

134 FERC ¶ 61,205
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.

Erie Boulevard Hydropower, L.P

Project No. 2539-061

ORDER DENYING REHEARING

(Issued March 17, 2011)

1. On May 17, 2010, Green Island Power Authority (Green Island) filed a request for rehearing of the Commission's April 15, 2010 order on remand reinstating the new license for the School Street Project No. 2539, located on the Mohawk River in Albany and Saratoga Counties, New York.¹ The Commission issued the order in response to a decision of the U.S. Court of Appeals for the Second Circuit, which vacated the Commission's earlier order issuing a new license to Erie Boulevard Hydropower, L.P. (Erie) for the project.² The court remanded the case for further proceedings and directed the Commission to determine: (1) whether an offer of settlement filed by Erie and other parties constituted a material amendment of the license application, such that the Commission should have offered the public an opportunity to intervene in the relicensing proceeding; and (2) if so, to consider whether Green Island's proposal for a project that would replace the School Street Project was a feasible alternative to be considered in the relicensing proceeding.

2. In the April 15, 2010 Order, the Commission found that the offer of settlement was not a material amendment and that, therefore, the Commission was not required to consider Green Island's motion to intervene as timely filed. The Commission nevertheless considered Green Island's proposal, and found that the Cohoes Falls Project was not a feasible alternative to the School Street Project. The Commission therefore reinstated the new license for the School Street Project. On rehearing, Green Island argues that the Commission erred in making these findings. For the reasons discussed below, we deny rehearing.

¹ *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036 (2010) (*Erie Boulevard* or April 15, 2010 order on remand).

² *Green Island Power Authority v. FERC*, 577 F.3d 148 (2d Cir. 2009) (*Green Island v. FERC*).

Background

3. A detailed procedural history appears in our orders of February 15, 2007,³ and April 15, 2010. Briefly, Erie's predecessor, Niagara Mohawk Power Corporation, filed a timely application for a new license for the School Street Project in 1991, and no other entity filed an application for a new license in competition for the project by the deadline established in section 15(c)(1) of the Federal Power Act (FPA).⁴ The relicensing proceeding was substantially delayed, however, primarily because of the state's denial of water quality certification, the licensee's appeal of the denial, and subsequent settlement negotiations concerning the certification and relicensing issues. These negotiations led to a settlement among Erie, state and federal resource agencies, and other parties, which Erie filed on March 9, 2005, and also led to the state's issuance of water quality certification on October 10, 2006.

4. Beginning in July 2004, Green Island made a series of filings designed to support its development of the Cohoes Falls Project as an alternative to relicensing the School Street Project. The Commission rejected these filings, because the Cohoes Falls Project was a statutorily-barred, untimely competing proposal that would conflict with the timely-filed application for the existing project and was thus precluded by the FPA and the Commission's regulations. On September 7, 2004, more than 11 years after the deadline to seek intervention, Green Island filed a late motion to intervene in the relicensing proceeding, which the Commission denied because Green Island had not demonstrated good cause for filing late. Green Island sought rehearing, which the Commission denied on November 16, 2006.⁵

5. On February 15, 2007, the Commission issued an order on Erie's offer of settlement and issuing a new forty-year license for the School Street Project.⁶ Green Island and Adirondack Hydro Development Corporation (Adirondack), a party to the relicensing proceeding, jointly filed a request for rehearing, which the Commission denied on September 21, 2007.⁷ Both entities filed petitions for judicial review of the relicense and rehearing orders, as well as other Commission notices and orders related to the Commission's denial of Green Island's motion for late intervention and rejection of Green Island's proposal for the Cohoes Falls Project. On judicial review, the court

³ *Erie Boulevard*, 118 FERC ¶ 61,101 (2007).

⁴ 16 U.S.C. § 808(c)(1) (2006).

⁵ *Erie Boulevard*, 117 FERC ¶ 61,189 (2006).

⁶ *Erie Boulevard*, 118 FERC ¶ 61,101 (2007).

⁷ *Erie Boulevard*, 120 FERC ¶ 61,267 (2007).

vacated the license order and remanded the case to the Commission for further proceedings.

6. On April 15, 2010, the Commission issued its order on remand reinstating the new license.⁸ The Commission found that the offer of settlement was not a material amendment of the relicense application and that, therefore, the Commission was not required to consider Green Island's motion to intervene as timely filed. The Commission nevertheless considered Green Island's proposal, and further found that the proposed Cohoes Falls Project did not present a feasible alternative to the School Street Project. The Commission therefore reinstated the license for the School Street Project as issued in its earlier order.

Preliminary Matters

A. Attachments to Green Island's Rehearing Request

7. With its request for rehearing, Green Island included eleven attachments (designated A through K). Many of these attachments also included one or more attachments. Together, these materials comprise nearly 300 pages, consisting of affidavits, additional comments and analyses, materials submitted earlier in support of Green Island's draft application for the Cohoes Falls alternative, a copy of the Idaho National Laboratory report that we used in our order on remand as part of our economic feasibility analysis for the Cohoes Falls alternative, documents related to Erie's application for and receipt of certification under New York's renewable energy portfolio standards, published materials discussing the flow regime of rivers, and correspondence between Erie and the Commission regarding excavation of the power canal at the School Street Project and requests for extensions of time to comply with various license requirements, including the time to start and complete construction of the optional 11-MW "fish friendly" turbine authorized by the license.

8. Under section 313(b) of the FPA, Commission decisions must be supported by substantial evidence.⁹ This means that we must have substantial evidence to support our findings and conclusions. It does not require that we discuss in detail and seek to refute all evidence offered in support of an alternative finding. For this reason, we will consider and discuss the materials attached to Green Island's rehearing request to the extent

⁸ *Erie Boulevard*, 131 FERC ¶ 61,036 (2010).

⁹ 16 U.S.C. § 8251(b) (2006).

necessary to evaluate their relevance and to understand and respond to the arguments Green Island raises on rehearing.¹⁰

B. Erie's Answer to Green Island's Rehearing Request and Green Island's Answer to Erie's Answer

9. On June 1, 2010, Erie filed a motion for leave to file an answer and an answer to Green Island's request for rehearing. With its motion, Erie included three attachments (designated A through C), consisting of an excerpt from Green Island's May 5, 2008 reply brief before the Second Circuit; a consultant's report (the Hatch Report) that provided its own estimate of the cost to construct the Cohoes Falls Project based on the information in Green Island's draft license application; and also provided a cost range analysis for a 100-MW project derived from the Idaho National Laboratory Report; and information regarding a change in Green Island's bond ratings.

10. On June 16, 2010, Green Island filed an answer in opposition to Erie's motion and, in the alternative, a motion for leave to file an answer and an answer. Green Island's answer included an affidavit of James A. Besha that responded to the Hatch Report and included additional information in support of Green Island's cost estimates.¹¹ The affidavit included five attachments: information regarding a cost estimate classification system of the Association for the Advancement of Cost Engineering International; a copy of the database, in Excel format, that Green Island states was used to develop the construction cost estimating tools used in the Idaho National Laboratory report; an article published in 1982 in Engineering News-Record entitled *Small hydro: Fords to Cadillacs*; an email from Robert A. Baumgarten, U.S. Bureau of Reclamation, to Mr. Besha in response to his June 15, 2010 email request for cost trend data; and an email from Doug Dixon of the Electric Power Research Institute regarding plans for the development and testing of the fish-friendly turbine.

11. Erie maintains that its answer is necessary to correct "misleading statements of law and fact" in Green Island's rehearing request.¹² Green Island responds that the

¹⁰ In that regard, as discussed later in this order, we find that documents related to Erie's application for and receipt of certification under New York's renewable energy portfolio standards, as well as Green Island's arguments regarding those documents, are not relevant to the issues presented on remand, and we do not accept them into the record.

¹¹ Mr. Besha is President of Albany Engineering Corporation, the company that Green Island has retained to assist it in developing the Cohoes Falls Project. See Affidavit of James Besha at 1, 2 (filed May 17, 2010 as attachment A to Green Island's request for rehearing).

¹² Erie's Motion for Leave to File Answer at 2 (filed June 1, 2010).

Commission should reject Erie's answer, because it is prohibited by the Commission's rules and is not necessary to clarify the record or to assist the Commission in making an informed decision. In the alternative, Green Island argues that, if the Commission accepts Erie's answer, the Commission should also grant Green Island's motion for leave to file an answer in response to Erie's answer.

12. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, an answer may not be made to either a request for rehearing or an answer, unless otherwise ordered by the decisional authority.¹³ Rule 714(d)(1) similarly prohibits an answer to a request for rehearing.¹⁴ Under Rule 714(d)(2), however, the Commission may afford parties an opportunity to file briefs on one or more issues presented by a request for rehearing.¹⁵ For the most part, Erie's answer is not necessary to help clarify the record or to assist the Commission in reaching a reasoned decision. We therefore deny in part Erie's motion and dismiss as moot most of Green Island's motion to reject Erie's answer and alternative motion for leave to file an answer.

13. The only exception, for both Erie's answer and Green Island's answer to Erie's answer, relates to new arguments and analyses concerning the economic feasibility of the Cohoes Falls alternative that we discussed for the first time in our order on remand. With regard to these matters, we find it appropriate to allow both Erie and Green Island a limited opportunity to respond. Specifically, we will consider the arguments and analyses of both Green Island and Erie that concern our use of the Idaho National Laboratory Report to evaluate the economic feasibility of the Cohoes Falls alternative, and will include the Excel database that Green Island states was used to develop the cost estimating tools used in the Idaho National Laboratory report.¹⁶ We do not accept into the record the remainder of Green Island's and Erie's pleadings.

¹³ 18 C.F.R. § 385.213(a)(2) (2010).

¹⁴ 18 C.F.R. § 385.714(d)(1) (2010).

¹⁵ 18 C.F.R. § 385.714(d)(2) (2010).

¹⁶ As discussed later in this order, the Excel database that Green Island states was used to develop the construction cost estimating tools used in the Idaho National Laboratory report is not the same as the Excel database that was described in Appendix B to the report and included as a compact disk in a pocket on the back cover of the report. The latter Excel database is available online from the Idaho National Laboratory's website at: <http://hydropower.inel.gov/resourceassessment/index.shtml> (the Excel database included with the Idaho National Laboratory report is identified as "INL Hydropower Resource Economics Database, April 29, 2003," directly under the online copy of the Idaho National Laboratory Report, which is listed as item 4 under the heading, "Resource Assessment Reports").

C. Green Island's Motion to Lodge Evidence or to Reopen the Record

14. Concurrently with its June 16, 2010 response to Erie's June 1, 2010 answer to Green Island's rehearing request, Green Island filed a separate motion to lodge evidence or, in the alternative, an offer of proof and, if necessary, a motion to reopen the record. With its motion, Green Island included an affidavit of James A. Besha and three of the same attachments that were included with Green Island's June 16, 2010 answer to Erie's June 1 answer, discussed above. In its motion, Green Island states that, shortly after reviewing the Commission's April 15, 2010 Order on remand, Mr. Besha requested the data underlying the Idaho National Laboratory report that the Commission cited in its order, and that Mr. Besha did not receive the requested data (the Excel database) until June 9, 2010. Green Island seeks to include this information in the record, along with Mr. Besha's affidavit discussing the data; the 1982 *Small hydro: Fords to Cadillacs* article; and the email from Robert A. Baumgarten, U.S. Bureau of Reclamation, concerning Mr. Besha's request for cost trend data.

15. In support of its motion, Green Island argues that the record in this proceeding is still open, citing the Commission's statement in an order issued in 2006 that the record would remain open until the Commission acted on Erie's application and, if necessary, any requests for rehearing.¹⁷ Green Island maintains that, because the court vacated the Commission's subsequent order on rehearing and the Commission has not yet issued a new order on rehearing, the proffered evidence is neither untimely nor improper.

16. Erie did not file a response to Green Island's motion.

17. Under section 313 of the FPA and Rule 713(b) of the Commission's rules of practice and procedure, a request for rehearing must be filed not later than 30 days after issuance of a final decision in a proceeding.¹⁸ Although Green Island styled its motion as a request to lodge evidence, or alternatively as an offer of proof or a motion to reopen the record, its filing is at least in part an attempt to untimely supplement its request for rehearing.

18. As to Green Island's argument that the record is still open, this is incorrect. The Commission's statement in its 2006 order that the record would remain open until the Commission acted on Erie's application and, if necessary, any requests for rehearing, was directed to the time period that ended on September 21, 2007, with issuance of its order on rehearing of the order issuing a new license. Once the Commission issued its order on rehearing, the proceeding ended and the record was closed.

¹⁷ *Erie Boulevard*, 117 FERC ¶ 61,189 at P 52.

¹⁸ 16 U.S.C. § 8251(b) (2006); 18 C.F.R. § 385.713(b) (2010).

19. The court's decision vacating the new license remanded the case to the Commission with instructions to make specific findings on limited issues. It did not reopen the record, and left for the Commission to decide in the first instance whether the 2005 settlement was a material amendment of the license application and, if so, what further proceedings might be necessary consistent with the court's opinion. As explained below, we find that the settlement was not a material amendment. We further find that the existing record, as supplemented with the additional arguments and evidence regarding our use of the Idaho National Laboratory Report, is adequate to evaluate the feasibility of the Cohoes Falls proposal as an alternative to relicensing the School Street Project. Therefore, to the extent that it seeks to introduce additional arguments and evidence in support of the Cohoes Falls proposal, we deny the Green Island's motion.

20. We note, however, that for the most part, Green Island makes essentially the same arguments in its motion to reopen the record as it did in its June 16, 2010 answer to Erie's answer, and has attached three of the same documents, including the Excel database. We therefore grant the motion and will address these matters, as discussed above, to the extent necessary to allow both Erie and Green Island an opportunity to respond to new arguments and analyses arising from our use of the Idaho National Laboratory Report in our April 15, 2010 Order to assess the economic feasibility of the Cohoes Falls alternative.

D. Green Island's Additional Requests to Supplement the Record

21. On October 14, 2010, Green Island filed a motion to take official notice, or, in the alternative, a motion to lodge evidence, or, in the alternative, an offer of proof, and, if necessary a motion to reopen the record. Green Island requests the Commission to take official notice of an October 15, 2009 determination of an administrative law judge of the Division of Tax Appeals for the State of New York, which states that the Erie partnership was terminated on September 28, 2004, as a result of its sale by its then owners, Orion Power New York, L.P., and Orion Power New York G.P., L.P., to the Brascan companies, Brookfield Power's predecessors. Green Island states that it only recently learned of this 2009 determination, and asserts that it is relevant to the issue of whether the entity named Erie Boulevard Hydropower, L.P., to which the Commission issued a new license in April 2010, is the same legal entity that held the previous School Street Project license, owned the project, or was the applicant for the new license application that was the basis of the Commission's April 2010 decision.

