

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell and Joseph T. Kelliher.

City of Idaho Falls	Project Nos. 2842-039 and 2952-069
Ada and Fulcrum, Inc.	Project No. 4881-022
Aquenergy Systems, Inc.	Project No. 2883-005
Arco, Aziscohos Hydro & Nynex Co.	Project No. 4026-042
Big Wood Canal Co. & BP Hydro Assoc.	Project No. 8909-024
Boott Hydropower, Inc.	Project No. 2790-044
Calaveras County Water District	Project Nos. 2409-129
Central Nebraska Public Power and Irrigation District	Project No. 1417-148
Cities of Aberdeen and Tacoma, Washington	Project No. 6842-159
City of Kaukauna, Wisconsin	Project Nos. 1510-016, 2588-020, 2677-016 and 2715-024
City of Ketchikan, Alaska	Project Nos. 420-037 and 1922-042
City of Los Angeles, California	Project No. 2426-189
City of Oswego, New York	Project No. 10551-100
City of Santa Clara, California	Project Nos. 3190-021, 3193-020
City of Seattle, Washington	Project Nos. 553-162, 2144-032, 2705-033, and 2959-119

Project No. 2842-039, *et al.*

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City of Tacoma, Washington

Project Nos. 1862-132 and  
2016-077

City of Watertown, New York

Project No. 2442-066

Consolidated Hydro New York

Project No. 4428-005

Consolidated Hydro Southeast, Inc. and  
Pelzer Hydro Co., Inc.

Project Nos. 10253-026 and  
10254-022

FPL Energy Maine Hydro, LLC

Project Nos. 2142-039, 2194-023,  
2283-033, 2284-029, 2302-060,  
2322-040, 2325-057, 2329-069,  
2335-028, 2519-048, 2527-048,  
2528-071, 2529-066, 2530-035,  
and 2531-045

Horseshoe Bend Hydroelectric Co.

Project No. 5376-076

Hydro Energies Corp.

Project No. 5313-011

Idaho Power Co.

Project Nos. 18-081, 503-040,  
1971-092, 1975-018, 2055-013,  
2061-009, 2726-014, 2736-032,  
2777-012, 2778-013, and 2848-029

Kentucky Utilities Company

Project No. 539-005

Lawrence Hydroelectric Associates

Project No. 2800-034

LG&E Energy Corp.

Project No. 289-014

Lower Saranac Hydro Partners, L.P.

Project No. 4114-052

Malacha Hydro Ltd. Partnership

Project No. 8296-055

Merimil Limited Partnership

Project No. 2574-039

Milner Dam, Inc.

Project No. 2899-120

Missisquoi Associates

Project No. 7186-039

Project No. 2842-039, *et al.*

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New York Power Authority

Project Nos. 2000-054, 2216-064,  
2685-019

Oakdale and South Joaquin Irrigation  
Districts

Project Nos. 2005-013 and 2067-023

Oklahoma Municipal Power Authority

Project No. 3083-104

Pacific Gas and Electric Company

Project No. 619-108

PacifiCorp

Project Nos. 20-033, 472-026,  
935-055, 1744-032, 1927-034,  
2071-023, 2082-030, 2111-021,  
2337-066, 2342-017, 2381-053,  
2401-050, 2420-028, 2630-005,  
2652-019, 2659-017, and 2722-016

Public Utility District No. 1 of  
Chelan County

Project Nos. 637-027, 943-088,  
2145-061

Public Utility District No. 1 of  
Cowlitz County

Project No. 2213-012

Public Utility District No. 1 of  
Douglas County

Project No. 2149-112

Public Utility District No. 1 of  
Pend Oreille County

Project No. 2042-027

Pyrites Associates

Project No. 6115-012

Riegel Textile Corp.

Project No. 2416-021

Rock Creek Hydro Inc./BP Hydro Assoc.

Project No. 6015-049

Sacramento Public Utility District

Project No. 2101-081

South Sutter Water District

Project No. 2997-029

Tri-Dam Power Authority

Project No. 2975-019

Triton Power Co.

Project No. 5698-020

Twin Falls Hydro Associates

Project No. 4885-052

Victory Mills, Inc.

Project No. 7153-014

Wisconsin Electric Power Co.

Project Nos. 1759-083, 1980-049,  
2073-047, 2074-040, 2131-062,  
2357-071, 2394-070, 2431-067,  
and 2486-065

ORDER ON REHEARING CONSOLIDATING ADMINISTRATIVE  
ANNUAL CHARGES BILL APPEALS AND MODIFYING  
ANNUAL CHARGES BILLING PROCEDURES

(Issued October 8, 2004)

1. In this order, the Commission acts on a motion to consolidate or intervene and requests for rehearing and clarification of the order issued on June 18, 2004 in this proceeding (Remand Order).<sup>1</sup> The Remand Order was issued in response to a decision of the United States Court of Appeals<sup>2</sup> which concluded that the Commission must determine the reasonableness of costs incurred by other federal agencies (OFAs) related to the participation of those agencies in the Commission's proceedings under Federal Power Act (FPA) Part I<sup>3</sup> when those agencies seek to include such costs in the administrative annual charges licensees must pay to reimburse the United States for the cost of administering Part I. The court also remanded to the Commission issues regarding the eligibility of specific types of OFA costs for reimbursement, and issues regarding the availability of refunds for certain charges.

