay that granting those motions could cause.

41. In a similar vein, the movants argue that we denied their motions based on the allegedly erroneous legal premise that we could not consider an application for the Cohoes Falls Project, when it was not in fact their intention to file an application, but rather to present "a well-documented, non-speculative alternative that, for the Commission's convenience, was submitted in the form of a license application."³³

42. The fact is that GIPA and its supporters have taken every possible avenue to place their untimely proposal for the Cohoes Falls Project before the Commission. Presenting it in the form of a preliminary permit application, a comment on historic properties issues, an offer of settlement, or a motion to present evidence cannot conceal this fact. In any event, the notices denying the motions to intervene simply noted that support of the Cohoes Falls Project by itself does not justify late intervention. As discussed herein, the movants have failed to meet the criteria that we consider in reviewing later interventions. Also, the assertion that the Commission should consider the Cohoes Falls Project as an alternative is not germane to the merits of a motion for late intervention. The Commission considers all comments and recommendations filed with it, regardless of whether they are made by intervenors, and the comments of intervenors do not receive greater weight than those of other commenters. Thus, whether the Commission must consider the Cohoes Falls Project as an alternative to School Street is not relevant to the issue of whether we should grant the late motions to intervene.

43. The movants argue that the two cases cited in the notice denying their motions for late intervention³⁴ do not support the denial. We disagree. In *Sayles Hydro*, we denied

³² We recently granted two late motions to intervene, filed by New York DEC and the National Marine Fisheries Service, on May 3, 1995, and January 16, 1996, respectively. It was only through inadvertence that we did not previously act on these motions, which were filed, relatively early in the proceeding, by agencies with jurisdiction to impose mandatory conditions on the School Street license.

³³ *See, e.g.*, New York Association for Public Power request for rehearing at 2-3.

³⁴ *Cogeneration, Inc.*, 54 FERC ¶ 61,178 (1991) and *Sayles Hydro Associates*, 52 FERC ¶ 61,249 at 61,859 (1990).

late intervention based on an entity sitting on its rights, which is precisely what the movants have done in this case, their protestations to the contrary notwithstanding. In *Cogeneration, Inc.*, the Commission rejected a late motion to intervene filed some six years after the intervention deadline, similar to the movants' late motions here.³⁵ In any case, our actions here are based on the movants' failure to justify late intervention in the circumstances of this proceeding, and are consistent with our precedent, as noted above.

44. Movants next contend that their motions for intervention are actually timely, because, they allege, the Commission failed to follow its own regulations, which would have required it to issue additional public notice and opportunity to intervene at certain points in the proceeding.³⁶

45. This argument is unavailing. First, in order to be timely, any complaint that the Commission should have issued additional public notice based on events that occurred in this proceeding would have had to have been raised at the time that those events occurred, not some five years later. Second, movants make no showing that they would have responded to additional opportunities to intervene. The latter of the two events specifically cited by movants – Erie Boulevard's decision to return to a proposal to add a new generator at the project that it had made in the original application and subsequently dropped – took place in 2001.³⁷ Movants specifically state that they had no interest in the proceeding until the proposal for the Cohoes Falls Project first appeared, in 2004. Therefore, it is not possible to conclude that they would have taken advantage of the additional opportunities that they allege the Commission should have provided. Finally, movants fail to show that there were any substantial amendments to the School Street application that would have warranted notice and an opportunity to intervene. In the first instance movants cite, in 1999 when Erie Boulevard was substituted as the license

³⁵ Movants state that, in *Cogeneration*, the Commission characterized the arguments of the Department of the Interior, the late intervenor, as applicable in virtually every licensing proceeding and that Interior had previously participated in the proceeding. Here too, the movants' assertion that they did not act until they saw a proposal to their liking also could apply in virtually every proceeding. The fact that, unlike Interior in *Cogeneration*, movants have not previously been active in the School Street proceeding, despite a plethora of public notices regarding the matter, hardly justifies their late intervention.

³⁶ See Alliance for Economic Renewal request for rehearing at 2-4.

