
PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

(Act of November 9, 1978, Public Law 95-617, 92 Stat. 3117)

TITLE II – CERTAIN FEDERAL ENERGY REGULATORY COMMISSION AND DEPARTMENT OF ENERGY AUTHORITIES

SEC. 210 COGENERATION AND SMALL POWER PRODUCTION

(a) COGENERATION AND SMALL POWER PRODUCTION RULES – Not later than one year after the date of enactment of this Act, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities at not more than 80 megawatt capacity, which rules require electric utilities to offer to –

(1) sell electric energy to qualifying cogeneration facilities and qualifying small production facilities and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) RATES FOR PURCHASES BY ELECTRIC UTILITIES – The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase –

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) RATES FOR SALES BY UTILITIES – The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale –

(1) shall be just and reasonable and in the public interest and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) Definition – For purposes of this section, the term “incremental cost of alternative electric energy” means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) EXEMPTIONS –

(1) Not later than one year after the date of enactment of this Act and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatt capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatt or 80 megawatt for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from –

(A) any State law or regulation in effect in a State pursuant to subsection (f),

(B) the provisions of section 210, 211, or 212 of the Federal Power Act or the necessary authorities for enforcement of any such provision under the Federal Power Act, or

(C) any license or permit requirement under part I of the Federal Power Act, any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) IMPLEMENTATION OF RULES FOR QUALIFYING COGENERATION AND QUALIFYING SMALL POWER PRODUCTION FACILITIES –

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) JUDICIAL REVIEW AND ENFORCEMENT –

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) in the same manner, and under the same requirements, as judicial review may be obtained under section 123 in the case of a proceeding to which section 123 applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f). Any such action shall be brought only in the manner, and under the requirements, as provided under section 123 with respect to an action to which section 123 applies.

(h) COMMISSION ENFORCEMENT –

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act, such rule shall be treated as a rule under the Federal Power Act. Nothing in subsection (g) shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2) (A) The Commission may enforce the requirements of subsection (f) against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) shall be treated as a rule enforceable under the Federal Power Act. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than –

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f), or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) as pro-

vided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) **FEDERAL CONTRACTS** – No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after the date of the enactment of this Act may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) **DEFINITIONS** – For purposes of this section, the terms “small power production facility”, “qualifying small power production facility”, “qualifying small power producer”, “primary energy source”, “cogeneration facility”, “qualifying cogeneration facility”, and “qualifying cogenerator” have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act. (92 Stat. 3144; § 643(b), Act of June 30, 1980, 94 Stat. 770; 16 U.S.C. § 824a-3)

TITLE IV – SMALL HYDROELECTRIC POWER PROJECTS

SEC. 401 ESTABLISHMENT OF PROGRAM

The Secretary shall establish a program in accordance with this title to encourage municipalities, electric cooperatives, industrial development agencies, nonprofit organizations, and other persons to undertake the development of small hydroelectric power projects in connection with existing dams which are not being used to generate electric power. (92 Stat. 3154; 16 U.S.C. § 2701)

SEC. 402 LOANS FOR FEASIBILITY STUDIES

(a) **LOAN AUTHORITY** – The Secretary, after consultation with the Commission, is authorized to make a loan to any municipality, electric cooperative, industrial development agency, nonprofit organization, or other person to assist such person in defraying up to 90 percent of the costs of –

(1) studies to determine the feasibility of undertaking a small hydroelectric power project at an existing dam or dams, and

(2) preparing any application for a necessary license or other Federal, State, and local approval respecting such a project at an existing dam or dams and of participating in any administrative proceeding regarding any such application.

(b) **CANCELLATION** – The Secretary may cancel the unpaid balance and any accrued interest on any loan granted pursuant to this section if he determines on the basis of the study that the small hydroelectric power project would not be technically or economically feasible. (92 Stat. 3154; 16 U.S.C. § 2701)

SEC. 403 LOANS FOR PROJECT COSTS

(a) Authority – The Secretary is authorized to make loans to any municipality, electric cooperative, industrial development agency, nonprofit organization, or other person of up to 75 percent of the project costs of a small hydroelectric power project. No such loan may be made unless the Secretary finds that –

(1) the project will be constructed in connection with an existing dam or dams,

(2) all licenses and other required Federal, State, and local approvals necessary for construction of the project have been issued,

(3) the project will have no significant adverse environmental effects, including significant adverse effects on fish and wildlife, on recreational use of water, and on stream flow, and

(4) the project will not have a significant adverse effect on any other use of the water used by such project.

The Secretary may make a commitment to make a loan under this subsection to an applicant who has not met the requirements of paragraph (2), pending compliance by such applicant with such requirements. Such commitment shall be for a period not to exceed three years unless the Secretary, in consultation with the Commission, extends such period for good cause shown. Notwithstanding any such commitment, no such loan shall be made before such person has complied with such requirements.

(b) Preference – The Secretary shall give preference to applicants under this section who do not have available alternative financing which the Secretary deems appropriate to carry out the project and whose projects will provide useful information as to the technical and economic feasibility of –

(1) the generation of electric energy by such projects, and

(2) the use of energy produced by such projects.

(c) INFORMATION – Every applicant for a license for a small hydroelectric power project receiving loans pursuant to this section shall furnish the Secretary with such information as the Secretary may require regarding equipment and services proposed to be used in the design, construction, and operation of such project. The Secretary shall have the right to forbid the use in such project of any equipment or services he finds inappropriate for such project by reason of cost, performance, or failure to carry out the purposes of this section. The Secretary shall make information which he obtains under this subsection available to the public, other than information described as entitled to confidentiality under section 11(d) of the Energy Supply and Environmental Coordination Act of 1974.

(d) Joint Participation – In making loans for small hydroelectric power projects under this section, the Secretary shall encourage joint participation, to the extent permitted by law, by applicants eligible to receive loans under this section with respect to the same project. (92 Stat. 3155; 16 U.S.C. § 2703)

SEC. 404 LOAN RATES AND REPAYMENT

(a) INTEREST – Each loan made pursuant to this title shall bear interest at the discount or interest rate used at the time the loan is made for water resources planning projects under section 80 of

the Water Resources Development Act of 1974 (42 U.S.C. 1962-17(a)). Each such loan shall be for such term, as the Secretary deems appropriate, but not in excess of –

- (1) Ten years (in the case of a loan under section 402), or
- (2) Thirty years (in the case of a loan under section 403).

(b) REPAYMENTS – Amounts repaid on loans made pursuant to this title shall be deposited into the United States Treasury as miscellaneous receipts. (92 Stat. 3155; 16 U.S.C. § 2704)

EXPLANATORY NOTE

Reference in the Text – Section 80 of the Water Resources Development Act of 1974 (Act of March 7, 1974, 88 Stat. 12), referred to in subsection (a) of the text, adopts the discount rate formula published by the Water Resources Council on December 24, 1968 (33 F.R. 19170; 18 C.F.R. 704.39) for use in formulating and evaluating water resource projects. Extracts from the 1974 Act, including section 80, appear in Volume IV in chronological order.

SEC. 405 SIMPLIFIED AND EXPEDITIOUS LICENSING PROCEDURES

(a) ESTABLISHMENT OF PROGRAM – The Commission shall establish, in such manner as the Commission deems appropriate, consistent with the applicable provisions of law, a program to use simple and expeditious licensing procedures under the Federal Power Act for small hydroelectric power projects in connection with existing dams.

(b) PREREQUISITES – Before issuing any license under the Federal Power Act for the construction or operation of any small hydroelectric power project the Commission –

(1) shall assess the safety of existing structures in any proposed project (including possible consequences associated with failure of such structures), and

(2) shall provide an opportunity for consultation with the Council on Environmental Quality and the Environmental Protection Agency with respect to the environmental effects of such project.

Nothing in this subsection exempts any such project from any requirement applicable to any such project under the National Environmental Policy Act of 1969, the Fish and Wildlife Coordination Act, the Endangered Species Act, or any other provision of Federal law.

(c) FISH AND WILDLIFE FACILITIES – The Commission shall encourage applicants for licenses for small hydroelectric power projects to make use of public funds and other assistance for the design and construction of fish and wildlife facilities which may be required in connection with any development of such project.

(d) EXEMPTIONS FROM LICENSING REQUIREMENTS IN CERTAIN CASES – The Commission may in its discretion (by rule or order) grant an exemption in whole or in part from the requirements (including the licensing requirements) of part I of the Federal Power Act to small hydroelectric power projects having a proposed installed capacity of 5,000 kilowatts or less, on a case-by-case basis or on the basis of classes or categories of projects, subject to the same limitations (to ensure protection for fish and wildlife as well as other environmental concerns) as those which are set forth in subsections (c) and (d) of section 30 of the Federal Power Act with respect to

determinations made and exemptions granted under subsection (a) of such section 30; and subsections (c) and (d) of such section 30 shall apply with respect to action taken and exemptions granted under this subsection. Except as specifically provided in this subsection, the granting of an exemption to a project under this subsection shall in no case have the effect of waiving or limiting the application (to such project) of the second sentence of subsection (b) of this section. (92 Stat. 3156; § 408, Act of June 30, 1980, 94 Stat. 718; 16 U.S.C. § 2705)

EXPLANATORY NOTE

1980 Amendment – Section 408(b) of the Act of June 30, 1980 (Public Law 96-294, 94 Stat. 611, 718), known as the Energy Security Act, added subsection (d). Title IV of that act, in which section 408 is located, is known as the Renewable Energy Resources Act of 1980. The Act does not appear herein.

