

129 FERC ¶ 61,095  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands      Docket No. RM09-6-001

ORDER DENYING REHEARING

(Issued October 30, 2009)

1. A group of entities who are licensees of hydropower projects regulated by the Commission under Part I of the Federal Power Act (the Federal Lands Group) have filed a request for rehearing of a February 17, 2009 notice updating the Commission's fees schedule for charges for the use of government lands by hydropower licensees (February 17 Notice).<sup>1</sup> As discussed below, we deny rehearing, and also deny the Federal Lands Group's alternative motion for stay as moot.

**Background**

2. Section 10(e)(1) of the Federal Power Act (FPA)<sup>2</sup> requires Commission hydropower licensees using federal lands to:

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<sup>1</sup> *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands*, 74 Fed. Reg. 8184 (February 24, 2009) FERC Stats. & Regs. ¶ 31,288 (2009).

<sup>2</sup> 16 U.S.C. § 803(e)(1) (2006). Section 10(e)(1) also requires licensees to reimburse the United States for the costs of the administration of Part I of the FPA. Those charges are calculated and billed separately from the land use charges at issue here, and are not in question in this proceeding.

pay to the United States reasonable annual charges in an amount to be fixed by the Commission . . . for recompensing [the United States] for the use, occupancy, and enjoyment of its lands or other property . . . and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require . . . .

In other words, where hydropower licensees use and occupy federal lands for project purposes, they must compensate the United States through payment of an annual fee, to be established by the Commission.<sup>3</sup>

3. The Commission has employed various methodologies to determine the charges. The touchstone has been to find an administratively practical methodology which results in reasonably accurate land valuations.

4. Beginning in 1938, annual charges for use of government land were based on project-by-project appraisals.<sup>4</sup> That proved uneconomical because of the cost of appraisal in comparison to the value of the land involved.<sup>5</sup> In 1942, the Commission's predecessor, the Federal Power Commission (FPC), developed a national average value of \$50 per acre, to which it applied a four percent rate of return to derive an annual land use charge of \$2.00 per acre.<sup>6</sup> In 1962, the FPC increased the national average land value to \$60 per acre, and in 1976 to \$150 per acre. In 1976, the FPC also adopted a fluctuating interest rate to ensure that the rate of return would remain current.<sup>7</sup>

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<sup>3</sup> Pursuant to FPA section 17(a), 16 U.S.C. § 810(a) (2006), the fees collected for use of government lands are allocated as follows: 12.5 percent is paid into the treasury of the United States, 50 percent is paid into the federal reclamation fund, and 37.5 percent is paid into the treasuries of the states in which particular projects are located. No part of the fees is used to fund the Commission's operation.

<sup>4</sup> See *Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, Order No. 469, FERC Stats. & Regs. ¶ 30,741, at 30,584 (1987).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* This rate was based on a fluctuating rate used by the United States Water Resources Council, based primarily upon the average yield of long-term United States interest-bearing securities.

5. In 1985, the Inspector General of the Department of Energy concluded that the Commission's existing methodology resulted in an under-collection of over \$15 million per year because it used outdated land values. The Inspector General also found that the wide variation in land values made the use of a zone index preferable to a national average. The Inspector General recommended that the Commission: (1) base land use charges on the current fair market value of the land being used, (2) use current long-term interest rates in its calculations, and (3) replace the national average land value with state-by-state averages.<sup>8</sup>

6. In response, the Commission instituted a rulemaking for several purposes, including, as relevant here, to impose federal land use fees that better approximated the fair market value of the use of those lands. In the Notice of Proposed Rulemaking, the Commission noted that it had found no existing index of lands values that accurately reflected current economic conditions and conformed precisely to the context of land used for hydropower projects.<sup>9</sup> The Commission stated that it was considering using, with modifications, the "Agricultural Land Values and Market Outlook and Situation Report," published by the Department of Agriculture, which provided state-by-state average farm land and building values.<sup>10</sup> The Commission also suggested that it could base land use fees on a rental schedule for linear rights-of-way being developed jointly by the Department of Agriculture's U.S. Forest Service and the Department of the Interior's Bureau of Land Management (BLM). The Commission explained that, although the rental schedule concerned linear rights-of-way, it might be more representative of the value of land used for hydropower projects than valuation of farm lands or any other currently published information.<sup>11</sup> The Commission also requested comment on whether it should continue to assess the value of lands occupied by project facilities other than transmission lines at twice the rate use for lands occupied only by project transmission lines.

7. In its final rule, the Commission explained that its then-existing methodology had resulted in undercollection of land use charges and was no longer reasonable because it

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<sup>8</sup> *See Assessment of Charges under the Hydroelectric Program*, DOE/IG Report No. 0219 (September 3, 1986); *see also More Efforts Needed to Recover Costs and Increase Hydropower Charges*, U.S. General Accounting Office Report No. RCED-87-12 (November 1986).

