

136 FERC ¶ 61,044  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Erie Boulevard Hydropower, L.P.

Project No. 2539-064

ORDER DENYING REHEARING

(Issued July 21, 2011)

1. On April 14, 2011, Green Island Power Authority (Green Island) filed a request for rehearing of certain portions of the Commission's March 17, 2011 order<sup>1</sup> denying its request for rehearing of the Commission's April 15, 2010 order on remand and reinstating the new license for the School Street Project No. 2539.<sup>2</sup> The project is located on the Mohawk River in Albany and Saratoga Counties, New York. Green Island seeks rehearing of the Commission's denial of several motions to reopen the record in this proceeding, as well as the Commission's consideration of a flow analysis prepared in response to Green Island's rehearing request. For the reasons discussed below, we deny rehearing.

**Background**

2. A detailed procedural history appears in our orders of February 15, 2007,<sup>3</sup> and April 15, 2010.<sup>4</sup> Briefly, the Commission issued a new license for the School Street Project on February 15, 2007.<sup>5</sup> On judicial review, the U.S. Court of Appeals for the

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<sup>1</sup> *Erie Boulevard Hydropower, L.P.*, 134 FERC ¶ 61,205 (2011) (*Erie Boulevard*).

<sup>2</sup> *Erie Boulevard*, 131 FERC ¶ 61,036 (2010).

<sup>3</sup> *Erie Boulevard*, 118 FERC ¶ 61,101 (2007).

<sup>4</sup> *Erie Boulevard*, note 2 *supra*.

<sup>5</sup> *Erie Boulevard*, note 3 *supra*.

Second Circuit vacated the license and remanded the case to the Commission.<sup>6</sup> On April 15, 2010, the Commission issued an order on remand and reinstated the new license for the School Street Project to the applicant, Erie Boulevard Hydropower, L.P. (Erie).

3. On May 17, 2010, Green Island filed a request for rehearing. Among other things, Green Island attached to its rehearing request and filed a motion to include in the record several documents related to Erie's application for and receipt of certification for the School Street Project under New York's renewable energy portfolio standards.

4. On June 16, 2010, Green Island filed a motion to include in the record evidence related to the Idaho National Laboratory report that the Commission relied on in its order on remand to assess the economic feasibility of the Cohoes Falls Project, an alternative that Green Island had proposed.

5. On October 14, 2010, Green Island filed a motion to include in the record an October 15, 2009 determination of an administrative law judge of the Division of Tax Appeals for the State of New York.

6. On December 28, 2010, Green Island filed a motion to include in the record the final reviewer's report to the Low Impact Hydropower Institute for the School Street Project.

7. On January 21, 2011, Green Island filed a motion to include in the record Erie's January 6, 2011 letter to the Commission requesting an extension of time to start and complete construction of a new 11-megawatt (MW) turbine-generator unit at the School Street Project that was authorized, but not required, by the license for the project.

8. On March 15, 2011, Green Island filed a motion to include in the record a flow modeling analysis, using the Indicators of Hydrologic Alteration (IHA) software, that Green Island prepared to compare the changes in the flow regime of the project as proposed in the license application with those of the 2005 settlement agreement.

9. On March 17, 2011, the Commission issued its order denying rehearing and denied, with limited exceptions, Green Island's motions to include these documents in the record. On April 18, 2011, Green Island filed a limited request for rehearing, objecting to the Commission's denial of its motions.

10. On May 3, 2011, Erie filed a motion requesting that the Commission include in the record Erie's previously-submitted responses to Green Island's filings if, in response to

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<sup>6</sup> *Green Island Power Authority v. FERC*, 577 F.3d 148 (2d Cir. 2009) (*Green Island v. FERC*).

Green Island's rehearing request, the Commission includes in the record the materials that Green Island submitted to which Erie's responses pertain. Erie also filed a response to Green Island's March 15, 2011 motion to reopen the record, requesting that the Commission include in the record and consider Erie's answer if it includes Green Island's March 15, 2011 motion in the record.

## **Discussion**

### **A. The Court's Remand Decision**

11. Green Island argues that the Commission erred in determining that the record did not reopen following the Second Circuit's decision vacating the new license for the School Street Project and remanding the case to the Commission for further proceedings. In its March 17, 2011 *Order Denying Rehearing*, the Commission determined that the record closed when the Commission issued its September 21, 2007 order on rehearing of the 2007 license order. Green Island maintains that this determination is incorrect, because it fails to account for the court's vacatur and remand, which had the effect of "returning matters to the *status quo ante*, namely, a pending . . . license application, disposition of which is a matter for the Commission to resolve on remand."<sup>7</sup> As a result, Green Island argues that, from the time of the court's remand until the Commission acted on rehearing of its order reissuing the license, the record "necessarily remained open so that the Commission could avail itself of new information it might need to comply with the Court's guidance,"<sup>8</sup> and that all of the evidence that Green Island proffered during that time period should have been accepted into the record.

12. The court's decision reinstated Erie's annual license and relicense application for the School Street Project, leaving it for the Commission to determine what action might be appropriate with respect to the pending application. It did not automatically reopen the record, or require the Commission to admit all of the evidence that Green Island sought to introduce. The relicensing proceeding concluded with the Commission's issuance of the new license and its order denying rehearing. On remand, the court specifically directed the Commission to consider whether the 2005 settlement was a material amendment of the 1991 relicense application, and if so, what further action might be required with regard to Green Island's motion to intervene and consideration of the Cohoes Falls alternative. Because we determined that the settlement was not a material amendment, we were not required by the court's decision to address other issues,

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<sup>7</sup> Request for Rehearing at 6 (quoting *City of Fredericksburg*, 53 FERC ¶ 61,343, at 62,249 (1990)).

<sup>8</sup> *Id.* at 7.

but we did so to the limited extent necessary to determine whether the Cohoes Falls Project was a feasible alternative to the School Street Project.

