

168 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Green Island Power Authority and
Albany Engineering Corporation

Project No. 13-036

ORDER DENYING IN PART AND GRANTING IN PART REHEARING,
DENYING REQUEST FOR STAY AND TECHNICAL CONFERENCE

(Issued July 18, 2019)

1. On October 3, 2018, Commission staff issued an order¹ finding that Green Island Power Authority (GIPA) and Albany Engineering Corporation (Albany Engineering), the co-licensees for the Green Island Hydroelectric Project No. 13, were in violation of a number of license terms and conditions set forth in the August 2012 license issued for the project.² The Compliance Order required the licensees to expeditiously address each separate violation within specified time frames. On November 2, 2018, the licensees timely filed a request for rehearing of the Compliance Order or, in the alternative, a request that the Commission stay the license articles with which the Compliance Order found the licensees out of compliance and convene a technical conference. For reasons discussed below, we grant rehearing in part, deny rehearing in part, and deny the request for stay and to convene a technical conference.

I. Background

2. The Green Island Project is located at the U.S. Army Corps of Engineers' (Corps) Green Island-Troy Lock and Dam at river mile 154 on the Hudson River in Albany

¹ *Green Island Power Authority*, 165 FERC ¶ 62,013 (2018) (Compliance Order).

² *Green Island Power Authority*, 140 FERC ¶ 62,133 (2012) (License Order).

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County, New York.³ The Green Island-Troy Lock and Dam is the first lock and dam encountered by vessels navigating up the Hudson River from Upper New York Bay and the Atlantic Ocean. The dam consists of a 586-foot-long main spillway with a crest elevation of 14.33 feet mean sea level (msl); a 750-foot-long auxiliary spillway with a crest elevation of 16.33 feet msl; a 300-foot-long ice fender bulkhead; and a 520-foot-long, 45-foot-wide navigation lock.⁴ During navigation season from May 1 through November 15 the Corps operates the lock and dam to maintain a minimum impoundment water surface elevation of 14.33 feet msl and uses 80 cubic-feet-per-second (cfs) of river flow in the lock to lift and lower vessels approximately 14 vertical feet to allow for passage at the dam.⁵

3. The Green Island Project, located at the west side of the lock and dam, operates in a run-of-release mode, in that it uses the flows made available to it by the Corps.⁶ GIPA uses 2-foot-high, pneumatically-operated spillway gates to raise the water surface elevation to 16.33 feet msl for hydroelectric generation and thereby creates the upper two-feet of the 700-acre impoundment established by the Corps dam.

4. On March 2, 2009, GIPA⁷ filed an application for a new license to operate and maintain the Green Island Project, and proposed major construction activities, including substantially expanding the project's generating capacity from 6 megawatts (MW) to 48 MW. Because there are no fish protection and passage facilities at the Green Island

³ The original license for the project was issued on March 3, 1921 to Henry Ford and Son, Inc., and expired on March 2, 1971. First Annual Report of the Federal Power Commission, at 110, 195. The Commission issued a new license for the project on February 7, 1977 to Niagara Mohawk Power Corporation, which expired on March 2, 2011. *Niagara Mohawk Power Corp.*, 57 FPC 817 (1977). The Commission issued an order in 1999 approving the transfer to *Erie Boulevard Hydropower, L.P.*, 88 FERC ¶ 62,082 (1999). By notice issued January 3, 2001, the Commission recognized GIPA has the licensee in light of the transfer of ownership from Erie Boulevard to GIPA by order of condemnation by the Supreme Court of New York.

⁴ License Order, 140 FERC ¶ 62,133 at P 10.

⁵ *Id.* P 13.

⁶ *Id.* PP 13-14. The project bypasses a 750-foot-long section of the Hudson River. *Id.* P 11.

⁷ Albany Engineering became a co-licensee on November 14, 2014. *Green Island Power Authority*, 149 FERC ¶ 62,108 (2014). Albany Engineering accepted all of the terms and conditions of the project license.

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Project, the federal and state resource agencies expressed concern that the project operations have resulted in continued project impacts on the valuable fish resources of the Hudson River.⁸ During the relicensing, GIPA engaged in consultation with federal and state agencies to address measures to reduce project effects on fisheries resources, including limiting project operation, installing and monitoring upstream and downstream fish passage, and monitoring water quality and streamflow. As a result, on January 15, 2010, GIPA filed a Settlement Agreement memorializing more than five years of negotiations with the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and New York Department of Environmental Conservation (New York DEC) (collectively, the Resource Agencies), and setting out the measures required to satisfy their concerns (Settlement Agreement). The Settlement Agreement outlines the types of upstream and downstream fishways and the fish exclusion devices that are to be installed and operated at the project.⁹

5. The Settlement Agreement also details the implementation schedule for project construction and, as relevant here, installation and operation of the fish protection measures.¹⁰ Specifically, the parties contemplated that the new construction at the Green Island Project would be divided into five zones, each of which would progress sequentially over an approximately four year period, beginning immediately after

⁸ FWS January 30, 2017 Comment Letter from David A. Stillwell. FWS noted that nearly every hydroelectric project relicensed by the Commission in the last 25 years in the northeast has been required to have fish protection measures and downstream passage. FWS October 30, 2017 Response Letter from David A. Stilwell, at 2.

⁹ As further discussed below, the order issuing a new license required implementation of the Settlement Agreement's fishway proposals and included the Settlement Agreement provisions into the license at Appendix E. The measures include: Denil fish ladders at each end of the powerhouse for the upstream passage of blueback herring, American shad, and alewife; three separate upstream passage facilities for American eel at the west end of the expanded powerhouse, at the apex of the auxiliary and main spillway, and adjacent to the lock; and a fish exclusion screen upstream of the project intakes; a downstream fish passage facility; and, a plunge pool in the bypassed reach for downstream passage. Section 3.4 also provides that GIPA will prepare a plan for the operation and maintenance of the proposed fish passage facilities. Section 3.5 provides that GIPA will monitor the effectiveness of the fish passage facilities, while Section 3.6 provides that GIPA will implement a shortnose sturgeon mitigation plan to ensure that construction and operation of the proposed project would not adversely affect shortnose sturgeon. License Order, 140 FERC ¶ 62,133 at Appendix E.