<sup>9</sup> *Billing Procedure Revisions – Annual Charges Methodology for Assessing Federal Land Use Charges*, FERC Stats. & Regs. ¶ 32,423, at 33,281, (1985).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

used outdated land values, that the wide variation in land values across the country made use of a zone index preferable to a national average, and that its previous decision not to use such an index because of the burden of the Commission having to determine the value of Forest Service lands was no longer an issue because the Forest Service and BLM had begun promulgating an index setting forth those values.<sup>12</sup> The Commission agreed with the majority of commenters that the BLM-Forest Service index more accurately reflected typical project lands, and so decided to use that index rather than the farm values index.<sup>13</sup>

8. The Commission explained that the BLM-Forest Service methodology was based on a survey of the various types of lands that the Forest Service has allowed to be occupied by linear rights-of-way. The schedule was divided into regional zones, and provides per-acre rental fees listed by state and county.<sup>14</sup> The Commission decided to continue its past practice of doubling the linear right-of-way fee in order to establish the annual fees for the use of federal lands for project works other than transmission lines (e.g., dams, powerhouse, and reservoirs), because lands used for transmission line rights-of-way would remain available for multiple uses, while other federal lands occupied by hydropower project works would not.<sup>15</sup>

9. The Commission found no merit to claims that charging fair market value for federal lands is prohibited by the FPA:

All increases in charges will result in some impact on consumers. The statutory provision bars the Commission from assessing unreasonable charges that would be passed along to consumers. Reasonable annual charges are those that are proportionate to the value of the benefit conferred. Therefore, a fair market approach is consistent with the dictates

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<sup>12</sup> Order No. 469, FERC Stats. & Regs. ¶ 30,741 at 30,584.

<sup>13</sup> *Id.* at 30,589.

<sup>14</sup> *Id.* at 30,588.

<sup>15</sup> *See id.* at 30,588-89.

of the Act. Furthermore, as land values have not been adjusted in over ten years, an adjustment upwards is warranted and overdue.<sup>[16]</sup>

The Commission stated that “the Forest Service index is the best approximation of reasonable land charges and explained that “the Forest Service index will be adopted and published each year by the Commission.”<sup>17</sup>

10. Based on these findings, the Commission promulgated a regulation stating, *inter alia*, that annual charges for the use of government lands would be set on the basis of the schedule of rental fees for linear rights-of-way (the BLM-Forest Service schedule); that annual charges for government lands occupied by project transmission lines would be based directly on the schedule, while charges for lands used for other project purposes would be twice the charges set forth in the schedule; and that the Commission “by its designee the Executive Director, will update its fees schedule to reflect changes in land values established by the Forest Service. The Executive Director will publish the updated fee schedule in the Federal Register.”<sup>18</sup>

11. Consistent with the regulations, each year since 1987 the Commission issued a fee update schedule, virtually identical to the Fee Update Schedule at issue here.<sup>19</sup> The

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<sup>16</sup> *Id.* (footnotes omitted). The Commission also rejected arguments that it should intentionally set low land charges, based on the public benefits provided by hydropower projects.

<sup>17</sup> *Id.* at 30,591.

<sup>18</sup> *See* 18 C.F.R. § 11.2(b) (2009).

<sup>19</sup> *See Update of the Federal Energy Regulatory Commission’s Fee Schedule for Annual Charges for the Use of Government Lands*, FERC Stats. & Regs. ¶ 30,837 (1988), 53 Fed. Reg. 44,858 (November 7, 1988); FERC Stats. & Regs. ¶ 30,866 (1989), 54 Fed. Reg. 48,590 (November 24, 1989); FERC Stats. & Regs. ¶ 30,903 (1990), 55 Fed. Reg. 47,309 (November 13, 1990); FERC Stats. & Regs. ¶ 30,931 (1991), 56 Fed. Reg. 58,497 (November 20, 1991); FERC Stats. & Regs. ¶ 30,953 (1992), 57 Fed. Reg. 48,454 (October 20, 1992); FERC Stats. & Regs. ¶ 30,982 (1993), 58 Fed. Reg. 54,035 (October 20, 1993); FERC Stats. & Regs. ¶ 31,004 (1994), 59 Fed. Reg. 54,815 (October 28, 1994); FERC Stats. & Regs. ¶ 31,028 (1995), 60 Fed. Reg. 55,992 (November 6, 1995); FERC Stats. & Regs. ¶ 31,043 (1996), 61 Fed. Reg. 58,469 (November 15, 1996); FERC Stats. & Regs. ¶ 31,058 (1997), 62 Fed. Reg. 54,035 (November 17, 1997); FERC Stats. & Regs. ¶ 31,068 (1998), 63 Fed. Reg. 66,003 (December 1, 1998); FERC Stats. & Regs. ¶ 31,084 (1999), 64 Fed. Reg. 62,572 (November 17, 1999); FERC Stats. & Regs. ¶ 31,113 (2000), 65 Fed. Reg. 79,916

(continued...)

update notices state: “the Commission . . . is updating its schedule of fees for the use of government lands. The yearly update is based on the most recent schedule of fees for the use of linear rights-of-way prepared by the United States Forest Service.”<sup>20</sup> The Commission has never sought comment or provided an opportunity for intervention with respect to these updates.