22. On October 18, 2010, Erie filed an answer in opposition to Green Island's motion, arguing that it is irrelevant and should be denied. Erie states that, in any event, the tax determination that Green Island seeks to introduce clearly indicates that the "termination" was a constructive or technical termination, with the Erie partnership continuing to exist and operate its business as before, and that it is therefore not relevant to the status of Erie as the license applicant or licensee of the School Street Project.

23. While we could certainly take official notice of the existence and content of this tax determination, which Green Island attached to its motion, there is no need to do so. The determination states on its face that Erie continued to exist and operate as before,¹⁹ demonstrating that it is irrelevant to the issues before us on remand. We therefore deny Green Island's motion and dismiss as moot Erie's answer opposing Green Island's motion.

24. On December 28, 2010, Green Island filed a motion to lodge evidence, or in the alternative, that official notice be taken of the final reviewer's report to the Low Impact Hydropower Institute for the School Street Project, and, if necessary, a motion to reopen the record. Green Island states that the report resulted from Erie's application for certification of the School Street Project as a low-impact hydro project, based on reduced environmental impacts. Green Island seeks to use the report to introduce and support additional arguments regarding the effectiveness and testing of the Phase I fish passage facilities that were required by the 2007 license order and are currently installed and operating at the School Street Project.

25. On January 12, 2011, Erie filed an answer to Green Island's motion, stating that it does not object to and indeed welcomes the inclusion in the record of the documents appended to the motion. However, Erie "vigorously objects" to the meaning that Green Island ascribes to those documents in its motion, contending that Green Island's contentions are "misplaced and frivolous."²⁰

26. Green Island's motion is an improper attempt to supplement its request for rehearing. Moreover, Green Island's arguments concerning the content of this report are not relevant to the issues on rehearing. A request for rehearing must address alleged errors in a final Commission order, not the statements of some other entity. We therefore reject Green Island's motion.

27. On January 21, 2011, Green Island filed a motion to include in the relicensing docket Erie's January 6, 2011 letter requesting an extension of time to start and complete

¹⁹ The determination states: "[Internal Revenue Code] § 708(b)(1) provides that a partnership will terminate for federal income tax purposes if 50 percent or more of the total interest in partnership profits and capital is sold or exchanged within a 12-month period. This type of partnership termination is also referred to as a constructive termination or technical termination because, in most cases, the partnership will continue to operate its business following the termination." Determination at 6 (included as an attachment to Green Island's motion). It also states (at 7) that "Erie continued to exist and operate as before" after the Brascan companies purchased a 100 percent interest in the Erie partnership.

²⁰ Erie's Answer at 1 (filed January 12, 2011).

construction of the new 11-MW turbine-generator unit. Green Island asserts that this request “lends additional weight to [its] earlier arguments in the School Street relicensing proceeding.”²¹ It adds that Erie’s request should have been filed as a motion, and that Green Island is entitled to file comments in answer to Erie’s letter.

28. On February 7, 2011, Erie filed an answer in opposition to Green Island’s motion, arguing that its request for an extension of time to install the new unit is not relevant to the issues on remand or raised in Green Island’s request for rehearing.

29. We deny Green Island’s motion and reject its comments on the extension request. A request for an extension of time is a post-licensing matter, and is not part of the relicensing proceeding. In its request for rehearing, Green Island addresses a similar request for an extension of time that Erie filed on January 22, 2009, and includes a copy of the request as Attachment H. Green Island’s motion essentially repeats the arguments it raises on rehearing and seeks to introduce additional arguments and comments. As such, the motion is an improper supplementation of Green Island’s rehearing request, and is not permitted under our rules.²²

²¹ Green Island’s Motion at 3 (filed January 21, 2011).

²² On March 15, 2011, Green Island filed a motion to lodge evidence or, in the alternative, an offer of proof and, if necessary, a motion to reopen the record. The motion attached an affidavit of James A. Besha and a Mohawk River flow regime analysis using the Indicators of Hydrologic Alterations (IHA) software. Mr. Besha states that he “became aware” of this software “in late 2010 while reviewing the journals of the American Society of Civil Engineers,” (affidavit at ¶ 6) and that it “has been widely used since the mid-1990s” (Exhibit A to affidavit at 1).

We deny Green Island’s motion as an improper attempt to supplement Green Island’s rehearing request. Moreover, the Commission has stated in a previous hydropower proceeding that it does not favor parties filing pleadings after issuance of the Sunshine Act notice that a matter would be on the Commission agenda, because such pleadings can disrupt the orderly consideration of matters before the Commission. *See The Electric Plant Board of the City of Paducah, Kentucky*, 121 FERC ¶ 61,091 at P 10 (2007). We therefore reject the filing. In any event, we find nothing in the filing that would call into question the validity of Commission staff’s flow analysis, as discussed later in this order.

Discussion

A. Material Amendment Analysis

30. As explained in our April 2010 order on remand, the court directed the Commission to determine in the first instance whether Erie's offer of settlement "materially amended the School Street license application."²³ The court required us to do so because the answer could affect whether or not we would be required to consider Green Island's motion to intervene as timely filed.²⁴ Under our rules, a material amendment is defined as "any fundamental and significant change," including, among other things, certain specified changes to a project's generating capacity, dam, powerhouse, reservoir, or units of development.²⁵ In the April 15, 2010 Order, we examined the background and prior application of the rule in some detail, to provide the context for our interpretation of its provisions. We then considered whether the changes proposed in the 2005 settlement, both individually and collectively, would constitute a material amendment within the meaning of the rule, and concluded that they would not. On rehearing, Green Island maintains that the Commission failed to follow the court's instructions correctly and "committed multiple errors resulting in wrong conclusions."²⁶

1. The "Different Project" Standard

31. In our order on remand, we explained that, in promulgating the material amendment rule, the Commission stated that the changes that would be considered material are those that "are of such a fundamental nature as to constitute the proposal of a different project."²⁷ The purpose of the rule was to identify which changes would result in treating the proposal as a new application. Green Island argues that this standard is improperly narrow, leading to the conclusion that every possible change is minor, so that

²³ *Green Island v. FERC*, 577 F.3d at 165.

²⁴ Under section 16.9(b)(3) of the Commission's relicensing rules, if an applicant files a material amendment to a new license application, the Commission must reissue public notice of the application and invite comments, interventions, and protests. *See* 18 C.F.R. § 16.9(b)(3) (2010). If the 2005 settlement were a material amendment, the Commission would have been required to invite new motions to intervene.

²⁵ 18 C.F.R. § 4.35(f)(1) (2010).

²⁶ Request for Rehearing at 8.

²⁷ *Erie Boulevard, L.P.*, 131 FERC ¶ 61,036 at P 13, quoting *Revisions to Certain Regulations Governing Applications for Preliminary Permit and License for Water Power Projects*, Order No. 183, 46 FR 55,245 at 55,249 (Nov. 9, 1981), FERC Stats. & Regs. ¶ 30,305, at 31,723 (1981).

no change to a license application could ever be found material. Specifically, Green Island takes issue with our statement that a new opportunity to intervene will be provided “only when a new proposal materially changes the original proposal, such that it should be considered an entirely new project.”²⁸ Although Green Island refers to this as a “new definition” of the term, there is nothing new about it. As we explained in the order on remand, this standard dates back to the Commission’s original promulgation of the rule in 1981, and the Commission has been using it for nearly 30 years.

32. Green Island criticizes this definition as a “heightened, impermissibly vague standard.”²⁹ In doing so, Green Island ignores our extensive review of the background of the material amendment rule and the Commission’s application of it in prior cases. These cases make clear that the material amendment rule applies only to fundamental and significant changes that would warrant treating the amended application as one for a different project. In that regard, it bears noting that the rule provides that, in order to constitute a material amendment, a change must be both “fundamental and significant;” the use of the word “and” rather than “or” makes it clear that, even if a change might be considered significant, it would not be material unless it also changed the proposal in some fundamental way. This is indeed a high standard, intended to apply to only those changes that radically alter a proposed project. In the order on remand, the Commission cited a number of examples of major changes to an applicant’s plan of development that were found to constitute material amendments. All of them involved substantial alterations to a project’s physical features, such as adding a unit of development, moving an entire project to a different location, enlarging a dam, adding or relocating a reservoir, or more than doubling a project’s installed capacity.³⁰ These examples demonstrate that, contrary to Green Island’s assertion, this standard is neither impossibly high nor impermissibly vague. Rather, it is intended to apply to only those changes that would constitute the proposal of a different project.³¹

²⁸ Request for Rehearing at 28-29, *quoting* paragraph 37 of our order on remand.

²⁹ Request for Rehearing at 29.

³⁰ *See Erie Boulevard*, 131 FERC ¶ 61,036 at P 15.

³¹ For an example of an amendment to a relicense application that would result in a different project, *see City of Escondido, California, Notice of Application Accepted for Filing, Ready for Environmental Analysis, and Soliciting Comments, Motions to Intervene, Protests, Recommendations, and Terms and Conditions*, issued March 1, 2011 in the docket for Project No. 176-018 (amending a relicense application to replace it with an application for a conduit exemption for the Bear Valley powerhouse). The conduit exemption application was coupled with a separate application to surrender the license for the remaining facilities of the Escondido Hydroelectric Project, including two storage reservoirs, a diversion dam, four primary water conduits, and the Rincon powerhouse.

(continued...)

33. When viewed in this context, it is easy to understand why the changes proposed in the 2005 settlement are not material. Quite simply, none of them, either singly or together, would result in a project that is both fundamentally and significantly different from the one that was described in the 1991 application. The project proposed in the 2005 settlement was basically the same as that proposed in the 1991 application; it would use the same School Street dam, reservoir, powerhouse, and power canal to generate power at the same site, with provisions for minimum flows, fishery protection, and recreational measures. In short, there is no basis for concluding that the settlement proposed a different project that would require the Commission to treat it as a new application.

34. Green Island also asserts that, by discussing the exceptions to the material amendment rule found in section 4.35(e), the Commission “appears to continue to consider factors in its material amendment analysis that the court held were improper,”³² and “attempts to avoid” the court’s decision.³³ This is incorrect.

35. As set forth in section 4.35, the material amendment rule consists of a general rule in paragraph (a), the conditions under which the rule applies in paragraph (b), the consequences that flow from the rule in paragraphs (c) and (d), exceptions to the rule in paragraph (e), and the definition of material amendment in paragraph (f). The court found that, for relicensing proceedings, the Commission may consider only the definition in paragraph (f), because section 16.9(b)(3) of the Commission’s regulations expressly makes the rest of the rule inapplicable.³⁴

36. In our order on remand, we reviewed the history and prior application of the rule and explained why we had considered the exceptions relevant in our 2007 license order. However, we did not rely on any of the exceptions in our material amendment analysis. Rather, we specifically considered and applied only the definition of material amendment in section 4.35(f), without regard to any of the exceptions set forth in section 4.35(e). Green Island’s assertion to the contrary is without merit.

See Notice of Application Accepted for Filing, Ready for Environmental Analysis, and Soliciting Comments, Motions to Intervene, and Protests, issued on March 1, 2011, in the docket for Project No. 176-035.

³² Request for Rehearing at 12.

³³ Request for Rehearing at 13.

³⁴ *Green Island v. FERC*, 577 F.3d 148 at 163-64.

2. Installed Capacity and Flow Regime: 18 C.F.R. § 4.35(f)(1)(i)

37. Under section 4.35(f)(1)(i) of the Commission’s regulations, a “material amendment to plans of development proposed in an application for a license . . . means any fundamental and significant change, including but not limited to . . . [a] change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project.”³⁵ Green Island argues that the 2005 settlement was a material amendment because it changed both the installed capacity and the number of generating units in a manner that significantly modified the flow regime.³⁶

38. Green Island points out that the 1991 application proposed to add a new 21-megawatt (MW) Kaplan generating unit, whereas the 2005 settlement proposed to eliminate the new 21-MW unit and to replace it with either a new 11-MW generating unit or no new generating unit, at Erie’s option. Green Island adds that the effect of this change would be to amend the proposed installed capacity of the School Street Project from 59.8 MW to either 49.8 MW or 38.8 MW. Green Island contends that these proposed changes in installed capacity would significantly affect the flow regime. As discussed below, Green Island misreads the rule by focusing on changes to the flow regime in the Mohawk River, instead of the flow regime associated with the School Street Project.

39. In our order on remand, we examined these changes in detail in light of what the applicant proposed in the 1991 application and the 2005 settlement agreement. We reviewed previous Commission orders and concluded that, in Commission practice, the term “flow regime” is used to describe the set of rules governing how flows are to be managed at and released from a project, and recognized that, although there are a number of factors that can influence the availability of flows, the primary elements that characterize a project’s flow regime are its mode of operation and conditions that specify the amount, location, and timing of any required flow releases. With regard to the

³⁵ 18 C.F.R. § 385.4.35(f)(1)(i) (2010).

³⁶ Request for Rehearing at 15. Although Green Island also appears to assert that the 2005 settlement changed the location of generating units (*id.*), there is no discussion of the location of generating units anywhere in its rehearing request. In both the 1991 license application and the 2005 settlement, all generating units would be located either in the existing powerhouse or in a new powerhouse or powerhouse addition adjacent to the existing powerhouse, at essentially the same location. A change in the location of generating units is considered material under this part of the rule “if the change would significantly modify the flow regime associated with the project.” 18 C.F.R. § 4.35(f)(1)(i) (2010). As discussed above, we find that in this case, there is no such change.

proposed changes to the School Street Project, we acknowledged that reducing the size of the proposed new generator or omitting it altogether would result in a change in how flows pass through the project, because more water would spill over the dam under the settlement proposal with its smaller overall hydraulic capacity turbines. We recognized, however, that for this particular project, either of these changes in installed capacity could occur without causing or requiring any changes to the project's run-of-river operation or required minimum bypassed reach flows. We therefore concluded that these changes would not significantly affect the project's flow regime, because the project would still be required to operate in a run-of-river mode and could provide the same minimum flows to the bypassed reach of the Mohawk River.³⁷

40. We also examined the effect that the settlement agreement proposal would have on the project's mode of operation. Specifically, as proposed in the 1991 application, the School Street Project would consist of a single hydroelectric development with six generating units, sized to permit the project to operate with one or more generators in a range of available flows between 450 cubic feet per second (cfs) and 8,910 cfs. As discussed in the order on remand, with the optional new 11-MW turbine proposed in the 2005 settlement, the project would operate with available flows between 450 cfs and 7,510 cfs, and without the new unit (the other settlement option) the project would operate with available flows between 450 cfs and 5,910 cfs. Thus, for both options in the 2005 settlement, the project would operate with flows that are within the range of flows originally proposed in the 1991 application. This reduction in the maximum flows used for generation would not significantly affect the flow regime, because it would not cause or require any change in the project's run-of-river operation or minimum flows. Moreover, this change in flows used for generation would not be a fundamental and significant change, because the project would continue to use flows for generation that fall within the range of flows that were originally proposed to be used for that purpose.