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<sup>1</sup> *City of Idaho Falls, et al.*, 107 FERC ¶ 61,277.

<sup>2</sup> *City of Tacoma, WA, et al. v. FERC*, 331 F.3d 106 (D.C. Cir. 2003) (*Tacoma v. FERC*)

<sup>3</sup> 16 U.S.C. §§ 794-823b.

2. The Remand Order determined which OFA costs are eligible to be included in administrative annual charges. It also established procedures for Commission review of future OFA cost submittals and those currently under appeal. Finally, it introduced a new form for such cost submittals and announced a technical conference for the purpose of finalizing the proposed form.

3. In this order, we consolidate with the annual charge bill appeals addressed in the Remand Order other more recent annual charge bill appeals that are unresolved. We also modify the procedures established in the Remand Order to provide an opportunity for the OFAs and licensees to discuss and resolve issues pertaining to the OFA's cost submissions before annual charge bills are issued.

## **BACKGROUND**

4. FPA section 10(e)(1)<sup>4</sup> requires the Commission to collect annual charges from licensees to reimburse the United States for its costs of administering Part I of the FPA. Since 1986, the Commission has included in its annual charges bills to licensees the costs incurred by the OFAs in the performance of their responsibilities in administering FPA Part I. Each year the Commission sends a letter to eight OFAs<sup>5</sup> requesting them to report the actual costs they have incurred during the prior fiscal year for administering FPA Part I. The Commission then adds these costs to its own Part I costs for the current fiscal year<sup>6</sup> and allocates the total among all licensees pursuant to a methodology set forth in its regulations.<sup>7</sup> The annual charges bills include assessment tables that show the costs incurred by the Commission and each of the reporting federal agencies.

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<sup>4</sup> 16 U.S.C. §803(e)(1).

<sup>5</sup> The OFAs are the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, the National Park Service, and the U.S. Fish and Wildlife Service (all in the Department of the Interior); the Corps of Engineers (in the Department of the Army); the U.S. Forest Service (in the Department of Agriculture); and the National Oceanic and Atmospheric Administration (in the Department of Commerce).

<sup>6</sup> The Commission's costs in the bills for each fiscal year consist of the estimated costs for the current fiscal year and a true-up of the previous year's estimated costs.

<sup>7</sup> See 18 C.F.R. §11.1 (2004).

5. In section 1701(a) of the Energy Policy Act of 1992 (EPAAct)<sup>8</sup> Congress, in anticipation of substantial strains on the budgets of federal and state agencies expected to undertake studies in connection with a wave of relicensings of existing projects,<sup>9</sup> amended FPA section 10(e)(1) to provide that annual charges are to include, subject to appropriations, reasonable and necessary costs of such agencies in connection with such studies.<sup>10</sup>

6. Beginning in 1997, several licensees began requesting rehearing of the OFA component of their annual charges bills.<sup>11</sup> They alleged that: (1) the costs were not supported by substantial evidence; (2) there was no mechanism in place for the Commission to review the submitted costs to determine if they are reasonable, necessary, and within the scope of section 10(e)(1); and (3) the Commission impermissibly broadened the scope of OFA costs it would accept beyond those for “studies and reviews.” The Commission consolidated the requests for rehearing of the FY 1997 and 1998 bills (OFA FY 1996 and 1997 costs), and set the matter for hearing before an administrative law judge (*Idaho Falls I*).<sup>12</sup>

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<sup>8</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, §1701(a), 106 Stat. 2776, 3008 (codified at 16 U.S.C. §803(e)(1)).

<sup>9</sup> H.R. Report No. 1-2-474(I), at 222 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 2045.

<sup>10</sup> EPAAct section 1701(a)(1) amended FPA section 10(e)(1) to read, in pertinent part:

the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter. . . .

<sup>11</sup> The Fiscal Year 1997 bills included the OFAs’ reported FY 1996 costs and the Bureau of Indian Affairs’ FY 1995 costs.

<sup>12</sup> *City of Idaho Falls, et al.*, 87 FERC ¶ 61,114 (1999).