¹⁰ Settlement Agreement at section 3.8.

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issuance of its new license. And, under the Settlement Agreement, the various fish protection measures are to be operational immediately after completion of construction activities by zone.¹¹

6. FWS, NMFS, and New York DEC separately submitted mandatory conditions pursuant to their respective statutory authorities. FWS and NMFS each filed section 18 fishway prescriptions¹² on November 29, 2010, and the New York DEC issued a water quality certification¹³ for the project on February 11, 2011.

7. The Resource Agencies incorporated into their mandatory conditions certain provisions of the Settlement Agreement. The FWS prescriptions require the licensee to construct fishways according to a specific schedule.¹⁴ However, unlike the schedule for fishway construction established by the Settlement Agreement, which is tied to completion of construction of expanded project works,¹⁵ the schedule set by FWS's prescriptions keys the schedule for fishway construction to the date of license issuance:

¹¹ Generally, the schedule contemplates upstream fish passage at the west end of the project site will be operational immediately after Zone 1 construction is completed, which includes construction activities on the west side of the site, including the new powerhouse construction; Zone 2 includes modification to the main dam and installation of a new trash boom; Zone 3 includes construction on the east side of the site including new powerhouse expansion and related headrace and tailrace excavation, and a positive-exclusion fish protection system; Zone 4 includes refurbishment of the existing powerhouse; and Zone 5 includes construction of shoreline amenities.

¹² Section 18 of the Federal Power Act (FPA) states that “[t]he Commission shall require the construction, maintenance, and operation by licensee . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.” 16 U.S.C. § 811 (2012).

¹³ Under section 401 of the Clean Water Act (CWA), the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has issued water quality certification for the project or has waived certification; the certification shall become a condition of any federal license that authorizes construction or operation of the project. 33 U.S.C. § 1341(a)(1) and (d) (2012).

¹⁴ License Order, 140 FERC ¶ 62,133 at Appendix B, section 11.3.

¹⁵ *Id.* at Appendix E, section 3.8

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Structure/Measure	Implementation Deadline
West Side Denil Ladder	Within 12 months of License Issuance
West Side Eel Ladder	Within 12 months of License Issuance
Eel Ladder Adjacent to the Lock	Within 20 months of License Issuance
East Side Denil Ladder	Within 35 months of License Issuance
East Side Eel Ladder	Within 35 months of License Issuance
FISHIS™ Passage System	Within 35 months of License Issuance
Fishway Effectiveness Monitoring Plan	Within 6 months of License Issuance
Fishway Facilities Operation and Maintenance Plan	Within 12 months of License Issuance
Fishway Effectiveness Monitoring	First Season After All Fishways Operational

8. NMFS’s fishway prescriptions require the licensee to “construct, operate and maintain [upstream and downstream] fish passage facilities that pass diadromous fish species around the powerhouse in a safe, timely and effective manner.”¹⁶ Such facilities are required to “be operational immediately upon construction, consistent with the schedule outlined in the Settlement Agreement,” subject to the further condition that they be “operational for upstream and downstream passage between April 1 and November 30 of each year during the life of the license . . . [and] are to operate whenever generation occurs during the migration period.”¹⁷ In addition, the prescriptions require that “[i]n order to ensure sufficient evaluation of the facilities, the licensee shall prepare a Fishway Effectiveness Monitoring Plan in consultation with the Resource Agencies and submit the

¹⁶ *Id.* at Appendix C.

¹⁷ *Id.*

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plan to the Commission within six months of license issuance, consistent with the Settlement Agreement.”¹⁸

9. The New York DEC’s water quality certification also included several conditions incorporating the Settlement Agreement provisions, including measures for fish protection and passage.¹⁹ In addition, GIPA’s proposed powerhouse expansion and some of the fishways are to be built on land immediately adjacent to the existing project boundary that was previously owned by the Ford Motor Company plant (Ford property) and is contaminated with oil, petroleum, and polychlorinated biphenyl (PCBs).²⁰ The New York DEC is currently providing oversight of the Ford Motor Company’s remediation of the site. Accordingly, the certification includes: condition 20 that requires the licensee to obtain New York DEC approval prior to disturbing soil in the Ford property area located near the western portion of the project; and condition 21, which requires the licensee, prior to construction, to submit to New York DEC a plan that describes potential effects on project construction on the restricted area and ongoing remediation of that area.²¹

A. License Requirements

10. The License Order authorizes GIPA’s proposals to make major modifications to the project, increasing its generating capacity from 6 MWs to 48 MWs. Specifically, the License Order authorizes the expansion of the existing powerhouse to accommodate four new 6.0-MW generating units and four new replacement 6.0-MW generating units, as well as project works consisting of: (1) new hydraulically-operated crest gates along the top of the main spillway; (2) the upper 4.07 feet (i.e., from 14.33 feet msl to 18.4 feet msl) of the impoundment controlled by the new crest gates, thus creating a 708-acre impoundment with a maximum water surface elevation of 18.4 feet mean sea level; (3) a new trash boom extending across and upstream of the forebay; (4) an existing forebay

¹⁸ *Id.*

¹⁹ *Id.* at Appendix A. The fish protection measures were similar to the NMFS prescription, requiring GIPA to “construct, operate and maintain upstream and downstream fish passage facilities that pass diadromous and resident fish species (other than shortnose sturgeon) in a safe, timely, and effective manner.”

²⁰ License Order, 140 FERC ¶ 62,133 at P 19.

²¹ *Id.* P 41.

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leading to the expanded powerhouse; and (5) a new 70-foot-long, 18.8-kilovolt transmission line.