12. From 1987 until 2008, BLM and the Forest Service did not change the 1987 linear right-of-way schedule, other than to make an adjustment to the fees each year to account for inflation. In section 367 of the Energy Policy Act of 2005,<sup>21</sup> Congress required BLM “to update [the schedule] to revise the per acre rental fee zone value schedule by State, county, and type of linear right-of-way use to reflect current values of land in each zone.” Congress further ordered that “the Secretary of Agriculture shall make the same revision for linear rights-of-way . . . on National Forest System land.”

13. On April 27, 2006, BLM issued an advance notice of proposed rulemaking proposing to update the fee schedule.<sup>22</sup> BLM stated that it was considering using existing published information or statistical data, such as information published by the National Agricultural Statistic Service (NASS), for updating the schedule. BLM asked for comment on a number of issues, including what information it should use as the basis for the update, and what, if any, provisions it should include to provide relief from large, unexpected increases in fees.

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(November 28, 2000); FERC Stats. & Regs. ¶ 31,120 (2001), 66 Fed. Reg. 59,361 (November 21, 2001); FERC Stats. & Regs. ¶ 31,135 (2002), 67 Fed. Reg. 70,158 (November 14, 2002); FERC Stats. & Regs. ¶ 31,154 (2003), 68 Fed. Reg. 67,592 (November 28, 2003); FERC Stats. & Regs. ¶ 31,170 (2004), 69 Fed. Reg. 71,364 (December 3, 2004); FERC Stats. & Regs. ¶ 31,201 (2006), 71 Fed. Reg. 2,863 (January 18, 2006); FERC Stats. & Regs. ¶ 31,235 (2007), 72 Fed. Reg. 1,453 (January 12, 2007); FERC Stats. & Regs. ¶ 31,262 (2008), 73 Fed. Reg. 3,626 (January 22, 2008); FERC Stats. & Regs. ¶ 31,288, 74 Fed. Reg. 8,184 (February 24, 2009).

<sup>20</sup> For the first two years, the notice stated that the update is determined by “adopting” the Forest Service schedule. It then stated that the update was determined by “adapting” that schedule. In 1996, the notice began using the current terminology: “the update is based on” the Forest Service schedule. We view these minor language changes as having no relevance here.

<sup>21</sup> 42 U.S.C. § 15925 (2006).

<sup>22</sup> *Update of Linear Right-of-Way Rental Schedule*, 71 Fed. Reg. 24,836.

14. On December 11, 2007, BLM issued a proposed rule updating the rental fee schedule,<sup>23</sup> and on October 31, 2008, it issued a final rule.<sup>24</sup> The rule based the updated fee on the NASS information, as BLM had proposed. BLM noted that the four commenters who had addressed the issue had supported use of the NASS data.

15. The Forest Service subsequently adopted the BLM revisions.<sup>25</sup>

16. In January 2009, the Commission sent letters to all of its licensees, explaining that the Forest Service had revised its fee schedule in response to direction from Congress and that consequently “for many projects, the [fiscal year] 2009 federal land use charges will increase substantially.” The Commission asked licensees to confirm the federal acres that the Commission believed to be occupied by each project.<sup>26</sup>

17. The Commission issued notice of the Fee Update Schedule at issue here in the February 17 Notice and based the schedule, as in previous years, on the BLM’s and Forest Service’s land valuations. Because of the BLM-Forest Service revisions, this resulted, in some cases, in significantly higher fees being assessed.<sup>27</sup> In calculating the 2009 fees, the Commission used the same methodology that it has used for the past 21 years: it took the land values published by Forest Service and BLM, used the information in its files showing federal acreage occupied by individual projects, and applied the values for the counties in which individual projects were located, doubling the values for acreage occupied by non-transmission line portions of hydropower projects.

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<sup>23</sup> *Update of Linear Right-of-Way Rent Schedule*, 72 Fed. Reg. 70,376.

<sup>24</sup> *Update of Linear Right-of-Way Rent Schedule*, 73 Fed. Reg. 65,040.

<sup>25</sup> *See Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands*, 73 Fed. Reg. 66591 (November 10, 2008). The Forest Service noted that it had given notice, in the preambles to BLM’s proposed and final rules, that it would adopt BLM’s revised fee schedule.

<sup>26</sup> *See, e.g.*, letter to Portland General Electric Company in Project No. 2030 (January 6, 2009).

<sup>27</sup> *See* request for rehearing at 18 (statement by Federal Lands Group of fee increases for some of its members’ projects). Other licensees, typically in the eastern part of the country, had their charges reduced.

