

132 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Update of the Federal Energy Regulatory Commission's Docket No. RM10-27-001
Fees Schedule for Annual Charges for the Use of
Government Lands

ORDER DISMISSING REQUEST FOR REHEARING AND MOTION FOR STAY

(Issued September 16, 2010)

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)¹ has filed a request for rehearing and stay of the Commission annual notice updating the fees charged licensees for use of federal lands.² For the reasons discussed below, we dismiss the group's pleadings as moot.
2. Section 10(e)(1) of the Federal Power Act (FPA)³ requires Commission hydropower licensees using federal lands to:

¹ The Federal Lands Group consists of the City of Idaho Falls, Idaho; Bradley Lake Project Management Committee; City of Tacoma, Washington; City of Seattle, Washington; El Dorado Irrigation District; PacifiCorp; Portland General Electric Co.; Public Utility District No. 1 of Chelan County, Washington; Puget Sound Energy; Sacramento Municipal Utility District; and Turlock Irrigation District. The City of Seattle, Washington and the Bradley Lake Project Management Committee were not members of the group during most of the proceedings discussed below, but have subsequently joined it.

² See *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands*, 132 FERC ¶ 62,050 (2010).

³ 16 U.S.C. § 803(e)(1) (2006).

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.

3. In 1987, 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; 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.”⁴ 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.

4. From 1987 until 2008, the Department of the Interior’s Bureau of Land Management (BLM) and the Forest Service did not change their joint 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 2005,⁵ 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.”

⁴ See 18 C.F.R. § 11.2(b) (2010).

⁵ 42 U.S.C. § 15925 (2006).

5. On December 11, 2007, BLM issued a proposed rule updating the rental fee schedule,⁶ and on October 31, 2008, it issued a final rule.⁷ The Forest Service subsequently adopted the BLM revisions.⁸
6. On February 17, 2009, the Commission issued notice of its annual fees schedule,⁹ based, 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. In calculating the 2009 fees, the Commission used the same methodology that it had used for the prior 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.
7. On March 6, 2009, the Federal Lands Group filed a request for rehearing or, in the alternative, stay of the February 17 notice, alleging that the 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.
8. On, April 14, 2009, the Federal Lands Group filed with the United States Court of Appeals for the District of Columbia Circuit a motion for a stay of the notice. On April 30, 2009, the court granted the stay motion, only with regard to the nine licensees who had requested the stay, and stated that the Commission could issue interim bills to the nine licensees based on the previous year's charges. On May 13, 2009, the Commission, as authorized by the court, issued interim bills to the nine licensees based on the 2008 fees schedules.

⁶ *Update of Linear Right-of-Way Rent Schedule, Federal Register* 72 Fed. Reg. 70,376 (2007).

⁷ *Update of Linear Right-of-Way Rent Schedule, Federal Register* 73 Fed. Reg. 65,040 (2008).

⁸ *See Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands, Federal Register* 73 Fed. Reg. 66,591 (2008).

⁹ *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands, 74 Fed. Reg. 8184 FERC Stats. & Regs.* ¶ 31,288 (2009).

9. On October 30, 2009, the Commission issued an order denying rehearing on the February 17 notice.¹⁰ In sum, the Commission concluded that the notice did not constitute a rulemaking, but rather simply implemented the Commission's existing regulations. The Federal Lands Group thereafter filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit.¹¹ The appeal is pending. The City of Seattle, Washington and the Bradley Lake Project Management Committee, the two members of the Federal Lands Group that were not party to the original request for rehearing, the request for judicial stay, and the petition for review, subsequently moved to intervene in the appeal and, without objection from the Commission, were allowed to do so.

10. On July 20, 2010, the Commission issued its annual fees schedule update, again based on the current BLM-Forest Service valuations. The Federal Lands Group thereafter filed a request for rehearing and for stay of the update, advancing essentially the same arguments it had made with respect to the 2008 update.

11. Pursuant to the Court of Appeal's stay order, the Commission has previously charged the members of the Federal Lands Group land use charges based on the 2008 fees schedule, which predates BLM's and the Forest Service's increased land valuations. We will continue to follow this procedure until the conclusion of the pending litigation. Although the two new members of the group were not party to the stay, they have followed the Commission's procedures for filing administrative appeals of their lands fees bills and have joined the judicial review proceedings, and we therefore will also base their bills on the 2008 fees schedule until the litigation is resolved. This being the case, the members of the Federal Lands Group are not aggrieved by the 2010 fees schedule, and there is no reason to stay that schedule as to them. We therefore dismiss the group's request for rehearing and motion for stay as moot.

¹⁰ *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands*, 129 FERC ¶ 61,095 (2009) (Moeller, Comm'r, dissenting).

¹¹ *City of Idaho Falls, et al. v. FERC*, No. 99-1315 (appeal docketed December 18, 2009).

The Commission orders:

The request for rehearing and motion for stay, filed by the Federal Lands Group on August 19, 2010, are dismissed as moot.

By the Commission. Commissioner Moeller is concurring with a separate statement.

(S E A L)

Kimberly D. Bose,
Secretary.

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MOELLER, Commissioner, *concurring*:

I concur on today's order because it results in a stay, pending a ruling from the court on appeal,¹ of the application of a new methodology as the basis for the Commission's assessment of federal land fees. As stated in my previous dissent,² the Commission should have considered, in an open process with public notice and opportunity for comment, whether relying on the new BLM methodology results in a reasonable annual charge³ on hydropower projects that use federal lands.

Philip D. Moeller
Commissioner

¹ *City of Idaho Falls, et al. v FERC*, No. 99-1315 (D.C. Cir. appeal docketed December 18, 2009).

² *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Federal Lands*, 129 FERC ¶ 61,095 (2009) (Moeller, Comm'r, dissenting).

³ The Federal Power Act requires the Commission to assess a reasonable annual charge on hydropower projects that use federal lands. Federal Power Act § 10(e)(1), 16 U.S.C. § 803(e)(1) (2006).