NOTE OF OPINION

1. Lease of power privilege charge – The Secretary of the Interior may, but need not, impose upon a non-Federal power development at a Reclamation facility a charge for the lease of power privileges even though the Federal Energy Regulatory Commission has exempted the development from paying reasonable annual charges under the Federal Power Act for use of the Reclamation facility. Memorandum of Associate Solicitor Good, December 15, 1981.

SEC. 406 NEW IMPOUNDMENTS

Nothing in this title authorizes (1) the loan of funds for construction of any new dam or other impoundment, or (2) the simple and expeditious licensing of any such new dam or other impoundment. (92 Stat. 3156; 16 U.S.C. § 2706)

SEC. 408 DEFINITIONS

(a) For purposes of this title, the term –

(1) “small hydroelectric power project” means any hydroelectric power project which is located at the site of any existing dam, which uses the water power potential of such dam, and which has not more than 30,000 kilowatts of installed capacity;

(2) “electric cooperative” means any cooperative association eligible to receive loans under section 4 of the Rural Electrification Act of 1936 (7 U.S.C. 904);

(3) “industrial development agency” means any agency which is permitted to issue obligations the interest on which is excludable from gross income under section 103 of the Internal Revenue Code of 1954;

(4) “project costs” means the cost of acquisition or construction of all facilities and services and the cost of acquisition of all land and interests in land used in the design and construction and operation of a small hydroelectric power project;

(5) “nonprofit organization” means any organization described in section 501(c)(3) or 501(c)(4) of the Internal Revenue Code of 1954 and exempt from tax under section 501(a) of such Code (but only with respect to a trade or business carried on by such organization which

is not an unrelated trade or business, determined by applying section 513(a) to such organization);

(6) “existing dam” means any dam, the construction of which was completed on or before April 20, 1977, and which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of any small hydroelectric power project;

(7) “municipality” has the meaning provided in section 3 of the Federal Power Act; and

(8) “person” has the meaning provided in section 3 of the Federal Power Act.

(b) The requirement in subsection (a)(1) that a project be located at the site of an existing dam in order to qualify as a small hydroelectric power project, and the other provisions of this title which require that a project be at or in connection with an existing dam (or utilize the potential of such dam) in order to be assisted under or included within such provisions, shall not be construed to exclude –

(1) from the definition contained in such subsection (a)(1), or

(2) from any other provision of this title,

any project which utilizes or proposes to utilize natural water features for the generation of electricity, without the need for any dam or impoundment, in a manner which (as determined by the Commission) will achieve the purposes of this title and will do so without any adverse effect upon such natural water features. (92 Stat. 3156; § 408, Act of June 30, 1980, 94 Stat. 718; 16 U.S.C. § 2708)

**AGREEMENT BETWEEN
TOWN OF SUMMERSVILLE, WEST VIRGINIA AND NOAH CORP.
AUTHORIZING NOAH CORP. TO ACT AS AGENT
TO DEVELOP HYDROELECTRIC POWER
AT THE SUMMERSVILLE DAM**

This agreement is made as of December 13, 1982 between the Town of Summersville, West Virginia, a municipality chartered by the State of West Virginia (“the Town”), and Noah Corp., a corporation under the laws of the State of South Carolina and domesticated in the State of West Virginia.

RECITALS

1. On September 22, 1980 the Town and Noah jointly filed with the Federal Energy Regulatory Commission (“FERC”) and application for a preliminary permit under Section 4(f) of the Federal Power Act for a hydroelectric project (“the Project”) to be installed at the U.S. Army Corps of Engineers’ Summersville Dam on the Gauley River in Nicholas County, West Virginia. The Summersville Dam is located near the Town.
2. Thereafter, Noah and the Town concluded that Noah’s participation as a joint applicant for the preliminary permit might imperil the Town’s entitlement to municipal preference under Section 7(a) of the Act. Believing that it was in the Town’s best interest that Noah not be a joint applicant, Noah withdrew its application on December 16, 1980, leaving the Town as sole applicant. Concurrently with the withdrawal, the Town and Noah reached an understanding that the Town would own, develop, manage and control the Project and would retain Noah as an independent contractor serving as its agent to develop and operate the Project.
3. On May 22, 1981, FERC, acting through its Director of the Office of Electric Power Regulation, issued a preliminary permit for the Project to the Town and denied competing applications for preliminary permits.
4. The Town desires to employ Noah Corp., acting as the Town’s agent under the Town’s direction and control, to manage and conduct the licensing, financing, construction and operation and maintenance of the Project and the marketing of power and energy from the Project.
5. Noah Corp. desires to serve as the Town’s agent to manage and conduct the activities described above under the Town’s direction and control.
6. In conformance with West Virginia law, the Town shall not be obliged to pledge its full faith and credit in obtaining Project financing.

In consideration of the mutual covenants contained herein, the Town (hereinafter “the Principal”) and Noah Corp. (hereinafter “the Agent”) agree as follows:

**SECTION ONE
The Principal’s Commitment to Proceed with the Project**

The Principal shall proceed with licensing, financing and construction and operation of the Project if economic and technical studies demonstrate that the Project is feasible.

SECTION TWO
Employment of the Agent; Scope of the Agency

The Principal hereby retains and employs the Agent to prepare and prosecute an application by the Town for a license for the Project and, if a license is issued, to develop and operate the Project for the Town.

The Agent hereby accepts the obligations involved in such agency and commits itself to carry out those obligations as an independent contractor serving as agent under the Town's direction and control.

The Agent is to be the Principal's sole and exclusive agent for the purposes set out above.

SECTION THREE
Specification of the Agent's Obligations and Authority

In carrying out the agency created under this agreement, the Agent shall have the obligation and the authority, subject to the Principal's direction and control, to take the following actions:

1. Provide overall management of all aspects of the licensing, financing, design, construction, operation and maintenance of the Project and the marketing of power from the Project. In particular:
2. Prepare and prosecute an application by the Town for a license for the Project under the Federal Power Act. Prepare and prosecute applications for such other permits or authorizations from Federal or State authorities as may be required or desirable for the Project.
3. In consultation with the Principal's attorney, prepare pleadings and papers and otherwise participate in administrative or court proceedings involving the Project.
4. Prepare amendments to any application, license, permit or authorization as may be required or desirable from time to time.
5. Make arrangements for financing the Project.
6. Hire consultants, engineers, construction firms, accountants, attorneys, and other independent contractors and agents as may be required or desirable to provide services in connection with the Project and contract with the same as necessary or appropriate for purposes of the Project, including the securing of additional financial support and additional technical resources. Discharge independent contractors and agents as may be required or desirable. Review and approve the bonding of independent contractors and agents.
7. Purchase or contract to purchase equipment, materials and supplies and other goods and personal property as may be required or desirable for the Project. Sell or otherwise dispose of any goods no longer needed for the Project.
8. Conduct competitive bidding or other methods of procurement to insure the most reliable and economic construction, operation and maintenance of the Project.
9. Supervise the execution and performance of any contract entered into in connection with the Project.

10. Obtain insurance for the protection of the Principal and itself against various risks, hazards and liabilities of the Project. Obtain bonding of all employees of the Principal and the Agent who regularly handle cash.
11. In consultation with the Principal's attorney, negotiate for and arrange for the Town to acquire such rights of way and other property or water rights as may be required or desirable for the Project and, in the event that rights cannot be acquired otherwise, arrange for the Principal to acquire such rights by eminent domain.
12. Arrange with the Corps of Engineers the terms and conditions on which the Project may be installed at Summersville Dam and determine the Corps of Engineers' requirements for design, construction, and operation and maintenance of the Project at the dam. Enter agreements as may be required or desirable with the Corps of Engineers regarding such requirements.
13. Establish before FERC any payments to be made to the United States under Section 10(c) of the Federal Power Act for use by the Project of the Summersville Dam.
14. Undertake such consultation and coordination with Federal and State authorities and private parties as may be required or desirable in the process of licensing, constructing and operating and maintaining the Project. Enter agreements with such authorities and may be required or desirable.
15. Hire and train as employees of the Agent personnel to operate and maintain the Project. Discharge same as may be necessary or desirable.
16. Supervise operation of the Project to insure that it produces maximum revenues consistent with license obligations, Corps of Engineers' requirements and any other requirements.
17. Arrange for routine and preventive maintenance of the Project.
18. Arrange for extraordinary repair and maintenance as may be required from time to time.
19. Provide for periodic inspection of the Project and reports of same.
20. Take any and all actions required to comply with the terms and conditions of the license and FERC regulations and requirements, with the terms and conditions of any other permits or authorizations and with any other applicable requirements of law.
21. Negotiate and enter into agreements to sell or to transmit and sell any power and energy from the Project.
22. If such sales are priced on the purchaser's "avoided cost," monitor the purchaser's "avoided cost" to insure that the Principal receives the full price to which it is entitled.
23. Make reports to the FERC and other Federal or State authorities as may be required.
24. Take any and all actions necessary regarding any claims or causes of action that the Principal might have as a result of the Project or that might be asserted against the Principal as a result of the Project as a direct Project cost and take such further action as the Principal or its attorney might direct regarding those claims or causes of action.
25. Prepare and revise from time to time budgets for the Project.

26. As specified in Section Seven below, pay the expenses and receive the income of the Project, render to the Principal an accounting of expenses and income and pay to the Principal the net proceeds of the Project.

27. Establish, maintain and use separate trust accounts in the name of the Principal in connection with the Project.

28. Render advice to the Principal on any subject affecting the Project on which the Principal must act or on which the Principal seeks advice.

29. Take any other actions, as may be required or desirable to accomplish the licensing, financing, construction and operation and maintenance of the Project and the marketing of power and energy from the Project.

SECTION FOUR **The Principal's Control**

The Principal shall have the right to direct and control the Agent in each and every action undertaken pursuant to the agency. Any actions of the Agent within the scope of this agency that are not inconsistent with prior directions of the Principal shall be treated as actions of the Principal itself.