13. Reopening the record is only required when it clearly appears that the new evidence would compel or persuade to a contrary result.<sup>9</sup> As explained in more detail below, the documents and information that Green Island sought to introduce, which we declined to accept in our order on rehearing, do not meet this standard. In addition, most of these documents were not relevant to the issues before us on remand. As a result, the Commission was not required to reopen the record to include them. Moreover, the Commission would in any case have only been required to reopen the record with regard to evidence concerning the limited issues that the court directed the Commission to consider. The court's decision did not require that we revisit the merits of all aspects of the relicensing proceeding.

14. Green Island argues that the Commission's rejection of its proffered evidence violates sections 10(a)(1) and 15(a)(2) of the Federal Power Act (FPA), which require that a licensed project must be best adapted to a comprehensive plan for improving and developing the waterway to serve the public interest. Green Island contends that this determination cannot be made without considering all of the evidence available at the time the decision is made. Green Island also argues that the Commission's action is inconsistent with its affirmative duty to consider all relevant facts and ensure that the record is complete, as discussed in the *Scenic Hudson* case.<sup>10</sup>

15. Green Island's argument is based on the assumption that all of its proffered evidence was relevant. In fact, we included its evidence where we found it relevant to the issues on remand, and excluded evidence that we found not relevant to those issues. We also explained our reasons for doing so.<sup>11</sup> Nothing in FPA sections 10(a)(1) and 15(a)(2) or the *Scenic Hudson* decision would require us to include all available evidence, regardless of relevance.

16. In addition, as discussed below, some of Green Island's proffered evidence was inexcusably late. As the Supreme Court has observed:<sup>12</sup>

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<sup>9</sup> See *Friends of the River v. FERC*, 720 F.2d 93, 98 n.6 (D.C. Cir. 1983).

<sup>10</sup> *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (1965) (*Scenic Hudson*).

<sup>11</sup> *Erie Boulevard*, 134 FERC ¶ 61,205 at P 12-13, 23, 26, and n.22.

<sup>12</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55 (1978)

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Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

17. Green Island further argues that keeping the record open is compelled by the court's statement that the Commission "is statutorily obligated, pursuant to the 'best adapted' standard set forth in sections 10 and 15 of the FPA, to give full consideration to all feasible alternatives, even where it ultimately cannot license those alternatives."<sup>13</sup> As explained in our order on remand, the court instructed that we first consider whether the 2005 settlement was a material amendment of the relicense application, and if so, to consider Green Island's motion to intervene as timely filed and evaluate it accordingly. We have found that the settlement was not a material amendment, and that we properly denied Green Island's untimely motion to intervene.<sup>14</sup> As a result, the court's decision did not require us to take the next step to consider whether the Cohoes Falls Project was a feasible alternative to the School Street Project. We nevertheless undertook that review to ensure that we had considered all possibly relevant factors, and found that the Cohoes Falls Project is not an economically feasible alternative. Therefore, the mandate of *Scenic Hudson* to consider all feasible alternatives is not applicable, because the Cohoes Falls Project is not a feasible alternative.

**B. Documents Related To Erie's Certification Under New York's Renewable Energy Portfolio Standards**

18. Green Island attached to its rehearing request a number of documents related to Erie's application for and receipt of certification under New York's renewable energy portfolio standards.<sup>15</sup> In our order denying rehearing, we declined to include these

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(quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)).

<sup>13</sup> *Scenic Hudson*, 354 F.2d at 620.

<sup>14</sup> *Erie Boulevard*, 134 FERC ¶ 61,205 at P 77.

<sup>15</sup> These documents include: Attachment B (an Affidavit of Marc S. Gerstman) and the exhibits that are attached to it, specifically, Exhibit 1 (New York's assessment of Erie's application, with Erie's application and independent engineer's report attached), Exhibit 2A (Erie's application package checklist and related documents), Exhibit 2B (a

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documents in the record because they are not relevant to the matters at issue in the remanded relicensing proceeding.

19. Green Island seeks rehearing of that determination, arguing that, even if the record closed in September 2007, the Commission erred in failing to reopen the record to accept these documents pursuant to Rule 716 of the Commissions Rules of Practice and Procedure,<sup>16</sup> and in failing to accept relevant evidence necessary to create a complete record for decision in this proceeding. Rule 716(c) provides that the Commission may reopen the record after the initial decision is served if the Commission “has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest.”<sup>17</sup> Green Island maintains that, because its motions to lodge evidence demonstrated a number of changed factual circumstances, the Commission erred in excluding the evidence.

20. Specifically, Green Island argues that the documents demonstrate that Erie made physical changes to the School Street Project between February 15, 2007 (when the Commission issued the new license, which the court vacated in 2009), and April 15, 2010 (when the Commission reinstated the new license in its order on remand), and that these physical changes are relevant to whether circumstances had substantially changed, such that the Commission could not simply reissue a license identical to the one it had previously issued without reopening the record to take into account the effect of these changes. Green Island adds that these documents show “that the School Street Project in 2009 was physically a different project from the School Street Project in February 2007”

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second copy of Erie’s independent engineer’s report by Kleinschmidt Associates, already included as part of Exhibit 1), Exhibit 3 (New York’s response to request for records from Marc Gerstman’s law office), Exhibit 4 (New York’s request for proposal standard form contract), and Exhibit 5 (New York’s internal email correspondence regarding the provisional certification applications and their qualification status).

<sup>16</sup> 18 C.F.R. § 385.716 (2011).