³⁷ This proposal is consistent with the settlement filed by Erie Boulevard on March 9, 20005.

applicant in place of its predecessor, Niagara Mohawk Corporation, the Commission did in fact issue public notice and seek interventions.³⁸ Erie Boulevard's return to Niagara Mohawk's original proposal regarding a new generator did not require public notice because the public had already been informed of that proposal in the public notice of the original application, and any entity that wished to intervene based on that proposal had already been given the chance to do so.³⁹

46. In sum, the movants have not provided sufficient justification for us to grant their extremely late motions to intervene, and we therefore deny rehearing.

Motion to Present Evidence

47. GIPA and Adirondack Hydro seek rehearing of the notice denying their motion to present evidence.

³⁸ The notice was issued on May 5, 1999. None of the movants took action at that point.

³⁹ Movants reference "the many corporate changes and mysteries surrounding Erie Boulevard's identity." See Alliance for Economic Renewal request for rehearing at 3; GIPA request for rehearing at 6-19. While the movants may consider the various corporation transactions that have occurred during the life of this proceeding mysterious, the Commission does not. The licensee has at all times kept the Commission and the public informed of these matters, and, in the one instance where it was appropriate -- when a new licensee was substituted -- the Commission issued public notice. As a general matter, Commission approval is not required for the sale or transfer of a licensee, provided that the licensee remains the same, and the license or the project is not transferred to another entity. See, e.g., *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207 at 61,797 (1999) (rejecting argument that debt-restructuring and project-management agreements effectively transferred license without Commission approval). In *Great Northern Paper Company*, 50 FERC ¶ 61,1163 (1990), cited by movants, the Commission indeed examined whether a merger had resulted in a new corporate entity holding the license, which would have required Commission approval. However, movants fail to reveal that the Commission ultimately decided that question in the negative. See *Great Northern Paper Company*, 52 FERC ¶ 62,237 (1990). In addition to the foregoing, the Commission will consider in any order disposing of Erie's Boulevard's relicense application the company's ability to comply with any license that is issued and with Part I of the FPA, as required by FPA section 15(a)(2)(A), 16 U.S.C. § 808(a)(2)(A) (2000).

48. Our regulations provide that motions may be filed by participants in proceedings “or by a person who has filed a timely motion to intervene which has not been denied.”⁴⁰ “Participant” is defined as a party or a Commission employee.⁴¹ GIPA is not a participant in the School Street proceeding, and it did not file a timely motion to intervene (moreover, its untimely motion to intervene has been denied). In consequence, GIPA could not properly file the motion. Adirondack Hydro, however, is a party,⁴² and is entitled to file motions in the proceeding. We will therefore address its request for rehearing.

49. Adirondack Hydro makes the confusing and contradictory argument that it and GIPA “did not ask for their filing to be treated as a competing license application” but that they assume favorable “Commission action as a prerequisite to opening the relevant stretch of the Mohawk River to competing applications from the public.”⁴³ It is hard to imagine that Adirondack Hydro does not envision GIPA’s application as being precisely one (indeed, the only one) of the competing applications it references. As we made clear in our *Cohoes Falls* orders, we are barred by law from now entertaining any application that competes with the School Street Project. Should we deny Erie Boulevard’s relicense application, the School Street site could then be opened for competition. Unless and until that occurs, the FPA bars competing applications, and we cannot entertain one in any form.

50. Adirondack Hydro goes on to allege that its filing is intended to demonstrate that more power can be generated at the School Street site than has been proposed by Erie Boulevard, and that the School Street Project results in certain environmental impacts.⁴⁴ Adirondack Hydro’s and GIPA’s posturing as objective commenters seeking to vindicate the public interest simply lacks credibility. From its first appearances before us in the

⁴⁰ 18 C.F.R. § 385.212(a) (2006).

⁴¹ *See* 18 C.F.R. § 385.103(c) (2006).

⁴² In its opposition to the motion, Erie Boulevard also argues that Adirondack Hydro is not a proper party, because its stated interest at the time of its motion may no longer exist. Adirondack Hydro’s motion to intervene was granted on March 28, 1997. It is not our practice to revisit whether parties who have been allowed to intervene in a proceeding later retain an interest in it, and we will not do so here.

⁴³ Adirondack Hydro and GIPA request for rehearing at 4.

⁴⁴ *Id.* at 6-8.