7. In *Idaho Falls II*,<sup>13</sup> the Commission rejected a proposed settlement of the OFA 1996 and 1997 costs that would have provided for refunds. It determined that FPA section 10(e)(1) requires the Commission's annual charges to fully recover the United States' costs of administering FPA Part I, but there was no clear factual relation between the amount to be refunded under the settlement and the actual OFA costs incurred.<sup>14</sup> The matter was remanded to the judge to develop findings of fact as to disputed costs.

8. In order to inform the development of the necessary facts, *Idaho Falls II* made various determinations regarding the scope of recoverable OFA costs, the Commission's authority to review those costs, and the appropriate method for OFA cost submittals. First, it found that the requirements of FPA section 10(e)(1) that annual charges be "reasonable" and of section 3401 of the Omnibus Budget Reconciliation Act of 1986 (OBRA)<sup>15</sup> that annual charges be "fair and equitable," address the Commission's "rate design" responsibilities, and not the "reasonableness" or "fairness" of the OFA-incurred costs themselves, because these sections require the Commission to recover all of the United States' costs of administering Part I.<sup>16</sup>

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<sup>13</sup> *City of Idaho Falls, et al.*, "Order on Rehearing in Part, Disapproving Settlement, and Remanding Proceeding," 93 FERC ¶ 61,145 (2000).

<sup>14</sup> *Idaho Falls II*, 93 FERC at 61,454-55.

<sup>15</sup> 42 U.S.C. § 7178. Section 3401 states in pertinent part:

(a) In general. (1) Except as provided in Paragraph (2) and beginning in fiscal year 1987 and in each fiscal year thereafter, the Federal Energy Regulatory Commission shall, using the provisions of this section and authority provided under other laws, assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.

(2) The provisions of this section shall not affect the authority, requirements, exceptions, or limitations in sections 803(e) and 823a(e) of Title 16.

(b) Basis for assessments. The fees or annual charges assess shall be computed on the basis of methods that the Commission determines, by rule, to be fair and equitable.

<sup>16</sup> *Id.* at 61,455-56.

9. The Commission also rejected the licensees' contention that the language of EPC Act section 1701(a)(1) restricted the scope of OFA costs recoverable under section 10(e)(1) to costs for the "studies and other reviews" incurred by resource agencies. Rather, it found, the amendment added to the charges borne by licensees for the costs of federal agencies the qualifying administrative and study costs of qualifying state resource agencies.<sup>17</sup> As to particular cost items, the Commission found that the OFAs' costs of administering FPA Part I includes overhead and litigation expenses,<sup>18</sup> and the costs of participation in the Commission's Part I processes required by statutes other than the FPA,<sup>19</sup> such as the Endangered Species Act (ESA),<sup>20</sup> National Historic Preservation Act (NHPA),<sup>21</sup> and Clean Water Act.<sup>22</sup> As to the latter cost category, the Commission found that such costs are "inextricably interwoven" with the administration of FPA Part I.

10. In order to implement these determinations, the Commission stated that it would henceforth require the OFAs to report their Part I-related costs pursuant to the cost accounting rules of the Office of Management and Budget (OMB),<sup>23</sup> and to certify that the reported costs are true and accurate. A licensee with concerns about OFA cost accounting would be required to pay its annual charge bill under protest and lodge an appeal with the Commission's Chief Financial Officer. It would then pursue the matter at the agency in question and, if the agency agreed to modify its costs, it would file a revised cost sheet with the Commission, which would be used to adjust the next annual

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<sup>17</sup> *Id.* at 61,456.

<sup>18</sup> 93 FERC at 61,457.

<sup>19</sup> *Id.*

<sup>20</sup> 16 U.S.C. §§ 1531-43.

<sup>21</sup> *See* section 106 of that Act, 42 U.S.C. §470f.

<sup>22</sup> 33 U.S.C. §§ 1251-1376.

<sup>23</sup> 93 FERC at 61,455-58. Licensees were directed to follow the guidance set forth in OMB's *Circular A-25—User Charges and the Federal Standards Advisory Board's Managerial Cost Accounting Concepts and Standards for the Federal Government: Statement of Financial Accounting Standard Number 4* (Washington, D.C.: July 1995). *See Idaho Falls II*, Appendix A.

charge bill. If this process was not successful, the agency would be required to place its cost documentation on the record at the Commission, so as to be available for judicial review of the annual charge assessments that include such costs.<sup>24</sup>

11. Finally, *Idaho Falls II* remanded the proceeding to the judge to complete the record for the OFAs' FY 1996 and 1997 costs consistent with the determinations made in that order. It also directed Commission staff to request that the OFAs review their submittals with respect to their FY 1998 and 1999 costs, make any necessary adjustments, and ensure appropriate certification. Any cost submittals for those years not properly certified would be credited to future year bills sent to the licensees who appealed their FY 1999 and 2000 bills.<sup>25</sup>

12. In *Idaho Falls III*,<sup>26</sup> the Commission approved a revised settlement agreement for the OFA's FY 1996-1997 costs. In *Tacoma*,<sup>27</sup> the Commission clarified that *Idaho Falls III* also granted the licensees' appeals of the OFAs' FY 1998 costs to the extent of disallowing cost submittals not accompanied by timely, conforming certifications. Because the FY 2001 annual charge bills were being prepared at that time, and would include credits for the OFA FY 1998 and 1999 costs, the Commission allowed licensees to raise any legal, policy, or factual arguments regarding OFA FY 1998 and 1999 costs within the time for appealing the 2001 bills.