11. The License Order also requires the installation of upstream and downstream fish passage facilities, consistent with the Settlement Agreement, the fishway prescriptions, and the water quality certification.²² Ordering Paragraph (D) of the license requires the licensees to comply with all the conditions of the New York DEC's water quality certification. Ordering Paragraph (E) requires compliance with FWS's section 18 fishway prescriptions, including the schedule for completing various parts of the fishways as set forth in the Implementation Table above, starting with the requirement to file the Fishway Effectiveness Monitoring Plan (Fishway Effectiveness Plan) within six months of license issuance. And, pursuant to Ordering Paragraph (F), the license is subject to NMFS's section 18 fishway prescriptions, which include similar, although not identical, requirements.²³

12. Article 401 requires the licensee to submit plans required by New York DEC's water quality certification to the Commission for approval. As relevant here, the licensee is required to submit a Sediment Sampling Plan within six months of license issuance (condition 15); an Excavation and Dredging Plan (condition 16), a Dewatering Plan (condition 17), and a Stormwater Pollution Prevention Plan (condition 19) within one year of license issuance and at least six months prior to commencement of construction; a Disposal Plan (condition 18) within one year of license issuance and at least three months prior to commencement of construction; and a Ford Motor Site Remediation Plan (condition 21) at least six months prior to the start of construction. In addition, Article 401 requires the licensee to demonstrate that it developed each plan in consultation with the Resource Agencies and the Corps, and had received approval from the appropriate Resource Agencies. Article 401 also requires the licensee to file reports set forth in FWS's and NMFS's section 18 prescriptions, including downstream and upstream fish passage effectiveness monitoring reports by April 1 after each of the required five years of monitoring.

13. The license also includes the following additional articles, some of which are necessary requirements due to the nature of the major new construction, and others that

²² The License Order requires two new Denil fishways and three new upstream passage facilities for American eel, and a new downstream fish exclusion screen attached to a new bulkhead structure, a new downstream fish passage facility, and a new plunge pool. *Id.* PP 18, 31.

²³ The license incorporates the conditions of the water quality certification at Appendix A, the FWS section 18 fishway prescriptions at Appendix B, and the NMFS section 18 fishway prescriptions at Appendix C.

related to the implementation of the water quality and fish protection measures mandated by the Resource Agencies:

- Article 206 requires the licensee to file documentation of project financing for the construction, operation, and maintenance of the project at least 90 days before the start of construction;
- Article 301 requires the licensee to start construction of the new and modified project works, including the expanded powerhouse and new generating units, within two years from the August 17, 2012 issuance date of the license (August 17, 2014), and to complete construction within five years of the issuance date of the license (August 17, 2017);
- Article 302 requires the licensee to file final contract plans and specifications to the Commission's Division of Dam Safety and Inspections-New York Regional Engineer at least 60 days prior to start of construction;
- Article 311 requires licensee to file a regulating plan with the Corps at least 60 days prior to start of construction;
- Article 313 requires the licensee to file the Corps' written approval of construction plans and specifications prior to the start of construction;
- Article 403 requires the licensee to file an erosion and sediment control plan within one year of license issuance;
- Article 412 requires the licensee to file a recreation and aesthetics management plan within one year of license issuance; and
- Article 414 requires the licensee to file functional design drawings of the fish passage facilities to provide upstream and downstream passage of blueback herring, American shad, alewife, and American eel within six months of license issuance.

14. On September 17, 2012, the licensee accepted the terms and conditions of the license.²⁴

B. Post-Relicensing Filings and Extensions

15. As discussed in the Compliance Order, since 2013, GIPA has requested, and has been granted, many extensions of time to comply with the license requirements. Staff

²⁴ 16 U.S.C. § 799 (2012) (A license “shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter...”). The acceptance filing also included a request for rehearing for the limited purpose of correcting the inclusion of an amortization reserve requirement. On September 27, 2012, staff issued an order granting rehearing and amending the license accordingly. *Green Island Power Authority*, 140 FERC ¶ 62,232 (2012).

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twice extended the deadline to file the functional design drawings for the fishways, required by the Resource Agencies and pursuant to Article 414, first to July 3, 2013, and then to October 31, 2013.²⁵ On January 31, 2014, staff granted the licensee's request to file the Fishway Effectiveness Plan, to "six months prior to start of construction," rather than within six months of license issuance.²⁶ However, the order did not amend the schedule for fishway construction required by the prescriptions.²⁷

16. On May 9, 2014, Albany Engineering, on behalf of GIPA, submitted a "Proposed Revised Development Plan and License Compliance Schedule" (May 9 Proposal), which proposed to modify the overall project development and construction sequencing, including deferring new powerhouse construction activities and associated permanent upstream passage facilities for fish and eel until remediation activities on the Ford property were completed. This would have resulted in, among other things, a delay of up to seven years for completion of diadromous upstream passage facilities, and by four years the completion of full downstream bypass facilities. New York DEC and NMFS filed separate letters opposing the May 9 Proposal, noting that it would materially alter the Settlement Agreement and License Order, without benefit of the required consultation with the Resource Agencies.²⁸ On June 12, 2014, GIPA withdrew the May 9 Proposal.

17. On August 5, 2014, the licensee again requested extensions of time for several license articles, citing unforeseen difficulties in constructing the project, including a "prolonged length of time" to remediate the Ford property. The licensee stated its intentions to amend the project development schedule, contending that economic conditions at that time necessitated a reevaluation of the project's development plan to expand generation to 48 MW.

²⁵ *Green Island Power Authority*, Project No. 13-023 (April 3, 2013) (delegated order); *Green Island Power Authority*, Project No. 13-023 (July 29, 2013) (delegated order).

²⁶ *Green Island Power Authority*, 146 FERC ¶ 62,089, at P 3 (2014).

²⁷ *Id.* The January 2014 order noted that due to damage to the existing inflatable rubber flashboards after Tropical Storm Irene and Tropical Storm Lee in August and September of 2011, the licensee may be changing the schedule to commence construction. However, the order reminded the licensee that the due dates associated with the start of construction have not changed.

²⁸ NMFS June 9, 2014 Comment Letter from Louis A. Chiarella, Assistant Regional Administrator; New York DEC June 12, 2014 Comment Letter from Patricia J. Desnoyers.