Unless exigent circumstances require otherwise, the Agent shall consult with the Principal or such officials of the Principal as the Principal may designate before the Agent:

1. Formulates a design for the Project,
2. Formulates an application for a license for the Project,
3. Submits any amendment to the application for a license or submits any application for amendment of a license,
4. Makes arrangements for financing the Project,
5. Hires or discharges consultants, accountants, or any other independent contractors and agents to provide major services in connection with the Project,
6. Purchases or contracts to purchase major equipment for the Project,
7. Establishes policies for any competitive bidding, if any, or other methods of best providing goods and services for the Project,
8. Takes actions significantly affecting the timing or cost of construction of the Project,
9. Takes actions affecting the structural integrity and safety of the Project,
10. Enters agreements with the Corps of Engineers significantly affecting the design, construction or operation and maintenance of the Project,
11. Takes actions significantly affecting the amount of power and energy generated at the Project,
12. Undertakes extraordinary repairs or maintenance on the Project,

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13. Arranges for litigation or appeals in connection with the Project,
 14. Makes arrangements for the transmission or sale of power and energy from the Project, and
 15. Takes any other action significantly affecting the Project or the Principal's interest in it.

If the Principal, after consultation, does not direct the Agent to take a particular course of action, the Agent is authorized to take the course of action that it considers to be in the Principal's best interest, consistent with requirements of law. If in exigent circumstances consultation in the areas specified above is impractical, the Agent is authorized to act on behalf of the Principal without consultation.

The Agent is authorized to act on behalf of the Principal without consultation in any matter that does not significantly affect the Project or the Principal's interest in it.

The Agent shall promptly inform the Principal of any developments concerning the Project that significantly affect its licensing, financing, construction, operation and maintenance, structural integrity and safety, cost or profitability. The Agent shall render quarterly written reports to the Principal summarizing developments and operations at the Project during the preceding three months. In accordance with Section Seven, the Agent shall render a monthly accounting to the Principal of the expenses and income of the Project.

SECTION FIVE **Project Financing**

The Principal, acting through the Agent, shall arrange Project financing as early in the course of the Project's development as is feasible. Such Project financing shall be sufficient to cover all costs of the Project. Promptly after the Project financing is obtained, the Principal shall reimburse the Agent for all of Agent's time and overhead costs and out-of-pocket expenses of the Project, including but not limited to expenses incurred for such services as detail design, license preparation, power purchase contract negotiation, environmental consultations, legal work and project construction administration. Thereafter, the Agent from time to time shall call upon the Principal to advance funds acquire through the Project financing as needed to cover the expenses of the Project, and the Principal shall promptly advance such funds. In obtaining Project financing, the Principal shall not be obliged to pledge its full faith and credit.

SECTION SIX **The Agent's Risk**

If the Project should be abandoned, the Agent shall absorb the loss of any expenses of the Project for which it has not been reimbursed.

SECTION SEVEN **Accounting**

The Agent shall issue bills for power and energy sold from the Project and shall receive on behalf of the Principal all income from the Project. The Agent also shall pay all expenses, including debts and obligations, of the Project. The Agent shall establish and maintain separate trust accounts in the name of the Principal for receipt and disbursement of funds for the Project.

The Agent shall render to the Principal monthly statements of income and expenses of the Project and such other monthly accounting statements as the Agent or Principal may deem desirable. The Agent shall render to the Principal an annual profit and loss statement and balance sheet for the Project.

The Agent shall pay to the Principal the monthly net proceeds of the Project, which shall consist of the gross monthly income of the Project received by the Agent less the monthly expenses of the Project incurred by the Agent. Gross monthly income shall consist of all revenues from sales of power and energy from the Project and any other income related to the Project. In the event that any of the power or energy generated by the Project is not able to be sold to a utility, and if in such event, the Principal elects to use some or all of such power to serve its own load requirement, then in such event the gross monthly revenues of the Project shall consist of the total of the revenue of sales of power and energy, to the utility and the value of the power used by the Principal, which shall be set at the fully allocated cost of such power. Monthly expenses shall consist of all expenses of the Project including, but not limited to, operation and maintenance expenses, all other business disbursements and expenditures, depreciation and amortization, contributions to contingency funds (including, but not limited to, contingency funds for working capital, low flow years and scheduled and unscheduled maintenance and repairs), taxes (if any) and payments on debt, including interest and scheduled repayment of principal, but monthly expenses shall not include capital expenditures. The Agent shall include in the monthly expenses of the Project any out-of-pocket expenses incurred by it in connection with the Project and all of the expenses of employing and training personnel to operate and maintain the Project. The intention is the the Agent shall be reimbursed, promptly after Project financing is obtained, for all of its true and overhead costs and out-of-pocket expenses incurred prior to the Project's date of commercial operation (those costs to be capitalized as Project costs), but shall be reimbursed only for its out-of-pocket expenses and operating personnel expenses after the date of commercial operation.

The agent shall offset against the payment of net proceeds owing to the Principal any amounts owed by the Principal to the Agent, including the monthly Agent's fee under Section Eight.

The payment of the monthly net proceeds of the Project to the Principal shall be made before the end of the month succeeding the month to which the payment pertains.

The Agent shall maintain such full and accurate books of account and records for the Project as are required under the Federal Power Act, the license, FERC regulations and requirements and any other statutes and regulations. The Agent's books of account for the Project shall be kept in accordance with good accounting practice and shall be audited annually by an independent firm of certified public accountants, whose report and opinion shall be provided to the Principal. The Agent's books of account and records for the Project shall be available at all reasonable times for inspection by the Principal.

SECTION EIGHT

The Agent's Fee

The Principal shall pay the Agent a monthly Agent's fee as compensation for the services and risks undertaken in this agreement. The Agent's fee shall be 49 percent of the monthly net proceeds of the Project as established under Section Seven.

In the event that the expenses of the Project exceed the gross income of the Project in any month, the Agent shall receive no Agent's fee for that month; if in any later month the gross income exceeds the expenses, the Agent's fee for that later month shall be computed without any offset to account for any net loss of the Project in the earlier month. The Agent shall bear, under Section Six, the risk of loss of its unreimbursed expenses if the Project is abandoned, but shall not participate in any net operating losses of the Project, either by reduction of monthly Agent's fees or by any other means.

SECTION NINE

Ownership

The Project shall be owned exclusively by the Principal. It is the parties' intention that this agreement not create any joint venture, joint enterprise or partnership between them. Thus, the Principal, as sole owner of the Project, has the right to direct and control the Agent in each and every of the Agent's actions undertaken pursuant to this agreement, and the Agent has not rights of management or control of the Project except those that derive from the Principal. Thus also, the agent does not participate in any net operating losses of the Project. The Agent's participation, through the Agent's fee, in the net proceeds of the Project is intended to compensate the Agent for the services rendered and risks assumed in undertaking the agency and does not imply any ownership interest.

SECTION TEN

Insurance

The Agent shall obtain appropriate policies of insurance, satisfactory to the Principal's attorney, against property damage, casualty loss, fire, liability, and workmen's compensation and employer's liability and may obtain insurance against such other hazards and risks of the Project as the Agent may deem desirable. The insurance shall include comprehensive general liability insurance with minimum limits in amounts approved by the Principal's attorney. The Principal shall be insured against loss occasioned by an act of the Agent or its employees or agents by virtue of its work in developing and operating the Project. In all policies of insurance, the Principal and Agent shall be coinsured. The cost of insurance shall be treated as a cost of the Project. Further, the Agent shall assure the Principal, either through policies of insurance or contingency funds set up prior to initial operation of the Project and as a direct Project cost, that Principal's risk of loss in the operation of the Project shall be borne by a third party or parties. For such purposes, the third parties may be insurers, underwriters of insurance or escrow agents entrusted with contingency funds. Such appropriate insurance or fund, or a combination thereof, shall be satisfactory to Principal's attorney and such approval shall not be unreasonably withheld.

SECTION ELEVEN

Terms of Agency

The agency created by this agreement shall commence as of the date first above written. The agency shall terminate as follows:

1. If the Principal receives a license for the Project and the Project is completed the agency shall terminate when commercial operation of the Project under the license and any successor license terminates,

2. If the Principal receive a license for the Project and the Project is not completed, the agency shall terminate when the license is surrendered or revoked,
3. If the Principal does not receive a license for the Project, the agency shall terminate when the Principal desists from any appeal or the Principal's rights of appeal are exhausted, or
4. The agency may be terminated at any time by written agreement of the parties.

The Principal may revoke the agency at any time, but such revocation shall be only on the terms specified in Section Twelve.

The Agent may resign the agency, but such resignation shall be only on the terms specified in Section Thirteen.

This agreement shall continue in effect for the duration of the agency created hereunder except that the agreement shall remain in effect after the termination or revocation of the agency or the resignation of the Agent to any extent necessary to preserve, enforce or bring action upon any rights or obligations under the agreement not exercised or fulfilled at the termination or revocation of the agency or the resignation of the Agent.

SECTION TWELVE

Revocation of the Agency

If the Principal revokes the agency at any time, the Principal shall make the following payments to the Agent within sixty days of the date of revocation:

1. The Principal shall reimburse the Agent for all of the out-of-pocket expenses that the Agent has incurred and for which the Agent is liable in connection with the Project but for which the Agent has not been previously paid. It is intended that such reimbursement shall include any unreimbursed expenses for which the Agent would otherwise be at risk under Section Six, and
2. The Principal shall pay the Agent a sum computed by these steps:
 - (a) Estimate the Agent's fee for each month of the projected future period of commercial operation of the Project. In estimating the Agent's fee for such period, assume escalation of the price of power and energy sold from the Project at 6 percent per annum from the average sales price from the previous 24 months.
 - (b) Apply a discount rate of 8 percent per annum to the estimated future stream of income from monthly Agent's fees determined in step (a) to establish the estimated present worth of that future stream of income.
 - (c) Estimate the Agent's expenses (including charges for the estimated time that the Agent's employees or its agents would devote to the Project) for each month of the projected future period of commercial operation of the Project.
 - (d) Apply a discount rate of 8 percent per annum to the estimated future stream of Agent's expenses determined in step (c) to establish the estimated present worth of that future stream of expenses.