<sup>17</sup> *Id.* at § 385.716(c). Rule 716(c) applies to matters set for hearing under subpart E of the Commission’s regulations; it does not apply to notice and comment hearings under section 4.34(b) of the Commission’s regulations, 18 C.F.R. § 4.34(b) (2011). An initial decision is defined in Rule 702(a), 18 C.F.R. § 385.702(a) (2011), and is governed by the procedures set forth in Rule 708, 18 C.F.R. § 385.708 (2011). A decision issuing a hydroelectric license after a notice and comment hearing is not an initial decision; it is a final decision subject to rehearing under Rule 713, 18 C.F.R. § 385.713 (2011). For this reason, we used the standard articulated in paragraph 13 above to evaluate Green Island’s motion.

and “was operating under different protocols that it had been before the February 2007 license originally issued.”<sup>18</sup>

21. As explained in our March 17, 2011 Order Denying Rehearing, Green Island’s argument rests on the mistaken assumption that, under the 2007 license, excavation of the power canal would not occur unless the new 11-MW turbine were installed. Under Article 401 of the license and Condition 15 of the water quality certification for the School Street Project, Erie was required to file a power canal excavation and sediment removal plan.<sup>19</sup> Article 301 of the license authorized, but did not require, the new turbine. These provisions permitted Erie to excavate the power canal without installing the new turbine. Thus, there is no basis for Green Island’s assertions that this resulted in a different project or a third option that allowed the project to operate under different conditions than were contemplated by the 2007 license.<sup>20</sup>

22. In light of the fact that the 2007 license authorized the canal excavation without tying it to installation of the new turbine, Green Island’s documents and arguments regarding Erie’s application for and receipt of certification under New York’s renewable energy portfolio standards are simply not relevant to our determination of whether the 2005 settlement was a material amendment of the 1991 license application. Similarly, these documents and arguments are not relevant to a determination of whether we could reissue a new license to Erie in accordance with the FPA following the court’s remand. Although the canal excavation resulted in a minor change in the project to allow the existing turbines to operate more efficiently, this change was contemplated by the 2007 license, and the fact that it was underway at the time of the court’s decision would not affect the Commission’s authority to reissue a new license with the same terms and

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<sup>18</sup> Request for Rehearing at 13.

<sup>19</sup> Among other things, Condition 15 of the water quality certification (which is a condition of the license) states: “The Certificate Holder proposes to increase the hydraulic capacity of the power canal.” On September 20, 2007, Erie filed its plan for the first phase of canal excavation involving modifications to the upper gatehouse. This plan explained (at 1) that the second phase of the planned work would include excavation of the power canal to improve hydraulic capacity and construction of fish passage facilities.

<sup>20</sup> There was no need to prepare a separate analysis of the School Street Project with the existing turbines and the increased hydraulic capacity of the power canal, because the increased hydraulic capacity after the excavation (6,600 cfs) was within the range of the two settlement alternatives already considered (i.e., 7,510 cfs with the new 11-MW turbine and 5,910 cfs without it).

conditions authorizing the change.<sup>21</sup> Thus, this information concerning changed circumstances lacks relevance and would not compel or persuade us to reach a contrary result in this case. We therefore deny rehearing of this issue.

C. **June 16, 2010 Motion to Include Documents Related to the Commission's Use of the Idaho National Laboratory Report**

23. With its June 16, 2010 motion to reopen the record, Green Island sought to introduce several documents related to the Commission's use of the Idaho National Laboratory Report to evaluate the financial feasibility of the Cohoes Falls alternative.<sup>22</sup> In our order denying rehearing, we granted the motion and addressed these documents to the extent necessary to allow both Green Island and Erie, who filed an answer to the motion, to respond to new arguments and analyses arising from our use of the Idaho National Laboratory Report.

24. On rehearing, Green Island requests that we clarify what documents we accepted and, to the extent that we excluded any part of the June 16, 2010 motion and attachments, seeks rehearing. Green Island contends that all of the evidence it proffered went towards challenging the Commission's use of the Idaho National Laboratory Report to find the Cohoes Falls proposal not economically feasible, and that the evidence is therefore "directly relevant to the central issue of the case."<sup>23</sup>

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<sup>21</sup> Although the matter is far from clear, it is possible that Green Island might now be seeking to suggest some relationship between the court's remand and Erie's compliance with the standards for New York's certification program. *See* Request for Rehearing at 7 n. 8. We need not address this possibility, because Erie's compliance with these state standards is a matter for the state, not the Commission. Moreover, Green Island never raised or briefed this issue before us, and its mere mention in a footnote is not sufficient to preserve the issue. *See OMYA, Inc. v. FERC*, 111 F.3d 179, 181 (D.C. Cir. 1997).

<sup>22</sup> These documents are: Attachment 1, an Affidavit of James A. Besha, and Exhibit 1, an Excel database; Exhibit 2, an article published in 1982 in Engineering News Record entitled *Small Hydro: Fords to Cadillacs*; and Exhibit 3, an email from Robert A. Baumgarten, U.S. Bureau of Reclamation, to Mr. Besha. We note that on June 16, 2010, Green Island also filed an answer to Erie's answer to Green Island's request for rehearing, and attached an affidavit of Mr. Besha with five attachments, three of which were the same as the three exhibits listed above. Green Island did not seek rehearing of the Commission's treatment of its June 16, 2010 Answer to Erie's answer.

<sup>23</sup> Request for Rehearing at 14.

25. The economic feasibility of the Cohoes Falls Proposal is not the central issue in this case. As discussed in the court's order on remand, the central issue in this case is whether the 2005 settlement was a material amendment of the 1991 license application. A secondary issue is whether, if the settlement was a material amendment, the Cohoes Falls Project is a feasible alternative to the School Street Project. The economic viability of the Cohoes Falls Project is one aspect of that secondary issue.

26. We clarify that we included in the record Mr. Besha's affidavit, the Excel database used in preparing the Idaho National Laboratory report (Exhibit 1),<sup>24</sup> and the 1982 *Small Hydro – Fords to Cadillacs* article (Exhibit 2). We did not include the email from Mr. Baumgarten of the U.S. Bureau of Reclamation (Exhibit 3), because we found that it was an improper supplementation of Green Island's rehearing request. Green Island points out that this email relates to the appropriateness of our use of the Idaho National Laboratory report. However, as noted in our March 17, 2011 Order Denying Rehearing, this email is of limited relevance and lacks probative value. There is nothing in the record to suggest that the caution about indexing expressed in the email represents the official position of the U.S. Bureau of Reclamation, and Green Island made no attempt to provide any specific information about the possible significance of this "potential error."<sup>25</sup> Moreover, the email contains nothing more than a vague statement that indexing a period of longer than five years has "associated inherent risks."<sup>26</sup> Thus, including this email in the record would not compel or persuade us to reach a contrary result regarding the appropriateness of our use of the Idaho National Laboratory Report. We therefore deny rehearing of this issue.