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18. On November 13, 2014, staff granted the licensee's request and extended: Article 301's commencement and completion of construction deadlines to August 17, 2016 and August 17, 2019, respectively; and Article 412's requirement to file a Recreation and Aesthetics Management Plan to December 31, 2015.²⁹ The order did not change the deadlines for construction of the fishways, nor did it change the requirement that the fishways operate whenever the project generates electricity during the fish migration period.³⁰

19. On February 26, 2016, the licensees provided to the Resource Agencies design drawings of their proposed fish exclusion system as required in Article 414. In a May 12, 2016 letter to the licensees, NMFS challenged the plans as having insufficient detail, and asserting they were merely conceptual plans.³¹ On May 27, 2016, NMFS filed with the Commission a letter reiterating its concerns over the lack of information with respect to the fish exclusion system.³²

20. On July 13, 2016, the licensees filed a status report with the Commission that included a proposed revised construction schedule that would replace the five-zoned implementation plan contemplated by the Settlement Agreement with a three-phase implementation plan, with the first two phases beginning in August 2016 (extended start of construction deadline), and completion by February 2023 (over three years past the extended completion of construction deadline of August 17, 2019). On July 26, 2016,

²⁹ Licensees also requested, and were granted, extensions of time, until March 3, 2015, to file Article 404's erosion monitoring plan and Article 413's Historic Properties Management Plan.

³⁰ The order noted that certain license articles with compliance filing dates tied to commencement of construction would accordingly be extended, including: Article 206, Documentation of Project Financing (three months prior); Article 302, Contract Plans and Specifications (sixty days prior); Article 311, Regulating Plan and Operating Agreement (sixty days prior); Article 313, Corps' Written Approval (prior to commencement of construction); and various conditions set forth in Article 401, including: Condition 16, Excavation and Dredging Plan (six months prior); Condition 17, Dewater Plan (six months prior); Condition 18, Disposal Plan (three months prior); Condition 19, Stormwater Pollution Prevention Plan (six months prior); Condition 21, Ford Motor Site Remediation Plan (six months prior); and Article 403, Erosion and Sediment Control Plan (three months prior).

³¹ NMFS May 12, 2016 Comment Letter from Christopher Boelke, Field Supervisor, to Wendy Jo Carey, Albany Engineering Corporation.

³² NMFS May 27, 2016 Comment Letter from Christopher Boelke.

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NMFS forwarded to the Commission a June 9, 2016 letter it had sent to the licensees objecting to the proposed revised construction plan, citing, among other things, insufficient fishway design plans, and a schedule that would result in delayed upstream passage. The licensees' July 13, 2016 status report did not mention NMFS' June 9 letter.

21. Construction did not begin on August 17, 2016, as required by Article 301, as extended, nor did the licensees file acceptable plans and specifications, or copies of required permits, by that date. By letter issued October 24, 2016, staff noted NMFS's and FWS's concerns with respect to the proposed construction schedule and lack of information necessary to approve the proposed fishway design.³³ The October 2016 letter noted that before staff could consider the licensees' July 13, 2016 request to revise the project development schedule, the licensees must file by November 24, 2016, an updated status report on fish passage design and associated construction, including start dates, documentation of resource agency approval of final fish facility design, and any other pertinent information.

22. The licensees did not meet the November 24, 2016 deadline. On December 20, 2016, December 30, 2016, February 2, 2017, and February 17, 2017, the licensees filed progress reports that documented consultations with the Resource Agencies. The reports also stated the licensees' intention to negotiate a revised schedule and Settlement Agreement with the Resource Agencies regarding the fishways.³⁴

23. In separate letters filed March 24, 2017, from NMFS and FWS, and March 28, 2017, from New York DEC, the Resource Agencies opposed extending timelines or otherwise delaying construction of the required fish passage facilities. NMFS stated that it "categorically disagrees with the Licensees' characterization of past settlement discussions..." adding that, "in our view, the report's underlying and unstated purpose is to modify and indefinitely suspend agency fish passage protections."³⁵ New York DEC similarly noted that the licensees "mischaracterize the situation," and "would instead,

³³ FERC October 24, 2016 Letter Request for Additional Information from Joseph Enrico, Aquatics Resources Branch, Division of Hydropower Administration and Compliance.

³⁴ The February 2 filing included copies of a design and specifications plan of the licensees' proposed fish bypass system that was not approved by the Resource Agencies, and, accordingly, failed to meet licensees' obligation under license Article 414 to submit acceptable functional design drawings. Notwithstanding that the designs were not approved by the Resource Agencies or the Commission, on November 7, 2017, the licensees filed notification that it installed and would be testing the fish bypass system.

³⁵ NMFS March 24, 2017 Comment Letter from Christopher Boelke.

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characterize the Project as out of compliance with the License and Settlement Agreement.”³⁶ FWS observed that the licensees do not “accurately represent the settlement discussions...” and that, “in the five years since the license was issued, very little progress has been made in the design of the fish protection and passage facilities, and none of the facilities have been installed.”³⁷ FWS added that the Resource Agencies “have tried to work with the Licensee by agreeing to several time extensions; however, the Licensee has not made progress towards implementing the license requirements.”³⁸ The Resource Agencies urged the Commission to require the licensees to comply with their license requirements.

24. On September 11, 2017, staff issued a letter to the licensees detailing noncompliance with a number of the license requirements, including those regarding fish passage, project construction, and dam safety directives.³⁹ The letter required the licensees to provide a detailed plan and schedule to immediately comply with the fish passage requirements of the license or to provide documentation that shows the Resource Agencies and the licensees have agreed to submit the scheduling dispute to dispute resolution. Further, the letter gave the licensees 30 days to address each of the delinquent items listed in the September 11 letter and file any required material or explain why the required material was not filed on time.⁴⁰ The September 11 letter also cited the Settlement Agreement procedures for amending license articles if the parties cannot reach agreement on implementation, or if substantial new evidence or circumstances arise.

³⁶ New York DEC March 28, 2017 Comment Letter from Sita Crouse, Senior Attorney.

³⁷ FWS March 24, 2017 Comment Letter from David A. Stillwell at 1.

³⁸ *Id.*

³⁹ FERC September 11, 2017 Letter on Noncompliance with License Requirements from Thomas J. LoVullo, Chief, Aquatic Resources Branch, Division of Hydropower Administration and Compliance, to Wendy Jo Carey, Albany Engineering Corporation. Specifically, the letter cited noncompliance with Articles 206, 301, 401, 403, and 414, including the requirement to file a Fishways Facilities Operation and Maintenance Plan, Fishway Effectiveness Monitoring Plan and Fish Passage Design and Construction required by Appendices A (items 11-13), B (items 11.3, 11.5, 11.9), and C (items 1, 2, 4 and 5) of the project license.