-
- (e) Subtract the amount found in step (d) from the amount found in step (b) to determine the Principal's payment to the Agent under paragraph 2 of this Section Twelve.

In the event that there is any dispute between the Principal and the Agent about the amounts owing to the Agent upon revocation of the agency, they shall be resolved as provided in Section Fourteen.

SECTION THIRTEEN **Resignation of the Agent**

The Agent may resign the agency upon six month's notice without obligation to the Principal if the Agent's fee, after the commencement of the commercial operation of the Project, is less than \$5,000 per month in any 60 months, not necessarily consecutive, or is less than that amount per month in any 24 consecutive months.

If the Agent resigns the agency in circumstances other than those described above, the Agent shall give six month's notice and, within 60 days of the date of resignation, shall make a payment to the Principal computed by these steps:

- (a) Estimate the expense to be incurred by the Principal in replacing the Agent or performing the work itself for each month of a five year period after the resignation.
- (b) Apply a discount rate of 8 percent per annum to the estimated future stream of the Principal's expenses determined in step (a) to establish the estimated present worth of that future stream of expenses.
- (c) Estimate the Agent's fee for each month of the five year period after resignation. In estimating the Agent's fee for such period, assume escalation of the price of power and energy sold from the Project at 6 percent per annum from the average sales price for the previous 24 months.
- (d) Apply a discount rate of 8 percent per annum to the estimated future stream of monthly Agent's fees determined in step (c) to establish the estimated present worth of that future stream of Agent's fees.
- (e) Subtract the amount found in step (d) from the amount found in step (b) to determine the Agent's payment to the Principal under this provision of the agreement.

In the event that there is any dispute between the Principal and the Agent about the amounts owing to the Principal upon resignation of the agency, they shall be resolved as provided in Section Fourteen.

SECTION FOURTEEN **Procedures upon Revocation or Resignation of the Agent**

Upon any revocation or resignation of the agency, the Agent shall make available to the Principal for copying all books of account, records, correspondence, memoranda, studies and other documents that might be of use to the Principal in licensing, financing, constructing and operating and maintaining the Project and selling power and energy from the Project. The Agent shall cooperate with the Principal and the Principal's new Agent, if any, in transferring responsibilities for the Project; the Principal shall compensate the Agent for any expenses incurred or services performed in the course of the transfer after revocation or resignation.

In the event that there is any dispute between the parties about payments owing under Sections Twelve and Thirteen upon revocation or resignation of the agency, the parties revoking or resigning the agency shall pay the other party the amounts that the party revoking or resigning the agency agrees are owing and shall pay into an escrow account, bearing interest, any additional amounts that the other party claims are owing. Thereafter, either party, by written request specifying the issues in dispute and summarizing the claims, may refer the dispute to arbitration as provided below. Payments shall be made from the escrow account to the parties according to the arbitration decision. In order to encourage the parties to make responsible claims as to what is or is not owing, the interest component on any amounts paid from the escrow account to a party shall be matched by a payment to that party from the other party of an amount equal to the interest component.

Any late payments under Sections Twelve and Thirteen shall bear interest at the prime rate paid from time to time by the commercial bank in Charleston, West Virginia, having the largest assets.

In any matter referred to arbitration under this Section Fourteen, the parties shall, if possible, agree upon a single arbitrator. If the parties fail to agree upon a single arbitrator within 30 days from the request in writing of one party to the other for arbitration, then each party shall, within 15 days after such failure, appoint one arbitrator and the arbitrators appointed by each party shall appoint a third arbitrator. If either party fails to appoint its arbitrator, then the other party shall request the American Arbitration Association to appoint a single arbitrator to arbitrate the matter. The arbitrator(s), after an opportunity for each of the parties to be heard, shall consider and decide the dispute and notify the parties in writing of the decision. Such decision shall be final and binding upon all parties and shall not be appealable in any jurisdiction. The expense of the arbitration shall be borne by the parties as determined by the arbitrator(s). Any proceedings in connection with such arbitration shall be conducted in Charleston, West Virginia.

SECTION FIFTEEN

Responsibilities of the Parties

The Agent's responsibility under this agreement is to use its best efforts in carrying out the obligations of the agency. The Agent and its employees and agents shall not be liable to the Principal for good faith errors of judgment or for any acts of commission or omission in connection therewith, but nothing in this agreement shall be construed to protect the Agent against any liability to the Principal arising from willful misconduct, bad faith, gross negligence or reckless disregard by the Agent of the obligations of its agency.

The Principal's responsibility under this agreement is, pursuant to its commitment in Section One to proceed with the Project, to:

1. Exercise its right of direction and control of the Agent's activities in a fashion that is timely and efficient,
2. Advance to the Agent the funds acquired through Project financing as they are needed to cover the expenses of the Project, and
3. Take such actions in administrative proceedings or such actions at law as may be required or desirable on behalf of the Project.

If at any time either party believes the other to be in default under this agreement, that party shall give written notice to the other and shall afford the other a reasonable opportunity to remedy the default before taking any other action.

SECTION SIXTEEN
Miscellaneous Provisions

This agreement shall inure to the benefit of, and shall bind, any successors or assigns of the Principal, including any transferees of a license for the Project, but shall not be assignable by the Agent without the Principal's written consent.

Performance under this agreement shall be excused if and to the extent that a party is prevented from performing by action of a court or public authority, storm, flood, lightning, earthquake, explosion, strike, fire, breakdown, civil disturbance, war, acts of God, or shortage or any cause beyond the reasonable control of the party.

If any provision of this agreement shall be held invalid or unenforceable, the remainder of the agreement shall not be affected thereby and shall be valid and may be enforced to the full extent permitted by law.

The interpretation and performance of this agreement shall be in accordance with and controlled by the laws of the State of West Virginia.

This agreement may not be changed orally and may not be modified except by a writing signed by the parties.

Notices and written communications under this agreement should be addressed to:

Attention: Carroll T. Lay, Esquire
Attorney for Town of Summersville
717 Main Street
Summersville, West Virginia 26651

Attention: President
Noah Corporation
Post Office Box 640
Aiken, South Carolina 29801

or such other persons as the parties may designate in writing from time to time.

This agreement represents the complete understanding of the parties and any prior understandings regarding the subject of this agreement are merged herein and superseded hereby.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

ATTEST: G. Dale Bailes, Secretary

BY: Thomas J. Trent, Mayor
Town of Summersville

ATTEST: Elaine K. Edison, Secretary

BY: Howard M. Hickey, President
Noah Corporation

Resources, Inc.) submitted another license application. In May 1984 both license applications were dismissed because the affected reach of the Gauley River was designated under the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, for possible inclusion in the National Wild and Scenic Rivers System.⁵ On April 26, 1985, the President recommended that the affected reach of the Gauley River not be included in the National Wild and Scenic River System; pursuant to the terms of the Wild and Scenic Rivers Act, the licensing prohibition would expire on April 26, 1988.

Thereafter, Summersville submitted an application for a preliminary permit for the Summersville Dam site, which was granted in 1986,⁶ but due to concerns regarding its ability to finance the development Summersville surrendered the permit. The Commission Secretary's Notice of Surrender, issued December 1, 1986, advised that new applications for the site could be filed on January 2, 1987. Summersville and Manassas submitted permit applications on that date, but in July 1988 the Commission dismissed both permit applications because of a policy adopted in March 1987 precluding consideration of permit or license applications at study river sites until the three-year period for Congressional consideration had expired.⁷ The order stated that applications for the site would be accepted beginning Aug. 8, 1988.

On Aug. 8, 1988, Manassas filed a permit application that was docketed as Project No. 10634, and Summersville filed a license application that was docketed as Project No. 10635. The Commission staff notified Summersville of deficiencies in the license application, and Summersville submitted information to correct them.

On Oct. 26, 1988, before the competing permit and license applications were accepted or rejected, Congress enacted the West Virginia National Interest River Conservation Act of 1987, Public Law 100-534, 102 Stat. 2699. Title II of the act created the Gauley River National Recreation Area, which begins at the foot of the Summersville Dam and extends downstream approximately 25 miles. Within Title II, Section 202(d) adopted Section 7(c) of the Wild and Scenic Rivers Act, which prohibits the issuance of hydroelectric licenses. However, Section 205(c) of the act provides that:

during the four-year period after the enactment of this Act (i.e., until Oct. 26, 1992), nothing in this Act shall prohibit the licensing of a project adjacent to Summersville Dam as proposed by the City of Summersville, or by any competing project applicant with a permit or license application on file as of Aug. 8, 1988...

Section 205(c) also provides that if a project is licensed the boundary of the National Recreation Area is to be modified by relocating the upstream boundary of the Recreation Area to a point 550 feet downstream from the existing valve house. Section 205(c) directs the Secretary of the Interior to retain in the Recreation Area all lands which are not necessary to the operation of the project. The National Recreation Area is to be administered as a unit of the National Park System.

⁴ 15 FERC ¶ 62,218 (1981). *The order issuing the preliminary permit also denied competing permit applications, one of which was filed by a group that included Manassas.*

⁵ 27 FERC ¶ 61,206 (1984), *reh'g denied*, 28 FERC ¶ 61,257 (1984), *aff'd*, *Town of Summersville v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986).