**D. October 14, 2010 Motion to Take Official Notice of Tax Determination**

27. With its August 14, 2010 motion to take official notice or to reopen the record, Green Island sought to include a state administrative determination that, for tax purposes, the Erie partnership was terminated on September 28, 2004, as a result of its sale by one

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<sup>24</sup> Green Island suggests that we might have regarded the Excel database as "suspect" because it differs from the database provided as part of the Idaho National Laboratory report. Request for Rehearing at 15 n.15. To the contrary, we pointed this out to avoid any possible confusion, because Green Island had failed to make this distinction clear in the description of the database that it proffered.

<sup>25</sup> Besha Affidavit at 6 (attached to Green Island's June 16, 2010 Motion to reopen the record).

<sup>26</sup> Exhibit 3 at 3 (attached to Green Island's June 16, 2010 Motion to reopen the record).

corporate owner to another. In our order denying rehearing, we denied the motion, finding that the status of the Erie partnership for tax purposes was not relevant to Erie's status as the license applicant or licensee of the School Street Project. Green Island seeks rehearing of that determination.

28. Green Island alleges that the Erie partnership terminated in 2004, and contends that this "is relevant to the issue of whether the Erie Boulevard partnership that existed in 2010 should be granted a new license for the School Street Project."<sup>27</sup> However, Green Island provides no information to suggest that the Erie partnership in 2004 differed in any way from the Erie partnership in 2007 (when the Commission first relicensed the project) or in 2010 (when the Commission reissued the new license), apart from the change in corporate ownership of the partnership. At all times during this relicensing proceeding since the Commission approved a transfer of the license in 1999,<sup>28</sup> including following the court's remand, Erie Boulevard Hydropower, L.P. has been the license applicant and licensee. Any possible changes in a licensee's corporate ownership, without any changes in the identity of the licensee or its ability to carry out the terms of the license, are not relevant in Commission licensing proceedings.<sup>29</sup> We therefore deny rehearing of this issue.

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<sup>27</sup> Request for Rehearing at 16.

<sup>28</sup> See *Niagara Mohawk Power Corp. and Erie Boulevard Hydropower, L.P.*, 88 FERC ¶ 62,082 (1999).

<sup>29</sup> License transfers and certain leases of project property require Commission approval. See 18 C.F.R. §§ 9.1 through 9.3 and 9.10 (2011), respectively. There is no similar requirement to obtain Commission approval when a licensee's corporate ownership changes. In addition, the Commission's administrative record already reflects the change in Erie's corporate ownership that Green Island seeks to introduce with its proffered tax determination. The 1999 Order Approving the License Transfer notes that Erie's general partner is Orion Power New York GP, Inc., and its sole limited partner is Orion Power New York LP, Inc. *Id.* at 64,150. On October 21, 2004, shortly after the sale from Orion to Brascan, Brascan Power New York filed, on behalf of Erie Boulevard Hydropower, L.P., the required annual generation report for the School Street Project. Subsequent filings were made either by Erie or by Brascan on Erie's behalf. On September 24, 2007, Erie informed the Commission that Brascan Power had officially changed its name to Brookfield Power, and that this change would have no impact on the status of its license for the School Street Project, because Erie Boulevard Hydropower, L.P. remained the licensee and was still a wholly-owned subsidiary of Brookfield Power. See Letter from Steven Murphy, Erie Boulevard Hydropower, L.P., to Kimberly Bose, FERC (filed Sept. 25, 2007). At no time during these proceedings has the status of Erie

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**E. December 28, 2010 Motion to Include Documents Related to the Low Impact Hydropower Institute's Certification of the School Street Project as a Low Impact Hydropower Project**

29. With its December 28, 2010 motion, Green Island sought to include in the record documents related to Erie's application for and receipt of certification from the Low Impact Hydropower Institute (Institute) that the School Street Project meets the Institute's criteria for certification as a low impact hydropower project. In our order denying rehearing, we denied Green Island's motion, finding that it was an improper supplementation of Green Island's rehearing request and in any event lacked relevance to the issues on rehearing, because it concerned a decision of the Institute, rather than any alleged errors in the Commission's order on remand.

30. On rehearing, Green Island contends that we mischaracterized its motion and improperly rejected relevant evidence "on the impact of the School Street Project on fisheries."<sup>30</sup> Green Island maintains, without elaboration, that its motion is therefore related to "a key issue about which the Commission should have been concerned,"<sup>31</sup> citing in support the provisions of FPA section 10(a)(1), which requires that the project be best adapted to a comprehensive plan for improving or developing a waterway for a full range of public interest factors, including the adequate protection, mitigation, and enhancement of fish and wildlife resources.

31. Green Island has failed to demonstrate the relevance of its proffered evidence on rehearing. Its brief statement that the documents relate to the project's effect on fisheries is insufficient to preserve the issue on rehearing. We have nevertheless reexamined Green Island's motion, as well as Erie's response, to determine whether these documents might possibly have any relevance to the matters at issue. In its motion, Green Island seeks to use the report and related documents to show that the Institute approved the certification for five years, included project-specific conditions requiring Erie to submit the results of its fish passage effectiveness testing and to discuss how the results demonstrate that downstream migrating fish are being safely passed, and retained the

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as the license applicant or the licensee ever been in doubt. Moreover, it appears that Green Island was fully aware of the 2004 change in corporate ownership at the time when it occurred. *See* Letter from John Brown, Chairman/CEO, Green Island, to Patrick Wood, Chairman, FERC (filed Dec. 21, 2004).