⁴⁰ The letter adds that its terms do not grant, or intend to grant, an extension of time regarding the requirements set forth in the license and the letter.

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25. On September 20, 2017, the licensees filed a response explaining that “there is still much that needs to be worked out with the Resource Agencies before a meaningful compliance plan and schedule can be prepared...”⁴¹ Licensees attached a September 14, 2017 request to the Resource Agencies “to complete the amendment process.” The September 20 response added that it was “premature to move directly to dispute resolution when the process of amending the Settlement Agreement that commenced in July 2014 has not yet concluded.” In an October 11, 2017 filing, the licensees reiterated the “challenges” to starting construction of the expanded generation capacity, including the ongoing Ford property remediation and economic conditions. They again proposed a three-phase schedule for construction that would delay upstream fish passage until Phase 3 which, “given evolving market conditions,” will need “subsequent extensions of time...depending on economic conditions.”⁴²

26. In response to both filings, the Resource Agencies reiterated their objections to the licensees’ request for an extension of the schedules for both the expanded generating capacity and the fishways, as well as the characterization of what licensees deemed “settlement discussions” to “complete the amendment process.” The Resource Agencies asserted that the licensees had consistently failed to provide with detailed timelines for all phases of the project and complying with the fishway requirements, and that the Resource Agencies have tried for years to work with the licensees, with no progress made.⁴³ For example, New York DEC stated it had not received any details of the licensees’ plan and schedule, noting that the licensees have not “taken any meaningful steps to resolve the dispute,” and that, “despite more than 100 written interactions” between the licensees and the Resource Agencies, the latter “still have no idea” what the licensees want to do.⁴⁴ NMFS noted that it had previously explained that the licensees “had not complied with even the most preliminary information to seek an amendment, including new information

⁴¹ Licensees’ September 20, 2017 Letter at 1.

⁴² Licensees’ October 11, 2017 Letter at 7.

⁴³ FWS September 28, 2017, October 3, 2017, and October 23, 2017 Comment Letters from David A. Stillwell; NMFS September 22, 2017 and September 26, 2017 Response Letters from Louis A. Chiarella; New York DEC September 26, 2017 Comment Letter from Roy A. Jacobson, Jr.

⁴⁴ New York DEC September 26, 2017 Comment Letter from Roy A. Jacobson, Jr.

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at the site.”⁴⁵ The Resource Agencies urged the Commission to initiate enforcement proceedings to compel compliance.

27. Over the ensuing months, the licensees presented no evidence of progress in complying with their license requirements.⁴⁶

28. In a July 24, 2018 Progress Report, the licensees noted a June 22, 2018 letter they sent to the Resource Agencies proposing downstream fish passage studies be conducted by the S.O. Conte Anadromous Fish Research Center, and seeking the Resource Agencies’ concurrence. The proposal was predicated on the licensees’ previously proposed three-phase construction plan. On August 24, 2018, the licensees filed an update expressing concern there had been no response from the Resource Agencies.

29. In a September 25, 2018 filing, NMFS responded that the licensees’ plan did not comport with the fishway prescriptions set forth in the license, and that the licensees’ submittals “continue to be insufficient as a technical and procedural matter; the proposed fish passage measure is experimental and does not satisfy our resource protection needs or your license requirements; and they offer no schedule for meeting license requirements.”⁴⁷

30. On September 28, 2018, FWS similarly responded that the licensees’ submissions did not comport with the licensed fishway requirements and failed to address the licensees’ noncompliance with fishway requirements set forth in the license.⁴⁸

⁴⁵ NMFS September 26, 2017 Response Letter from Louis A. Chiarella (attaching September 22, 2017 reply to licensees).

⁴⁶ On June 21, 2018, the Corps filed a letter it simultaneously sent to the licensees notifying them that their February 2010 permit application for the discharge of fill material into waters of the United States to facilitate the rehabilitation and expansion of the Green Island Project had been withdrawn due to the licensees’ failure to respond to requests made in 2010 and 2013 for additional information needed to process the application. *See* Army Corps of Engineers June 21, 2018 Letter to Green Island Power Authority from Amy L. Gitchell, Chief, Upstate New York Section.

⁴⁷ NMFS September 25, 2018 Comment Letter from Louis A. Chiarella at 1-2. On September 26, 2018, the licensees filed a response taking issue with NMFS’ characterization of the proposed plan as “experimental.”

⁴⁸ FWS September 28, 2018 Comment Letter from David A. Stillwell at 1.

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C. October 3, 2018 Compliance Order

31. The Compliance Order details the licensees' violations of the requirements of the license, including:⁴⁹ (1) failing to file documentation of project financing by May 17, 2016, as required by Article 206; (2) failing to commence construction by August 17, 2016, as required by Article 301; (3) failing to file contract plans and specifications for project construction by June 16, 2016, as required by Article 302; (4) failing to submit a regulating plan for approval by June 16, 2016, from the Corps as required by Article 311; (5) failing to file Corps' written approval of construction plans and specifications prior to the start of construction, as required by Article 313; (6) failing to file certain plans and reports required by Article 401, including the following WQC Conditions: Condition 12, Fisheries Facilities Operation and Maintenance Plan by August 17, 2013; Condition 13, Fish Effectiveness Monitoring Plan by February 16, 2016; Condition 16, Excavation and Dredging Plan by February 16, 2016; Condition No. 17, Dewatering Plan by February 16, 2016; Condition 18, Disposal Plan, by February 16, 2016; Condition 19, Stormwater Pollution Prevention Plan, by May 16, 2016; Condition 21, Ford Motor Remediation Plan by February 16, 2014; (7) failing to file an Erosion and Sediment Control Plan by May 17, 2016, as required by Article 403; (8) failing to file a Recreation and Aesthetics Management Plan by December 31, 2017, as required by Article 412; (9) failing to file the Fish Passage Functional Design and Construction Plans required by Article 414; and (10) failing to submit a proposed plan and schedule addressing recommendations by its Independent Consultation, as required by dam safety obligations established by section 12.39 of the Commission's regulations. The Compliance Order found that licensees have also failed to construct and operate fishways as required by FWS's and NMFS' section 18 prescriptions and New York DEC's water quality certification.