⁶ 36 FERC ¶ 62,179 (1986).

⁷ 44 FERC ¶ 62,095 (1988). *A study river site is a river segment which has been designated for possible inclusion in the Wild and Scenic Rivers System.*

The Summersville Hydroelectric Project will be located between the Summersville Dam and the National Recreation Area, with the downstream edge of the project boundary being adjacent to the upstream boundary of the Recreation Area.

Before Summersville's 1988 license application was accepted or rejected, Manassas' permit application was accepted for filing, and the Commission issued notice of that application. Since the deadline for filing license applications in competition with Manassas' permit application was approaching and Summersville had not been informed whether it had corrected the deficiencies in its 1988 application, Summersville filed on July 31, 1989, a timely license application that was docketed as Project No. 10813.

The Commission staff notified Summersville of deficiencies in its 1989 license application, and subsequently rejected Summersville's 1988 license application for failure to correct deficiencies. Summersville filed an appeal of the rejection. The Commission upheld the rejection of the 1988 application but accepted Summersville's 1989 license application for filing.⁸ In an answer to Summersville's appeal, Manassas argued⁹ that a license should not be issued to Summersville because it had abused its municipal preference.¹⁰ The Commission deferred consideration of Manassas' allegations of municipal abuse until the review of Summersville's license application.

On rehearing,¹¹ the Commission addressed one aspect of Manassas' allegation of municipal abuse by Summersville.¹² The Commission found that Manassas had not shown that Summersville's 1989 license application was the result of any abuse by Summersville of its municipal preference at the permit stage. The order noted that the 1983 license application filed by Summersville during the term of its 1981 permit was dismissed because of the designation of the Gauley River for potential inclusion in the Wild and Scenic River System. The order further noted that, upon the expiration of

⁸ 53 FERC ¶ 61,259 (1990). This order determined that Summersville's 1989 application qualified as eligible under the terms of the Wet Virginia National Interest River Conservation Act. *Id.* at p. 62,040 n. 7.

⁹ Manassas also argued that Summersville's 1989 license application should be rejected because it duplicated the then-pending 1988 license application. The Commission found that Summersville had two license applications on file for the same project as a result of a staff procedural error. We noted that Manassas' permit application should not have been accepted before the staff decided whether to reject Summersville's 1988 application, and therefore rescinded the not of Manassas' permit application. We also noted that Summersville had corrected the deficiencies in its 1989 license application in a timely manner and that it was being accepted for filing as of July 31, 1989. On Dec. 13, 1990, the staff dismissed Manassas' permit application without prejudice, and Manassas filed a request for rehearing of that order.

¹⁰ Under Section 7(a) of the FPA, 16 U.S.C. § 800(a), when there are competing applications for preliminary permit, or competing applications for original

license that were not preceded by preliminary permits, the Commission must give tie-breaker preference to the application filed by a state or municipality. In *City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (1981) (Fayetteville), the Commission determined that municipal preference does not apply to so-called "hybrid" applications consisting of a municipality and a nonmunicipality. The Commission has found abuse of municipal preference in situations where the municipality used its municipal preference at the permit stage to gain competitive advantage at the licensing stage on behalf of hidden, nonmunicipal entities whose interest in the project required them to have been co-applicants. See, e.g., *Gregory Wilcox*, 24 FERC ¶ 61,317 (1983) and 26 FERC ¶ 61,113 (1984).

¹¹ 55 FERC ¶ 61,271 (1991).

¹² The order also withdrew our rescission of the notice of Manassas' permit application but upheld the order dismissing Manassas' permit application, and affirmed the decision to accept and process Summersville's 1989 license application.

the prohibition against licensing during Congressional consideration of the Wild and Scenic River issue, Manassas and Summersville were in fresh and equal positions to compete for development of the Summersville Dam site, and that Summersville's 1989 license application was filed independently from the 1983 permit and not in reliance on it. The order deferred, until review of Summersville's 1989 license application, consideration of Manassas' allegations that Summersville does not have authority under state law to own and operate the project, and that Summersville does not intend to acquire and retain all of the property rights and interests in property necessary to operate and maintain the project. Those issues are addressed below in this order.

DISCUSSION

A. Manassas' Allegations Regarding Summersville's Qualifications to Be a Licensee

1. Relationship Between Summersville and Noah Corporation

Manassas asserts that Noah Corporation is a joint venturer with Summersville in the project's development and that the project will actually be owned and operated by Noah. Manassas argues that Summersville does not intend to retain all of the property rights necessary to construct and operated the project but intends to transfer interests in the project to Noah that would require Noah to become a licensee. Manassas contends that Summersville will not be able to construct and operate the project as a sole licensee, inasmuch as all of the design, consultation, and study work related to the various applications has been performed by Noah and not by Summersville. Manassas also cites to a letter dated Nov. 26, 1980, from Howard M. Hickey, Jr., on behalf of Noah, to Farrell Johnson, Mayor of Summersville, recommending that Noah be withdrawn as an applicant from the pending permit application for Project No. 3493 so that the applicant would be a "pure" municipal rather than a hybrid. The letter goes on to state that any license issued for the project would then be transferred jointly to Summersville and Noah prior to the commencement of construction.

The addition of a non-municipal entity as a co-licensee to a license that was issued to a municipal applicant could constitute an abuse of the municipal preference, even if the non-municipal entity is being added in order to provide financing for the project.¹³ Therefore, any financing plan or other agreement in which Noah would hold property rights which would require it to become a licensee could result in a finding that Summersville had abused its municipal preference.¹⁴

The November 1980 letter from Mr. Hickey to Mr. Johnson raises a question about the relationship between Summersville and Noah and Summersville's intent to acquire and retain all of the property interests necessary to construct, operate and maintain the project. However, this letter was written before the Commission announced its policy regarding abuse of municipal preference in Fayetteville (see n. 11, supra). Summersville has since stated, in its application and in response to

¹³ See *Paterson Municipal Utilities Authority*, 27 FERC ¶ 61,323 (1984), and the *City of Vidalia, Louisiana*, 28 FERC ¶ 61,328 (1984).

¹⁴ *These principles apply despite the fact that Summersville is the sole applicant for a license and no competing license application has been filed, because (as we explained in Paterson and Vidalia) Summersville's status as a municipality gave it an inherent advantage over potential non-municipal*

applicants such as to discourage potential applications by the latter. However, as discussed in our prior order, as summarized above, any advantage that Summersville might have incurred from an abuse of municipal preference at the time it sought and held a preliminary permit, had such abuse occurred, would in any event be irrelevant, because Summersville filed its license application in this proceeding long after the permit expired.

staff inquiry, that it intends to acquire and retain all property interests necessary to be sole licensee for the project. It does, however, have a contractual agreement with Noah by which Noah is Summersville's agent for most activities concerning the Summersville Dam Project.

In our decision in City of Fayetteville Public Works Commission, we stated that:¹⁵

“the preference afforded a municipality under Section 7(a) need not be jeopardized by contractual arrangements the municipality may make with non-municipal entities for assistance in financing, studying, constructing or operating a project. In order to retain its entitlement to municipal preference as the party who intends to be the licensee, the municipality must retain in such contractual relationships requisite control over the operation of the project and may not relinquish any property or other rights necessary for project purposes.”

We have reviewed the agreement between Summersville and Noah, dated Dec. 13, 1992, and conclude that, as modified herein, it is acceptable. Under the agreement, Noah is to manage all aspects of the licensing, financing, design, construction, operation, and maintenance of the project, subject to the direction and control of Summersville,¹⁶ which will own all project property exclusively.¹⁷ Summersville has the right to direct and control Noah “in each and every action undertaken pursuant to the agency” established by the agreement, and Noah must consult with Summersville before taking actions “significantly” affecting the project, “unless exigent circumstances require otherwise.”¹⁸ Under these provisions, Summersville appears to retain the requisite control over project operations required by the FPA.

Nevertheless, since Summersville's control of Noah's overall management of the project under the agreement is subject to “exigent circumstances”, and since Noah appears to have authority to take independent actions with respect to the project that do not “significantly” affect the project, and to make clear that Noah may in no way encumber Summersville's performance of its duties as a licensee, the agreement must be modified to include a provision stating that:

“Notwithstanding any provision contained herein, the Principal (Summersville) has the right to perform any and all acts required by an order of the Federal Energy Regulatory Commission or its successor without the prior approval of the Agent (Noah).”¹⁹

Inclusion of the foregoing provision will serve to ensure that the agreement comports with the project control and municipal preference requirements of the FPA.

Under the agreement, Summersville will pay Noah a monthly fee equal to 49 percent of the proceeds of the project,²⁰ and in the event project expenses exceed gross income, Noah is to receive

¹⁵ *Fayetteville*, 16 FERC ¶ 61,209 at p. 61,456. The Commission has approved a variety of agreements where municipalities have contracted with non-municipals for financing or project operation. See, e.g., *City of New Martinsville, West Virginia*, 32 FERC ¶ 61,268 (1985), and *El Dorado Irrigation District*, 29 FERC ¶ 61,375 (1984).

¹⁶ See the agreement at pp. 3-7, Section Three.

¹⁷ *Id.* at p. 14, Section Nine.

¹⁸ *Id.* at p. 8, Section Four.

¹⁹ Compare *Linweave, Inc.*, 23 FERC ¶ 61,391 (1983), where the Commission required modification of a lease agreement of project property to include a similar provision to ensure that the licensee/lessee would possess all rights necessary to accomplish all project purposes.