³⁷ We reached a similar conclusion in our order on rehearing of the 2007 license order, finding that changes that occurred in 1995 and 2001 did not constitute material amendments to the license application. Specifically, we examined the effect of the applicant's proposal in 1995 to omit the new 21-MW generator, and its proposal in 2001 to reinstate the new 21-MW generator. We recognized that these changes would result in a change in flows, because more water would spill over the dam whenever flows available for generation exceeded the capacity of the existing turbines. We concluded, however, that this would not significantly affect the project's flow regime because the project would still be required to operate in a run-of-river mode and to provide the same minimum flows in the bypassed reach. *Erie Boulevard*, 120 FERC ¶ 61,267 at P 18. Green Island challenged this conclusion as illogical, but offered no evidence to demonstrate that it was flawed. On judicial review, the court held that our findings were supported by substantial evidence. *Green Island v. FERC*, 577 F.3d at 162-63. Thus, we are now using the same reasoning that the court previously upheld.

41. Green Island maintains that our definition of flow regime is impermissibly narrow and must be rejected because it renders section 4.35(f)(1)(i) meaningless. Green Island asserts that operating mode and minimum flow requirements can be placed on any project, regardless of its size, and are not affected by the installed capacity or the number and location of generators at the project. As an example, Green Island asserts that both a 25-MW project and a 100-MW project could be required to operate in run-of-river mode with the same 1,000 cfs minimum flows in the bypassed reach, with the result that a license applicant could add or subtract new or old units at will, even proposing to quadruple the installed capacity or the number of generating units at the project without materially amending the license application. As a result, Green Island argues, a proposed change in installed capacity could never be a material amendment, because the change in and of itself could never significantly affect the flow regime.

42. Green Island's argument is misplaced. In our order on remand, we acknowledged that, for a run-of-river project with a specified minimum flow release, like the School Street Project, these particular changes in installed capacity could occur independently of any proposed changes in minimum flows. As noted, in this case, the reductions in installed capacity in the settlement agreement compared with the proposal in the license application would not significantly affect the flow regime associated with the project. This does not mean, however, that section 4.35(f)(1)(i) is rendered superfluous. Each case must be examined on its own facts. Without more information, Green Island's hypothetical example is meaningless, and we are unable to evaluate it.³⁸ Our conclusions in this case are limited to the facts pertaining to the School Street Project. For other types of projects or project configurations, such as peaking projects, those that divert water from one river basin to another for generation, or those with a powerhouse integral to the dam (and thus no bypassed reach), different considerations could apply. Depending on the facts, a proposed change in installed capacity of sufficient magnitude could significantly affect the flow regime associated with a project. Green Island's argument to the contrary is incorrect.³⁹

³⁸ In any event, it appears unlikely that an applicant could propose to quadruple a project's size without materially amending its license application. *See Indian River Power Supply, LLC*, 117 FERC ¶ 61,089, at P 9 (2006) (proposal to double an exempted project's installed capacity would have been a material amendment, if filed while the application was pending).

³⁹ In addition, the effects of a proposed change in generating capacity could differ, depending on whether any required minimum flows were continuous or intermittent. For an example of a peaking project with an intermittent minimum flow requirement, *see Alabama Power Company*, 53 FERC ¶ 61,217, at 61,893 (1990). In that case, the Project's existing flow regime, which consisted of a continuous leakage flow of 188 cubic feet per second (cfs) plus periodic peaking releases of 4,475 cfs or more, was

(continued...)

43. Green Island asserts that “flow regime,” as defined in the order on remand, is “completely independent from installed capacity.”⁴⁰ In support, Green Island cites the Commission’s statement that, for a run-of-river project with a specified minimum flow release, reductions in installed capacity could occur independently of any proposed changes in minimum flows.

44. Green Island’s argument is misplaced. As explained in the order, we assumed a specified minimum flow in this case for purposes of analysis, in order to isolate the effect of the change in installed capacity from other changes proposed in the 2005 settlement. We did so because the settlement proposed not only a decrease in installed capacity, but also an increase in seasonal minimum flow releases from the project. Later in the order, we examined the proposed changes to minimum flows and found that they were not significant for purposes of our material amendment analysis. Although changes in installed capacity can be examined separately from changes in minimum flows, this does not mean that they are completely independent.⁴¹

45. Green Island argues that the Commission’s definition of flow regime is inconsistent with this term’s established usage in academic literature, regulations, and agency materials. Green Island maintains that the term should be defined as “a description of the flows in the waterway and how they are affected by the construction or

inadequate to protect fishery resources. Although the project was required to release a minimum of 2,500 acre feet of water during any 72-hour period (an amount equivalent to a continuous flow of about 420 cfs), this amount of water could be released in bursts, during periods of peak generation. *Id.* at 61,867. To reduce the negative effects of peaking operations, which produced a “rapidly varying unsteady flow regime” below the project dam (*id.* at 61,869), the Commission imposed a continuous minimum flow requirement of 2,000 cfs from June 1 through the end of February, and 4,475 cfs from March 1 through May 31. *Id.* at 61,905.

⁴⁰ Request for Rehearing at 17.

⁴¹ Green Island also argues that, although our order only states that reductions in installed capacity could occur independently of any proposed change in minimum flows, this would necessarily mean “that increases in installed capacity are likewise independent from any proposed changes in minimum flows,” and that this must be true “as a matter of simple logic and basic mathematics.” Request for Rehearing at 17 n. 8. As explained above, Green Island misinterprets the purpose of our analysis. Moreover, because we are comparing the 1991 application (which included a new 21-MW turbine) to the 2005 settlement (which proposed either an 11-MW turbine or no new turbine), we are concerned here only with a proposed decrease in the project’s installed capacity, and need not consider the effect of any hypothetical increase.

modification of a hydroelectric project.”⁴² In support, Green Island cites examples from hydrology textbooks and similar materials that it asserts demonstrate that this term is commonly used as a descriptor of the existing characteristics of a river, and includes the components of magnitude, frequency, duration, timing, and rate of change of flows.⁴³

46. Using this definition, Green Island maintains that the proposed changes to the installed capacity and number of generating units at the School Street Project significantly changed the flow regime of the relevant stretch of the Mohawk River. In support, Green Island argues that the 21-MW Kaplan unit proposed in the 1991 relicense application would have increased withdrawals from the Mohawk River by an additional 3,000 cfs above the status quo at that time, and that this represents 10 percent of the total instream flows during periods of highest flows during the spring months. Green Island therefore contends that eliminating the 21-MW unit significantly changed the amount of water left in the Mohawk River under Erie’s 2005 settlement agreement, and that consequently, the amendment was material.

47. All of the sources on which Green Island relies for this definition of flow regime are concerned with defining or describing the flow regimes of rivers. In contrast, section 4.35(f)(1)(i) of the Commission’s regulations is concerned with the flow regime associated with a hydroelectric project. It is obvious that these two concepts are separate and distinct. Green Island ignores the words actually used in the rule, and would have us substitute the “flow regime of the river” for the “flow regime associated with the project.” This would substantially amend the regulation, and is therefore inconsistent with its terms.

48. Our order on remand acknowledges that flows in the bypassed reach of the Mohawk River and over Cohoes Falls will vary, depending on seasonal flows in the river and the volume of water diverted to the School Street Project for power generation. Eliminating the 21-MW turbine that was originally proposed in the 1991 application, and replacing it with either no new turbine or an 11-MW turbine, would therefore result in

⁴² Request for Rehearing at 16.

⁴³ Specifically, Green Island cites a textbook entitled *Fundamentals of Fluvial Geomorphology*, the *Glossary of Hydrology*, an article in the December 1997 issue of *Bioscience*, and regulations of the U.S. Fish and Wildlife Service in 50 C.F.R. §§ 17.95(c) and 226.214 (2009), designating certain river reaches as critical habitat for various species listed as threatened or endangered under the Endangered Species Act. (Although Green Island also cites 50 C.F.R. § 226.219, this is apparently a typographical error, because the section is reserved, and has no content.) As noted above, because all of these sources concern the flow regime of a river, they are not relevant in defining the flow regime associated with a hydroelectric project, as that term is used in section 4.35(f) of the Commission’s regulations.

more spill and higher flows over the falls for either option of the proposed settlement as compared to the original application. Because these proposed changes in installed capacity would not change the project's run-of-river operation or significantly affect the project's minimum flow releases, they would not significantly modify the project's flow regime.

49. In an effort to examine these proposed changes in detail, Commission staff used historical Mohawk River flow data⁴⁴ to predict the effects of the various project proposals on flow in the project's bypassed reach. Staff analyzed the project as proposed in the 1991 application (with the new 21-MW turbine) and the two options of the 2005 settlement (with and without the new 11-MW turbine). Staff examined all three scenarios using the continuous 60 cfs minimum flow proposed in the 1991 application and the seasonal minimum flows proposed in the 2005 settlement.

50. Plots comparing the daily flows in the bypassed reach and downstream of the project showed little variation in the shape or magnitude of the hydrographs under each of the scenarios. Staff also calculated the number of days and percentage of the year when the project would release flows in excess of the minimum flows to the bypassed reach. Based on this analysis, decreasing the project capacity from 59.8 MW as proposed in 1991 to 38.8 MW (i.e., eliminating the proposed 21-MW turbine) would increase the number of days when bypassed reach flows exceed the minimum flows by 23 to 65 days, or between 6.3 percent and 17.8 percent over the five years examined.⁴⁵ Decreasing the project's capacity from 59.8 MW to 49.8 MW (i.e., replacing the 21-MW turbine with the 11-MW turbine), would result in even less change in the bypassed reach flows. Under this scenario, the number of days when bypassed reach flows exceed the minimum flows would increase by only 9 to 36 days, or between 2.5 percent to 9.9 percent over the five years examined. These results demonstrate that either eliminating the 21-MW turbine or substituting the 11-MW turbine would not significantly change the flow regime of the bypassed reach.

⁴⁴ Staff's analysis was based on five flow years consisting of the lowest and highest average annual flows and three years with intermediate flows, as measured at U.S. Geological Survey gauge 0135700 for the period from 1926 to 2008. These years and their corresponding rankings (in parentheses) based on average annual flow are: 1941 (ranked first, with the lowest annual flow), 1961 (ranked 21st), 1960 (ranked 42nd), 1947 (ranked 63rd), and 1972 (ranked 83rd, with the highest annual flow). See http://waterdata.usgs.gov/ny/nwis/inventory/?site_no=01357500.

⁴⁵ The highest change in the number of days (i.e., 65 days) was based on the 1972 water year, which is the highest flow year in the period examined. Results for the other four years were generally lower, and ranged from 23 to 48 days or from 6.3 to 13.2 percent.

51. Green Island maintains that, “without improperly pre-judging the outcome of the licensing process, it is impossible for the Commission to know at the time a capacity amendment or change in the number or location of generating units is proposed, whether the associated changes to the river’s flow regime are positive or negative.”⁴⁶ Green Island also argues that a detailed, quantitative analysis is necessary to determine the specific effects of eliminating the 21-MW turbine on the magnitude, frequency, duration, timing, and rate of change in diversions to the School Street Project and instream flows. In support of the need for a quantitative analysis, Green Island provides two figures. Figure 1 shows a comparison of river flow in the bypassed reach with and without the existing School Street Project. Figure 2 shows a comparison of river depth in the bypassed reach with and without the School Street Project.

52. These figures are not relevant to our material amendment analysis. It is obvious that, by directing flow to the turbines and thus around the bypassed reach, the existing School Street Project can change the flow and depth of the bypassed reach of the Mohawk River. Our inquiry is different; we must determine whether the changes proposed in the 2005 settlement would significantly affect the flow regime associated with the School Street Project, not whether the existing project affects flows in the Mohawk River.

53. As discussed above, Commission staff did conduct a detailed quantitative analysis of flows in this case, and found that the changes proposed in the 2005 settlement were not significant. However, a detailed quantitative analysis is not required before the Commission can determine whether a proposed change is a material amendment. As explained earlier, a material amendment is a fundamental and significant change that would result in a different project. The changes specifically listed in the rule are examples of the types of changes that the Commission has determined would meet this standard. The Commission must make this determination at the time the amendment is proposed, based on the information available, and can request additional information if necessary. However, there is no need to conduct a detailed examination of the effects of the proposal, or to consider the possible ultimate outcome of the licensing process, in order to determine whether a proposed change would constitute a material amendment of the license application.⁴⁷

⁴⁶ Request for Rehearing at 26.

⁴⁷ Green Island also asserts that a quantitative analysis is needed because any changes to the project’s installed capacity were to be accompanied by other changes. As examples, Green Island contends that the 1991 application proposed upgrades to two existing units and considered various ways for the generators to run with the project in a modified peaking mode. Green Island further maintains that both the 1991 application and the 2005 settlement proposed to operate the new unit before the existing units, but the 2005 settlement contemplated run-of-river operations, with sequential operation of the

(continued...)

54. Green Island argues that the 2005 settlement was a material amendment because it significantly modified the flow regime, by doubling the minimum flows from 60 cfs as proposed in the 1991 license application to the settlement's proposal to maintain flows between 120 cfs and 245 cfs, depending on the season. Green Island further maintains that the costs of the additional energy losses from these flows could exceed \$700,000 annually in 1991 dollars, and that it is implausible to describe these adjustments as ordinary or routine when they resulted from ten years of negotiation and would improve environmental conditions in the bypassed reach. Green Island therefore concludes that there was a material difference between the level of flows proposed in the original application and those proposed in the settlement.

55. Green Island misunderstands the purpose and intent of the material amendment rule. Changes that might be considered significant in other contexts would not necessarily be so regarded for purposes of determining whether a proposed change to a license application is a material amendment. As explained earlier, a material amendment

individual existing units. Green Island argues that these changes in operations could have potentially significant effects on the magnitude, frequency, duration, timing, and rate of change of diversions to the School Street Project canal and the flow regime of the Mohawk River. Request for Rehearing at 27. Once again, Green Island erroneously focuses on the flow regime of the river, instead of the flow regime associated with the project. In addition, Green Island misstates certain aspects of the 1991 relicense application, and offers no analysis to support its assertions. The upgrades described in the application are simply replacements of the original design runners with modern design runners, some of which had already been completed and some of which were planned, to increase the capability of the turbines. These were not significant changes. Because all of them had been completed by 1996, Commission staff included them in its environmental analysis as part of the no-action alternative, instead of considering them as part of the applicant's relicensing proposal. *See* Environmental Assessment at 12 (issued September 28, 2001). In addition, although the 1991 application acknowledges that the then-existing license allowed for a "continued peaking operation" with a one-foot drawdown, it also describes changes that had occurred in the operation of upstream projects that required the School Street Project to be operated in a run-of-river mode, and indicates that this change was included in the relicense application. *See* Niagara Mohawk's license application at B-3. As we explained in the order on remand, this change from run-of-river operation with a one-foot drawdown to run-of-river operation with a 0.5 foot drawdown would not be a material amendment, because it would not be of such magnitude as to constitute the proposal of a different project. Any changes in the sequencing of operation of the turbines are likewise not significant from a material amendment standpoint. Similarly, we examined the no-new-turbine option of the 2005 settlement in our order on remand and concluded that it was not a material amendment of the relicense application.

is one that would result in a different project. In this case, although the settlement proposed to increase minimum flows by a factor of two, these flows would be released in the same manner from the same project, with no significant changes in the project's physical features. Green Island's argument concerning the cost of providing these flows is both unsubstantiated and incorrect.⁴⁸ We doubt whether an increase in minimum flows, without more, could ever be a change of such a fundamental and significant nature that the application should be treated as one for a different project.⁴⁹ In any event, that standard is not met in this case.