32. The Compliance Order concluded that the licensees had shown a persistent pattern of missing deadlines and submitting deficient designs, plans, and specifications, and noted that the failure to comply with fishway requirements is particularly concerning.⁵⁰ The Compliance Order acknowledged that staff has been flexible in granting extensions, and both staff and the Resource Agencies have worked with the licensees for over five years to try to get plans developed and implemented to meet the license requirements. Despite such efforts, the Resource Agencies' have not received acceptable designs and specifications for the eel and Denil ladder designs or the fish exclusion device, although they are prepared to give conditional concurrence for the fish exclusion

⁴⁹ Nearly all of the following violations are based on the extended deadline for commencement of construction date of August 17, 2016.

⁵⁰ Compliance Order, 165 FERC ¶ 62,013 at P 33.

(continued ...)

device once the licensees provide a design that meets the engineering criteria.⁵¹ The Compliance Order discussed the licensees' contention that they have been trying to renegotiate and amend the various construction schedules and Settlement Agreement, while the Resource Agencies have indicated that they are not willing to delay construction of the fishways any further.⁵²

33. The Compliance Order considered NMFS's assertions that the licensees did not explain how they want to amend the schedules and Settlement Agreement, did not offer a biological justification or new information that would suggest an amendment is appropriate, provided limited information on what they plan to do at the project, and continue to propose indefinite delays in complying with fish passage requirements.⁵³ The Compliance Order noted that the licensees' latest proposal suggested delaying fish passage until the final phase of construction, while conceding that the final phase may not even be economically feasible.⁵⁴

34. The Compliance Order explained that the licensees' failure to begin construction of upstream and downstream fish passage facilities is having adverse effects on the surrounding fishery and aquatic resources in the Hudson River.⁵⁵ The Compliance Order found that, notwithstanding multiple extensions and other accommodations by staff and the Resource Agencies, the licensees made little progress toward meeting their compliance obligations, and that the violations of the terms and conditions of their license and the Commission's regulations are extensive. Therefore, the Compliance Order required the licensees to expeditiously address the listed violations and ordered the

⁵¹ *Id.* P 34 (citing FWS, October 23, 2017 Response Letter from David A. Stilwell at 2). The Compliance Order further noted the Resource Agencies' assertions that they have spent years working with the licensees to move the process forward "with minimal success," and that "the resource suffers every day that appropriate passage is not in place" *Id.* See, e.g., NMFS September 26, 2017 Response Letter from Louis A. Chiarella; New York DEC September 27, 2017 Comment Letter from Roy A. Jacobson, Jr.; FWS October 3, 2017 Comment Letter from David A. Stillwell.

⁵² *Id.* P 35. See, e.g., Albany Engineering filings from December 20, 2016, December 30, 2016, February 17, 2017, March 31, 2017, September 20, 2017, October 11, 2017 and October 26, 2017.

⁵³ *Id.* P 36 (citing NMFS October 27, 2017 Response Letter from Louis A. Chiarella).

⁵⁴ *Id.*

⁵⁵ *Id.* P 37.

(continued ...)

licensees to file, within 30 days of the date of the Compliance Order, a plan and schedule for commencing construction of the modified project works including the hydraulically operated crest gates, the auxiliary spillway, and the expanded powerhouse required by license Article 301.⁵⁶

35. On November 2, 2018, the licensees timely filed a request for rehearing of the Compliance Order.

II. Procedural Matters

36. On November 28, 2018, FWS filed an answer to the licensees' rehearing request; on November 30, 2018, New York DEC and NMFS separately filed answers to the licensee's rehearing request.

37. Commission regulations provide that an answer may not be made to a request for rehearing, unless the decisional authority orders otherwise.⁵⁷ Because the answers contain information that can assist us in resolving the issues on rehearing, we will permit the answers.

III. Discussion

38. On rehearing, the licensees request that the Commission "reverse its finding that the licensees are in violation of their license," but acknowledge that they will not be able to comply with license requirements.⁵⁸ The licensees assert that delays with the Ford property remediation and the adverse economic conditions have resulted in changed circumstances that are beyond their control and "make it impossible to implement the schedules set out in the license."⁵⁹ They argue that because the Commission declined to consider their request to modify the project construction schedules set forth in the license to address these "challenges," it would be "arbitrary and capricious" for the Commission to find the licensees out of compliance.⁶⁰

⁵⁶ For detailed deadlines see Ordering Paragraphs (A) through (K) of the Compliance Order.

⁵⁷ 18 C.F.R. § 385.213(a)(2) (2018).

⁵⁸ Rehearing Request at 34.

⁵⁹ *Id.* at 19.

⁶⁰ *Id.*

(continued ...)

A. Remediation of Ford Property Is Not an Obstacle to Complying with License Terms and Conditions

39. The licensees assert on rehearing that much of their construction work requires ground-disturbing activity, including excavation and blasting, on or close to the Ford property contaminated land “that is not yet sufficiently remediated.”⁶¹ They add that, as of October 24, 2018, remediation is continuing, and “there is no known termination date for the remediation of the Ford land.”⁶² The licensees state that, given this information, they “do not believe that Ford or New York DEC would permit the construction activities necessary for expansion of the Green Island Project powerhouse and associated changes...before remediation is resolved.”⁶³

40. In its November 30, 2018 reply, New York DEC challenges the claim that remediation of the Ford property is a primary obstacle to complying with the terms and conditions of the license. New York DEC notes the remediation at the Ford property does not affect the licensees’ obligations under their license, the water quality certification, or the Settlement Agreement. New York DEC asserts that neither completed remediation nor an estimated completion date “is a condition precedent to construction of the required modifications to the Project.”⁶⁴ New York DEC adds that it issued the water quality certification “in part, to review and address the Project’s potential impacts” on the remediation, yet the licensees failed to file any of the required construction plans and drawings.⁶⁵ New York DEC notes that, as of the date of the issuance of the Compliance Order, the licensees had not contacted the New York DEC remediation office in over three years.⁶⁶ New York DEC concludes that it cannot agree with the licensees’ allegations as to what it “would/would not approve or what impact the Project would have on the remediation area, site hydrology, etc. without reviewing detailed construction plans and drawings for the Project.”⁶⁷

⁶¹ *Id.* at 12.