<sup>30</sup> Request for Rehearing at 17.

<sup>31</sup> *Id.* (footnote citing FPA section 10(a)(1) omitted).

right to suspend the certification or take other appropriate action if the testing should demonstrate that safe downstream passage is not occurring.<sup>32</sup>

32. In its answer, Erie notes that the fish passage facilities have been installed, effectiveness testing is underway, it has provided the federal and state resource agencies with a draft interim report concerning the passage evaluations conducted in 2009, and it is in the process of developing a more comprehensive report concerning all of the fish bypass evaluations to date, with a final report to be provided to the agencies and the Commission.

33. These facts do not demonstrate a serious question concerning the effectiveness of fish passage measures. Rather, they reflect the fact that the Institute certified the School Street Project as meeting its low impact criteria without first awaiting the results of tests of the effectiveness of these measures.

34. Green Island also seeks to rely on the Institute's reviewer's record of contacts with federal and state agency officials to suggest that these officials raised concerns about the effectiveness of fish passage measures.<sup>33</sup> In its answer, Erie provides information to suggest that, in at least one instance, either the reviewer or a state official may have misunderstood or misinterpreted information about the measures or their effectiveness.<sup>34</sup>

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<sup>32</sup> See Green Island's Motion at 6 (filed Dec. 28, 2010) and Attachment C at 1, 3.

<sup>33</sup> Among other things, Green Island cites the reviewer's statement that "the question of the effectiveness of safely passing fish downstream of the facility is still a significant issue, as the facility has just installed this passage pursuant to its new license," (Report at 3) as well as the reviewer's record that an agency official "stated that the agency hadn't determined whether the facilities are passing fish safely" and that "about 90% of the fish are still going through the turbine." (Report at 14).

<sup>34</sup> In its response, Erie states that it is unaware of any evidence that could support the statement that 90 percent of the fish are still going through the turbine. Erie adds that "preliminary information from the effectiveness testing that took place in 2009 indicates that resident fish using the fish bypass facility exhibited very high survival (90-95% plus), while preliminary information from the testing that occurred in the Spring and Summer of 2010 indicates that 85-90% of adult blueback herring in the Project's power canal utilized the fish bypass system at School Street." Erie's Response at 4 (filed Jan. 12, 2011). Erie also notes that the report also indicated that the state official said that "the agency hadn't determined whether the facilities are passing fish safely." Report at 14. In light of this statement, Erie regards it as possible that the reviewer "may have misquoted the employee with respect to the 90% statement or simply misunderstood the

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35. These statements are unreliable as evidence. We therefore decline to include them.

36. Contrary to Green Island's assertion, the documents it proffered concerning the Institute's certification of the School Street Project as a low impact hydropower project are not relevant to the issues before us, and in any event do not provide a sufficient basis for questioning the effectiveness of the Project's fish passage measures.<sup>35</sup> As described on its web site, the Institute is a non-governmental entity dedicated to reducing the impacts of hydropower generation.<sup>36</sup> Nothing in the FPA or the Commission's regulations requires that Commission-regulated projects be certified by the Institute. Further, any conditions imposed by the Institute are outside the Commission's jurisdiction and Erie's license. Moreover, we need not reopen the record to include these documents, because they would not compel or persuade us to reach a different result in this proceeding. We therefore deny Green Island's request for rehearing of this issue.

**F. January 21, 2011 Motion to Include Erie's Request for an Extension of Time to Construct the New 11-MW Turbine Generator**

37. With its January 21, 2011 motion, Green Island sought to include in the record of the relicensing proceeding Erie's January 6, 2011 request for an extension of time to start and complete construction of the new 11-MW turbine generator. In our order denying rehearing, we denied Green Island's motion because it concerned a post-licensing matter and was an improper supplementation of Green Island's rehearing request, in that it essentially repeated arguments that Green Island had raised on rehearing concerning a similar request for an extension of time that Erie filed on January 22, 2009.

38. On rehearing, Green Island agrees that the request for an extension of time was a post-licensing matter, but also maintains, without elaboration, that "it was relevant to the Commission's ongoing obligations in this relicensing proceeding,"<sup>37</sup> and that the

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information he was attempting to convey." Erie's Response at 4. Erie argues that, because of the possibility of misinterpretation, the Commission should not rely on this hearsay evidence from the Report.

<sup>35</sup> As noted in our March 17, 2011 Order Denying Rehearing, should such issues arise, we would address them in the normal course of post-license regulation of the School Street Project. See *Erie Boulevard*, 134 FERC ¶ 61,205 at P 70.

<sup>36</sup> See <http://www.lowimpacthydro.org/>.

<sup>37</sup> Request for Rehearing at 17.

Commission should not have denied its motion to lodge information and arguments concerning Erie's second request for an extension of time to construct the new turbine.

39. We fail to see how a request for an extension of time to install an optional new turbine could relate to our "ongoing obligations" in the relicensing proceeding. As we have explained, because the new turbine is optional, Erie is not required by the license to install it, and Green Island has not shown how the request for or grant of an extension of time has any relevance to the matters at issue in the relicensing proceeding. We therefore deny Green Island's request for rehearing of this issue.

#### **G. March 15, 2011 Motion to Lodge Flow Modeling Results**

40. With its March 15, 2011 motion, Green Island sought to include in the record an affidavit of James A. Beshar and a Mohawk River flow regime analysis using the Indicators of Hydrologic Alteration (IHA) software. Green Island filed its motion just two days before the publicly-noticed meeting at which the Commission was scheduled to consider pending matters concerning the School Street Project. In our order denying rehearing, issued on March 17, 2011, we denied Green Island's motion as an improper attempt to supplement its rehearing request. We accordingly rejected the filing, and noted that "the Commission has stated in a previous hydropower proceeding that it does not favor parties filing pleadings after issuance of the Sunshine Act notice that a matter would be on the Commission's agenda, because such pleadings can disrupt the orderly consideration of matters before the Commission."<sup>38</sup>

41. On rehearing, Green Island argues that we erred in rejecting its flow analysis, because it quantified the nature and magnitude of changes to the flow regime that resulted from Erie's 2005 settlement, and is thus relevant to the question that the court directed the Commission to consider on remand: "whether the Offer of Settlement constituted a 'fundamental and significant change' to the School Street license application."<sup>39</sup> Green Island contends that the Commission acted arbitrarily and capriciously in rejecting Green Island's flow analysis as too late, while simultaneously relying on a Commission staff flow analysis that was not made available to the public until after the Commission had denied rehearing. Green Island further maintains that the Commission erred in introducing and relying on new evidence in its rehearing order without first providing parties with notice and an opportunity to respond to it, contrary to the Commission's regulations concerning notice and comment hearings in hydroelectric licensing proceedings.