13. The licensees sought judicial review of *Idaho Falls II*, *Idaho Falls III*, and *Tacoma*.<sup>28</sup> The court held that section 10(e)(1) requires the Commission to determine the reasonableness of the OFAs' FPA-related cost submissions.<sup>29</sup> It declined however to rule on the licensees' challenges to the Commission's orders regarding the scope of

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<sup>24</sup> 93 FERC 61,458 and n. 44.

<sup>25</sup> 93 FERC at 61,459.

<sup>26</sup> *City of Idaho Falls, Idaho, et al.*, "Order Approving Settlement Agreement," 95 FERC ¶ 61,126 (2001).

<sup>27</sup> *City of Tacoma, Washington, et al.*, "Order Clarifying Prior Order and Denying Rehearing," 95 FERC ¶ 61,465 (2001).

<sup>28</sup> The orders appealed in *Tacoma v. FERC* concern the licensees' Fiscal Year 1999 and 2000 assessments; that is, the OFAs' FY 1998 and 1999 actual costs.

<sup>29</sup> 331 F.3d at 115.

recoverable costs, denial of refunds for costs supported only by the OFAs' certifications, and denial of refunds for FY 1998 and 1999 costs added by the OFAs following announcement of the certification policy in *Idaho Falls II*.<sup>30</sup> Instead, the court vacated the appealed orders and remanded the unresolved matters to the Commission for further proceedings consistent with its opinion.

14. In the Remand Order, we affirmed our prior determinations regarding the scope of other federal agency costs eligible for inclusion in administrative annual charges assessments, established procedures for review of future OFA cost submittals and those currently under appeal, and introduced a new form for such cost submittals. Because the remanded matters were pending when the Commission issued its FY 2003 annual charges bills, those bills did not include the OFA's FY 2002 costs. We requested each OFA to resubmit its FY 2002 costs using the new form, after which supplemental bills would be issued subject to the new procedures. We similarly indicated that the FY 2004 bills would be issued when the OFAs submitted their FY 2003 costs using the new form.<sup>31</sup>

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<sup>30</sup> 331 F.3d at 116.

<sup>31</sup> The new form was issued on August 13, 2004, and may be viewed on the Commission's web site at [www.ferc.gov/docs-filing/hard-fil-hydro.asp](http://www.ferc.gov/docs-filing/hard-fil-hydro.asp).

15. Two groups of licensees filed requests for rehearing of the Remand Order. The Idaho Falls Group<sup>32</sup> timely filed a motion to consolidate or intervene and request for rehearing and clarification of the remand order. A timely request for rehearing was also filed by the Public Licensees.<sup>33</sup>

16. In light of the pending rehearing requests, the Commission issued a letter to all licensees on August 4, 2004, stating that it would delay billing of the OFA costs which would have been included in the 2004 annual charges statement until the rehearing requests are addressed. We turn now to the rehearing requests.

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<sup>32</sup> The Idaho Falls Group has increased in number since these proceedings began. It consists, at this time, of Ada and Fulcrum, Inc. (A&F); Aquenergy Systems, Inc. (Aquenergy); Arco, Azisohos Hydro & Nynex Co. (AAH&N); Big Wood Canal Co. & BP Hydro Assoc. (Big Wood); Boott Hydropower, Inc. (Boott); Central Nebraska Public Power and Irrigation District; Cities of Aberdeen and Tacoma, WA; City of Idaho Falls (Idaho Falls); City of Los Angeles, California (Los Angeles); City of Oswego, New York; City of Seattle, WA; City of Tacoma, WA; Consolidated Hydro New York; Consolidated Hydro Southeast, Inc. and Pelzer Hydro Co., Inc. (Consolidated/Pelzer); FPL Energy Maine Hydro, LLC (FPL); Horseshoe Bend Hydroelectric Co. (Horseshoe); Hydro Energies Co. (Energies); Idaho Power Company (IPC); Kentucky Utilities Company (KU); Lawrence Hydroelectric Assoc. (Lawrence); LG&E Energy Corp. (LG&E); Lower Saranac Hydro Partners, L.P. (Saranac); Malacha Hydro Ltd. Partnership (Malacha); Merimil Limited Partnership (Merimil); Milner Dam, Inc. (Milner); Missisquoi Assoc. (Missisquoi); New York Power Authority; PacifiCorp; P.U.D. No. 1 of Chelan County; P.U.D. No. 1 of Cowlitz County (Cowlitz); P.U.D. No. 1 of Douglas County; P.U.D. No. 1 of Pend Oreille County; Pyrites Associates (Pyrites); Reigel Textile Corp. (Reigel); Rock Creek Hydro Inc./BP Hydro Assoc. (Rock Creek/BP); Sacramento P.U.D.; South Sutter Water District; Triton Power Co. (Triton); Twin Falls Hdyro Assoc. (Twin Falls); Victory Mills, Inc. (Victory); and Wisconsin Electric Power Co.