⁶² *Id.* at 14.

⁶³ *Id.* at 15.

⁶⁴ New York DEC November 30, 2018 Response at 2.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

41. As noted above, Article 401 and condition 21 of the water quality certification require that, at least six months prior to the start of construction, the licensee must submit to the New York DEC their remediation plan for the Ford project lands within the project boundary: given the extended August 17, 2016 deadline for start of construction, the deadline for submitting the plan was February 16, 2016. The record indicates that the licensees have made minimal, if any, efforts to consult with New York DEC in meeting the requirements set forth in the long-overdue condition 21. In short, the licensees' inability to start construction because they have not received necessary approvals from New York DEC is self-inflicted. By failing to submit the remediation plan required by condition 21, the licensees cannot—and will not—receive the necessary approvals from New York DEC to commence construction.

42. We also reject the licensees' suggestion that staff was "arbitrary and capricious" in declining to grant their request to modify the project construction schedule. As discussed above, the record in this proceeding shows that staff did not "decline" to grant the modifications; rather, the licensees either withdrew their request for modification to the schedule, or were informed by staff that the request could not be acted upon, in both cases because the Resource Agencies did not agree to the modifications and expressed numerous concerns over the insufficient information provided by the licensees.⁶⁸

B. Economic Viability is Not Relevant

43. The licensees argue they are unable to comply with the terms and conditions of the license because power prices have dropped since the license application was filed in 2009, rendering the generation expansion uneconomical. Licensees note that the power sales rates today are roughly half of what they were when the relicensing proceeding for the Green Island Project started.⁶⁹

⁶⁸ Licensees assert it was error for the Commission to find violations of their license for failing to commence construction of the expanded facilities within four years of license issuance. They note that pursuant to Section 3001 of American's Water Infrastructure Act of 2018, which amended FPA section 13 to allow for up to ten years from license issuance to commence construction, "Congress recognized that modern hydropower development may well take significantly longer" than the four year limit previously allowed. However, licensees provide no justification for reversing the findings of violations based on this law. *See* Rehearing Request at 19-20 (citing Pub. L. No. 115-270 § 3001, 123 Stat 3765, 3862, October 23, 2018).

⁶⁹ Rehearing Request at 17. The licensees add that the 2012 license order "appears to have omitted the cost of the non-environmental capital improvements included in the license," which they allege explains what they deem the "significant divergence" between staff's estimate of the cost of project power and the estimated power cost included in the *(continued ...)*

44. The licensees provide no support for their contention that adverse change in project economics merits relief from complying with the terms and conditions of their license. In fact, it is well settled that unfavorable project economics are not a justification for failing to comply with the terms and conditions of a license. Where the Commission concludes that the public interest requires certain conditions for a hydroelectric license that reduces private benefits to the licensee, the Commission will leave to the applicant the decision “whether to accept the license and any financial risk that entails.”⁷⁰ As we recently explained, a licensee’s requirement to satisfy all license terms does not change, regardless of what revenues are generated from the project.⁷¹ If this were not the case, the licensees could decline to meet their public interest obligations anytime they decided that their projects were not profitable.⁷² Moreover, we note that licensees accepted the 2012 license, even though, by their own admission, they observed drops in power prices since 2009.

C. Fish Passage Requirements Not Tied to Project Expansion

45. On rehearing, the licensees challenge the Compliance Order’s finding that they are in violation of the requirements to construct and operate fishways as required by the 2012 license ordering paragraphs (D) through (F). They assert that, contrary to the Compliance Order’s finding, the timing of fish passage installation is not independent from the construction of the generation expansion, but rather is tied to that construction.⁷³ Licensees cite to both the 2009 Settlement Agreement, which they assert “expressly keys

license application. The licensees assert that “had the estimate of the cost to construct the project been accurate, the project would still be economically viable today.” We decline to address the merits of this new argument as it is an untimely collateral attack on the 2012 license order. Moreover, as articulated in *Mead Corporation, Publishing Paper Division*, 72 FERC ¶ 61,027 (1995), the basic purpose of the Commission’s economic analysis is to provide a general estimate of the potential benefits and the costs of a project. The Commission makes no forecasts or assumptions concerning potential future inflation, escalation, or deflation beyond the license issuance date.

⁷⁰ *Id.*, see also *City of Tacoma, Wash.* 107 FERC ¶ 61,288 (2004) (“[T]here is no merit to the suggestion that otherwise reasonable conditions become unreasonable per se whenever they would render a project uneconomic...there is no guarantee that a license will make a profit.”).

⁷¹ *Boyce Hydro Power LLC*, 166 FERC ¶ 61,029, at P 20 (2019).

⁷² *Boyce Hydro Power LLC*, 162 FERC ¶ 61,116, at P 20 (2018).

⁷³ Rehearing Request at 24.

(continued ...)

the schedule for fishway construction to the expansion of the project works,” as well as contemporaneous filings from NMFS and FWS that they claim “emphasized the link between the specific passage facilities identified in the Settlement Agreement and the changes in project flows caused by the proposed generation expansion.”⁷⁴ The licensees claim that because they were precluded from commencing construction of the generation expansion due to circumstances beyond their control, they are not in violation of the license requirements to construct and operate fishways.

46. As noted above and in the Compliance Order, the licensees are required by their license, which includes the mandatory conditions imposed by the Resource Agencies, to commence construction of the generation expansion by August 17, 2016. That being the case, the licensees cannot use their failure to comply with the requirement to construct the project expansion as an excuse for noncompliance with the fishway requirements. In any event, the licensees’ argument that the fishway construction requirements are not independent from the generation expansion is unavailing. Although the licensees argue that the 2009 Settlement Agreement links the fish passage facilities to the construction of the new generation facilities, as noted in the implementation schedule above, FWS’s fishway protection measures are tied to the issuance of the license, and not the expansion of the project works.⁷⁵ Nothing in the license conditions compliance with the fishway requirements on project expansion. The licensee did not seek rehearing of the License Order, and cannot now collaterally attack that order or the mandatory conditions contained in it.