Cohoes Falls preliminary permit proceeding and the School Street relicensing, GIPA has been making every effort to promote the Cohoes Falls Project. Nothing in any of its pleadings has explained why it has any interest in these projects other than as a competitor. Neither Adirondack Hydro nor GIPA has suggested that either entity is affected by conditions in the project area, that they have a general interest in environmental issues, or that their principals even reside in the project area or use its resources, as for recreational purposes. No matter how they seek to cloak their filings, they clearly have only one intent—to promote the development of the Cohoes Falls Project. Whether or not that project has merit, consideration of it is barred by law.

51. Adirondack Hydro asserts that the record of the School Street proceeding is still open, and that it therefore was improper of the Commission to reject its motion.⁴⁵ It argues that the Commission has obligations under the FPA and the National Environmental Policy Act (NEPA) to consider the evidence it presents, and to examine alternatives to the School Street Project.

52. The record of the School Street proceeding is indeed open, and will remain so until we act on Erie Boulevard's application and, if necessary, on any requests for rehearing. That does not mean, however, that entities can disrupt the proceeding by requiring the Commission to treat untimely competitive proposals with the same level of scrutiny as applications filed by the deadline imposed by the FPA. We will consider all comments filed in the proceeding, whether by parties or others. Thus, to the extent that GIPA, Adirondack Hydro or some other entity files comments on the merits on the School Street Project, those comments will be included in the record and we will consider them. However, we will not accept what purports to be a complete application for a proposal that is statutorily barred, no matter in what guise it is presented.

53. Adirondack Hydro suggests that two cases, *Scenic Hudson Preservation Conference v. FPC*⁴⁶ and *City of Pittsburgh*⁴⁷ require the Commission to consider the "alternative" proposed by GIPA. We disagree.

54. In *Scenic Hudson*, the court concluded that, in issuing a license for a pumped storage project, the Commission had erred in rejecting testimony late in the proceeding that power from gas turbines would be a preferable alternative to the hydropower project.

⁴⁵ *Id.* at 9-16.

⁴⁶ 354 F.2d 608 (2nd Cir. 1965).

⁴⁷ 237 F.2d 741 (D.C. Cir. 1956)

The court stated that the Commission must actively represent the public interest rather than “blandly calling balls and strikes” and that it must compile a complete record.⁴⁸ In *City of Pittsburgh*, a gas pipeline case, the court noted that the Commission could reject a proposal based on the existence of a more desirable alternative, even if it had no authority to require the alternative.⁴⁹

55. We are uncertain of the extent to which these cases remain vital – if indeed they can fairly be read to suggest that the Commission must consider alternatives that are legally barred when they are proposed. Both cases were decided before the Commission established its detailed NEPA compliance proceedings (and indeed before NEPA was enacted) and its current licensing regulations, both of which provide for extensive public notice and opportunity for comment. Under our existing regulations, the public is given the chance, early and often, to propose recommendations for and alternatives to proposed projects.⁵⁰ Our NEPA documents analyze the impact of proposed projects and alternatives on all resource areas. Commission staff develops its own alternatives, and it is a rare license that does not contain a significant number of alternative measures proposed by Commission staff, by federal and state resource agencies, and by other interested persons, in addition to those proposed by the licensee. We make our decisions as to which project is best adapted to the comprehensive development of the waterway(s) in question based on an extremely comprehensive record. Thus, it cannot seriously be asserted that the Commission “calls balls and strikes” based on applicant’s proposal, rather than making an impartial, independent determination of where the public interest lies.

56. Further, while we have not yet acted on the School Street application, it cannot be said that we have not considered alternatives. Examination of the environmental assessment issued by Commission staff shows that staff indeed considered alternatives and examined in detail the impacts of the School Street Project. The two issues on which GIPA has focused, historic properties (and specifically the amount of flow over Cohoes Falls) and the appropriate level of generation at the project have been studied in the environmental assessment, are the subject of the settlement agreement presented by Erie Boulevard and other parties (which itself represents another alternative), and will be considered when we act on Erie Boulevard’s application. Also, unlike *Scenic Hudson*, where the alternative in question – a different energy source – would have obviated the

⁴⁸ 354 F.2d at 620.

⁴⁹ 237 F.2d at 751, n.28.