<sup>33</sup> The Public Licensees consists of Calaveras County Water District; The City of Ketchikan, Alaska (Ketchikan); City of Watertown, New York; Tri-Dam Power Authority (Tri-Dam); Oakdale and South San Joaquin Irrigation Districts (Oakdale); City of Kaukauna, Wisconsin (Kaukauna); Oklahoma Municipal Power Authority; and City of Santa Clara, California. We refer to both groups of licensees collectively as “the licensees.”

## **DISCUSSION**

### **A. Motion to Consolidate or Intervene**

17. The caption of the Remand Order did not list several licensees that are now members of the Idaho Falls Group and which filed appeals of the OFA component of their annual charge bills for some or all of fiscal years 1999-2002, and one project for which an appeal had been filed by Idaho Falls.<sup>34</sup> Idaho Falls Group requests that we consolidate the appeals of these licensees and the additional Idaho Falls project with the appeals in the Remand Order because the Remand Order ruled on issues of law, vacated refund credits previously granted, and established procedures applicable to the redetermination of the OFA cost component of the 2000-2002 bill for all licensees that appealed their bills in those years. Alternatively, Idaho Falls Group requests that we grant these licensees intervenor status because the Remand Order affects the appeals of their annual charge bills, and states that their request for intervention is timely because the Commission has never established a time period for intervention in this proceeding.

18. The Public Licensees also include licensees that were not included in the caption of the Remand Order.<sup>35</sup>

19. These licensees were not listed in the caption of the Remand Order because they were not identified as members of the Idaho Falls Group or Public Licensees<sup>36</sup> in those entities' pleadings prior to their requests for judicial review. However, the Remand Order and this order affect the outcome of those licensee's appeals, we will consolidate their appeals with the appeals listed in the caption of the Remand Order.

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<sup>34</sup> A&F; Aquenergy; AAH&N; Big Wood/BP; Boott; Idaho Falls (Project No. 2952); Los Angeles; Consolidated/Pelzer; FPL; Horseshoe; Energies; IPC; KU; Lawrence; LG&E; Saranac; Malacha; Merimil; Milner; Missisquoi; PacifiCorp; Cowlitz; Pyrites; Riegle, Rock Creek/BP; Triton; Twin Falls; and Victory.

<sup>35</sup> Ketchikan, Tri-Dam, Oakdale, and Kaukauna.

<sup>36</sup> Prior to the addition of Ketchikan, Tri-Dam, Oakdale, and Kaukauna, the Public Licensees were known as the Calaveras Group.

**B. The Annual Charge Bill Appeals Process**

20. Idaho Falls Group contends that because it is the Commission's responsibility to fix the amount of reasonable annual charges it is inappropriate for the Commission to issue annual charge bills based on a presumption of reasonableness with respect to OFA costs that are certified and accompanied by a detailed cost accounting report. It argues that the Commission should conduct a reasonableness review of OFA costs before the bills are issued. It contends that requiring licensees to pay their bills subject to refund before they have the opportunity to examine the OFA costs virtually ensures that they will have to file appeals, and thereby incur unnecessary costs and risks, plus the loss of the time value of any money ultimately refunded.<sup>37</sup>

21. The Idaho Falls Group states that we should modify the Remand Order to require OFA certifications to be made publicly available to licensees sufficiently in advance of the annual billing cycle for the Commission to afford licensees an opportunity to identify any issues, to hold a technical conference and, if the issues are not resolved, to hold an evidentiary hearing. Only then would the Commission issue annual charge bills, subject to rehearing. The Idaho Falls Group suggests that this would eliminate many unnecessary appeals.<sup>38</sup> The Public Licensees argue that the court's ruling requires the Commission to conduct a reasonableness review before the annual charges bills are issued, and question the usefulness of technical conferences, noting that the OFAs did not attend the July 1, 2004 conference on the new cost reporting form. They recommend that the technical conference be held before the bills are issued.<sup>39</sup>

22. In this regard, Idaho Falls Group states that the procedures set forth in the Remand Order conflict directly with our procedures for recovery of fish and wildlife agency costs under FPA section 30(e)<sup>40</sup> incurred in connection with hydroelectric exemption

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<sup>37</sup> Idaho Fall Group at 7-10. The Commission does not have authority to issue refunds with interest. Annual charges refunds are accomplished via a credit to the licensee's next year's annual charges bill.