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<sup>38</sup> *Erie Boulevard*, 134 FERC ¶ 61,205 at P 29 n.22 (citation omitted).

<sup>39</sup> *Green Island v. FERC*, 577 F.3d at 163 (quoting 18 C.F.R. § 4.35(f)(1)).

42. Green Island's rehearing request raises two separate but related issues: (1) whether the Commission erred in denying Green Island's late motion to lodge its flow modeling results; and (2) whether the Commission erred in relying on Commission staff's flow modeling results without first providing parties with notice and an opportunity to respond. We address these issues in turn.

### 1. Green Island's Flow Analysis

43. We reaffirm our rejection of Green Island's flow analysis on grounds of lateness. Green Island's filing states that the IHA software "has been widely used since the mid-1990s"<sup>40</sup> and that Mr. Besha became aware of it "in late 2010."<sup>41</sup> Green Island offered no reason why it could not have filed the results of a quantitative flow analysis a year earlier with its rehearing request, when it first raised the issue of the need for a study of flows. Moreover, Green Island offered no justification for waiting until two days before the scheduled Commission meeting to file the results of its analysis, at a time when Erie and the Commission would have little time to respond.

44. The information that Green Island filed on March 15, 2011, consists of its motion to lodge evidence or to reopen the record; an affidavit of James A. Besha, President of Albany Engineering Corporation (Albany), Green Island's engineering consultant; and a document entitled, *Analysis of Mohawk River Flow Regime Using Indicators of Hydrologic Alteration (Analysis)*, prepared by Albany and dated March 2011. Green Island argues that we should accept its late-filed analysis, contending that it "demonstrated that the Settlement would cause hydrologic alteration ranging from 63% to 1,175%, which indicates 'moderate to high alteration in the flow regime' based on standard criteria used to interpret IHA modeling results."<sup>42</sup> As a result, Green Island maintains that its flow analysis "directly contradicts" the Commission's conclusion that the settlement agreement would not significantly modify the flow regime associated with the project.<sup>43</sup>

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<sup>40</sup> See Exhibit A to Affidavit of James A. Besha at 1, attached to Green Island's March 15, 2011 Motion to lodge evidence or to reopen the record.

<sup>41</sup> Affidavit of James A. Besha at ¶ 6 (filed March 15, 2011).

<sup>42</sup> Request for Rehearing at 19.

<sup>43</sup> Green Island also takes issue with our statement in the rehearing order that we found nothing in Green Island's filing that would call into question the validity of Commission staff's flow analysis. See *Erie Boulevard*, 134 FERC ¶ 61,205 at P 29 n.22. With regard to that point, Green Island's arguments are confusing. For example, Green

45. For the reasons discussed below, we find that Green Island's flow analysis suffers from serious shortcomings that call into question not only its reliability but also its relevance. As a result, we are compelled to conclude that this analysis should not be included in the record of this proceeding.

46. The Albany analysis uses the IHA software to compare the flow regime in the bypassed reach of the School Street Project under the proposal in the 1991 license application with the flow regime that would occur under the 2005 settlement agreement, with and without the new 11-MW turbine. To perform the IHA analysis, Albany calculated flows in the School Street Project bypassed reach of the Mohawk River for each of the alternatives evaluated using daily flow gage data from 1930 to 2007.<sup>44</sup> While Albany describes some of the input parameters used to estimate flows, it does not describe the calculations or assumptions used to estimate flows in the bypassed reach, nor does it describe or provide any of the estimated flow data. Without this information, we are unable to evaluate the accuracy or appropriateness of the flow data that Albany used in its IHA analysis.

47. Albany does not describe the calculations and assumptions used to derive its estimates of flows in the bypassed reach under each of the scenarios, nor provide the flow estimates for review. Albany does reveal, however, that it used the estimates of flows in the bypassed reach under the proposal in the 1991 license application to derive the flow targets for the base case in the IHA analysis. As discussed below, use of these highly

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Island asserts that our statement in the rehearing order "may be an admission that the 2005 Offer of Settlement did indeed materially change the flow regime of the Mohawk River." Request for Rehearing at 19. This is incorrect. Our statement was limited to the issue of whether we found anything in Green Island's filing that would cause us to question the validity of Commission staff's flow analysis. In addition, our staff's analysis did not address changes to the flow regime of the Mohawk River; it addressed changes to the flow regime associated with the School Street Project. Similarly, Green Island argues that "to the extent that the Commission's Rehearing Order statement means that *both* GIPA's IHA flow analysis *and* the Staff's flow analysis demonstrate that flows in the Mohawk River were materially changed by the 2005 Offer of Settlement, GIPA agrees with that assessment." *Id.* (emphasis in original). This is also incorrect. Regardless of what Green Island thinks its analysis may have shown, Commission staff's analysis demonstrates that the settlement did not significantly modify the flow regime associated with the project.

<sup>44</sup> Albany used daily flow data from U.S. Geological Survey gage station 01357500, located on the Mohawk River downstream of the School Street Project and its bypassed reach. *Analysis* at 2.

regulated flows as the base case for the IHA analysis provides another significant basis for concern with Albany's analysis.