18. On March 6, 2009, the Federal Lands Group, a group of licensees composed of both municipal and private entities,<sup>28</sup> filed a request for rehearing or, in the alternative, stay of the February 17 Notice.<sup>29</sup> The group alleged that the February 17 Notice amounted to a rulemaking, improperly issued without notice and an opportunity for comment, and that the Commission had improperly delegated its authority to set annual charges to BLM and the Forest Service. The group asked the Commission to vacate the February 17 Notice, rescind annual charge bills that had been sent out in accordance with it, and reissue bills calculated under the prior fees schedule.

19. On, April 14, 2009, the Federal Land Group<sup>30</sup> filed with the United States Court of Appeals for the District of Columbia Circuit a request for a stay of the February 17 Notice. On April 30, 2009, the court issued an order staying the February 17 Notice only with regard to the nine licensees who had requested the stay. The court further held that the stay was without prejudice to the Commission filing a motion to dissolve the stay within 15 days of acting on the request for rehearing, and stated that the Commission could issue interim bills to the nine licensees using last year's charges. On May 13, 2009, the Commission issued interim bills to the nine licensees based on last year's fees schedules.

### **Discussion**

20. For the reasons discussed below, we conclude that it is inappropriate for the Federal Lands Group to seek rehearing here.

21. The Federal Lands Group's primary quarrel is with the increased valuations promulgated by BLM and the Forest Service. As the group states,<sup>31</sup> the BLM

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<sup>28</sup> The members of the Federal Lands Group are: City of Idaho Falls; City of Tacoma, Washington; El Dorado Irrigation District; PacifiCorp; Portland General Electric Company; Public Utility District No. 1 of Chelan County, Washington; Puget Sound Energy; Sacramento Municipal Utility District; Southeast Alaska Power Agency; and Turlock Irrigation District.

<sup>29</sup> The Federal Lands Group asserts that it need not file a motion to intervene because the proceeding at issue here is a rulemaking. Request for rehearing at 2, n.7. While, as discussed below, we disagree with the manner in which the Federal Lands Group characterizes the substance of this proceeding, we agree that no motion to intervene is required here.

<sup>30</sup> One member of the group, the Southeast Alaska Power Agency, did not join in the motion for stay.

<sup>31</sup> Request for rehearing at 8.

promulgated the updated fee methodology through a notice and comment proceeding. The group does not suggest any deficiency in BLM's proceeding, nor does the group claim that it was not on notice of that proceeding. Indeed, the Federal Lands Group states that at least one of its members took part in the rulemaking where the expert federal land managing agencies were determining the proper valuation of federal lands.<sup>32</sup> The February 17 Notice cannot serve as a vehicle for an attack on the now-final actions of other agencies.

22. In addition, to the extent that the group objects to the Commission's use of the BLM-Forest Service valuation as the basis for its land use charge calculations, the initial appropriate venue for seeking review of that procedure would have been a request for rehearing of the Commission's notice and comment rulemaking in 1987 that resulted in Order No. 469, where the Commission decided that it would thereafter base annual charge fees for the use of government lands on the BLM-Forest Service index, "updating [the] fees schedule to reflect changes in land values established by [those agencies]."<sup>33</sup> Raising that matter in a request for rehearing of the February 17 Notice is an improper collateral attack on the Commission's 1987 rulemaking.<sup>34</sup>

23. Moreover, the Federal Lands Group has failed to seek the appropriate remedy. As stated by the courts, "[w]here a plaintiff is challenging the validity of a[n existing] regulation, the rule of exhaustion normally requires that the plaintiff petition the agency for rulemaking."<sup>35</sup> The Federal Lands Group did not seek rehearing in 1987 and has not

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<sup>32</sup> Request for rehearing at note 71. To the extent that members of the Federal Lands Group elected not to participate in the BLM and Forest Service rulemakings, they gave up their rights with respect to the resulting rules. *See, e.g. Nader v. Nuclear Regulatory Commission*, 513 F.2d 1045 (D.C. Cir. 1975) (one who refrains from participating in rulemaking proceedings may not obtain judicial review of resulting regulations).

<sup>33</sup> 18 C.F.R. § 11.2(b) (2009).

<sup>34</sup> *Cf. Associated Gas Distributors v. FERC*, 810 F.2d 226 (D.C. Cir. 1987) (affirming Commission ruling that witness' testimony was impermissible collateral attack on prior rulemaking).

<sup>35</sup> *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997), *citing South Hills Health Sys. v. Bowen*, 864 F.2d 1094, 1095 (3d Cir. 1988). *See also Biggerstaff v. FCC*, 511 F.3d 178, 184 (D.C. Cir. 2007). We recognize that the exhaustion doctrine may be more relevant during appellate review than before us, but the doctrine nonetheless indicates that the Federal Lands Group did not follow the proper avenue in seeking relief here.

petitioned the Commission for a rulemaking, as it should have done if it wanted the Commission to change its regulations.<sup>36</sup> Thus, the group has not exhausted its remedies.