<sup>38</sup> *Id.*, and 18 C.F.R. §§ 4.300-4.305.

<sup>39</sup> Public Licensees at 5.

<sup>40</sup> 16 U.S.C. § 823a(e).

applications for exemptions and for licenses seeking benefits under the Public Utility Regulatory Policies Act of 1978,<sup>41</sup> because those procedures require a pre-billing review of the reasonableness of the OFA's reported costs.<sup>42</sup>

23. On the contrary, the billing procedures associated with section 30(e) are fully consistent with the procedures at issue here. The regulations provide for the bills to be issued when the Commission has received the agency cost statements with supporting documentation. The applicant has 45 days to file any disputes with the Director of the Office of Energy Projects. The agency's cost statement is presumptively reasonable, and the disputing applicant has the burden of showing that an agency's cost statement is unreasonable. If the Director determines that a disputed cost is unreasonable, the parties have 45 days to resolve the matter. If they fail to do so, the Director will determine the agency's reasonable costs. If the reasonable amount exceeds the amount of the bill, the applicant receives a refund.<sup>43</sup>

24. In any event, we have determined that the process set forth in the Remand Order can practicably be modified to partially accommodate the licensees' concerns. The fiscal year for federal agencies closes on September 30<sup>th</sup> each year. New federal accelerated timelines require agencies to submit audited financial statements to the Office of Management and Budget two months later, by November 30<sup>th</sup>. At this point, most agencies close their accounting systems for the prior fiscal year. Since the FPA Part I related costs of the OFAs are likely to be a very small part of their total annual expenditures, the agencies should be able to provide the Commission with their Part I expenditures by December 31 of each year.

25. Under these circumstances, it seems reasonable for the Commission to provide licensees with the OFA cost submissions within two weeks of receiving them, and to simultaneously give notice of a technical conference, to be held approximately the first of March. Following the technical conference, the OFAs would have approximately one month to submit any revisions. This would give the licensees and OFAs a mechanism to raise and resolve issues pertaining to the OFA's expenditures before the annual charge bills are issued. It would also afford the Commission sufficient time to prepare and send out the annual charges bills.

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<sup>41</sup> 16 U.S.C. § 2601, *et seq.*

<sup>42</sup> Idaho Falls Group at 9-10.

<sup>43</sup> *See* 18 C.F.R. § 4.303(c)-(f).

26. We are not inclined to establish an evidentiary hearing or other additional procedures prior to issuance of the annual charge bills. First, the trial-type evidentiary hearing the licensees seek would entail discovery, additional technical conferences, possibly evidentiary hearings or settlement discussions, an administrative law judge's decision, and a Commission decision, which would then be reflected in the annual charge bills. It is highly doubtful all of these things could be completed in time for the Commission to timely issue annual charge bills.<sup>44</sup> Second, this revised process should ensure that many, if not most, of the issues are resolved before the bills are issued.

**C. Applicability of OBRA to Recovery of OFA Costs**

27. The Remand Order again rejected Idaho Falls Group's argument that section 3401 of OBRA does not require full recovery of OFA costs.<sup>45</sup> Idaho Falls Group renews its contention, but advances no arguments not previously considered.<sup>46</sup> We therefore reject its rehearing request in this regard.

28. Idaho Falls Group also requests that we clarify that "full recovery" of costs under OBRA means recovery only of "reasonable costs." The Remand Order finds that OBRA requires all reasonable program costs to be recovered.<sup>47</sup>

29. Public Licensees also continue to assert that administrative annual charges are limited to the costs of the Commission, and offers some new arguments that warrant a response. First, they assert that administrative annual charges cannot encompass the OFAs' costs because section 10(e)(1) states that the purpose of such charges is to reimburse the United States "for the costs of the administration of this Act." They contend that "administration" means "management and direction" and whatever roles the OFAs play with respect to FPA Part I, they do not include management and direction.<sup>48</sup> Public Licensees offer no support for their crabbed interpretation of the word

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<sup>44</sup> An additional complication is that the annual charge bills would have to be issued simultaneously with the Commission's decision in order to ensure a complete record for rehearing purposes.

<sup>45</sup> 107 FERC at 62,290.

<sup>46</sup> Idaho Falls Group at 11.

<sup>47</sup> 107 FERC at 62,290.

<sup>48</sup> Public Licensees at 9.

“administration.” It makes much more sense to interpret the word broadly, as does the DOE Inspector General’s 1986 report,<sup>49</sup> consistent with the fact that the thrust of the statutory provisions is to recover the United States’ costs.