3. Other Types of Changes Related to Installed Capacity and Flows

56. Green Island argues that "there is a substantial difference between the flows diverted and used by a 60-MW project and those used by a 39-MW project," and that, "because any water not diverted into the canal for power production will likely remain in the river," the proposed change in installed capacity "will have a significant effect on the amount of water left in the bypassed reach of the Mohawk River."⁵⁰ Green Island maintains that the Commission improperly ignores this significant environmental impact.

57. Again, while using less water for generation (thus making more water available to the bypassed reach) might be considered significant in other contexts, it is not a fundamental and significant change from a material amendment standpoint under section 4.35(f)(1) of our regulations. Only those changes that would result in a different project would be considered material within the meaning of our material amendment rule.

58. Green Island argues that this treatment of proposed changes in our material amendment rule "sharply contrasts" with section 15(a)(2) of the FPA, which requires the Commission to find that the proposed project is best adapted to serve the public interest,

⁴⁸ Green Island's citation to Table D-7 of the 1991 license application does not support its cost estimate of "over \$700,000 annually in 1991 dollars." Request for rehearing at 29. In the final EA, staff estimated that the annual cost of providing its recommended minimum flow of between 200 and 300 cfs, together with recommended habitat improvements, was between \$319,640 and \$475,960 (2001 dollars). The annual cost of providing the minimum flows in the 2005 settlement would be lower, because those flows range from 120 cfs to 245 cfs, depending on the season. In any event, these costs are not a fundamental and significant change that would result in a different project.

⁴⁹ Indeed, it is typical in hydropower licensing proceedings for different levels of minimum flows to be proposed – by the licensee, Commission staff, and other entities – at various points in the proceeding. We have never found such a proposal, standing alone, to be a fundamental and significant change that constituted a material amendment.

⁵⁰ Request for Rehearing at 30.

and the standards of FPA sections 4(e), 10(a)(1), and 15, which “do not place concerns about fishery and wildlife protection, water supply, recreation, and other public purposes in some minor category, but rank them on an equivalent basis to power development.”⁵¹ Green Island maintains that it is unreasonable to assume that the parties and the Commission “wasted significant resources and many years in pointless and unproductive negotiations resulting in only minor changes not to be commented upon by the public, once disclosed.”⁵²

59. Green Island misstates the facts; the Commission did allow an opportunity for public comment on the settlement. The only matter at issue is whether the Commission was also required to invite motions to intervene, which would be the case only if the settlement were a material amendment of the license application (which it was not). Contrary to Green Island’s assertion, our material amendment analysis does not make any assumptions about the value of the settlement negotiations or the changes that resulted from them. Rather, it simply analyzes those changes in light of the purpose and intent of the material amendment rule: to identify those proposed changes that are of such magnitude that they would constitute the proposal of a new project, and would thus warrant a new notice of application and an opportunity to intervene. Public comment on the settlement was sought in this case, regardless of the outcome of the material amendment analysis. Moreover, sections 4(e), 10(a)(1), and 15 apply to the Commission’s ultimate determination of whether to issue a license, and on what conditions. These sections do not apply to an interlocutory decision concerning what procedures should be followed if an applicant amends its license application. In any event, we find nothing in sections 4(e), 10(a)(1), or 15 that would require a different approach to our material amendment rule. Equal consideration does not require equal treatment,⁵³ and would not preclude us from concluding, as we did in promulgating the rule, that although major changes to a project’s physical features would likely result in a different project, changes to the project’s operational and environmental measures ordinarily would not.

60. Green Island argues that the order on remand misses the point of section 16.9 of the Commission’s regulations.⁵⁴ That section requires the Commission to reissue public notice and invite new interventions when an amendment considered material under section 4.35(f) is filed. According to Green Island, this rule is intended to assure that the

⁵¹ *Id.*

⁵² *Id.* at 30-31.

⁵³ See *California v. FERC*, 966 F.2d 1541 (9th Cir. 1992); *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1481 (D.C. Cir. 1990).

⁵⁴ 18 C.F.R. § 16.9(b)(3) (2010).

public is aware of the details of the project that the applicant is actually proposing, including the project's effects on flows, and is given an opportunity to participate in the process to determine whether the proposal should be granted, rejected, or modified. Green Island further maintains that the proper inquiry is not whether the subject matter of a proposed amendment is within the scope of issues generally considered in relicensing, or whether the change is good or bad, but whether the amendment changes the proposal in a fundamental and significant way. Green Island concludes that eliminating the 21-MW turbine, which was to be operated first and was to serve as a primary fish passage system for the project, coupled with the proposed changes in the project's mode of operation and minimum flows, culminated in "a different looking, hydraulically-different project," triggering the Commission's obligation to issue a public notice and invite new interventions under that section.

61. As explained earlier, the point of section 16.9 is to reissue public notice and invite new interventions when an amendment considered material under section 4.35(f) is filed. In determining whether an amendment is a fundamental and significant change within the meaning of section 4.35(f), the Commission uses the "different project" standard first articulated when the Commission promulgated the rule. It is not sufficient to assert that the project would look different, or would differ hydraulically. As we have seen, eliminating the 21-MW turbine would not result in or require a significant change in the flow regime, and the proposed minor changes in the project's mode of operation and minimum flows would not result in a different project. Similarly, changes in the manner in which fish passage is to be provided would not result in a different project. The same project works would be used in the same manner at the same location to generate power, using flows that are within the range of flows that were originally proposed to be used for that purpose in the 1991 license application. Taken together, the changes proposed in the 2005 settlement did not alter the plans of development for the School Street Project proposed project in a fundamental and significant way, as contemplated in the material amendment rule.

4. Location of the Powerhouse: 18 C.F.R. § 4.35(f)(1)(ii)

62. Green Island argues that the proposed elimination of the 21-MW turbine also meets the definition of a material amendment in section 4.35(f)(1)(ii).⁵⁵ Under that section, a material change in the location of the powerhouse would be a material amendment if the change would enlarge, reduce, or relocate the area of the proposed impoundment or cause adverse environmental impacts not previously discussed in the original application.⁵⁶ Green Island contends that deleting the 21-MW unit resulted in

⁵⁵ 18 C.F.R. § 4.35(f)(1)(ii) (2010).

⁵⁶ That section also applies to material changes in the location, size, or composition of the dam, or the size and elevation of the reservoir, both of which are not applicable here.

“removing an entire powerhouse,”⁵⁷ as well as removing the plans to use the new unit as the primary means of fish passage at the School Street Project, and that these changes would adversely affect the applicant’s plans for fish passage and protection.

63. Green Island misconstrues the provisions of the rule. Section 4.35(f)(1)(ii) applies, by its terms, to a material change in the location of the powerhouse. In this case, the location of the powerhouse would not change. The 1991 application proposed to house the new 21-MW unit in an addition to the existing powerhouse, on the east side of the building. The 2005 settlement proposed either no new turbine, in which case the addition would not be built, or a new 11-MW turbine, to be housed in a new powerhouse or powerhouse addition at the same location, on the east side of the existing powerhouse. In either case, there would be no material change in the location of the powerhouse. The powerhouse would continue to exist at the same location, either with or without a new powerhouse or an addition.

64. Moreover, the change would not be considered a material amendment, because it would not satisfy the remaining requirements of this part of the rule. As noted, a material change in the location of the powerhouse would constitute a material amendment if it would enlarge, reduce, or relocate the area of the reservoir, or cause adverse environmental impacts not previously discussed in the application. In this case, the 2005 settlement did not propose any changes that would affect the size or location of the reservoir, and any proposed changes pertaining to the powerhouse would not cause adverse environmental impacts not previously discussed in the application. The rule is concerned with the adverse environmental effects that would result from construction of a powerhouse at a different location, not any possible effects that might result from a change in the equipment contained within the powerhouse.

65. The 1991 application discussed measures to address the environmental impacts associated with construction of the new powerhouse.⁵⁸ The two powerhouse options

⁵⁷ Request for Rehearing at 31.

⁵⁸ These include using natural materials such as wood and stone to ensure that any new facilities will blend with the existing environment, disturbing as little soil as possible for construction activities, and grading and reseeded or planting disturbed areas. The application acknowledges that short-term impacts to floodplains may occur during construction of some facilities, likely associated with erosion, removal of vegetation, and soil compaction, and states that these impacts will be minimized by measures such as filtering runoff water with straw bales or in settling basins, use of cofferdams, performing construction under dry ground conditions when practical, minimizing cutting and disturbance of vegetation, stabilizing stream banks, and locating refueling and similar activities away from sensitive habitats. *See, e.g.*, Executive Summary to Exhibit E of the

proposed in the 2005 settlement would not cause any adverse environmental effects not already discussed in the 1991 application. Omitting the new powerhouse or powerhouse addition would mean that the environmental effects of constructing a new powerhouse, which were previously discussed in the application, would not occur. Constructing a new powerhouse or addition to house a new 11-MW turbine would have either the same environmental effects as previously discussed, or would result in reduced environmental effects. This is because the new powerhouse or addition would be constructed at the same location as originally proposed, and would be either the same size or smaller.⁵⁹ In either case, the proposed changes with respect to the powerhouse would not cause any new adverse environmental effects.

5. Fish Passage Measures

66. Green Island argues that, because the 21-MW turbine had been planned as the project's primary means of fish passage, the settlement's proposal to eliminate or replace it presents a materially different proposal for dealing with the important fisheries issue and caused new adverse environmental effects not discussed in the application. Green Island therefore maintains that this change would be a material amendment under section 4.35(f)(1)(ii), the part of the rule discussed above that concerns changes to the location of powerhouse, dam, or reservoir. Green Island does not identify any changes to the location of project features, but relies instead on the adverse environmental effects that it maintains would result from this change.

67. Green Island misapplies this part of the rule. As discussed above, section 4.35(f)(1)(ii) applies to a material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir, if the change would enlarge, reduce, or relocate the reservoir, or would cause adverse environmental impacts not previously discussed in the application. It does not apply to any other types of changes that might cause new adverse environmental effects. Any effects that might result from omitting the 21-MW turbine or replacing it with an 11-MW turbine would be attributable to the proposed change in installed capacity, not to a change in the location of the powerhouse, and would therefore be governed by section 4.35(f)(1)(i), not section 4.35(f)(1)(ii). Contrary to Green Island's argument, the rule cannot be read broadly to provide that any and all changes that cause new adverse environmental effects would be considered material.

1991 Application at ES-18 to ES-19. The 1991 application refers to the proposed new structure interchangeably as either a new powerhouse or a powerhouse addition, as does the 2005 settlement.

⁵⁹ See Figure 3, Phase II Conceptual Design, of the 2005 settlement, which depicts a powerhouse addition that has a smaller footprint than that originally shown in Exhibit F, Sheet No. 3.3, of the 1991 application.

68. In any event, the settlement's proposed changes to the means of fish passage would not cause any new adverse environmental effects. Nor were they a fundamental and significant change within the meaning of the material amendment rule. Although the settlement omits a proposed fish passage device (the 21-MW turbine), it provides in its place a phased approach to fish passage that provides fish protection and downstream passage measures for both the existing project without a new turbine and the possibility that a new 11-MW fish-friendly turbine might be installed. These measures are also the mandatory fishway prescriptions of the Secretaries of the Departments of Interior and Commerce, pursuant to section 18 of the FPA.

69. Specifically, the settlement provides for fish protection and downstream passage measures (referred to as Phase I fishway measures) consisting of screening the bypass flow release mechanism in the project canal at the right end of the dam and installing new angled bar racks upstream of the existing lower gatehouse, with a seasonal overlay with one-inch bar spacing. The Phase I fishway is the primary means of fish passage at the project. If installed, the optional 11-MW turbine (referred to as a Phase II fishway), could not be used as the primary means of fish passage unless, after a period of testing, its fish passage effectiveness is found to be equal to or greater than that of the Phase I fishway, and the Phase I fishway would be maintained and operated for fish passage during any planned outages of the new unit. If the new unit were found to be less effective at safely passing fish, Erie would be required to install racks and seasonal overlays across the new unit's intakes and operate the Phase I fishway as the primary means of fish passage. In either case, the settlement provides a means of fish passage. These proposed changes to the project's fish passage measures would not constitute a material amendment, because they would not result in a different project.

70. Green Island argues that, because the settlement provides for evaluating the effectiveness of the Phase I fishway, it was impossible to know at the time the settlement was proposed "whether the adverse impacts created by the existing units were sufficiently mitigated in the new proposal."⁶⁰ This argument reflects a misunderstanding of the purpose of effectiveness testing. Testing does not suggest that the effectiveness of the fishway is unknown or unproven.⁶¹ Rather, it is used to account for site-specific factors that may affect a fishway's effectiveness and to verify that it is operating as intended, or to make any necessary adjustments. As noted, Interior and Commerce included these structures as their FPA section 18 fishway prescriptions for the School Street Project, and

⁶⁰ Request for Rehearing at 37.

⁶¹ Green Island's consultant recognizes this, stating that "post-construction testing of fish passage facilities is standard industry practice and the need for it does not inherently mean that a facility is either infeasible or ineffective." Affidavit of James A. Besha at 8 (page 27 of 104), included as Attachment A to Green Island's rehearing request.

similar structures are in use at many hydroelectric projects. If the test results indicate that changes to these structures are needed, the Commission can require them, either on its own initiative or in response to a request from Interior or Commerce, pursuant to the reserved authority in Article 405 of the license.

6. Other Material Amendment Arguments

71. Green Island argues that the settlement's proposed deletion of the 21-MW turbine was a fundamental and significant change, because it "decreased the amount of renewable, carbon-free electricity available from the site and reduced the installed capacity of the proposed project by more than 33 [percent]; it altered the level of the licensee's economic investment in the community; and it fundamentally changed the balance between adverse environmental impacts . . . , power generation, and community economic benefits."⁶² Green Island asserts that, because the settlement proposes a "dramatically different balance of public benefits and burdens," the public must be notified and given an opportunity to intervene and participate.

72. Green Island's argument is misplaced. The material amendment rule dictates that when a proposed plan of development is fundamentally and significantly changed, a new opportunity to intervene and participate must be offered. As we have seen, however, the rule is governed by the different-project standard. It does not require a new opportunity to intervene whenever a different balance of public interest factors is proposed. In this case, although the balance of developmental and environmental interests would be altered somewhat, the reduction in energy produced would not result in a dramatically different project.⁶³ The same project would operate in the same manner at the same location, with a slightly different balance of developmental and environmental values.