24. Notwithstanding the above-noted procedural failings, we will turn to the merits of the Federal Lands Group's argument.<sup>37</sup> The group's challenge to the February 17 Notice necessarily depends on its contention that the update was a rulemaking, subject to the notice and comment procedures mandated by the Administrative Procedure Act (APA). This premise is incorrect, and thus the Federal Lands Group's argument lacks foundation.

25. We do not believe that the February 17 Notice can be properly characterized as a rulemaking of any kind. The notice was not styled as a proposed rule, an instant final rule, or a rule of any kind. It was entitled "Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the use of Government Lands." The summary portion of the notice, under the heading "Action," does state "Final rule; update of Federal land use fees." However, this designation of "final rule" stemmed from the fact that the annual updates implement regulations established by the 1987 final rule, and cannot by itself transform a simple update, required by our regulations, into a rulemaking proceeding. That is, the label given by an agency to an action is not dispositive, and courts will independently inquire into the substance of a pronouncement.<sup>38</sup>

26. Our view of the February 17 Notice is supported by the procedural nature of the action. The February 17 Notice was issued, not by the Commission itself, but by the Commission's Executive Director. The Executive Director took that action pursuant to section 11.2(b) of the Commission's regulations, which, as noted above, provides that "[t]he Commission, by its designee the Executive Director, will update its fees schedule to reflect changes in land values established by the Forest Service." The Commission has

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<sup>36</sup> Given that each licensee received a letter from the Commission in early January 2009 stating that BLM and the Forest Service had revised their fee schedule and that annual charges bills would increase substantially as a result, the members of the Federal Lands Group were on notice of the procedures the Commission intended to follow.

<sup>37</sup> This is both to provide clarity to our licensees and to provide further explanation in the event that a reviewing court should conclude that the group's objections were properly raised before us.

<sup>38</sup> See, e.g., *Mt. Diablo Hospital District v. Bowen*, 860 F.2d 951 (9th Cir. 1988); *Chamber of Commerce v. Occupational Health and Safety Administration*, 636 F.2d 464, 468 (D.C. Cir. 1980).

not delegated to the Executive Director (or to any other of its office directors) the authority to conduct rulemakings or issue new regulations.<sup>39</sup>

27. The Federal Lands Group asserts that the Commission has “abandon[ed]” the previously-approved BLM-Forest Service index and “adopt[ed]” the new methodology that is now used by BLM and the Forest Service.<sup>40</sup> In Order No. 469, the Commission decided, following a notice and comment process, that it would use the index prepared by the BLM and the Forest Service as the basis for calculating government land use fees – and Order No. 469 made no exception for changes in the underlying methodology of BLM and the Forest Service. The Commission thus adhered to its previously-established procedures in issuing the February 17 Notice. The Federal Lands Group cannot use the actions of BLM and the Forest Service to argue that the Commission has abandoned its existing regulations.

28. Even under an assumption that the February 17 Notice were considered to be a rulemaking, it would be properly characterized as an interpretative rule, rather than a legislative rule, the Federal Lands Group’s arguments to the contrary<sup>41</sup> notwithstanding. The APA exempts from its notice and comment requirements “interpretative rules, general statements, or rules of agency organization, procedure, or practice.”<sup>42</sup> An interpretative rule “only ‘reminds’ affected parties of existing duties,” while in a legislative rule “the agency intends to create new law, rights, or duties.”<sup>43</sup> As the Court of Appeals for the District of Columbia Circuit held, in determining that an Environmental Protection Agency rulemaking was interpretative, “most importantly, the rule did not create any new rights or duties; instead, it simply restated the consistent practice of the agency. . . .”<sup>44</sup> Where, as here, an agency is interpreting language already

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<sup>39</sup> The Commission’s delegations of authority to the Executive Director appear at 18 C.F.R. § 375.312 (2009).

<sup>40</sup> Request for rehearing at 12.

<sup>41</sup> Request for rehearing at 13-18.

<sup>42</sup> See, e.g., *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561 at 1574, n.6 (D.C. Cir. 1984) (*en banc*).

<sup>43</sup> *Id.* at 1574.

<sup>44</sup> *Id.* See also *Arrow Air v. Dole*, 784 F.2d 1118 (D.C. Cir. 1986) (notice and comment procedures not required where agency action served to remind regulated entities of existing duties, policy had been consistently articulated and followed for significant period of time, and action did not create new law, rights, or duties). See also  
(continued...)

found in its regulations, and is not adding or amending regulatory language, the action is not subject to notice and comment procedures.<sup>45</sup> Moreover, although the Federal Lands Group contends that the February 17 Notice will have a substantial financial impact on its members, where a rule is properly characterized as interpretative, the fact that the action has a substantial impact does not create a need for notice and comment procedures.<sup>46</sup>