²⁰ See the agreement at pp. 12-14, Section Seven. Project proceeds are defined as gross income (consisting of power sales revenues to a utility plus an amount equal to the fully allocated cost of any project power used by Summersville) less monthly expenses incurred by Noah

no fee.²¹ These provisions appear to provide an acceptable method of allocating project revenues between Summersville and Noah.²² That Noah will receive a portion of the project revenue does not by itself require it to become a licensee.²³

Manassas has not presented any other evidence to support its contention that Summersville intends to transfer the license to Noah or add Noah as a co-licensee after the issuance of this license. Accordingly, we are satisfied that Summersville intends to maintain the control of project operations and ownership of property and property rights required by the license and the FPA.²⁴

2. Summersville's Municipal Authority

Manassas argues that a license should not be issued to Summersville because Summersville is not authorized by West Virginia law to construct, operate, and maintain the project. Summersville states in its application that it is authorized by West Virginia Code Sections 8-12-5(32) and (33) and 13-2C-1 to 13-2C-5 to engage in the business of operating a hydroelectric generating project.²⁵

Manassas contends that the language of Section 8-12-5(32) does not permit Summersville to operate this project. Section 8-12-5(32) states in pertinent part that municipalities shall have the power:

“To erect, establish, construct, acquire, improve, maintain and operate... an electrical system... within or without the corporate limits of the municipality or partly within and partly without the corporate limits of the municipality, except that the municipality shall not erect any such system partly without the corporate limits of the municipality to serve persons already obtaining service from an existing system of the character proposed...”

Manassas argues that the prohibition in subsection 32 against establishing an electrical system outside the corporate limits of a municipality to serve persons already receiving service from an existing system prohibits Summersville from producing power for sale to a power company.

²¹ *Id.* at pp. 14-15, Section Eight.

²² Compare *El Dorado Irrigation District and El Dorado County Water Agency*, 29 FERC ¶ 61,375 at p. 61,789 (1984), where the Commission approved a project financing arrangement involving the sharing of project revenues between municipal licensees and a group of private investors.

²³ See *Fayetteville*, supra, 16 FERC ¶ 61,459 n. 8, where the Commission found that it is the possession of proprietary interests in project property that distinguishes a licensee from parties that are mere beneficiaries of a project. Compare *Owyhee Irrigation District*, 55 FERC ¶ 61,252 p. 61,804 (1991), where the Commission found that a proposed contract to share project revenues between a licensee and a non-licensee, which would not convey interests in project property or rights necessary to accomplish project purposes, would not require the non-licensee to become a co-licensee.

²⁴ However, if in the future Summersville seeks to transfer its license to a non-municipal entity, such transfer may be barred as an abuse of municipal preference, unless the Commission determines, after a competitive transfer proceeding or other proceeding, that Summersville and/or its private transferee should be awarded the project license. See *Vidalia*, supra n. 13.

²⁵ Chapter 8, Article 12, Section 5 deals with general municipal powers, and Chapter 13, Article 2C is the Industrial Development and Commercial Development Bond Act. Section 8-12-5(33) provides that Summersville has the authority:

To acquire watersheds, water and riparian rights, plant sites, rights-of-way and all other property and appurtenances necessary, appropriate, useful, convenient or incidental to any such system... as aforesaid [including in Section 8-12-5(32)]...

On March 10, 1990, after the date of Manassas' motion opposing Summersville's license application, the West Virginia Code was amended to provide that any municipality may:

"... acquire, construct, establish, extend, equip, repair, maintain and operate or lease to others for operation... an electric power system or construct, maintain and operate additions, betterments and improvements to an existing... electric power system, notwithstanding any provision or limitation to the contrary in any other law or charter: Provided, That such municipality... shall not serve or supply... electric power facilities or services within the corporate limits of any other municipality or county commission without the consent of the governing body of such other municipality or county commission."

Section 8-19-1(a).²⁶ Summersville proposes to sell the project power to the Monongahela Power Company,²⁷ but does not yet have a power supply contract. If the sale of project power to a private utility were to invoke the proviso in Section 8-19-1(a), Summersville would at that time have to obtain any requisite consent as provided for in that section. However, at this point Manassas has not demonstrated that the West Virginia Code prevents Summersville from constructing and operating the Summersville Dam Project.²⁸

B. Whether to License the Project

We find that issuing a license for Summersville's proposed project, with the mitigative measures recommended by the Commission's staff, is in the public interest. This project will produce 198,000 MWh of electric energy annually using a clean, renewable resource. As discussed below and in the Environmental Assessment (EA)²⁹ attached to this order, the project, as licensed, will not have significant adverse impacts on the recreational use of Lake Summersville or the Gauley River. We recognize that temporary adverse impacts on water quality and on recreational boating below the dam will occur during construction of the project, and that some of the project works, such as the powerhouse, valve house, and transmission line, will adversely affect the aesthetic appearance of the project area. Nonetheless, we conclude that the benefits of the project outweigh the unavoidable adverse impacts. Accordingly, we find that the Summersville Hydroelectric Project No. 10813 would be best adapted to comprehensive development of the waterway for beneficial public uses, as required by Section 10(a)(1) of the FPA.³⁰

²⁶ Section 8-18-1(c)(2) defines "electric power system" as:

"... a system or facility which produces electric power in its entirety or provides for the distribution of electric power for local consumption and use or for distribution and resale or any combination thereof, including, but not limited to, power lines and wires, power poles, ... generators, ... machinery and all other facilities necessary, appropriate, useful or convenient or incidental in connection with or to an electric power supply system."

²⁷ See EA at 1-2.

²⁸ Summersville also states that it is authorized to construct and operate the Summersville Dam Project by the Industrial Development and Commercial Development Bond Act (Bond Act), which authorizes municipalities to acquire and finance industrial and commercial projects. Manassas argues that the Summersville Dam Project does not meet the definition of either a commercial or industrial project as contained in the Bond Act. In light of the above discussion, we do not believe it is necessary to reach this issue.

²⁹ Environmental Assessment for Summersville Hydroelectric Project, FERC No. 10813-000 – West Virginia (Jan. 10, 1992).

³⁰ 18 U.S.C. § 803(a)(1).

C. Project Design and Construction

The hydroelectric project licensed herein will be constructed adjacent to the Corps' Summersville Dam. The project reservoir is Lake Summersville, which the Corps manages for flood control, low-flow augmentation, and recreation. It has a surface area that varies seasonally between 514 and 4,920 acres.³¹ The dam, built in 1966, is a rockfill structure 393 feet high and 2,280 feet long. Water is drawn out of the reservoir through an intake structure that leads to a 29-foot-diameter outlet tunnel,³² which splits into three 11-foot diameter steel tunnels controlled by three 9-foot-diameter Howell-Bunger valves,³³ and one 3-foot-diameter steel tunnel controlled by one 30-inch Howell-Bunger valve. These valves are in a valvehouse located directly downstream of the reservoir.

The proposed project would be built immediately downstream of the Corps valvehouse. The existing tunnels would be extended and the three 11-foot diameter tunnels would each be bifurcated by wyes³⁴ into two conduits: one leading to a new powerhouse located approximately 250 feet downstream of the Corps valvehouse location,³⁵ and the other leading to a new valvehouse located to the left of the powerhouse. The 3-foot-diameter tunnel would go directly into the new valvehouse. The four Howell-Bunger valves would be moved from the Corps valvehouse to the new valvehouse. The powerhouse would contain three 24-MW turbine generators, and one 8-MW turbine generator.

The Corps is concerned that the addition of hydraulic turbines to the existing outlet tunnels could subject that structure to hydraulic transients³⁶ that are not experienced with the present control facilities. The Corps believes that the proposed plan's introduction of new bends and wyes into the Corps discharge tunnels could threaten the physical integrity of the existing outlet works. The Corps asks that we require Summersville to conduct a study of hydraulic transients and, if necessary, incorporate surge tanks³⁷ or other facilities into the project to protect the structural integrity of the outlet works.

We agree that the proposed changes in the outlet works have the potential to cause hydraulic transients which could threaten the structural integrity of the existing outlet works. Accordingly, we are including Article 312 in the license, which requires Summersville to conduct a study of potential hydraulic transients in the dam's discharge conduits and, if required by the Corps, incorporate surge tanks and other facilities into the proposed project to protect the existing outlet works.

³¹ *The minimum pool is 514 acres, and the maximum pool (during flood conditions) is 4,820 acres. The normal 928 acres, and the normal summer pool is 2,790 acres. In the fall, the Corps lowers the reservoir level in anticipation of heavy snows and rain in the winter and spring months. Recreational boaters raft down the river during the draw-down period.*

³² *The outlet tunnel is sometimes referred to as a discharge conduit.*

³³ *A Howell-Bunger valve, named for its inventors, is a regulating valve which allows for the release of a controlled flow of water. This type of valve is frequently used for turbine by-passes or to provide aeration of water.*

³⁴ *A wye is a "Y" shaped fixture that connects one pipe with two others.*

³⁵ *One of these tunnels would have a smaller tunnel off of it just before they entered the powerhouse.*

³⁶ *Hydraulic transients are changes in pressure in the water column in a tunnel or penstock. The pressure changes can be caused by changes in the volume of water flow, such as closing a valve. In order to run sufficient water through the turbines, the Howell-Bunger valves may be closed.*

³⁷ *A surge tank would provide a path for the blocked water in the tunnel to travel, thereby releasing any built-up pressure.*

The Corps is also concerned that the proposed changes in the discharge conduits may cause unacceptable flow patterns to develop in the conduits at the relocated Howell-Bunger valve site. In order to ensure that the proposed project does not create flow patterns which could adversely affect the dam or outlet works, we are including Article 313 in the license, which requires Summersville to construct and test a physical model of the penstock and conduit system to determine if unacceptable flow patterns would be created in the conduit system, including the tailrace.