⁵⁰ See 18 C.F.R. Part 380 (2006).

need for the hydropower project under consideration, here the Cohoes Falls Project is simply a different way to license a hydropower project at the same general site.

57. It is certainly true, as the *City of Pittsburgh* court held, that the Commission can reject a proposal based on the consideration of alternatives that are outside of its jurisdiction. We think it is a reach, however, to suggest that this holding means that we must compare the School Street Project, which is based on a complete application and years of record analysis, with the largely hypothetical Cohoes Falls Project, which is barred by the statute. We do indeed have the authority to deny a license where we determine that the project in question cannot be authorized consistent with the public interest. Whether we will reach such a decision, or instead choose a different course of action, remains to be seen.

58. In fact, the scenario posed by GIPA and Adirondack Hydro would lead to unfair results. For example, in this case the licensee, federal and state agencies, other interested parties, and Commission staff have spent years building a record on which the Commission can base a judgment on the merits of Erie Boulevard's application. A number of the parties expended extensive effort negotiating a settlement. To conclude that an entity can ignore the statutory and regulatory parameters that govern hydropower licensing proceedings by making a completely new proposal at the eleventh hour, and that the parties must then respond to it, and the Commission must conduct an extensive new analysis, including a complete environmental and engineering review, would be exceedingly unfair, and would mean that anyone could delay the completion of a licensing proceeding simply by postulating a supposed alternative at any time. This would make a mockery of the regulatory process and we will not countenance such a notion. Thus, even were the Cohoes Falls Project not legally barred, we do not believe that the law, our regulations, or sound regulatory practice would permit consideration at this late stage of a newly-proposed, unilateral alternative that would replace the alternatives that had been under consideration throughout the proceeding.⁵¹

⁵¹ Adirondack Hydro contends that neither the Commission's Secretary nor the Director of the Office of Energy Projects had authority to issue the rejection notice. Request for rehearing at 19-21. As is clear from the face of the notice, it was issued by the Secretary, not the Director. Our regulations, 18 C.F.R. § 375.302(h) (2006), provide that the Secretary may reject "any documents filed that do not meet the requirements of the Commission's rules which govern matters of form . . ." An improper motion is such a document. In any case, the Secretary regularly rejects untimely or improper filings to save the Commission the burden of having to take such initial action, and, to the extent necessary, we ratify the Secretary's action here. Moreover, in any case where the

(continued)

Offer of Settlement

59. Neither the FPA nor our regulations require us to entertain offers of settlement. Our decision whether to do so in a given case is therefore a matter left to our discretion.

60. As a matter of policy, we will entertain only offers of settlement that present a realistic prospect of resolving all or a significant part of the issues in a proceeding and that have sufficient support to justify our consideration. We have previously rejected an offer of settlement that was a “settlement in name only,” explaining that

[a] settlement, by definition, implies that there has been some sort of give-and-take and opportunity for [stakeholder] participation. Specifically, a settlement should be the product of numerous discussions, compromises, and extensive negotiations designed to resolve the issues. Here, [the] proposal is a unilateral act . . . where none of the other parties to the proceeding had an opportunity to participate and have their views considered.⁵²

61. GIPA and Adirondack Hydro seek rehearing of the May 24, 2006 notice rejecting their “alternative offer of settlement.”

62. Our regulations provide that an offer of settlement may be filed by “[a]ny participant in a proceeding.”⁵³ While at the time the offer of settlement was filed, GIPA’s motion to intervene in the School Street proceeding was pending, we subsequently denied it. In consequence, GIPA cannot file an offer of settlement.⁵⁴ However, because Adirondack Hydro is a party, it was entitled to file the offer of settlement and to seek rehearing of the rejection notice, and we will consider the request for rehearing as to it.

Secretary disposes of a pleading, the affected entity has recourse to the Commission to allege error in such action.

⁵² *Arkla Gathering Services Company*, 69 FERC ¶ 61,280 at 62,079 (citations omitted). *See also Pacific Gas and Electric Company*, 43 FERC ¶ 61,490 at 62,213 (1988) (“We emphasize . . . that we are not willing to entertain a unilateral offer of settlement that is contested by the other parties”).

⁵³ *See* 18 C.F.R. § 385.602(b) (2006).

⁵⁴ None of the other non-party entities who were listed as co-filers of the offer of settlement sought rehearing of the rejection notice.