73. Green Island also argues that the proposed change in the licensee's contributions to local tax revenues is material, stating that Niagara Mohawk made tax payments that benefited local communities, whereas Erie does not pay taxes to the local communities

⁶² Request for Rehearing at 40-41. Green Island asserts, without elaboration, that "the School Street Project, which dewateres almost a mile of the natural Mohawk River riverbed, has many adverse environmental impacts." *Id.* at 31. Green Island fails to mention that, under either of the 2005 settlement options (with or without the new 11-MW turbine), minimum flows in the bypassed reach would ensure that this area of the river is not "dewatered," and, because the project's installed capacity would be decreased, more flows would be provided to the bypassed reach than would be the case under the 1991 application, which included the 21-MW turbine.

⁶³ In that regard, the actual reduction in annual generation that would result from this reduction in installed capacity would be less than 20 percent. *See* Final Environmental Assessment at 65.

and receives subsidies from New York State. Any such change in local tax payments would be attributable to the identity of the applicant and the applicable provisions of the tax laws, not the terms of the settlement as compared to the plan of development in the 1991 application. As the court recognized, the applicant's identity changed in 1999, when the Commission approved a transfer of the license from Niagara Mohawk to Erie, and the Commission provided notice and an opportunity to intervene at that time.⁶⁴ In any event, a change in local tax payments would not be a material amendment, because it would not result in a different project.

74. Green Island's arguments regarding material amendments simply ignore the reality of the hydropower licensing process. In many instances, licensees alter significant aspects of their initial proposals – dealing with matters such as minimum flows, recreational releases, ramping rates, fish passage, and aquatic and terrestrial habitat – in response to issues raised by other stakeholders. If we were required to commence new proceedings each time this occurred, resolution of these already lengthy cases would be substantially delayed. Instead, as we have explained, the need for additional notice and a new opportunity to intervene occurs, by regulatory design, only in the relatively rare case of a fundamental and significant alteration in a project proposal. That is not what occurred here.

75. Green Island maintains that the Commission has once again ignored its fundamental duty to conduct the proper analysis of whether the 2005 settlement was a material amendment, and has again improperly denied Green Island's intervention. As we have seen, this argument is incorrect. We have carefully analyzed and applied the provisions of our material amendment rule in a manner that is consistent with its intent and purpose, as well as Commission precedent. Green Island also questions why the Commission should oppose its participation as a party, as well as that of other locally-based organizations who sought intervention in the School Street relicensing proceeding. Contrary to Green Island's suggestion, the Commission does not support or oppose the intervention of any party in its proceedings. Rather, the Commission is entitled to establish reasonable rules regarding the orderly conduct of its proceedings and the time by which intervention must be sought.⁶⁵ We have followed our rules in this proceeding. Nothing further is required.

⁶⁴ *Green Island v. FERC*, 577 F.3d at 152.

⁶⁵ See *California Trout v. FERC*, 572 F.3d 1003, 1007 (9th Cir. 2009); *Covelo Indian Community v. FERC*, 895 F.2d 581, 586-87 (9th Cir. 1990) (affirming Commission's decision to deny a motion to intervene that was 12 years late).

B. Green Island's Party Status and Standing

76. In order to seek rehearing and judicial review of a Commission order, a person must first be admitted as a party to a Commission proceeding. As the court recognized, the Commission has the authority under the FPA to control who may become a party to its proceedings.⁶⁶ And only a party that has been aggrieved by a Commission order may file a petition for judicial review under section 313(b) of the FPA.⁶⁷ A party is aggrieved if it can show that it has both constitutional and prudential standing to challenge a Commission order.⁶⁸

77. Green Island argues that, because the 2005 settlement was a material amendment, its motion to intervene was timely because it was filed within 30 days after the Commission issued notice of the settlement. Green Island further maintains that, because its "timely motion to intervene was unopposed," it became a party to this proceeding by operation of law.⁶⁹ Green Island misstates the facts, because its motion was opposed.⁷⁰ In addition, as we have seen, the 2005 settlement was not a material amendment of the 1991 relicensure application. Therefore, Green Island's 2004 motion to intervene was not timely filed, and the Commission properly exercised its discretion to deny Green Island's motion for late intervention. Because Green Island is not a party to this proceeding, it may not seek rehearing and judicial review except for the limited purpose of determining whether the Commission properly denied its motion for late intervention.⁷¹

⁶⁶ *Green Island v. FERC*, 577 F.3d at 158.

⁶⁷ 18 U.S.C. § 8251 (b) (2006).

⁶⁸ *Green Island v. FERC*, 577 F.3d at 158.

⁶⁹ See 18 C.F.R. § 385.214(c)(1) (2010), which provides that if no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

⁷⁰ See Erie's answer in opposition to Green Island's motion to intervene (filed Sept. 21, 2004). Green Island did not file a motion to intervene in response to the Commission's request for comments on the 2005 settlement. Instead, Green Island filed comments in opposition to the settlement and argued that the Commission should treat all pending motions to intervene (including its own) as timely filed because the settlement was a material amendment of the license application.

⁷¹ See *Green Island v. FERC*, 577 F.3d at 159; see also *City of Orrville v. FERC*, 147 F.3d, 979, 989-90 n. 12 (D.C. Cir. 1998); *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984).

78. We note that, even if we (or a court) were to determine that the offer of settlement was a material amendment of Erie's license application, and thus would require the Commission to invite new interventions, this does not mean that Green Island would necessarily be admitted as a party to the proceeding. Our regulations do not provide for intervention as a matter of right, but state that a movant becomes a party if no answer in opposition is filed within 15 days of a motion to intervene. If an answer in opposition is filed, the movant becomes a party only if the Commission expressly grants the motion.⁷²

79. In its September 7, 2004 motion to intervene, Green Island asserted that it had an interest that may be affected by the proceeding because its Green Island Project No. 13 is located three miles downstream of the School Street Project and because it intended to file a license application for the Cohoes Falls Project. Erie filed an answer in opposition to Green Island's motion on September 21, 2004, arguing that the Commission should deny it because Green Island did not have a legitimate interest in the relicensing proceeding. In its motion, Green Island did not provide any information to suggest that the Commission's issuance of a license for the School Street Project could affect its downstream project. We found that Green Island's interest in developing the Cohoes Falls Project was not a cognizable interest in the relicensing proceeding,⁷³ and the court has affirmed our conclusion that the Commission cannot grant Green Island a license for the Cohoes Falls Project in this proceeding.⁷⁴ Although we need not (and do not) now reconsider Green Island's motion to intervene as timely filed, if we were to do so, we might well find that Green Island lacks sufficient interest to be granted party status.

80. Apart from the matter of its party status, Green Island also argues that it is "aggrieved" by our order on remand and can demonstrate that it meets the traditional three-pronged test of standing: that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."⁷⁵ Specifically, Green Island maintains that the Commission's reinstatement of the School Street Project license, without a condition permitting an application for a better-adapted project to be filed and considered after the license is issued, injured Green Island by preventing it from filing an application for a license for the Cohoes Falls Project, and that the loss of an opportunity to compete and develop a project is an injury sufficient to support standing. Green Island adds that its inability to

⁷² See 18 C.F.R. § 385.214(c)(2) (2010).

⁷³ See *Erie Boulevard*, 117 FERC ¶ 61,189 at P 33.

⁷⁴ See *Green Island v. FERC*, 577 F.3d at 168.

⁷⁵ *Green Island v. FERC*, 577 F.3d at 159 (citations omitted).

pursue a license for the Cohoes Falls Project results from the Commission's issuance of an unconditioned license for the School Street Project, and that its injury would be redressed by a Commission order either denying a new license for the School Street Project or issuing a new license for the School Street Project with the conditions that Green Island has requested.

81. Green Island's argument overlooks the fact that, as a threshold matter, its arguments concerning standing are not relevant unless it can show that it would have obtained party status, which it can not. In any event, Green Island's purported injury is neither actual nor imminent. Green Island states that its interest is in competing for an original license for the Cohoes Falls Project, and that it is injured by the Commission's failure to issue an order that would allow it to do so. However, nothing in the FPA would require the Commission to issue a conditioned license for the School Street Project, as Green Island suggests. In fact, as explained later (in part F of this order), we find that the FPA would preclude us from issuing such a license with Green Island's requested conditions in the circumstances of this case. As a result, Green Island cannot demonstrate that our failure to issue the requested order would constitute "an invasion of a legally protected interest."⁷⁶

82. Green Island argues that the denial of an opportunity to compete for a license for the Cohoes Falls Project is an adequate injury. However, Green Island overlooks the fact that the opportunity to file an application in competition with that for the School Street Project is long past. A new opportunity to compete for the site could arise only if we were to deny Erie's license application or if Erie did not accept a license that we issued. In that sense, Green Island has been deprived of nothing more than "the opportunity to compete in a possible new licensing proceeding; . . . such a foreclosure is too speculative an injury for Article III standing."⁷⁷

83. In any event, as discussed in the next section, we find that the Cohoes Falls proposal is not a feasible alternative to the School Street Project. Even if it were feasible, however, we could not issue a license for the School Street Project that would allow Green Island (or some other entity) to acquire and decommission the School Street Project by paying Erie only its net investment in the project, as Green Island suggests, because those particular conditions would violate the FPA. If we were to conclude that the Cohoes Falls alternative was a feasible alternative, we would not be required to deny Erie's application and offer Green Island (and others) the chance to develop the project, but rather could issue Erie a license incorporating those aspects of the alternative that we found to be in the public interest. It would then be up to Erie to decide whether to accept

⁷⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁷⁷ *Free Air Corp. v. Federal Communications Comm'n*, 130 F.3d 447, 449 (D.C. Cir. 1997).

the license, as conditioned. As the court recognized, we could not simply proffer Green Island a license. Because we could provide for the possible development of the Cohoes Falls alternative, if appropriate, without offering Green Island an opportunity to compete for the site, it is by no means clear that Green Island is aggrieved by our decision that its proposal is not a feasible alternative to the School Street Project.

C. Feasibility of the Cohoes Falls Alternative

84. As noted in our order on remand, the court directed the Commission to consider in the first instance whether the 2005 settlement materially amended the School Street license application. Only if we found that the settlement was a material amendment would we then be required to take the next steps, as set forth in the court's opinion, of considering Green Island's motion to intervene as timely filed, analyzing it accordingly, considering, in accordance with *Scenic Hudson*,⁷⁸ whether the Cohoes Falls Project is a feasible alternative, and, if it were feasible, giving it full consideration in determining whether the School Street Project satisfies the "best adapted" standard of FPA, even if the Commission ultimately could not license that alternative.⁷⁹ In our order on remand, we nevertheless considered Green Island's proposal and found that, although the Cohoes Falls Project appears to be feasible from an engineering standpoint, it is not economically feasible and that, therefore, it is not a reasonable alternative to the School Street Project.

85. Green Island disputes this analysis, arguing that we erred by improperly calculating the estimated power generation for the Cohoes Falls Project and incorrectly substituting inaccurate, industry-wide averages of hydropower construction costs for Green Island's specific construction cost estimates. As we have seen, Green Island is not a party to this proceeding, and therefore may not seek rehearing and judicial review of these findings. As a result, we need not consider the remainder of Green Island's arguments. We nevertheless address them below to provide a more complete explanation of the basis for our conclusions, and to ensure that we have considered all relevant factors that may have a bearing on our decision.

1. Power Generation Estimates

86. In the remand order, we reduced Green Island's estimate of the average annual generation at the Cohoes Falls Project based on Commission staff's analysis of a tailwater rating curve based on stream flow and water surface elevations recorded at the U.S. Geological Survey (USGS) gage station located downstream of Cohoes Falls.⁸⁰ We

⁷⁸ *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965) (*Scenic Hudson*).

⁷⁹ See *Green Island v. FERC*, 577 F.3d at 168-69.

⁸⁰ See http://waterdata.usgs.gov/ny/nwis/inventory/?site_no=01357500.

noted that, although Green Island included a tailwater rating curve in its draft application, it did not provide a reference or an explanation of how the curve was developed.⁸¹ Because it appeared that tailwater elevations would be higher than Green Island estimated, we adopted staff's estimate that the project would have an average annual generation of about 287,500 megawatt hours (MWh), or 12,500 MWh less than Green Island's estimate of 300,000 MWh.

87. Green Island argues that this reduction was in error, because it failed to account for the improved hydraulic conditions that Green Island proposed as part of the Cohoes Falls alternative. Specifically, Green Island states that the Cohoes Falls alternative would provide for a different tailrace, with a larger and smoother hydraulic transition that would also be incorporated into the design of a whitewater boating course, and that the "resulting optimized tailrace would substantially lower the tailwater level at all flows, resulting in an increase in expected total energy output."⁸² In support, Green Island cites the attached declaration and analysis of Mr. Besha, its engineering consultant.

88. Green Island's draft license application for the Cohoes Falls Project includes a proposal for a kayak course and is shown by a symbol depicting a kayak on the conceptual plan attached to Exhibit A of the application. However, Exhibit B describing project operation, Exhibit C describing project construction, and Exhibit E describing recreation facilities, do not mention a proposal to modify the tailrace to improve hydraulic conditions for power generation or whitewater boating, or include any specific information about it. Exhibit D contains a list showing estimated costs to construct the Cohoes Falls Project, including site amenities (i.e., recreation proposals), but makes no mention of the proposal to modify the tailrace area. Exhibit F drawings showing the general design drawings of the principal project works, and the proposed rock excavation plan and erosion and sediment control plan, make no mention of a modified riverbed or tailrace.⁸³ Mr. Besha's declaration is devoid of any specific information regarding this proposal.

89. Further, Exhibit B includes a computer print-out of an energy analysis estimating average annual energy generation for the proposed Cohoes Falls Project. The print-out

⁸¹ A tailwater rating curve is a graphical representation that shows how tailwater surface elevation varies with river discharge (i.e., tailwater elevations increase as river flows increase, and decrease as river flows decrease).

⁸² Request for Rehearing at 57.

⁸³ The rock excavation and erosion and sediment control plans are in Exhibit F of the draft license application, and include preliminary drawings showing the approximate location of the proposed excavation areas and areas for sediment control, none of which are shown located in the tailrace near the proposed kayak site.

shows a tailwater elevation of 54.7 feet. Commission staff's analysis of the tailwater elevation, based on the water surface elevations recorded at the USGS gage station located downstream of Cohoes Falls, indicates a tailwater elevation of 57.8 feet, a 3.1-foot difference. Modifications to the tailrace to lower the water surface elevation by over three feet would require extensive and expensive excavation and earth moving that would increase construction costs and further call into question the financial feasibility of the project. In these circumstances, we find that there is insufficient support to find that Green Island's proposal to modify the tailrace area was included as part of the Cohoes Falls alternative. Green Island cannot provide us with a moving target by altering its proposal at this late date. Therefore, the reduction in estimated annual generation for the Cohoes Falls alternative was proper.