29. The February 17 Notice did not create new law, rights, or duties. It simply informed licensees of the updated land use fees which, as they have been for over two decades, were based on the BLM-Forest Service land valuations. As it has done since 1987, the Commission took the figures provided by the Forest Service and BLM and published the results in the federal register, to put licensees on notice as to how their annual charges bills would be calculated. The fact that the BLM-Forest Service valuation had changed in the last year does not vitiate the fact that the Commission did not alter its process in any way.<sup>47</sup>

30. Section 11.2 of the regulations provides that annual charges for use of government lands will be set on the basis of the schedule of rental fees for linear rights-of-way set out in the regulations. As noted above, section 11.2 also provides that the schedule will be adjusted to account for changes in land values established by the Forest Service (and, by

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*Southern California Edison v. FERC*, 770 F.2d 779 (9th Cir. 1985); *Guardian Federal Savings & Loan Association v. Federal Savings and Loan Insurance Corporation*, 589 F.2d 658 (D.C. Cir. 1978) (interpretative rule is clarification or explanation of existing statute or rule); *British Caledonian Airways v. Civil Aeronautics Board*, 584 F.2d 982, 990 (D.C. Cir. 1978) (“The feature which distinguishes declaratory orders and other interpretive rulings from those legislative rules which must conform with the procedures established by the APA for rulemaking is not their effect, but rather that the order or ruling instead of creating new law serves only to clarify and state an agency’s interpretation of an existing statute or regulation”) (citations omitted).

<sup>45</sup> See *Beezer East, Inc. v. EPA*, 963 F.2d 603 (3d Cir. 1992).

<sup>46</sup> See *Central Texas Telephone Cooperative, Inc. v. Federal Communications Commission*, 402 F.3d 205, 214 (D.C. Cir. 2005) (noting court’s rejection of “substantial impact” test in determining whether rule is interpretative or legislative). See also *Rivera v. Becerra*, 714 F.2d 887 (9th Cir. 1983), *cert. denied* 465 U.S. 1099 (1984); *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (TECA 1978).

<sup>47</sup> The notice, if considered to be a rule, could also be viewed as a “logical outgrowth” of Order No. 469, and thus not subject to the APA’s notice and comment requirements. See *City of Stoughton v. United States EPA*, 858 F.2d 747, 751 (D.C. Cir. 1988).

extension, by BLM). The new methodology utilized by BLM and the Forest Service still leads to a valuation of rental fees for linear rights-of-way. Thus, even though Order No. 469 discusses various methodologies, section 11.2 itself does not specify any underlying methodology as a condition for the Commission's continued use of the figures provided by the agencies. Indeed, the regulation specifically contemplates that the values provided by the other agency may change, and provides that the Commission will adopt values based on those changed values. That is precisely what occurred here.

31. The Federal Lands Group asserts that “[t]he courts have permitted establishment or revision of fee structures without notice and comment only in exceptional circumstances, such as an explicit statutory exemption from the requirement”<sup>48</sup> citing *Air Transp. Ass’n of Canada v. FAA*<sup>49</sup> and *Asiana Airlines v. FAA*.<sup>50</sup> However, *Air Transp. Assn* involves judicial review of the merits of a FAA rate setting rulemaking, does not deal with an allegation that the agency failed to provide for appropriate notice and comment (in fact, the FAA apparently did provide for notice and comment in the underlying proceeding) and, indeed, does not even mention the APA. In *Asiana*, the court held that the FAA had not violated the notice and comment requirement of APA section 553 where Congress had directed that the FAA establish for the first time fees for “overflights” (flights through U.S. airspace that neither originate nor end in this country) in an interim final rule, to be followed by public comment and the issuance of a final rule. In neither of these cases did the court mention the “revision” of fee schedules, rendering these citations inapposite.

32. As the Federal Lands Group notes,<sup>51</sup> the Commission has twice instituted formal notice and comment rulemaking proceedings when it proposed to change the methodology by which it calculated federal land use fees. In the February 17 Notice, the Commission did not change its methodology. Rather, as it had done some 21 times previously (and after giving each licensee notice in a January 2009 letter that it would be using the revised BLM-Forest Service methodology), the Commission simply notified licensees of the updated fees schedules promulgated by the Forest Service and BLM, and based annual fees on those schedules. The Federal Lands Group attempts to inflate this notification into a change in policy, an assertion that does not hold up to scrutiny. The calculation by the Commission of land use charges based on the Forest Service's and BLM's schedules has been consistent for 22 years: the fact that some of those fees

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<sup>48</sup> Request for rehearing at 12; 17.

<sup>49</sup> 323 F.3d 1093 (D.C. Cir. 2003).

<sup>50</sup> 134 F.3d 393 (D.C. Cir. 1998).

<sup>51</sup> See Request for rehearing at 4.

increased markedly in the most recent iteration does not amount to a change in Commission procedure or policy.