63. Turning to the “offer of settlement,” we conclude that, like offers we have rejected in other instances, it is unilateral and is a settlement offer in name only. Erie Boulevard, the licensee, is not a party to it, nor is any of the three federal and state resource agencies that have played a major role in the School Street relicensing.⁵⁵ In the context of hydropower licensing proceedings, a “settlement” that is not supported by the licensee or any of the resource agencies with jurisdiction in the matter is not truly a settlement, but is rather simply a recitation of the filer’s position in the case.⁵⁶ That being so, “we believe that it would be a waste of administrative resources to attempt to process this . . . filing under the procedures set forth in Rule 602 of the Commission’s rules of practice and procedure.”⁵⁷

64. Adirondack Hydro alleges that the notice erred in concluding that the “offer of settlement” was in fact an effort to present the Commission with an untimely competitive proposal, asserting that its pleading contained only a “proposed application,” and that the Commission is authorized to undertake the actions it suggests: denying a new license for School Street Project and requiring that the project be decommissioned; issuing a non-power license for the School Street Project; or issuing a license for School Street, contingent on the project being subject to decommissioning during the license term if a “better-adapted project” were to materialize.⁵⁸

65. Adirondack Hydro’s assertions notwithstanding, the “offer of settlement,” which includes a proposed application for the Cohoes Falls Project, and suggests three alternative resolutions of the School Street relicensing, all of which are geared toward the decommissioning of that project and the approval of the Cohoes Falls Project, is intended

⁵⁵ It is likewise the case that New York Rivers United, which has been heavily involved in the relicensing, and, indeed, in all of the New York relicensings discussed above, is not party to the “offer of settlement,” and the same is true for the other environmental parties who were signatory to Erie Boulevard’s pre-existing offer of settlement or who have been otherwise involved in the School Street proceeding.

⁵⁶ This does not mean that we will not consider and, where appropriate, adopt recommendations made by entities other than the licensee or the resource agencies: we often do so. It simply means that we do not consider a document purporting to be a settlement that lacks support from so many of the major players in a licensing case to warrant consideration as a settlement.

⁵⁷ See *Pacific Gas Transmission Company*, 54 FERC ¶ 61,035 at 61,148 (1991).

⁵⁸ Adirondack Hydro request for rehearing at 3-8.

to resurrect the Cohoes Falls Project. We will not permit this improper collateral attack on our final orders, which held that an application for the Cohoes Falls Project was barred by law.⁵⁹

66. Adirondack Hydro further contends that, because the record of the School Street proceeding is still open, the Commission should not reject the “offer of settlement.” It goes on to assert that there is new evidence that must be considered in the School Street proceeding, referencing alleged information regarding historic and cultural considerations.⁶⁰

67. Assuming these assertions to be true, they are irrelevant. The Commission is indeed still developing the record of the School Street proceeding. Any information that is properly presented to us on historic and cultural matters will be duly considered when we render a decision in that case. The “offer of settlement” has no bearing on this process. While Adirondack Hydro alleges that the “offer of settlement” presents an alternative that is more protective of historic and cultural resources than the School Street Project, consideration of such an alternative is not necessary for proper processing of the School Street application. Under section 106 of the National Historic Preservation Act (NHPA),⁶¹ the Commission is required to take into account the effects of any undertaking (here, the issuance of a license, if the Commission elects to do so) on historic properties, and to afford the National Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment on the undertaking. The Commission will impose whatever requirements it deems necessary to adequately protect or document historic resources. There is no requirement in the NHPA that the Commission consider alternatives to the undertaking or select the least environmentally damaging proposal.

68. If an undertaking may adversely affect historic properties, the Commission is required to consult with the Advisory Council, the State Historic Preservation Officer, affected Indian tribes, and interested members of the public, and to seek ways to avoid or mitigate any adverse effects. The consultation in this case resulted in a programmatic

⁵⁹ Adirondack Hydro contends that the Commission must consider the “offer of settlement” because it was duly filed pursuant to the Commission’s regulations. June 23 Request for Rehearing at 12. That the pleading was properly filed does not mean that we are required to consider it, particularly where it is substantively deficient, as discussed above.

⁶⁰ *Id.* at 10-12.