30. Public Licensees also assert that section 10(e)(1)’s reference to the “United States” instead of “the Commission” is the result of Congress’ inadvertent failure to amend the section to reflect other changes in the law since enactment of the Federal Water Power Act of 1920 (FWPA), the predecessor to Part I of the FPA.<sup>50</sup> Public Licensees explain that under the FWPA, the Federal Power Commission (FPC) originally had only one employee, its Executive Director, because its work was performed by and through the Departments of War, Interior, and Agriculture. Therefore, in order for annual charges to recover the costs of administering the FWPA, it was necessary for section 10(e)(1) to refer to the United States’ costs. The Public Licensees add that, although the FWPA was amended in 1930 so as to provide for the FPC to have its own staff, the FPC retained the authority to detail staff of other agencies until 1977, when the FPC was abolished and replaced by this Commission in the Department of Energy Organization Act (DOE Act). Thus, goes the argument, it was necessary to retain the reference to the United States’ costs in section 10(e)(1) until that time, but it should be clear to all that Congress never intended for the section 10(e)(1) to apply to any of the United States’ costs except those of the Commission itself.<sup>51</sup>

31. We disagree. The United States’ costs to administer the FPA are not a function of whether the Commission does or does not have authority to detail to itself the staff of other agencies. As we explained in the Remand Order<sup>52</sup> and *Idaho Fall II*,<sup>53</sup> the actions taken by the OFAs to participate in Commission proceedings under FPA Part I are inextricably interwoven with those of the Commission. When Congress enacted the DOE Act, moreover, it was well aware that the Commission’s work had been done by its own staff for nearly 50 years. If Congress believed elimination of the Commission’s authority

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<sup>49</sup> See Report on Accounts Receivable, Billings and Collections of the Federal Energy Regulatory Commission, U.S. Department of Energy, Office of Inspector General, Report No. DOE/IG 0224 (February 3, 1986).

<sup>50</sup> The FWPA became Part I of the FPA in 1935.

<sup>51</sup> Public Licensees at 9-10.

<sup>52</sup> 107 FERC at 62,289-90.

<sup>53</sup> 93 FERC at 61,455-57.

to detail staff from other agencies had any significance in the context of recovering costs of administering the FPA, it could easily have changed the words “United States” to “the Commission.”

32. Finally, Public Licensees suggest that the 1992 amendments to section 10(e)(1) in EPAct section 1701(a) should be construed to apply only to funds specifically appropriated by Congress to state and federal resource agencies to support project licensing, and which are actually expended for that purpose. They reason that the purpose of the section 1701(a) was to ensure that these agencies have sufficient funds to perform their FPA Part I responsibilities, and that remittance by the Commission of administrative annual charges to the U.S. Treasury does not ensure that this will occur.<sup>54</sup>

33. The Commission has already construed EPAct section 1701(a) to require an annual appropriation by Congress in the budgets of the federal resource agencies or of the Commission.<sup>55</sup> It is for Congress however to determine the degree of specificity necessary in agency appropriations and the disposition of monies collected by federal agencies, and nothing in section 1701(a) or its legislative history suggests that Congress intended for the Commission to construe that section in the manner Public Licensees suggest.

#### **D. Presumption of Reasonableness and Burden of Proof**

34. The licensees challenge the presumption of reasonableness of OFA cost submissions that are timely filed, certified, and in conformance with the reporting requirements.<sup>56</sup> Idaho Falls Group seeks from the Commission a statement that it will make a reasonableness determination in each specific instance in which a licensee challenges an OFA cost even if the cost falls within a category that the Commission has determined to be recoverable. It also seeks clarification that the burden of proof with respect to reasonableness lies with the OFAs and, ultimately, the Commission.<sup>57</sup>

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<sup>54</sup> Public Licensees at 12-13.

<sup>55</sup> *See* Testimony of Commission Chair Elizabeth Moler before the Subcommittee on Energy and Water Development of the House Committee on Appropriations (April 21, 1993); Letter from Chair Elizabeth Moler to Hon. John Dingell (August 2, 1994).

<sup>56</sup> Idaho Falls Group at 12-13; Public Licensees at 6-7.

<sup>57</sup> Idaho Falls Group at 12-13.

35. The presumption of reasonableness recognizes that the funds each OFA expends each year to participate in Commission proceedings under FPA Part I are made available to it in the context of the federal budgeting and appropriations processes. Each OFA submits detailed budget justifications for its appropriations request to the House and Senate Appropriations committees. Hearings are held and Congress determines what amounts will be appropriated to each agency and for what purposes. We think it is entirely appropriate for the Commission to treat as presumptively reasonable agency expenditures made in this context.