In order to construct the new facilities, the licensee will be installing cofferdams³⁸ to divert the water from the construction site. The large Howell-Bunger valves will be removed from the Corps valvehouse and placed in the new valvehouse and powerhouses one at a time, with one cofferdam installed for each valve move.³⁹

The Corps commented that the cofferdam needed for the first two stages of the project construction are substantial structures which will be difficult to design and construct. The Corps requests that Summersville satisfy the Corps as to the design and feasibility of constructing the cofferdams before proceeding with other aspects of the project design. Summersville does not object to Corps review and approval of the cofferdam design to ensure that the integrity of the federal Summersville Dam is not jeopardized, but does not believe that the Corps' concurrence on the feasibility of the cofferdams is necessary. Summersville believes that, because the cofferdams would not jeopardize the safety of the dam, the feasibility of the cofferdams is the concern of Summersville and its contractor.

We anticipate that any review of the cofferdam design by the Corps would include an evaluation of the likelihood of failure of the cofferdam and the potential threat that such a failure could pose to the structural integrity and operation of the federal project. Therefore, the Corps should have review and approval authority over the cofferdam design.⁴⁰ In order to ensure that the cofferdams do not threaten the operation and structural integrity of the federal project, we are including Article 304 in the license, which will require that cofferdam design and construction be performed in consultation with, and subject to, the approval of the Corps' Division Engineer. Article 304 also requires Summersville to submit a schedule for the submission of design documents and plans and specifications for the project in order to allow timely review and approval by the Corps.

³⁸ *The cofferdams will be a single-sheet pile supported by buttresses, or a similar structure.*

³⁹ *The first-stage cofferdam will be located between the third (nearest the new valvehouse) and second turbines in the powerhouse and extend upstream between the third and second powerhouse conduits to the Corps valvehouse, and downstream a short distance. A settling basin with a haybale dike will be located to the right of the cofferdam. While this cofferdam is in place, the conduit leading to the new valvehouse, the new valvehouse, and its tailrace will be built. The second-stage cofferdam will surround the second penstock from the Corps valvehouse to the powerhouse. A settling basin with a haybale dike will be located downstream of the cofferdam. While this cofferdam is in place, the second conduit to the powerhouse will be built. The third-stage cofferdam will extend from the end of the powerhouse nearing the valvehouse and cut*

across to the bank on the powerhouse side of the tailrace. A settling basin with a haybale dike will be located immediately downstream of the right side of the powerhouse. While this cofferdam is in place, the first conduit to the powerhouse, the powerhouse, and the tailrace will be built.

⁴⁰ *If the Corps were to conclude that there was a potential for failure of the cofferdam, but that such a failure would not threaten the structural integrity or operation of the federal project, we would expect the Corps to communicate its views to Summersville and its contractors. In light of the Corps' engineering experience and expertise in this area (as well as Summersville's obvious interest in ensuring the integrity of its own facilities) we would expect that in the event Summersville and its own contractors would consult extensively with the Corps and to accord considerable deference to the Corps' views.*

The National Park Service is concerned that the cofferdams could affect the Gauley River National Recreation Area (which, as noted above, extends from just below the project to some 25 miles downstream) through sedimentation and leaching, and has requested its own review authority over the design of the cofferdams. We agree that erosion, sedimentation, and leaching from the cofferdams could affect the Recreation Area. Therefore, Article 311 of the license requires Summersville to submit design drawings and computations for the proposed cofferdams to the Park Service for review and recommendations for making the proposed cofferdams compatible with the operation of the Recreation Area.

The Corps notes that construction of the Summersville Project will cause temporary reductions in the overall discharge capacity of the outlet works during the times that the Howell-Bunger valves are relocated. The Corps states that there are certain periods of the year when any reduction in discharge capacity would be unacceptable. In order to ensure that reductions in discharge capacity do not adversely affect the operation of the Summersville Dam, we are including Article 314 in the license, which requires Summersville to schedule the relocation of the Howell-Bunger valves only during the time periods specified by the Corps.

D. Erosion and Sedimentation

The Park Service and the West Virginia DNR are concerned that sedimentation and erosion from project construction could adversely affect the Recreation Area. Ground-disturbing construction activities include the excavation in the river bank and bed during the construction of the powerhouse, the tailrace, and the discharge channel for the new valvehouse; the creation of the construction staging area; the disposal of excess excavated soil; and obtaining access to transmission tower sites and the installation of the new towers. The EA notes that these construction activities could produce significant erosion and sedimentation problems.⁴¹

Summersville has prepared an Erosion and Sedimentation Control Plan, filed July 31, 1989, and revised May 30, 1990, which would reduce erosion and sedimentation from project construction to minor levels. Article 401 of this license requires Summersville to implement the erosion and sedimentation control plan it has filed. Summersville is required to file the final drawings, specifications, and schedule for implementing the plan at the same time it files the final project drawings and specifications required by Article 302. Article 401 further requires Summersville to prepare the final drawings and specifications for the erosion and sedimentation control plan in consultation with the Park Service, West Virginia DNR, the Soil Conservation Service, and the Corps.

The Park Service is also concerned that the planned excavation spoil disposal area could affect the Recreation Area. Summersville proposed to dispose of spoil excavated in construction of the powerhouse, tailrace, and new valvehouse in the old Summersville Dam borrow area. The Recreation Area boundary map provided by the Park Service indicated that part of the spoil disposal area would be within the Recreation Area. The Park Service states that it reserves the right to refuse deposition of spoil material on land within the Recreation Area. If the Park Service refuses deposition of spoil material, an alternative would be to sift the disposal site to another part of the Summersville Dam borrow area. It appears from maps that there is sufficient space in the borrow area outside the Recreation Area boundary to dispose of spoil from the project. Summersville states

⁴¹ EA at 8.

that there are a number of former coal strip mining sites in the area where spoil could be deposited, and that moving spoil to an alternate site would not place a greater economic burden on the project.

The Park Service is also concerned about revegetation of those portions of the transmission line route which cross the Recreation Area. The Park Service notes that Summersville's erosion and sedimentation control plan calls for use of lespedeza and alfalfa for revegetation. Park Service policies do not allow the use of "exotic" species such as lespedeza and alfalfa where other alternatives exist. The Park Service states that native species would need to be used to revegetate those parts of the transmission line route which cross Park Service land. Article 401 requires Summersville to consult with the Park Service in the preparation of the erosion and sedimentation plan. The Park Service will be able to identify acceptable species for revegetation of the transmission line route during this consultation. In addition, Article 410 adopts the terms of the Memorandum of Understanding (MOU) between Summersville and the Park Service, which requires Summersville to locate the transmission line on a route acceptable to the Park Service. These requirements will ensure that the routing and revegetation of the transmission line route will be consistent with the purposes of the Recreation Area.

The Park Service is concerned that the transmission line could pose an electrocution hazard to perching raptors. The EA notes that bald eagles and peregrine falcons may be attracted to the project area and could be electrocuted when perching on the transmission line if it is not properly designed.⁴² Article 406 requires Summersville, after consulting with the Park Service, West Virginia DNR, the Corps, and the Fish and Wildlife Service, to file a transmission line design plan which considers measures necessary to protect raptors from electrocution.

E. Water Quality

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), requires that Summersville receive water quality certification or a waiver of certification before we can issue a license for the project. West Virginia DNR issued a water quality certification for the project on Sept. 18, 1991.

West Virginia DNR is concerned that project operation could result in reductions in water quality, specifically dissolved oxygen (DO), downstream of Summersville Dam. At the present time, water is released from Summersville Dam through the Howell-Bunger valves at the base of the dam. These valves dissipate energy from the discharged water and also have the effect of aerating the water to near-saturated or super-saturated DO concentrations. Project operations would divert most of the release flows through the project turbines and would reduce or frequently eliminate releases through the Howell-Bunger valves, with commensurate losses in aeration at the project dam.

West Virginia DNR has designated the Gauley River downstream of the Summersville Dam as a High Quality Stream and a National Resource Water.⁴³ West Virginia's anti-degradation policy provides that there should be no reduction in present water quality of National Resource Waters and High Quality Streams.⁴⁴ The EA states that the area immediately downstream of the dam is classified as Trout Water by West Virginia DNR. The standard for DO concentrations immediately downstream of the dam is not less than 6.0 milligrams per liter (mg/l) at any time and not less than 7.0 mg/l during

⁴² EA at 20.

Virginia Code Chapter 20, Article 5A and Legislative Rules, Title 46, Series I, Section 4.0.

⁴³ "High Quality Stream" and "National Resource Waters" are categories established under West Virginia's water quality program pursuant to West

⁴⁴ EA at 11.

spawning areas. The EA also states that, although DO concentrations have not been continuously monitored downstream of the dam, 61 samples were taken immediately downstream of the dam between 1975 and 1988. DO concentrations ranged from 5.9 mg/l to 13.0 mg/l and averaged 9.7 mg/l. The DO standard of 6.0 mg/l was not met on only one occasion, in June 1981.⁴⁵

The water quality certification issued by West Virginia requires Summersville to maintain a DO concentration of 7.0 mg/l in the project tailrace and to operate the project in a manner that maintains DO concentrations in the river above Swiss, West Virginia, equivalent to those existing prior to project operations.⁴⁶ West Virginia requires that Summersville prepare a plan for determining pre-project DO concentrations. The certification also requires Summersville to prepare an operating plan and to monitor water quality for the first two years of project operations. After the two-year study, Summersville is required to prepare a comprehensive evaluation of the operating plan which documents project impacts and proposes revisions in the operating plan, if necessary.