⁶¹ 16 U.S.C. § 470 et seq. (2000).

agreement and a project-specific appendix, which the Commission will review in the School Street relicensing proceeding. If any party to the relicensing feels that the Commission's ultimate decision does not adequately address historic properties issues, the party may seek rehearing and, if necessary, judicial review. GIPA and Adirondack Hydro make no showing that we must consider the Cohoes Falls Project in order to carry out our NHPA obligations.

69. Adirondack Hydro again asserts that *Scenic Hudson* and *City of Pittsburgh* require the Commission to consider alternatives to the proposed project. These cases are not relevant to the issue of the "offer of settlement." There is no doubt that the Commission must consider alternatives to a proposed action and explain why it ultimately selects a particular option. In acting on the School Street relicense application, the Commission will be obligated to do just that. However, that obligation in no way means that the Commission must accept and act on an "offer of settlement" that presents a proposal that is barred by law. In those cases, the court found that the Commission had failed to consider evidence on open issues before it. In this instance, the Commission is precluded, during the pendency of the School Street proceeding, from considering an application for the Cohoes Falls Project. Thus, the merits of that project are not and cannot be before the Commission. Disguising a late-filed competitive proposal as an environmental alternative does not create an obligation that the Commission examine it, or empower the Commission to do that which the FPA forbids.

Historic Properties

70. GIPA seeks rehearing of the June 28, 2006 notice rejecting its request for rehearing of Commission's staff's letter distributing the School Street-specific appendix to the New York State Programmatic Agreement. GIPA raises only two points.

71. First, GIPA states that rejecting the rehearing request on the grounds that GIPA was not a party to the proceeding was improper because, should the Commission grant GIPA's request for rehearing of the notice denying its motion to intervene, it then would be a party. As discussed above, we deny GIPA's request for rehearing on the issue of intervention. In light of that action, GIPA's point is moot, and the notice was proper.

72. Second, GIPA does not quarrel with the notice's conclusion that rehearing does not lie with respect to the issuance of the appendix. Rather, it says that it seeks rehearing of the notice "to the extent that the Commission does not intend that challenges to the Commission's [NHPA] Section 106 proceedings are timely raised when the Commission takes final action on Erie's Boulevard's license application for project No. 2539." As we discuss herein, challenges by parties to the relicensing proceeding may be timely raised after, and only after, the Commission acts on the School Street relicensing application. Therefore, GIPA's second ground for rehearing is also moot.

73. Because we have affirmed the June 28, 2006 notice denying GIPA's motion to intervene, GIPA is not a party and may not seek rehearing of staff's action. In consequence, we need not address the substance of the rejected request for rehearing. However, in order to provide as much clarity as possible in this proceeding, we will address the issues raised by GIPA in its May 30, 2006 request for rehearing.

74. First, as the notice correctly states, requests for rehearing may only be filed by parties to proceedings and, because GIPA's motion to intervene has been denied, its request for rehearing was properly rejected. It is true that the Commission had not yet acted on the motion to intervene at the time that GIPA filed the request for rehearing. There was nothing improper in GIPA filing the request for rehearing at a time when its status had not yet been determined. However, once the Commission denied the motion, GIPA had been denied party status in the relicensing proceeding, and its request for rehearing therefore did not lie.

75. In addition, as the notice also explained, even if GIPA had been entitled to request rehearing of staff's April 28 letter, the request would have been dismissed as interlocutory. Rule 713 of our Rules of Practice and Procedure⁶² provides that rehearing may be sought of a "final Commission decision or other final order." An agency order is final when it "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process."⁶³ Staff's letter transmitting the historic properties appendix does not do any of these things. As with any of the documents leading up to a licensing order (for example, an environmental assessment), the historic properties appendix will only become effective and thus ripe for review at such time as the Commission approves it in a license order.⁶⁴ We do not consider in a piecemeal fashion the various documents that lead to such an order.

⁶² 18 C.F.R. § 385.713(2005).

⁶³ See *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); *Cities of Riverside and Colton v. FERC*, 765 F.2d 1434, 1438 (9th Cir. 1985); *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 239 (D. C. Cir. 1980).