36. The presumption of reasonableness is, however, just that. A licensee is free to challenge any OFA cost, regardless of how it is categorized. In order to overcome the presumption and obtain a hearing on a specific issue, a licensee has the burden of coming forward with some plausible evidence or argument that the particular cost was not reasonably incurred. It will not suffice for a licensee to merely assert that, for instance, a study was unnecessary or too expensive, the agency should reduce its overhead costs, or that its allocation of resources among program areas is inappropriate.<sup>58</sup> If a licensee makes the necessary showing, then the agency will bear the burden to show the expense was reasonably incurred. If the agency cannot make such a showing, the cost will be disallowed.

#### **E. Evidentiary Hearings**

37. Idaho Falls Group requests that a trial-type hearing be convened whenever there is a disputed issue of material fact. It suggests that such a policy would provide the opportunity for discovery and thereby enable the parties to resolve many cases before the submission of written testimony or hearings. Absent such a statement, Idaho Falls Group requests seeks rehearing on this matter.<sup>59</sup>

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<sup>58</sup> Congressional and Executive Branch oversight of such spending decisions occurs, in addition to the budget and appropriations processes, in Congressional oversight hearings and investigations by the Government Accounting Office. We do not think that by enacting section 10(e)(1) Congress intended for the Commission to duplicate these legislative and executive functions.

<sup>59</sup> Idaho Falls Group at 14-15.

38. Neither the FPA nor the Administrative Procedures Act,<sup>60</sup> requires a trial-type hearing, with witnesses under oath, cross-examination and compulsory process, instead of notice-and-comment type hearings. A trial-type hearing is only required where the dispute cannot be resolved through an examination of written submissions.<sup>61</sup> As discussed above, we expect that most issues will be resolved as a result of the technical conferences, and that others will be resolved through written submissions. It would also, as discussed above, be impractical to hold trial-type evidentiary hearings before the annual charges bills are issued.

**F. Filing Requirements Consistent with Modified Procedures**

39. Finally, in light of our decisions to consolidate the pending OFA-related annual charges appeals and to modify the procedures for review of OFA cost submissions, it is necessary to require the OFAs to resubmit their costs using the new form for FY 1998-2002 using the new form, and to make the initial cost submissions for FY 2003 and FY 2004. These submissions will be due by December 31, 2004. An appropriate notice initiating the review procedures will issue shortly thereafter.

The Commission orders:

(A) The pending appeals of annual charge bills for the years 2000-2002 filed by the following licensees are hereby consolidated with this proceeding: Ada County and Fulcrum, Inc.; Aquenergy Systems, Inc.; Arco, Aziscohoes Hydro & Nynex Co.; Big Wood Canal Co. and BP Hydro Assoc.; Boott Hydropower, Inc.; City of Idaho Falls (Project No. 2952); City of Los Angeles, California; Consolidated Hydro Southeast, Inc. & Pelzer Hydro Co., Inc.; FPL Energy Maine Hydro, LLC; Horseshoe Bend Hydroelectric Co.; Hydro Energies Corp.; Idaho Power Co.; Kentucky Utilities Co.; Lawrence Hydroelectric Associates; LG&E Energy Corp.; Lower Saranac Hydro Partners, L.P.; Malacha Hydro Ltd. Partnership; Merimil Limited Partnership; Milner Dam, Inc.; Missisquoi Associates; PacifiCorp; P.U.D. No. 1 of Cowlitz County; Pyrites Associates; Riegle Textile Corp., Rock Creek Hydro Inc./BP Hydro Assoc.; Triton Power Co.; Twin Falls Hydro Associates; and Victory Mills Co., Inc.

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<sup>60</sup> 5 U.S.C. §551, *et seq.*

<sup>61</sup> *See, e.g., Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993); *Sierra Association for the Environment v. FERC*, 744 F.2d 661, 663-64 (9th Cir. 1984).

(B) The Commission's prior determinations concerning the scope of other federal agency costs eligible for inclusion in administrative annual charges assessments made pursuant to Federal Power Act section 10(e)(1) and the Omnibus Budget and Reconciliation Act of 1986 are hereby affirmed, as discussed in the body of this order.

(C) The procedures for review of other federal agency costs pursuant to Federal Power Act section 10(e)(1) and the Omnibus Budget and Reconciliation Act of 1986 are hereby modified as discussed in the body of this order.

(D) The Bureaus of Indian Affairs, Land Management, and Reclamation, the National Park Service, and the U.S. Fish and Wildlife Service (all in the Department of the Interior); the Corps of Engineers (in the Department of the Army); the U.S. Forest Service (in the Department of Agriculture); and the National Oceanographic and Atmospheric Administration (in the Department of Commerce) are requested to resubmit their costs to participate in the Commission's proceedings under Part I of the Federal Power Act for Fiscal Years 1998-2002, and to submit their costs for Fiscal Years 2000 and 2004 by December 31, 2004, using the final version of the cost reporting form for this purpose issued on August 13, 2004.

(E) The Idaho Falls Group's and Public Licensees' requests for rehearing are denied in all other respects.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Acting Secretary.