33. The Federal Lands Group suggests that the February 17 Notice constituted a change in policy because, in Order No. 469, the Commission decided that it was not appropriate to use an index based on agricultural land values, and the new Forest Service/BLM land valuations are based on such values.<sup>52</sup> Even if this were correct, it would not alter the extremely limited nature of the February 17 Notice. In Order No. 469, the Commission decided to use the BLM-Forest Service index as the basis for establishing charges for use of government lands. That the Commission has continued to rely on an underlying index that itself has been changed arguably might be cause for the Commission to reexamine the propriety of using the BLM-Forest Service calculations, but it cannot be considered a change in Commission regulation. Indeed, if the Commission were to have decided that the manner in which BLM and the Forest Service calculated the most recent index made it inappropriate for use as the basis for the Commission's establishment of annual fees and turned to another manner for valuing the use of federal lands, that would have required a notice and comment rulemaking, because it would have represented a fundamental change in the Commission's annual charges calculations, in a manner inconsistent with section 11.2 of our regulations.

34. In any case, the Federal Lands Group overstates the significance of the Commission's 1987 conclusion with regard to the use of agricultural land values. In Order No. 469, the Commission concluded that the use of the Department of Agriculture's "Agriculture Land Values and Markets Outlook and Situation Report," which provided a state-by-state average value per acre of farm land and buildings, would require major adjustments to the point that it would not be an appropriate measure of land value for hydropower projects because farm land values vary greatly from state to state and are usually much higher than the values of land involved in hydropower development, because farm land values would have to be adjusted to account for farm buildings and cleared arable land, and because farm land values represent private, not federal, lands.<sup>53</sup> Instead, the Commission elected to use the BLM-Forest Service methodology, which was based on a survey of market values for the various types of federal lands used for linear rights-of-way.<sup>54</sup>

35. In promulgating its new fee schedule, BLM decided to use information contained in the Census of Agriculture, published every five years by NASS. BLM explained that

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<sup>52</sup> Request for rehearing at 19-20.

<sup>53</sup> Order No. 469, FERC Stats. & Regs. ¶ 30,741 at 30,589.

<sup>54</sup> *Id.* at 30,588.

this data is reflective of the types of agricultural use occurring in individual counties, including land value data for cropland, woodland, pastureland, and rangeland, as well as an “other” category, including non-commercial, non-residential building lots, wasteland, and land with roads and ponds.<sup>55</sup> BLM stated that lands administered by it and the Forest Service have many of the same uses as the lands covered by the NASS census, and further noted that Congress in 2003 had endorsed use of the NASS data for rental determination purposes.<sup>56</sup> BLM further stated that it was reducing the average per acre land and building value for each county by an amount that reflects the value of irrigated cropland and land encumbered by buildings, since BLM and Forest Service lands do not include these land categories.<sup>57</sup>

36. The question of whether the new BLM-Forest Service methodology results in a reasonably accurate valuation of federal land used for hydropower purposes is not properly before us. We therefore do not reach any conclusive determinations on that matter at this time. Nonetheless, the data now being used by BLM and the Forest Service is not the same as that which the Commission found in Order No. 469 to be inappropriate: the data takes account of a variety of land uses, and BLM and the Forest Service are making certain adjustments to the NASS data to avoid overvaluing the lands. Thus, it cannot be said that the BLM’s and the Forest Service’s change in methodology conflicts with our conclusions in Order No. 469.

37. The Federal Lands Group also asserts that the Commission has improperly delegated establishment of the land use charges methodology to other agencies.<sup>58</sup> The Commission has delegated no authority to BLM and the Forest Service. The cases cited by the group, *City of Tacoma v. FERC*<sup>59</sup> and *East Columbia Irrigation District v. FERC*,<sup>60</sup> are inapposite. In *City of Tacoma*, the court overturned the Commission’s prior practice of passing on to licensees, without review, costs that other agencies estimated that they had incurred in carrying out their responsibilities under Part I of the FPA. Here, the Commission adopted, after review, the BLM-Forest Service index to serve as the

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<sup>55</sup> 73 Fed. Reg. 65,040 at 65,043.

<sup>56</sup> *Id.*, citing the National Forest Organizational Camp Fee Improvement Act of 2003, 16 U.S.C. 6231 (2006).

<sup>57</sup> *Id.* at 65,044.

<sup>58</sup> Request for rehearing at 13; 22-23.

<sup>59</sup> 331 F.3d 106 (D.C. Cir. 2003).

<sup>60</sup> 946 F.2d 1550 (D.C. Cir. 1991).

basis for the Commission's own assessment of charges. In *East Columbia Irrigation District*, the court affirmed the Commission's assessment of section 10(e) charges for the use of government property, noting that "only the Commission has the authority to administer Section 10(e)."<sup>61</sup> Here, we continue to administer section 10(e). The group's logic dictates that any affirmative choice by an agency to rely on data prepared by another entity that is subsequently updated (such as the frequently-used Consumer Price Index) is an improper delegation or calls for re-evaluation every time the index being relied upon is updated. We disagree.