2. Cost Estimates

90. Green Island estimates that the total cost to construct the Cohoes Falls Project would be \$75,000,000.⁸⁴ In our remand order, we noted that Green Island's estimate does not include the cost of acquiring New York State owned land and water rights, which Green Island estimates at \$1,000,000, or the cost to decommission and leave in place the existing School Street Project facilities, which Green Island estimates at \$1,800,000. In the remand order, we included these necessary costs and updated the numbers to 2010 dollars to arrive at a total estimated cost to construct the Cohoes Falls Project of \$92,270,800.⁸⁵

91. In our order on remand, believing Green Island's cost estimates to be unreasonably low, we instead evaluated the economic feasibility of the Cohoes Falls Project using cost estimates contained in a 2003 report of the Idaho National Engineering and Environmental Laboratory (Idaho National Laboratory), prepared for the U.S. Department of Energy.⁸⁶ The report found that the median cost in 2002 of developing

⁸⁴ Green Island includes a summary table in Exhibit D of its draft application, listing the estimated capital cost as including the cost of acquiring land and water rights; power plant structures, facilities, and equipment; roads, bridges, and site amenities; transmission line relocation; a construction contingency allowance; and administration, engineering, legal and construction management during project construction. Green Island did not include any separate cost information regarding the cost to construct the proposed recreational measures for the Cohoes Falls Project, so we assume these costs are included in the total. If they are not, the total construction cost would be higher.

⁸⁵ Commission staff adjusted Green Island's April 2005 cost information to 2010 dollars using the Construction Cost Trends of the U.S. Department of the Interior's Bureau of Reclamation. See http://www.usbr.gov/pmts/estimate/cost_trend.html.

⁸⁶ Estimation of Economic Parameters of U.S. Hydropower Resources (Idaho National Engineering and Environmental Laboratory, June 2003). The report developed

(continued...)

new hydroelectric capacity at undeveloped sites, such as the Cohoes Falls Project, was \$2,700 per kilowatt (kW),⁸⁷ which would be \$3,700 per kW in 2010 dollars.⁸⁸ Thus, the median cost to develop the 100-MW Cohoes Falls Project would be about \$270,000,000 in 2002 dollars, and when escalated to 2010 dollars would be about \$370,000,000. Using this estimate, we determined that the Cohoes Falls Project would generate power at a cost that is significantly higher than that for the School Street Project, as well as significantly higher than the likely cost of alternative power. We therefore concluded that the Cohoes Falls Project is not an economically feasible alternative to the School Street Project.

92. Green Island maintains that we erred in rejecting its estimate of the cost of constructing the Cohoes Falls alternative and substituting an estimate based on industry average data from the Idaho National Laboratory report. Green Island argues that the report states that the cost estimates presented in the report are based on a collection of historical experience, and that actual costs for any specific site could vary significantly from the estimates.⁸⁹ Green Island therefore concludes that it was error for the Commission to rely on an industry average for hydro construction costs instead of Green Island's site- and design-specific cost estimates for the Cohoes Falls Project.

93. Contrary to Green Island's assertion, we did not use the median cost as a means of obtaining a precise, site-specific estimate of construction costs for the Cohoes Falls alternative. Rather, we used it to obtain a general sense of construction costs for the project and to test the reasonableness of Green Island's estimates. We found that, because we could not issue a license to Green Island for the Cohoes Falls Project in this relicensing proceeding, we could not assume for purposes of our feasibility analysis that Green Island would be the entity responsible for constructing the project. Similarly, it would not be appropriate to use cost estimates that might be unreasonably low or

tools for estimating the cost of developing, operating, and maintaining hydropower resources based on historical plant data. These tools were then applied to 2,155 hydropower sites in the United States, representing a total potential capacity of 43,036 MW. The hydropower sites were divided into three categories: (1) totally undeveloped sites; (2) dams without a hydroelectric plant; and (3) hydroelectric plants that could be expanded to achieve greater capacity.

⁸⁷ Development costs include licensing, construction, and mitigation costs.

⁸⁸ Staff used the Bureau of Reclamation's Construction Cost Trends to adjust the cost to develop new capacity at the Cohoes Falls Project to 2010 dollars. *See supra* note 57.

⁸⁹ *See* Idaho National Laboratory Report at vi (the entire report is reproduced as pages 31 through 104 of Attachment A to Appendix 1 to Green Island's rehearing request; page vi of the report is reproduced as page 38 of Attachment A).

unrealistic to give the appearance that the proposed project would be financially feasible. Because we were comparing projects, not applicants, we found that we required some means of determining whether other entities, including perhaps Erie, could reasonably be expected to construct the Cohoes Falls Project in lieu of our relicensing the School Street Project. Therefore, our use of the impartial and unbiased Idaho National Laboratory report was appropriate for that purpose.

94. Green Island further maintains that, if we had used a more appropriate cost estimating tool in the Idaho National Laboratory report, we would have concluded that the report in fact substantiates Green Island's cost estimate.⁹⁰ Specifically, Green Island states that the equation for estimating the cost of construction for undeveloped sites is provided in Table 3 of the report (on page 14), along with data band parameters.⁹¹ Green Island argues that, using the information in Table 3 together with an escalation factor derived from the Bureau of Reclamation Construction Cost Trends for power plants for October 2002 (246) and January 2010 (324),⁹² the Idaho National Laboratory report would support a construction cost estimate as low as \$90,497,800 in 2010 dollars. Green Island adds that its adjusted cost of \$93,671,200 (i.e., \$937 per kW) for construction of

⁹⁰ Request for Rehearing at 60-61.

⁹¹ *Id.* at 60. The Idaho National Laboratory report includes a graph (Figure A-2A) that shows how construction cost varies with developing capacity at undeveloped sites (i.e., construction cost increases as capacity increases). The report also includes Table 3, which lists multipliers that establish an upper bound (for the most expensive project) and a lower bound (for the least expensive project) that encompass 67 and 98 percent of the data in the report. Most of the projects fall within the 67 percent range; there are relatively few additional projects in the 98 percent range that are not already encompassed in the 67 percent range. Thus, while the 98 percent range includes 98 percent of the projects, it also includes more of the projects that cost considerably more or less than the median cost.

⁹² Green Island maintains that the Commission used an escalation factor that was lower, but less appropriate for the Cohoes Falls Project, so Green Island used the power plant escalation factor instead. Request for Rehearing at 61 n. 30. The Bureau of Reclamation cost trend index lists various project facilities, including dams, power plants, tunnels, and transmission lines, and a composite trend index that represents an average of all of the listed facilities. Because the Cohoes Falls Project would include all of these facilities, Commission staff correctly used the composite trend index to estimate the cost to construct in 2010 dollars, rather than using the cost trend index for constructing only a power plant.

the Cohoes Falls Project “is well within the bounding curve for construction at undeveloped sites and, therefore, is reasonable.”⁹³

95. Green Island’s analysis relies on the least expensive projects at the lower bound of the 98 percent range. As a result, nearly all of the projects in the data set would cost more to construct than the project at the lower bound of the 98 percent range. Green Island fails to mention that the upper bound of the 98 percent range would support a construction cost estimate for a 100-MW project as high as \$470,600,000 (in 2002 dollars), or \$619,800,000 in 2010 dollars.⁹⁴ The Cohoes Falls Project would require partial or complete removal of the School Street Project dam as well as construction of a new dam and powerhouse, and thus would require more extensive work than simply constructing a new project at an undeveloped site.⁹⁵ Green Island’s cost estimate of

⁹³ Request for Rehearing at 61.

⁹⁴ See Attachment 4 to Erie’s Hatch Report (included as Attachment B to Erie’s June 1, 2010 motion for leave to file answer and answer), which provides a cost range analysis for a 100-MW plant using the cost estimating equation and data band parameters for undeveloped sites in Table 3 of the Idaho National Laboratory report (at 14) and the Bureau of Reclamation’s cost adjustment factor. This is the same information that Green Island used to calculate a cost estimate for the Cohoes Falls Project and to show that its estimate was above the lower bound for the 98 percent data band.

Erie offered the Hatch Report in response to Green Island’s arguments concerning our use of the Idaho National Laboratory report. The report includes an estimate prepared by Erie’s engineering consultant, Hatch Acres Corporation, of the cost to construct the Cohoes Falls Project. It also includes Attachment 4, which provides a cost range analysis for the median cost figure in the Idaho National Laboratory report. Because Attachment 4 responds to Green Island’s arguments about the Idaho National Laboratory Report, we will consider only that attachment. We do not consider the rest of Erie’s Hatch Report, or Green Island’s criticisms of it. In that regard, we do not consider the AACE International cost estimate classification system that Green Island included as Attachment 1, Exhibit 1, to its June 16, 2010 answer to Erie’s answer, because it relates to Green Island’s arguments concerning the portions of the Hatch report that we do not consider.

⁹⁵ The Cohoes Falls Project would require decommissioning of the School Street Project’s upper and lower gate houses and powerhouse, partial or complete removal of the School Street Project’s existing dam, and constructing a new 700-foot-long weir, an intake structure equipped with screens, an underground powerhouse including two turbine generators, and two tunnels discharging water back to the Mohawk River. The civil work involved would thus be more extensive than constructing a project at an undeveloped site.

about \$940 per kW (2010 dollars) is considerably less than the Idaho National Laboratory report's median cost estimate of \$2,700 per kW (2002 dollars).⁹⁶ In light of this, we find no basis for Green Island's use of only the 98 percent lower bound as a point of comparison with its construction cost estimate for the Cohoes Falls Project. Because of the extensive construction that would be required to decommission the School Street Project and build the Cohoes Falls Project, Green Island's cost estimate is not valid.

96. As noted in our order on remand, if Green Island were to obtain a license for the Cohoes Falls Project, it would have to acquire the School Street Project, and it could not do so under the FPA by paying Erie only the project's net investment. Rather, it would have to acquire the project by paying fair market value in a condemnation proceeding. As a result, the economic cost for Green Island or any entity other than Erie to develop the Cohoes Falls Project would actually be substantially higher than the cost of simply constructing the project. When added to our cost estimate of \$370 million (2010 dollars) for the Cohoes Falls Project, including the \$90 million estimated value for the School Street Project that we noted in our order on remand yields an estimated cost to develop the Cohoes Falls Project of about \$460 million (in 2010 dollars).⁹⁷ Even if we were to use Green Island's cost estimate of \$94 million, including the cost to acquire the School Street Project would yield a total cost of \$184 million to develop the Cohoes Falls Project, which is almost twice Green Island's estimate.

97. Green Island argues and Mr. Besha states that the data set used to prepare the cost estimating tools used in the Idaho National Laboratory report "does not appear to include any projects developed by independent power producers, and instead appears to consist almost exclusively of projects owned by utilities."⁹⁸ In fact, the list of projects appearing in the data set that Green Island provided does not indicate the nature of project developers, so Mr. Besha's statement as to the "apparent" identity of the developers is unsupported and conclusory. In an attached affidavit, Mr. Besha states that projects

⁹⁶ In comparison, the Idaho National Laboratory report's median cost to develop new capacity at existing dams to which a powerhouse could be added is \$1,200 per kW (2002 dollars), and the median cost to develop additional capacity at a dam that already has a power plant is \$700 per kW (2002 dollars). As noted, the median cost to develop power at undeveloped sites is significantly more expensive at \$2,700 per kW (2002 dollars). See Idaho National Laboratory Report at vi (reproduced as page 38 of Attachment A to Green Island's request for rehearing).

⁹⁷ See *Erie Boulevard*, 131 FERC ¶ 61,036 at P 61.

⁹⁸ Green Island's answer to Erie's motion for leave to file answer and motion for leave to file answer at 15 (filed June 16, 2010). See also Mr. Besha's attached affidavit at ¶ 23 ("The database comprised almost exclusively utility-owned projects and does not appear to include any projects developed by independent power producers.").

developed by utilities tend to be more costly than projects developed by independent power producers, because utilities have the ability to pass the costs for project development directly through to their ratepayers (or did at the time those projects were developed).⁹⁹ In support, Mr. Basha attaches a copy of a 1982 Engineering News-Record article entitled *Small Hydro: Fords to Cadillacs*, which compared a utility's Upper Mechanicville Project No. 2394 to a municipality's Normanskill Project No. 2955. The article states that the cost to develop new capacity at these existing dams in 1982 was about \$2,500 per kW for the Mechanicville Project and \$1,500 per kW for the Normanskill Project.¹⁰⁰

98. Regardless of who developed the two projects discussed in the article, they both cost more to develop new capacity at these existing dams in 1982 than the average cost of \$1,200 per kWh in 2002 for developing such capacity that appears in the Idaho National Laboratory report. This undercuts Green Island's argument that the Idaho National Laboratory Report overestimates costs by including mostly utilities with more costly projects. In fact, this article could be used to suggest that the Idaho National Laboratory Report underestimates the cost to develop new capacity at existing dams, regardless of the entity that develops them.

99. Green Island criticizes the Idaho National Laboratory report as "unrepresentative" because the data set used to develop the cost estimating tools includes only 19 projects located in New York State, with all but one of those projects having a capacity of less than 25 MW; "i.e., significantly less than the 100 MW capacity proposed for the Cohoes Falls Project."¹⁰¹ Green Island argues that, instead of using the cost estimate derived

⁹⁹ In its initial statement in the draft license application, Green Island states that it is a corporate government agency, and has provided electric service for more than 100 years. For a municipal corporation such as Green Island to stay in business, it must also recover its incurred expenses, including increased expenses to provide electric service through new project construction, from its customers, or purchase replacement power from the regional distribution grid.

¹⁰⁰ The Upper Mechanicville Project was developed by the New York State Electric & Gas Corporation (a utility), and the Normanskill Project was developed by the City of Watervliet (a municipality). However, because we cannot assume that Green Island would be the entity that would develop the Cohoes Falls Project, any possible distinction between utilities and independent power producers is irrelevant. Moreover, a number of the entities listed in the Excel database appear to be municipalities, which would have the same incentives as Green Island, a municipal corporate entity, to keep costs low.

¹⁰¹ Green Island's answer to Erie's motion for leave to file answer and motion for leave to file answer at 16 (filed June 16, 2010). Green Island also argues that the data screening steps used in the Idaho National Laboratory report to reduce the original data

(continued...)

from the data used to prepare the Idaho National Laboratory report, the Commission should analyze data from its files for 190 licensed and exempted projects in New York. However, Green Island provides no specific information about any of these projects, or any basis to support its contention that these projects should be considered comparable to the Cohoes Falls Project simply because they are located in New York. Moreover, the Commission does not track project construction costs, as Green Island suggests.