⁶⁴ GIPA cites Commission's staff's letter transmitting the Appendix A to the effect that it "satisfies the Commission's responsibilities under Section 106 of the NHPA for any license issued for the School Street Project." The quoted statement simply represents staff's conclusion that execution and implementation of the programmatic agreement and the appendix will meet the requirements of the NHPA. Our ultimate determinations regarding these matters will be set forth in our order dealing with the School Street relicensing application.

76. Further, GIPA has failed to show that, even if the staff letter were ripe for rehearing, it was in any way aggrieved by the letter. GIPA cites to comments by the St. Regis Mohawk Tribe with respect to their concerns regarding flows at Cohoes Falls.⁶⁵ GIPA also references comments filed by the Advisory Council and the New York State Office of Parks, Recreation, and Historic Preservation regarding procedural issues related to historic preservation.⁶⁶ GIPA then alleges that the Commission did not take into account “new facts” (presumably the existence of GIPA’s project proposal), that the Commission did not designate GIPA as a consulting entity with respect to historic properties, and that the Commission should have held additional public hearings and further consultation on historic properties issues.⁶⁷

77. Despite all of this persiflage, GIPA nowhere even attempts to allege that it has any genuine interest in historic properties. Indeed, as an entity whose sole purpose, as far as the record of this proceeding shows, is to develop its own hydroelectric project -- and not an entity with historic or cultural ties to the project site or jurisdiction over the area -- it is difficult to imagine what that interest would be. GIPA’s true motive is laid bare when it states that “the Cohoes Falls Project must be considered as an alternative [for cultural resource purposes] regardless of whether the Commission can issue a license for it in this proceeding.”⁶⁸ In other words, GIPA’s interest in historic properties issues is limited to the extent to which it can use those matters as leverage to promote its project.

⁶⁵ May 31, 2006 request for rehearing at 6-8.

⁶⁶ *Id.* at 8-10. It is worthy of note that the record does not indicate, at this stage of the proceeding, whether any of the entities whose comments GIPA cites have any continuing concerns about the manner in which historic properties issues are being handled in this proceeding. If, however, any parties are not satisfied by the Commission’s order disposing of the School Street application, they will be able to seek rehearing. To date, none of these entities (the tribe or the federal and state agencies) has shown either a lack of ability to speak for themselves or a desire for GIPA to represent their interests. In fact, the Mohawk Nation Council of Chiefs filed comments making only minor suggested changes to the appendix, and stating that it had a positive working relationship with Erie Boulevard and was in the process of working out an agreement with the company to resolve historic properties issues. *See* letter from Barbara Grey (Administrator, Mohawk Nation Office) to Hon. Magalie R. Salas (filed March 31, 2006).

⁶⁷ Request for rehearing at 11-19.

⁶⁸ *Id.* at 19.

78. In addition, as discussed above, GIPA misrepresents the requirements of the NHPA. Section 106 of the NHPA and its implementing regulations⁶⁹ require federal agencies to take into account the effect of any proposed undertaking on properties listed or included for listing in the National Register, and does not contemplate the consideration of alternatives, as GIPA contends. Rather, the Commission is required to examine the impacts of a proposed undertaking on historic properties and to develop reasonable measures dealing with those impacts, as it is in the process of doing.

Conclusion

79. For the reasons discussed above, we deny the requests for rehearing of the notices denying late intervention, and of those rejecting the “offer the settlement,” the motion to reopen the record, and the programmatic agreement. The movants have failed to provide sufficient justification to support their untimely motions to intervene. The remainder of the pleadings at issue represent attempts to place before the Commission the legally-barred Cohoes Falls Project, and therefore they all must fail.

The Commission orders:

The requests for rehearing, filed on June 23, 2006, by Green Island Power Authority and Adirondack Hydro Development Corporation; on July 28, 2006, by Green Island Power Authority (two separate pleadings), Alliance for Environmental Renewal, New York Association for Public Power, Capital District Planning Commission, Friends of the Falls, Town of Green Island, Preservation League of New York State, Public Utility Law Project of New York, Inc., City of Watervliet; on July 28, 2006 by Adirondack Hydro Development Corporation and Green Island Power Authority; and on September 6, 2006, by the Village of Green Island and New York Bicycling Coalition, are denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁶⁹ 36 C.F.R. Part 800 (2006).