38. In addition, the Federal Lands Group contends that the Commission should not continue its current practice of assessing fees for federal lands occupied by project works other than transmission lines at double the rate for federal lands occupied by project transmission lines.<sup>62</sup> We reject this contention as an untimely collateral attack on Order No. 469. As the Federal Lands Group itself states, "the Commission's current practice is based on nothing more than the continuation of a[n] historical practice that was put into place several decades ago."<sup>63</sup> The Commission rejected arguments raised on this issue in 1987,<sup>64</sup> and the matter cannot now be resuscitated in the guise of an objection to the February 17 Notice. The Commission in 1987 provided a rationale for its decision to double transmission line charges to come up with valuations for federal lands used for non-transmission portions of hydropower projects: federal lands occupied by hydropower project transmission lines remain available for other uses by federal land managers, while those occupied by other project works do not. Thus, the Commission concluded, it is reasonable that licensees be charged more for use of the latter types of federal lands.<sup>65</sup> The Federal Lands Group fails to show why this decision was not valid

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<sup>61</sup> 946 F.2d at 1557.

<sup>62</sup> Request for rehearing at 20-21.

<sup>63</sup> *Id.*

<sup>64</sup> We note that all of the members of the Federal Lands Group, with the exception of the Southeast Alaska Power Agency, were licensees when Order No. 469 was issued. In fact, two members of the group, Sacramento Municipal Utility District and Public Utility District No. 1 of Chelan County, Washington, participated in the rulemaking. One party to the rulemaking – who is a not member of the Federal Lands Group -- sought, and was denied, rehearing on this very issue. *See Revision of the Billing Procedure for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, 41 FERC ¶ 61,006 at ¶ 61,009-010 (1987). This matter is long-since final and not subject to relitigation here.

<sup>65</sup> *See* Order No. 469, FERC Stats. & Regs. ¶ 30,741 at 30,588-89.

when made, and provides neither a procedural nor a substantive basis for reopening this matter.

39. Finally, the Federal Lands Group argues that if the Commission does not grant its request for rehearing, then the Commission should stay the effectiveness of the February 17 Notice. Given that the Federal Lands Group has obtained a judicial stay of the annual charges bills to those of its members that sought the stay, that we have re-issued revised bills pending the outcome of this matter, and that we here respond to the group's request for rehearing, the request for an administrative stay is moot.

The Commission orders:

(A) The request for rehearing, filed on March 6, 2009, by the Federal Lands Group, is denied.

(B) The Federal Land Group's motion for stay is denied as moot.

By the Commission. Commissioner Moeller dissenting with a  
separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Update of the Federal Energy Regulatory  
Commission's Fees Schedule for Annual Charges  
for the Use of Federal Lands

Docket No. RM09-6-001

(Issued October 30, 2009)

MOELLER, Commissioner, *dissenting*:

The Federal Power Act requires the Commission to assess a reasonable annual charge on hydropower projects that use federal lands.<sup>1</sup> In a 1987 rulemaking, the Commission determined that the methodology then in use by the Bureau of Land Management (BLM) was an appropriate methodology upon which to rely in arriving at a reasonable annual charge.<sup>2</sup> However, BLM has recently adopted a new methodology which the Commission has not assessed.<sup>3</sup>

The majority's reliance on BLM's new methodology results in vastly different fees than its old methodology. The annual fee assessed on the petitioners has increased from about \$2.6 million to more than \$8 million,<sup>4</sup> an increase that would certainly merit attention if a public utility were to seek a similar increase in its rates for electric service.

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<sup>1</sup> Federal Power Act Section 10(e)(1), 16 U.S.C § 803(e)(1) (2006).

<sup>2</sup> *See Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, Order No. 469, FERC Stats. & Regs. ¶ 30,741 (1987).

<sup>3</sup> In paragraph 37, the order states, "[T]he Commission adopted, after review, the BLM-Forest Service index to serve as the basis for the Commission's own assessment of charges." However, the Commission's Executive Director issued a notice adopting BLM's new methodology; that notice was not put before the full Commission for consideration and a vote. Thus, the decision to use BLM's new methodology was not subject to "review" by the Commission.

<sup>4</sup> *Emergency Motion of the City of Idaho Falls, Idaho, et al. to Stay Direct Final Rule of the Federal Energy Regulatory Commission*, at p. 3 (D.C. Cir., Docket No. 09-1120).

Similar to a tax assessment, projects obligated to pay this fee do not have any choice regarding whether or not they will pay. However, those who invest in hydropower projects have a choice of investing their dollars in the United States or elsewhere. Today's decision refuses to consider whether the public has any better thoughts on how the fee should be assessed, and I believe that this reduces confidence in the fairness of government process.

For these reasons, the Commission should have opened a notice of inquiry or other rulemaking process, with public notice and opportunity for comment, to consider whether relying on the new methodology of the BLM results in a reasonable charge. Because the majority did not take this approach to consider the substantial impact of BLM's new methodology on our annual fees, I respectfully dissent from this order.

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Philip D. Moeller  
Commissioner