48. As Albany indicates,<sup>45</sup> the IHA software uses 33 discrete hydrologic parameters as sensitive indicators of anthropogenic effects on riverine systems (i.e., those that result from human influence on nature). To quantify anthropogenic effects, the IHA uses measured or synthesized daily streamflow values from a period when human perturbations were negligible to calculate the range of variability for the hydrologic parameters and then uses the values as flow management targets.<sup>46</sup> However, Albany's analysis used the highly regulated flows that would occur under the proposal in the 1991 license application to establish the range of variability for the 33 hydrologic parameters that were used as flow targets. Because the flows within the bypassed reach under the proposal in the 1991 license application would be highly regulated and would include frequent occurrences of flows at the minimum of 60 cubic feet per second (cfs),<sup>47</sup> the range of variability in these flows would be driven by anthropogenic effects and thus would appear to be inappropriate for setting flow targets in an IHA analysis. Thus, Albany's approach is a significant departure from the typical application of the IHA method. Despite this, Albany does not acknowledge the uniqueness of this approach, and provides no discussion or evidence to demonstrate that it is a proper application of the IHA methodology.

49. The Albany analysis suffers from a further problem. It fails to demonstrate that the differences in the project's installed capacity under the various alternatives would result in significant changes in the flow regime associated with the project. A comparison of the results that Albany reports in Tables 2 and 3 reveals that the amounts of hydrologic alteration that result for each category without construction of the new 11-MW generating unit in Table 2 are essentially the same as those that results for each category with construction of the new 11-MW generating unit reported in Table 3. In fact, 39 of the 73 values (i.e., 53 percent of them) reported in Tables 2 and 3 are identical, and the average hydrologic alteration values for the low, middle, and high categories (as

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<sup>45</sup> *Analysis* at 1.

<sup>46</sup> See Richter et al., "How Much Water Does a River Need?" 37 *Freshwater Biology* 231-49 (1971), available from the Nature Conservancy's online public library web site at: <http://conserveonline.org/workspaces/ihadocuments/richter1997/view.html>.

<sup>47</sup> Commission staff's flow analysis filed on March 17, 2011, found that for the five representative flow years examined, flows in the bypassed reach would be at the 60 cfs minimum flow for between 227 and 309 days per year under the proposal in the 1991 license application.

reported in the last line of the two tables) differ by less than 2 percent.<sup>48</sup> This high degree of correspondence between the values in Table 2 and those in Table 3 suggests that the results are driven by the differences in the minimum flows, and there is little to no effect from the changes in installed project capacities. A more thorough analysis, separately comparing the minimum flow scenarios while holding project capacity constant, and separately comparing the project capacity scenarios while holding the minimum flows constant (as Commission staff did in its flow analysis) would likely confirm that the differences in Tables 2 and 3 are primarily the result of the differences in the minimum flows and do not result from changes in project capacity.

50. Because of Albany's incomplete and inadequate description of assumptions and methods, the unique and unsupported use of highly regulated stream flows to establish the IHA flow targets, and the evidence suggesting that the reported differences between the alternatives primarily resulted from the differences in minimum flows, we conclude that Albany's analysis is unreliable and lacks probative value. In any event, even if we were to admit and consider Albany's analysis as evidence in this case, it would not persuade or compel us to reach a different result, because it fails to demonstrate that the changes in installed project capacity proposed in the 2005 settlement, when compared to the 1991 license application, would significantly affect the flow regime associated with the School Street Project.<sup>49</sup>

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<sup>48</sup> Average hydrologic alteration (the last line in each table) reported for the low category was 65 percent in Table 2 and 66 percent in Table 3. When compared to the lower value of 65 percent, this one-point difference represents an increase of 1.54 percent ( $1/65 \times 100 = 1.54\%$ ). Average hydrologic alteration for the middle category was the same in Tables 2 and 3 (i.e., 63 percent). For the high category, average hydrologic alteration was 1,161 percent in Table 2 and 1,175 percent in Table 3. When compared to the lower value of 1,161 percent, this fourteen-point difference represents an increase of 1.21 percent ( $14/1,161 \times 100 = 1.21\%$ ).

<sup>49</sup> Green Island argues that we acted arbitrarily and capriciously in rejecting its flow analysis as too late, while simultaneously relying on our staff's flow analysis that was not completed until the day before the rehearing order was issued, and which was not made available to the public until one day after the Commission issued its order denying rehearing. As we have seen, even if we had not rejected Green Island's filing on grounds of lateness, we would deny its motion because its analysis is unreliable and lacks probative value. Nor is there any basis for concern regarding the timing of our staff's analysis. The record shows that staff prepared its analysis on February 16, 2011, and revised it on February 24, 2011, and March 16, 2011. *See* Memorandum to Files from Robert Easton (filed March 17, 2011). It was filed in the Commission's eLibrary system

(continued...)

51. As discussed below, we relied on the study prepared by our expert staff, and Green Island makes no arguments on rehearing disputing staff's methodology. As the Supreme Court has explained: "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive."<sup>50</sup> Our discretion would be even stronger here, where we have found significant problems with a contrary analysis.

## 2. Commission Staff's Flow Analysis

52. Green Island argues that the Commission erred in introducing and relying on a newly-prepared Commission staff analysis of flows in its rehearing order without first providing parties with notice of the new evidence and an opportunity to respond to it. Green Island maintains that this was a violation of due process and contrary to the Commission's regulations.

53. This argument is without merit. In its request for rehearing of our order on remand, Green Island criticized our analysis of whether the changes in installed capacity proposed in the settlement substantially modified the flow regime as proposed in the license application for the School Street Project.<sup>51</sup> Green Island maintained that our conclusions were unsupported generalizations that lacked evidentiary support, and argued that we erred in making our determinations without any "actual studies"<sup>52</sup> of specific impacts or a "quantitative analysis."<sup>53</sup> In his affidavit in support of Green Island's rehearing request, Mr. Besha provided examples of a "quantitative, comparative analysis of river flow both with and without the existing School Street Hydroelectric Project" as well as changes in water depth in the Mohawk River with and without the project, and stated: "Similar analyses could and should have been performed with regard to the Settlement Agreement so that its quantitative effects on the flow regime of the Mohawk

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on March 17, 2011, within two hours after issuance of our order on rehearing. Because staff's analysis was not filed electronically, it posted to the system at 11 a.m. on the following day. It is not unusual for there to be a slight delay in posting documents that are not electronically filed.