D. Dam Safety Compliance

47. With regard to dam safety requirements, licensees maintain that, pursuant to section 12.39 of the Commission’s regulations, they timely submitted to the Commission’s New York Regional Office the required proposed plan and schedule addressing the dam safety inspection recommendations made by their independent consultant, but only discovered after issuance of the Compliance Order that the document did not appear on eLibrary.⁷⁶ Licensees note that on October 15, 2018, they sent the

⁷⁴ *Id.* at 24-27 (citing February 2, 2010 letter accompanying FWS’s preliminary prescriptions, and November 29, 2010 comments and final prescriptions for fish passage facilities.)

⁷⁵ We note that NMFS’s section 18 prescriptions require fish passage facilities consistent with the schedule outlined in the Settlement Agreement.

⁷⁶ Rehearing Request at 32-33.

(continued ...)

New York Regional Office “an additional copy” of the October 27, 2017 compliance documentation, and also provided a copy in their request for rehearing.⁷⁷

48. Although it is licensees’ responsibility to ensure documents are filed consistent with the Commission’s filing guidelines at 18 CFR part 385 subpart T, based on licensees’ representations and the fact that the document is now filed in eLibrary, we will grant rehearing with respect to the finding of a violation of section 12.39 of the regulations.

E. Request for Stay and Technical Conference

49. Licensees request that, in the event the Commission affirms the Compliance Order, the Commission stay the commencement of construction requirements pending a resolution to reach agreement on modifications to the construction schedule, and order a Technical Conference on these matters.⁷⁸ Licensees assert that their request for a stay does not involve a case where the licensee “has been dilatory,” but rather, a case where licensees have “been working diligently to attempt to find a resolution” in light of the “unforeseen circumstances beyond licensees’ control.”⁷⁹

50. As explained in previous orders, the Commission applies the standard test set forth in the Administrative Procedure Act,⁸⁰ i.e., a stay will be granted “if justice so requires.”⁸¹ We have granted requests for a stay of the commencement of construction deadline only in narrowly circumscribed circumstances.⁸² We will not grant a request for a stay to relieve a licensee of its long-term failure to comply with its license, nor will we stay a license to give a licensee time to reassess the financial feasibility of the project.⁸³ Here, the licensee has failed, after several years and notwithstanding substantial efforts

⁷⁷ *Id.* at 33-34.

⁷⁸ *Id.* at 34.

⁷⁹ *Id.* at 34-37.

⁸⁰ 5 U.S.C. § 705 (2012).

⁸¹ *See, e.g., Clifton Power Corp.*, 58 FERC ¶ 61,094, at 61,343 (1992).

⁸² *See, e.g., East Bench Irrigation District*, 59 FERC ¶ 61,277, at 62,005-06 (1992).

⁸³ *R.L Garry Corp.*, 62 FERC ¶ 61,266 (1993).

(continued ...)

by Commission staff and the Resource Agencies, to comply with numerous license requirements. Accordingly, we decline to grant what is essentially an open-ended stay.⁸⁴

51. We also decline to direct staff to convene a technical conference. The record demonstrates that the licensees have had ample time to meet their license requirements, including starting construction of the generation expansion and associated facilities, as well as installing and operating the fishway protection measures. Indeed, on November 2, 2018, pursuant to Ordering Paragraph C of the Compliance Order, the licensees submitted a plan and schedule for completing consultation with the Resource Agencies within four months of the date of the Compliance Order (February 3, 2019) on the required upstream and downstream fish passage design plans. The licensees have since requested four extensions of time to file the design plans, but have still failed to file them.⁸⁵ For these reasons, we find that a technical conference would not be productive, and therefore reject the licensees' request to direct staff to convene one.

52. We reiterate the Compliance Order's admonition that the licensees' existing violations will be made part of the compliance history for this project, and the Commission may take further action pursuant to section 31 of the FPA,⁸⁶ including an order to cease generation or subject the licensee to the enforcement and civil penalty provisions of section 31, which includes penalties exceeding \$20,000 for each violation, per day,⁸⁷ or license revocation.⁸⁸

⁸⁴ As the licensees note in their rehearing request, on November 2, 2018, the licensees filed what they deem a "Proposed Plan for License Compliance Activities," that purports to respond to the Compliance Order and sets forth a plan for coming into compliance with the 2012 license. This filing reiterates the same issues the licensees raise on rehearing, including the proposed three-phased construction schedule discussed above. This filing will be addressed in a separate proceeding.

⁸⁵ Orders Granting Extension of Time issued February 27, 2019, March 22, 2019, and May 10, 2019. On June 14, 2019, staff denied the licensees' fourth request, noting that they provided no assurances they would not seek additional extensions of time.

⁸⁶ 18 U.S.C. § 823b (2012).

⁸⁷ Civil Monetary Penalty Inflation Adjustments, 18 C.F.R. § 385.1602(b) (2018).

⁸⁸ The Compliance Order further notes that the Commission takes fishway obligations seriously, as evidenced in our order revoking Eastern Hydroelectric Corporation's license for failure to construct required fishways. *See generally Eastern Hydroelectric Corp.*, 149 FERC ¶ 61,036 (2014). The courts have affirmed the Commission's authority to revoke project licenses for failure to construct such fishways. (continued ...)

IV. Conclusion

53. The Green Island Project has been operating under the new license for almost seven years with no measurable advancement towards any of the license requirements discussed above. The licensees acknowledge that they have not begun construction of either the generation expansion or the fishways required by the license. The licensees' professed concerns regarding the economic viability or the ongoing Ford property remediation of the Green Island Project do not relieve them of their obligations to comply with the terms and conditions of their license.

54. For the reasons discussed above, we deny licensees' rehearing request of the October 3, 2018 Compliance Order in part, grant their rehearing request in part, deny their request for a stay, and deny their request for a technical conference.

The Commission orders:

(A) Green Island Power Authority and Albany Engineering Corporation's November 2, 2018 request for rehearing is denied in part and granted in part as set forth in the order.

(B) Green Island Power Authority and Albany Engineering Corporation's requests for a stay of the license conditions it is violating is denied.

(C) Green Island Power Authority and Albany Engineering Corporation's request for a technical conference is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

See Eastern Hydroelectric Corp. v. FERC, 887 F.3d 1197, 1204 (2018) (rejecting Petitioner's argument that the Commission's revocation of its license was a "“flagrant departure' from the Commission's past enforcement decisions”).