100. Green Island also maintains that “the existing hydropower projects that are most comparable to the Cohoes Falls Alternative” are the twelve projects listed in Table 1 of Mr. Besha’s affidavit, which were designed by Albany Engineering Corporation and constructed in New York State.¹⁰² Green Island states that these twelve projects are similar in design to the Cohoes Falls Project and were constructed under budget. However, Green Island provides no specific information or documentation that shows any actual project construction costs for these twelve projects. We note that all but two of these projects are very small (5 MW or less), and the Glen Park Project, which is the largest at 32.65 MW, is only about one-third the size of the proposed Cohoes Falls Project.¹⁰³ Green Island does not attempt to explain why it rejected projects of less than 25 MW as unrepresentative in the Idaho National Laboratory report, yet considers these very small projects “most comparable” to the Cohoes Falls Project. Mr. Besha states that the Glen Park Project cost about \$36 million to construct in 1985, at a cost of \$1,095 per kW. The cost of building one project, not truly comparable to the Cohoes Falls

set of 909 projects to the 267 projects used to derive the cost estimating tools were “selective” and “purposefully excluded both the lowest and highest cost projects.” *Id.* at 14. Contrary to Green Island’s suggestion, these screening steps, which are described in the report, did not eliminate projects that would be considered comparable to the 100-MW Cohoes Falls Project. Specifically, they eliminated projects smaller than 1 MW, larger than 1300 MW, and pumped storage plants, as well as any records containing a zero value for total cost (considered unusable), records for plant constructed before 1940 (because escalated costs would likely be unrealistically low relative to current costs due to low labor rates), plants with construction costs of less than \$700/kW or greater than \$5,000/kW (considered atypical), and those with a history of decreasing costs for which a most realistic value could not be identified. *See Idaho National Laboratory Report at 4, 7* (reproduced as pages 52 of 104 and 55 of 104 of Attachment A to Green Island’s rehearing request).

¹⁰² *See* Green Island’s Answer at 17 and Besha Affidavit (Attachment 1) at 5 (filed June 16, 2010).

¹⁰³ Although Mr. Besha lists the Glen Park Project on page 5 of his affidavit as a 44-MW project, and asserts on page 9 that the project “produces well over 33 MW,” the project’s authorized installed capacity is 32.65 MW. *See Niagara Mohawk Power Corp. and Glen Park Associates*, 36 FERC ¶ 62,185 (1986).

Project, does not in any way support Green Island's cost estimates in this proceeding. In addition, because the Commission does not collect or maintain information about the actual costs of construction for licensed projects, we are unable to substantiate Mr. Besha's construction cost estimate for the Glen Park Project.¹⁰⁴ In any event, none of these twelve projects would appear to provide a valid basis for estimating the cost to construct the much larger Cohoes Falls Project, which would be a new project at an undeveloped site and would necessarily involve the additional costs of acquiring and decommissioning the School Street Project.¹⁰⁵

101. In our view, the Idaho National Laboratory's median cost to develop new hydroelectric capacity at undeveloped sites provides a reasonable means of determining, in a general sense, what it might cost to construct the Cohoes Falls Project. For this purpose, we are using this information appropriately, as a general cost estimate based on historical experience, not as a precise engineering estimate for a particular site.¹⁰⁶ Unlike Green Island's cost estimate for the Cohoes Falls Project, our general estimate derived from the Idaho National Laboratory report is the only cost information in this proceeding

¹⁰⁴ The order issuing an original license for the 15.49-MW Glen Park Project did not include a construction cost estimate. *See Niagara Mohawk Power Corp.*, 21 FERC ¶ 62,537 (1982). The order amending the license to authorize an increase in the project's installed capacity to 32.65 MW provided an estimate of the cost to construct only the new project works. *See Niagara Mohawk Power Corp. and Glen Park Associates*, 36 FERC ¶ 62,185.

¹⁰⁵ Green Island asserts that the Idaho National Laboratory report's use of the U.S. Bureau of Reclamation's *Hydropower Construction Cost Trends* (n. 85, *supra*) to escalate construction costs to 2002 dollars for projects constructed in 1969 and later "can introduce a significant source of potential error into an analysis." Green Island's answer to Erie's answer at 13. In support, Green Island cites an email from Robert A. Baumgarten, U.S. Bureau of Reclamation, to Mr. Besha, in response to Mr. Besha's June 15, 2010 email request for cost trend data. *See* Attachment 4 to Green Island's answer to Erie's answer (which states: "We caution users not to index any period of time greater than five years, as longer has associated inherent risks."). This email is an improper supplementation of Green Island's rehearing request, and we do not consider it. Green Island could have made this argument in its request for rehearing, because the use of this cost escalation method is clearly described in the Idaho National Laboratory report. In addition, there is nothing to suggest that this email represents the official position of the U.S. Bureau of Reclamation, as a similar caution does not appear on the Bureau's web site for the *Construction Cost Trends*. In any event, Green Island provides no specific information regarding the possible significance of this "potential error."

¹⁰⁶ *See* Idaho National Laboratory Report at vi (included as Attachment A to Green Island's rehearing request).

that was prepared by independent analysts for a national engineering laboratory, with no financial interest in the proceeding. In addition, as discussed above, our use of the cost information from this report could significantly underestimate the cost to develop the Cohoes Falls Project, because it does not include the cost of acquiring the School Street Project.

102. Using the median cost from the report, we determined in our order on remand that, in the first year of operation, the Cohoes Falls Project would cost about \$60.37 per MWh more than the likely cost of alternative power.¹⁰⁷ The School Street Project, consistent with the settlement, would cost about \$8.16 per MWh less than the likely alternative cost of power.¹⁰⁸ We therefore reaffirm our conclusion, based on the record, that the Cohoes Falls Project is not an economically feasible alternative to the School Street Project.

3. Other Arguments Concerning Economic Feasibility

103. Green Island argues that the error in using the average cost to estimate the costs of a specific alternative proposal is highlighted by considering the implications of that approach for other projects. Green Island maintains that, if the Commission were to evaluate all hydroelectric projects using an assumed construction cost of \$3,700 per kW and a current value of least cost alternative power of \$41.00 per MWh, as it did for the Cohoes Falls proposal, then no hydroelectric project would ever be considered economically feasible.

104. This argument is not persuasive. The least cost of alternative power varies for different regions in the United States as well as yearly, as the cost of power increases or decreases. It would not make sense to use the cost of alternative power for the Capital Region, which is the region of New York State where the Cohoes Falls Project would be located, to evaluate projects located in other regions, where the least cost of alternative power would be higher or lower.

105. Green Island adds that, because the Commission continues to approve new hydropower development under its policy articulated in *Mead Corp.*,¹⁰⁹ notwithstanding its conclusion that such development is not economically justified, this “strongly suggests that the Commission itself does not necessarily subscribe to the ‘methodology’ it has adopted.”¹¹⁰ We disagree. Our *Mead Corp.* policy, which has been judicially upheld as

¹⁰⁷ See *Erie Boulevard*, 131 FERC ¶ 61,036 at P 66.

¹⁰⁸ *Id.* P 75.

¹⁰⁹ *Mead Corp., Publishing Paper Division*, 72 FERC ¶ 61,027 (1995) (*Mead Corp.*).

¹¹⁰ Request for Rehearing at 63.

reasonable under the FPA,¹¹¹ recognizes that the licensee is ultimately responsible for making a business judgment of whether to accept the license and any associated risk. Moreover, it does not lead in every case to the conclusion that new hydroelectric development would cost more than the least cost of alternative power.¹¹² Green Island's argument to the contrary is without merit.

106. Green Island argues that the Commission's comparison of the cost effectiveness of the two projects in this case is arbitrary and capricious, where the Cohoes Falls alternative has enormous environmental, aesthetic, social, and power generation benefits. In essence, Green Island asserts that this comparison would be appropriate only where two projects provide equivalent non-monetary benefits.

107. Green Island overlooks the fact that, if the Commission is to consider the possibility of requiring that an existing project be decommissioned in favor of a new project alternative, at a time in a licensing proceeding when applications for competing projects are not permitted, the Commission must have some means of determining whether the new development could feasibly replace the existing project. Cost effectiveness is an important element of this determination. In our view, it would be arbitrary and capricious here to require decommissioning of an existing project in favor of a new alternative that would likely produce power at a cost that is much higher than both the existing project and the likely cost of alternative power.

108. Green Island argues that a proper application of the cost-effectiveness analysis required by FPA section 15(a)(2)(F) would compare the benefits of the Cohoes Falls alternative with those of the School Street Project in the areas of environmental and fishery measures, recreational measures, aesthetics, and other non-monetary benefits, in a manner that does not require those benefits to be reduced to dollar equivalents. Green Island provides no explanation of how this might be done. In any event, we did not provide dollar equivalents for the non-monetary aspects of the proposals. Instead, we compared the costs and benefits of the proposals to evaluate the cost effectiveness of the plans of development, as FPA section 15(a)(2)(F) contemplates. We also considered both developmental and environmental purposes, as required by FPA sections 10(a)(1) and 15(a)(2).¹¹³

¹¹¹ See *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 72-74 (D.C. Cir. 2006).

¹¹² In a recent case issuing an original license for the Cedar Lake Dam Project, the Commission determined that in the first year of operation, project power would cost \$78,730, or \$23.97 per MWh, less than the likely cost of alternative power. See *City of Nashua, Iowa*, 133 FERC ¶ 62,089 (2010).

¹¹³ Green Island takes issue with our statement in the order on remand that "the Cohoes Falls Project is infeasible as a matter of statute and regulatory policy, because
(continued...)

D. Changes in Circumstances Since 2007

109. Green Island argues that the Commission cannot reinstate the 2007 license as issued, because the underlying conditions and assumptions supporting the order no longer exist. Specifically, Green Island asserts that the 2007 license assumed that Erie would proceed with a new 11-MW unit or, alternatively, forego any physical changes to the project other than the Phase I fishway and the operating changes provided in the 2005 settlement. Green Island contends that, in 2010, it appears that Erie has abandoned the new 11-MW unit but has nevertheless proceeded with excavating and removing sediment from the power canal, which Green Island asserts was tied in the license to installation of the 11-MW unit. Green Island adds that the canal excavation allowed Erie to fully utilize the hydraulic capacity of the five existing units, thus increasing energy production by 13.3 percent, and leading the New York State Energy Research and Development Authority to certify that the School Street Project met the standards for a “qualifying upgrade” producing an incremental generation increase. Green Island maintains that, as a result, Erie has demonstrated that it has no intention of installing the new unit, which would require excavation of considerably more sediment, in addition to that already completed, in order to fully utilize the new unit’s hydraulic capacity.

110. Green Island’s argument is incorrect. The 2007 license order did not tie excavation of the power canal to installation of the new turbine. Article 401 of the 2007 license required Erie to file its power canal excavation and sediment removal plan within 14 months of license issuance. This plan was also required by Condition 15 of the water quality certification for the School Street Project (which required that the plan to be filed with the New York Department of Environmental Conservation for review and approval within 1 year of license issuance). Erie requested and obtained an extension of time to file the plan, which the Commission granted. Erie filed the plan with the Commission on November 4, 2008, and filed a revised plan based on comments of the New York Department on January 20, 2009. The Commission approved the plan and authorized

Green Island did not raise that alternative until a stage in the process when the FPA barred consideration of projects that would compete with the School Street Project.” See *Erie Boulevard*, 131 FERC ¶ 61,036 at P 81. According to Green Island, that this is nothing more than a resurrection of the Commission’s mischaracterization of the Cohoes Falls proposal as an “untimely competitive proposal,” an argument that the court rejected, and is contrary to the court’s directive that *Scenic Hudson* requires the Commission to consider feasible alternatives, “even if it ultimately cannot license those alternatives.” *Green Island v. FERC*, 577 F.3d at 166. Green Island overlooks our finding that the Cohoes Falls proposal is not economically feasible. It is therefore not a feasible alternative to the School Street Project. Our statement regarding feasibility as a matter of statute and regulatory policy is simply an alternative basis for finding that the Cohoes Falls proposal is not a feasible alternative.

Erie to begin the work on March 6, 2009.¹¹⁴ There was nothing in the 2007 license that made this work contingent on plans to install the new 11-MW turbine, which was authorized but not required in Article 301 of the license. Green Island's argument that these measures were linked is without merit.

111. Green Island also argues that a report prepared for Erie by Kleinschmidt Associates, which is included with Erie's filing for certification by the New York State Energy Research and Development Authority under the state's renewable energy portfolio standard,¹¹⁵ demonstrates that Erie has abandoned the 11-MW turbine in favor of a proposal that would allow all five existing units to operate simultaneously at their total rated capacity of 6,600 cfs, thus increasing energy production by 13.3 percent, and allowing Erie to meet the standards for a qualifying upgrade. Green Island maintains that, because the Kleinschmidt Report shows that considerably more cubic yards would need to be excavated to accommodate the 7,510 cfs hydraulic capacity of the new turbine (a total of 108,077 cubic yards), this means that Erie has decided not to install the new 11-MW unit. Green Island further maintains that, because this new option of partial canal excavation coupled with no new unit was not contemplated in 2007, circumstances have changed and the Commission cannot reissue the new license for the School Street Project without reopening the record to consider these changes.

112. We disagree. Erie's license authorized the canal excavation, and did not tie the excavation to the new turbine or specify the amount of rock and sediment to be removed. Therefore, there was nothing improper in Erie's plan to excavate the canal to allow full use of the existing five generating units, or to seek benefits available to it under New York law for the increase in generation that the excavation would allow. Because the 2007 license authorized these actions, they do not represent changed circumstances that would preclude us from reissuing the new license or require us to undertake any additional analysis.

113. Arguments concerning whether or not Erie has abandoned the new 11-MW unit are immaterial, because the license did not require its installation, but instead gave Erie the option of installing it. So far, Erie has requested and received an extension of time to begin and complete construction of the new unit based on the design and testing schedules of those directing the development and design of the new turbine; the Electric

¹¹⁴ See letter to Timothy Lucas, Erie, from Peter Valeria, FERC Regional Engineer, dated March 6, 2009 (included as Attachment J to Green Island's rehearing request).

¹¹⁵ See Attachment B, Exhibit 1, of Green Island's request for rehearing, which sets forth Erie's complete filing with the New York State ERDA, including the Kleinschmidt Report.

Power Research Institute and Alden Labs. The fact remains, however, that the new unit is optional, and Erie is not required to install it.

114. Green Island also argues that, in light of evidence indicating that Erie does not intend to make the financial investment required to add the new 11-MW unit, the Commission's decision to reissue a 40-year license for the School Street Project is in error. Green Island argues that, without the new unit, essentially all that remains is the same physical structure of the School Street Project, with a newly deepened canal excavated under other assumptions, and that in these circumstances, a 30-year license term would be more appropriate.

115. This argument is incorrect. We issued a 40-year license because of the moderate amount of environmental mitigation and enhancement measures that Erie proposed. Because installation of the new 11-MW unit was optional, it was not a factor in our decision that a 40-year license term was appropriate. On rehearing of the 2007 license order, we reaffirmed that a 40-year license was appropriate, even if the new turbine was not installed, because the license authorized a moderate amount of environmental mitigation and enhancement measures.¹¹⁶ In contrast, a 30-year term would be appropriate for a project with little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures.¹¹⁷ Green Island's argument to the contrary is without merit.