<sup>50</sup> *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1982).

<sup>51</sup> See Green Island's May 17, 2010 Request for Rehearing at 21-22, 26-27.

<sup>52</sup> *Id.* at 22.

<sup>53</sup> *Id.* at 26.

River were fully defined.”<sup>54</sup> We found that a detailed quantitative analysis is not required before the Commission can determine whether a proposed change is a material amendment. We nevertheless relied on our staff’s quantitative flow study as additional support for our conclusion that the proposed changes in the 2005 settlement did not significantly affect the flow regime associated with the School Street Project.<sup>55</sup> After having argued that the Commission should have prepared a quantitative analysis, Green Island should not now be permitted to claim surprise that the Commission seriously considered its argument and prepared the analysis that it had argued was needed.

54. Moreover, Green Island had both adequate notice of Commission staff’s flow analysis and a reasonable opportunity to respond to it. Green Island was fully aware of the rationale for the Commission’s material amendment analysis as explained in the order on remand, and Green Island certainly knew that it had specifically invited the Commission to perform a quantitative flow study. Thus, Green Island had notice that a flow study might well be offered as further support for the Commission’s decision. In our order denying rehearing, we discussed the results of our staff’s flow analysis in detail. Less than 24 hours later, Commission staff made its analysis publicly available, with a full explanation of its methodology, the numerical results of all of its calculations, how those calculations were made, and all of the resulting graphs of flows. Green Island was also aware of its obligation to seek rehearing of any new rulings or other matters for which it had not previously had an opportunity to seek rehearing, so as to be able to preserve those issues for possible judicial review, because it did in fact file a limited request for rehearing with respect to those rulings on April 18, 2011.<sup>56</sup> Inexplicably, however, Green Island chose not to offer any substantive comments or objections to staff’s flow analysis, choosing instead to argue that our use of the analysis was

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<sup>54</sup> Besha Affidavit at 3 (Attachment A to Green Island’s May 17, 2010 Request for Rehearing).

<sup>55</sup> See *Erie Boulevard*, 134 FERC ¶ 61,205 at P 53.

<sup>56</sup> Because the 30-day deadline within which to seek rehearing of the March 17, 2011 Order fell on a Saturday, Green Island was not required to file its rehearing request until Monday, April 18, 2011. Therefore, even accounting for the fact that staff’s flow analysis did not post to the Commission’s eLibrary system until 11 a.m. on March 18, 2011, Green Island had 30 days within which to examine the flow analysis and file any substantive comments on it, as well as to seek rehearing of the Commission’s use of the flow analysis in its March 17, 2011 Order. Despite this, Green Island offered nothing more than an unsupported assertion that the flow analysis was based on a “flawed premise,” with no explanation of how or why this might be the case. Request for Rehearing at 22 n. 21.

procedurally defective.<sup>57</sup> In short, Green Island had both notice of the flow analysis and an opportunity to respond to it. As a result, there is no basis for Green Island's assertion that our use of the analysis constituted a denial of due process, or violated the Commission's regulations providing for notice and comment hearings in hydroelectric proceedings.

55. Green Island argues that the "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation," quoting the Supreme Court's decision in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*<sup>58</sup> In that case, the Court found that there was no requirement to provide notice and an opportunity to rebut an agency's expressed views about the shortcomings of evidence in the record. Here, Green Island seeks an additional opportunity to comment on an issue of which it had notice and an opportunity to present its views. As we have seen, the Commission did not foreclose Green Island's opportunity to make a contrary presentation in this case; rather, Green Island failed to take advantage of the opportunity provided by the right (and obligation) to seek rehearing under the FPA and the Commission's regulations.<sup>59</sup>

56. Green Island also maintains that our failure to provide a separate notice and opportunity for comment on Commission staff's flow analysis before relying on that analysis in our March 17, 2011 Order Denying Rehearing violated our rules providing for notice and comment hearings in hydroelectric licensing proceedings. This is incorrect. Our rules require the Commission to provide notice and an opportunity to comment at specific stages of hydroelectric licensing proceedings.<sup>60</sup> They do not require a separate

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<sup>57</sup> Throughout this proceeding, Green Island has filed comments on various pending matters without waiting for the Commission to solicit comments. This demonstrates Green Island's understanding that parties may file comments in our proceedings at any time, leaving it for the Commission to determine whether or how to consider those comments based on the circumstances of the particular proceeding.

<sup>58</sup> 419 U.S. 281, 288 n.4 (1974).

<sup>59</sup> Green Island argues that during the rehearing period, it "was put in the position not of presenting information that would be weighed by a neutral decisionmaker, but of demonstrating the errors in evidence relied on to support an already-made decision." Request for Rehearing at 22 n.22. At the rehearing stage, a party is always in the position of seeking to demonstrate errors in the Commission's decision. This does not call into question the decision maker's neutrality.

<sup>60</sup> See 18 C.F.R. §§ 4.34(b) through (e) (2011).

notice and opportunity to comment for all filings in a proceeding, or for arguments and related materials prepared in support of a Commission order in response to a request for rehearing. In this case, we allowed both Green Island and Erie an opportunity to comment on our use of new information in our feasibility analysis for the Cohoes Falls Project, and we certainly would have considered Green Island's comments on our use of staff's flow analysis if Green Island had chosen to offer them. Green Island's assertion that our use of staff's flow analysis in this case violated our rules for notice and comment hearings in hydroelectric proceedings is without merit.

The Commission orders:

The request for rehearing filed on April 14, 2011, in this proceeding is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.