E. Need for a Supplemental Environmental Assessment

116. Green Island argues that, because the supplemental environmental analysis that addressed the 2005 settlement was contained in the 2007 license order which the court vacated, and the Commission reinstated the new license for the School Street Project without also reinstating the supplemental environmental analysis, there is now no on-the-record analysis of the settlement. Green Island adds that, because the Commission has never considered the Cohoes Falls proposal as an alternative under the National Environmental Policy Act (NEPA) and environmental conditions have changed since 2007, the final environmental assessment issued in September 2001 is grossly lacking and must be supplemented.

117. Green Island's argument is misplaced. The court vacated the 2007 license order because it found that we had misapplied our material amendment rule, and it was unable to determine whether the error was harmless. After correcting the error in our order on remand and finding that the 2005 settlement was not a material amendment, we reinstated the new license as issued in our earlier order. To the extent that the court did not call into

¹¹⁶ See *Erie Boulevard*, 120 FERC ¶ 61,267 at P 84-86.

¹¹⁷ See, e.g., *Consumers Power Co.*, 68 FERC ¶ 61,077, at 61,383-84 (1994).

question our reasoning and analysis in support of the 2007 license, we may properly continue to rely on it. We therefore clarify here that it is our intention to do so.

118. Green Island provides no basis for its assertion that environmental conditions have changed since 2007, such that a supplemental environmental assessment is required under NEPA.¹¹⁸ An environmental assessment must be supplemented only if there have been significant changes to the proposed action or its impacts.¹¹⁹ Green Island points to the passage of time, but does not identify any significant changes to the School Street Project or its impacts. Accordingly, no supplement to the analysis contained in the final environmental assessment and the 2007 license, as reinstated by the Commission, is necessary.

119. Moreover, a supplemental environmental analysis of the Cohoes Falls proposal is not required. Like the FPA, NEPA does not require consideration of infeasible alternatives.¹²⁰ Because we have found that the Cohoes Falls proposal is not a feasible alternative to the School Street Project under the FPA, it is not a reasonable alternative for NEPA purposes, and no supplemental analysis is required.¹²¹

F. Issuance of a Conditioned License for the School Street Project

120. Green Island argues that we erred in not granting its request that we issue a license for the School Street Project with conditions that would allow a better-adapted project to proceed. Specifically, Green Island maintains that we should have conditioned the new license for the School Street Project: (1) to reserve the Commission's authority to issue a license authorizing the construction, operation, and maintenance of a hydroelectric project that will more completely utilize the resources of the Mohawk River; (2) to provide that acceptance of the School Street Project license constitutes consent to this condition; (3) to require surrender of the School Street Project license when operation of the new project commences; and (4) to provide that the licensee shall be paid its net

¹¹⁸ Request for Rehearing at 77.

¹¹⁹ See *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998) (citing *Price Road Neighborhood Ass'n v. United States*, 113 F.3d 1505, 1509 (9th Cir. 1997)).

¹²⁰ *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (NEPA "regulations oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable.") (citing 40 C.F.R. §§ 1502.14(a)-(c), 1508.25(b)(2)).

¹²¹ See *Mt. Lookout – Mt. Nebo Property Protection Ass'n v. FERC*, 143 F.3d 165, 172-73 (4th Cir. 1998) (affirming FERC orders rejecting alternative under NEPA because it was not economically feasible).

investment in the School Street Project upon surrender of its license, without any compensation for severance damages sustained by reason of loss of generating capability to the project or project works of Project No. 2539.¹²²

121. Green Island objects to our statement in the order on remand that “the only possible way to implement the [Cohoes Falls] alternative in this relicensing proceeding would be to require that Erie develop it, notwithstanding that it has not sought authorization to do so.”¹²³ Green Island terms this a “self-imposed limit”¹²⁴ to the Commission’s choices, and points out that we could deny a new license to Erie, and open the site for new development of the Mohawk River at Cohoes Falls.

122. Green Island overlooks an important qualification in our statement; we found that the only way to implement the Cohoes Falls alternative “in this relicensing proceeding” would be to require Erie to develop it, because Erie is the only entity in the proceeding to have filed a timely relicense application. Green Island is correct in stating that we could deny a new license to Erie and subsequently consider new applications to develop the Cohoes Falls site. However, any such applications to develop the Cohoes Falls site would be applications for an original license, not a new license, and would not be part of the School Street relicensing proceeding.¹²⁵

123. More importantly, however, in our view the conditioned license that Green Island has proposed would violate the FPA, and we could not issue it in the circumstances of this case. Under section 14(a) of the FPA, the United States has a right to take over and operate a project after expiration of any license, after notice and an opportunity for a hearing, upon payment of the licensee’s net investment, not to exceed fair value, plus reasonable severance damages.¹²⁶ The right of the United States or of any State or municipality to take over and operate a project at any other time, upon payment of just

¹²² See proposed license articles for alternative offer of settlement, included as Attachment E to Green Island’s rehearing request.

¹²³ *Erie Boulevard*, 131 FERC ¶ 61,036 at P 81.

¹²⁴ Request for Rehearing at 86.

¹²⁵ Under FPA section 15(c)(1), each application for a new license must be filed at least 24 months before the expiration of the term of the existing license. Once a relicensing proceeding ends in denial of a new license, any later applications for new development at the site could not meet this statutory deadline, and would necessarily be considered applications for an original license, not a new license. See *City of Oconto Falls, Wisconsin v. FERC*, 41 F.3d 671, 677 (D.C. Cir. 1994).

¹²⁶ 18 C.F.R. § 807(a) (2010).

compensation, is expressly reserved.¹²⁷ Section 15(a)(1) of the FPA provides that, if the United States does not exercise its right to take over a project, the Commission is authorized to issue a new license to the existing licensee, or to issue a new license to a new licensee on the condition that the new licensee shall, before taking possession of the project, pay the existing licensee in the same manner as the United States would be required to do, as specified in section 14.¹²⁸ Under section 15(c)(1) of the FPA, each application for a new license must be filed at least 24 months before the expiration of the term of the existing license.¹²⁹ Thus, the FPA provides a mechanism for a competitor to take over a project at the net investment price: in order to do so, a competitor must timely file a competing application for a new license and be awarded the new license at relicensing. At any other time, a project can be taken over only by eminent domain, upon payment of fair market value.¹³⁰

124. As noted, section 15(c)(1) requires that an application in competition with a relicensing proposal must be filed no later than 24 months before the existing license expires. In this case, the School Street license expired on December 31, 1993, and the deadline to file applications for a new license for the project, including any competing applications, was December 31, 1991. Issuing a conditioned license here, to allow a post-relicensing proceeding in which untimely competitors could seek to displace an existing project with a new one, would in our view directly contravene this statutory provision. The only way to offer other entities an opportunity to compete for development of the Cohoes Falls site without violating this statutory provision would be to deny a new license for the School Street Project and then issue a notice inviting new applications for an original license to develop the Cohoes Falls site. In that case, anyone seeking to acquire the School Street Project could not obtain the project by paying Erie its net investment, but would have to pay the fair market price, as specified in section 14(a) of the FPA.

¹²⁷ *Id.*

¹²⁸ 18 C.F.R. § 808(a)(1) (2010).

¹²⁹ 18 C.F.R. § 808(c)(1) (2010). Sections 14 and 15 of the FPA were amended in 1986 to include provisions added by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. 99-495, 100 Stat. 1243 (Oct. 16, 1986). The new license application filing deadline of FPA section 15(c)(1) was one of these new provisions.

¹³⁰ Under section 21 of the FPA, 18 U.S.C. § 814 (2006), a licensee may acquire property necessary for the construction, maintenance, or operation of its project by eminent domain. However, this right is by condemnation, which requires payment of just compensation, and could not be used to acquire a project at the net investment price.

125. Although Green Island argues that the Commission has issued conditioned licenses on numerous occasions, nearly all of the examples it provides preceded the 1986 amendments to the FPA that established a statutory deadline for the filing of all relicense applications. None of the cases on which Green Island relies involved the circumstances presented here, in which a would-be competitor for the site has missed the statutory deadline for filing a new license application, and can only advance its proposal as an alternative in the relicensing proceeding, or as an application for an original license after relicensing has ended in the denial of a new license.¹³¹

126. Green Island argues that “the Cohoes Falls Alternative is *not* an untimely competing license application,” but rather, is simply evidence “submitted to assure the Commission that, if it appropriately rejected the Erie application, a license application for a better project would soon be forthcoming.”¹³² This assertion directly contradicts previous statements by Green Island that it does in fact seek to file a license application for the Cohoes Falls Project.¹³³ Nevertheless, despite its current concession that the Cohoes Falls proposal is not a competing relicense application, Green Island clearly seeks, through its proposed license conditions, to be permitted to acquire the School

¹³¹ Green Island cites a number of cases that, in its view, demonstrate “the Commission’s authority to issue a new license, subject to a condition that enables a better adapted project to proceed during the new license term.” Request for Rehearing at 87, n. 50. In fact, nearly all of the cases that Green Island cites involved original licenses, not new licenses, and many were original licenses for existing, unlicensed projects. Only six reported cases involved new licenses, and five of them were issued before the 1986 ECPA amendments to the FPA. *See, e.g., Pend Oreille Mines & Metals Co.*, 7 FPC 467 (1948); *Diamond Lake Improvement Co., Inc.*, 9 FPC 1203, 1205 (1950); *Packwood Elec. Co.*, 11 FPC 904, 906 (1952); *Pend Oreille Mines & Metals Co.*, 18 FPC 806, 809-10 (1957); *Pend Oreille Mines & Metals Co.*, 37 FPC 896, 897 (1967). (All of the *Pend Oreille* cases involved successive relicensings of the same project.). The only post-ECPA relicensing case involved special circumstances not at issue here. Specifically, in *Moon Lake Elec. Ass’n, Inc.*, 46 FERC ¶ 62,203, at 63,300 (1989), the Commission included a condition to allow for the possible development of a proposed Bureau of Reclamation dam that could affect the project, or even terminate its operation by federal takeover. The Commission thus included a condition providing for the possible federal takeover. Thus, this case provides no support for the proposition that the Commission could condition a new license for the School Street Project to allow a non-federal entity to take over the School Street Project in the manner that Green Island suggests.

¹³² Request for Rehearing at 80.

¹³³ *See, e.g.,* Green Island’s September 7, 2004 Motion to Intervene at 5, noting Green Island’s “clear intention to prepare the [Cohoes Falls] License Application . . . , as well as a Non-Power License describing the removal of the School Street Dam.”

Street Project by paying Erie its net investment in the project, an option that is only available in a competitive relicensing proceeding. Moreover, by providing that Erie would not be entitled to any severance damages, Green Island's proposed license condition seeks to allow it to acquire the School Street Project for even less than the amount that a competing applicant would be required to pay at relicensing. We find no basis in the FPA that would allow us to include such a provision in a new license for the School Street Project. Because this is not a competitive relicensing proceeding, we could not, consistent with the FPA, include any license condition that would permit Green Island or any other entity to acquire the School Street Project for anything less than fair market value.

127. Green Island maintains that, if the Commission denied a new license for the School Street Project, Erie would be required to remove the dam and decommission the project at its own expense.¹³⁴ This is not correct. If the Commission denied a new license, the requirements for project decommissioning would be established through the license surrender process.¹³⁵ Although the Commission has the authority to require the removal of dams and other project structures, in most cases the Commission has not required dam removal or other extensive decommissioning measures except as part of a settlement agreement. Under section 6 of the FPA, licenses may be surrendered only upon mutual agreement between the Commission and the licensee.¹³⁶ Although, in some cases, dam removal might be required in the public interest,¹³⁷ it appears unlikely that we would be able to make the necessary public interest finding in this case, because the only reason for removing the School Street Project dam and other structures would be to make it easier and less costly for another entity to develop the Cohoes Falls Project. In any event, we would not be able to make that determination without a full examination of all the relevant public interest factors; something we need not (and do not) undertake now.

¹³⁴ Request for Rehearing at 86 n. 49.

¹³⁵ See, e.g., *Southern California Edison Co.*, 106 FERC ¶ 61,212 (2004) (requiring surrender application to provide for the orderly disposition of a project with an expired original license).

¹³⁶ 18 C.F.R. § 799 (2010).

¹³⁷ See *Edwards Manufacturing Co., Inc.*, 81 FERC ¶ 61,255 (1997), in which the Commission denied a new license for the Edwards Project and required removal of the dam. The Commission subsequently approved a transfer of the license for the project to the State of Maine, which would then, in connection with surrendering the license, remove the dam as part of a settlement agreement resolving fish passage issues at seven dams located upstream of the Edwards Project. See *Edwards Manufacturing Co., Inc.*, 84 FERC ¶ 61,227 (1998).

128. Accordingly, we find that Green Island's proposed conditions for the School Street Project license are contrary to the requirements of the FPA, and we could not issue a license for the School Street Project that would include these conditions. Instead, if we were to find the Cohoes Falls alternative not only feasible but also better adapted (both of which we do not find), our only options under the FPA would be either to require that Erie develop the Cohoes Falls Project in lieu of the School Street Project, or to deny Erie's application for a new license and then issue a notice seeking applications for an original license to develop the Cohoes Falls Project. In short, we could not issue the conditioned license that Green Island seeks.

Conclusion

129. Green Island has presented us with numerous, often contradictory arguments in support of its quest to obtain the School Street site. While Green Island has, on occasion, described its intent as simply to present an alternative for Commission consideration, it is clear that Green Island seeks nothing less than a license for the Cohoes Falls Project, a project that is an untimely competitor pursuant to the relicensing provisions of the FPA. As we have seen, Green Island failed to timely intervene in the School Street proceeding, and nothing in the course of that proceeding required us to offer an additional opportunity to intervene. Moreover, Green Island's Cohoes Falls Project fails on economic grounds to provide a reasonable alternative to the School Street Project. We therefore affirm our prior holdings and deny Green Island's request for rehearing.

The Commission orders:

(A) The request for rehearing filed by Green Island Power Authority on May 17, 2010, in this proceeding is denied.

(B) The motion for leave to file an answer and answer to Green Island's request for rehearing, filed by Erie Boulevard Hydropower, L.P., on June 1, 2010, in this proceeding is denied, except to the extent discussed in this order.

(C) The answer to Erie's motion to file an answer and, in the alternative, motion for leave to file an answer and answer, filed by Green Island Power Authority on June 16, 2010, in this proceeding is dismissed as moot, except to the extent discussed in this order.

(D) The motion to lodge evidence or to reopen the record, filed by Green Island Power Authority in this proceeding on June 16, 2010, is granted to the extent discussed in this order, and is denied in all other respects.

(E) The motions to lodge evidence or to reopen the record, filed by Green Island Power Authority in this proceeding on October 14, 2010; December 28, 2010; January 21, 2010; and March 15, 2011; are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.