The EA states that the fish species which occur in the Gauley River require a well-aerated environment for optimum growth and reproduction. The EA note that the U.S. Environmental Protection Agency's (EPA) criteria for non-salmonid waters indicate that a DO concentration of 6.0 mg/l would have slight or no impact on early fish life stages and no impact on other life stages. The EPA criteria indicate that a DO concentration of 7.0 mg/l would have no impact on salmonid growth rates. The EA concludes that DO concentrations of at least 7.0 mg/l would have little or no effect on fish in the Gauley River. The EA states that it should be possible to operate the project in a manner which meets the 7.0 mg/l minimum DO concentration requirement during critical periods either with partial or total flow releases through the Howell-Bunger valves or other methods, such as the oxygen injection system proposed by Summersville.⁴⁷

Article 404 requires Summersville to maintain a DO concentration of at least 7.0 mg/l, as measured in the Gauley River immediately downstream of the project's tailrace. Article 404 also requires Summersville to install and operate permanent, continuously recording water temperature and DO monitoring devices, and reserves authority to the Commission to require modifications in project structures or operations to ensure that the 7.0 mg/l DO concentration level is met.

The water quality certification also requires Summersville to construct or provide a substantial number of recreation facilities which are completely unrelated to the maintenance or improvement of water quality. The section of the certification captioned "Recreation" requires Summersville to construct or improve access roads and paths, low water stepping stone bridges, fish attraction structures, a boat launching facility in Summersville Lake, and a residence and storage building, and to provide funds to West Virginia DNR for fish and wildlife management programs. We believe that these conditions are beyond the scope of Section 401, and that states should not use their water quality certification authority to impose conditions that are unrelated to water quality.⁴⁸ However, since pursuant to Section 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the

⁴⁵ EA at 12.

⁴⁷ EA at 15-16.

⁴⁶ The U.S. Department of the Interior supported this requirement.

⁴⁸ See *Central Maine Power Co.*, 52 FERC ¶ 61,033 (1990); *Carex Hydro*, 52 FERC ¶ 61,216 (1990).

Commission are either to issue a license with the conditions included or to deny Summersville's application, and we do not believe it is in the public interest to deny the application.

Several of the recreational facilities (an access road, angler access paths, and two stepping stone bridges) required by the water quality certification would be located outside of the project boundary and within the Recreation Area.⁴⁹ The EA recommends that these riverside facilities not be built, because they would pose a threat to the Virginia spirea and its habitat.⁵⁰ Intervenor American Whitewater Affiliation (Whitewater) objects to these facilities, because they would degrade the pristine scenery along the river bank. Whitewater also objects to the low water stepping stone bridges, because they could pose a serious hazard to boaters on the river. A low water stepping stone bridge is a series of rocks or concrete blocks placed in the river which allow pedestrians to cross the river at low flow levels without wading through the water. Whitewater believes that these bridges could create conditions which could cause boaters to be trapped under water and drowned.

The water quality certification requires Summersville to provide alternative access and/or recreational facilities at locations in the vicinity of the project site if the Park Service does not approve the proposed riverside facilities. For the reasons discussed above and in the EA, these facilities should not be built. Therefore, we strongly urge the Park Service to reject these proposed facilities.

With regard to the stepping stone bridges, we, too, are concerned that such bridges would pose a hazard to boaters who use the river during lower flows, and to anglers during flow periods that were slightly higher than the bridges are designed to accommodate. At such flows, the bridges could be submerged but visible to the anglers, tempting the anglers to use the bridges; under these circumstances, someone attempting to use the bridge could be swept into the river. Commission staff communicated these safety concerns to West Virginia DNR, and by letter telefaxed to the Commission on Sept. 15, 1992 (formal letter to follow), West Virginia DNR agreed to delete the water quality certification's requirement (at paragraph 3.C.IV) for stepping stone bridges. In its place, West Virginia DNR intends to insert the following new paragraph:

"The licensee shall design and install unspecified access improvements (to be determined by the Licensee and WV DNR) in the project vicinity at an expense comparable to designing, installing and maintaining two stepstone bridges on the Gauley River downstream of the project site, as per agreement reached between the Licensee and the WV DNR prior to issuance of State Certification."

We are issuing the license for Project No. 10813 now, even though the substitution of new paragraph 3.C.IV of the project's water quality certification will not be effective until West Virginia DNR formally amends the certification. However, by license Article 412 we are reserving our authority to amend the license to reflect adoption of procedures, to be developed through discussions with West Virginia DNR and, as appropriate, the Park Service, to ensure that any access improvements required under new paragraph 3.C.IV of the certification will, in the Commission's judgment, not pose a safety hazard.

⁴⁹ *These facilities would be located in or along the river between the powerhouse and the point where the emergency spillway joins the river, approximately two miles downstream. The certification*

requires Summersville to construct angler access paths on both sides of the river and two stepping stone bridges.

⁵⁰ *EA at 23-24.*

F. Recreation and Aesthetic Resources

The Park Service and intervenors West Virginia Professional River Outfitters (Outfitters) are concerned that modifications in the volume or scheduling of flows released into the Gauley River below the project could adversely affect the NRA and whitewater boating on the river. Whitewater rafting and boating on the Gauley River below the Summersville Dam are extensive. The EA notes that in 1990 over 30,000 people boated the river during the fall draw-down, and estimated that at current levels, recreational boating on the Gauley River adds 35 million dollars to the West Virginia economy.⁵¹ Any significant change in the volume or scheduling of flows released from the Summersville Dam could have a major adverse impact on recreational boating on the Gauley.

The Corps is required to provide 20 days of whitewater boating releases (2,500 cfs minimum) starting the first weekend after Labor Day every year.⁵² The EA notes that the current agreement between the Corps, the commercial rafting outfitters and West Virginia DNR provides for 22 days of whitewater releases.⁵³ These releases are scheduled Friday through Monday for five weeks and Saturday and Sunday for an additional week. Summersville agrees to generate power only from the flows that are provided by the Corps.

Article 402 requires Summersville to operate the project as directed by the Corps, using flows provided by the Corps and maintaining the current minimum flow regime. Article 402 further provides that the specified mode of operations may be modified only in the event of an emergency or for short periods upon mutual agreement among Summersville, the Corps, West Virginia DNR, the Park Service, and the U.S. Fish and Wildlife Service (FWS). Since Summersville must generate power only from the flows that are made available by the Corps and must maintain the present minimum flow regime, the operation of the project will not have any effect on the volume or timing of flows in the Gauley River below Summersville Dam.

Fayette County Chamber of Commerce, Outfitters, and Class VI River Runners (collectively, Fayette), the Park Service, and American Rivers are concerned that the construction and operation of the project will adversely affect whitewater boating on the Gauley River. Most whitewater boaters entering the Gauley River use one of the three put-ins located below Summersville Dam. The upper put-in, located just below the present outlet works, and the lower put-in, located about 500 feet downstream, are used extensively by commercial rafting operations. Between the upper and lower put-ins there is an undeveloped path which leads to the river. This path is used primarily by private boaters, most of whom are kayakers. The commenters are concerned that the powerhouse and new valve house will make the upper put-in unusable.

The EA states that an inspection of the site of the new powerhouse and existing boating access points by the commenters, Summersville, FWS, and the Commission's staff revealed that the middle and lower put-ins would not be adversely affected by the project, but that the upper put-in would be. Pursuant to agreements with the Park Service and West Virginia DNR, Summersville will construct

⁵¹ EA at 28.

⁵² Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, 4225.

⁵³ Outfitters believe that the EA's recommendation does not adequately address the additional two

days of whitewater flows (the two-day weekend). Since the license requires Summersville to use only those flows made available by the Corps and also requires the agreement of the Corps, Park Service, and West Virginia DNR to modify flow releases, the current 22-day whitewater draw-down season is adequately protected.

a new upper put-in and upgrade the trail leading to the middle put-in. The Memorandum of Understanding, as incorporated in Article 410 of the license, requires Summersville to construct these access improvements before the start of project construction. Article 410 requires Summersville to consult with the Park Service, the Corps, Whitewater, and Outfitters in the design and location of the put-in and other recreational facilities required in the MOU with the Park Service.

Whitewater is concerned that the appearance of the powerhouse and transmission line will adversely affect the aesthetic quality and character of the upper put-in. The proposed powerhouse and valve house will be a substantial structure (approximately 240 feet x 60 feet x 50 feet) and will be visible from the put-in area and from an overlook on U.S. Route 219. The EA recommends that Summersville, in consultation with the Corps and the Park Service, select colors and textural finishes for the exterior of these structures which will blend in with the existing landscape.⁵⁴ Article 409 adopts this recommendation and requires Summersville to file and implement a plan to minimize the visual impacts of structures. The visual impact of the new structures will be further reduced by their proximity to the dam, which is 2,280 feet long and 390 feet tall.

Whitewater is also concerned that the reduction or elimination of discharges through the Howell-Bunger valves will adversely affect the aesthetic quality of the upper put-in by eliminating the spray and mist effects that occur when flows are released from the Howell-Bunger valves.⁵⁵ We agree that this will occur, but note that the license ensures continued access to the Gauley River and continuity in river flows such that boaters will continue to enjoy the river. In balancing the power and non-power benefits of the project and the recreational and aesthetic benefits and values of the mist and spray effects of the Howell-Bunger valves, we find that the benefits of developing the project outweigh the adverse effect that will be caused by the loss of the spray and mists at the upper pit-in.⁵⁶

The Park Service and Fayette are concerned that construction-related traffic could adversely affect recreational use of the Gauley River during the fall draw-down season.⁵⁷ They believe that the single access road into and out of the project site does not have the capacity to handle construction-related traffic during the draw-down period. In its motion to intervene, Fayette requested that no construction take place on Friday through Monday during the draw-down, including the annual four-day Gauley River Festival. Fayette also asks that Summersville be required to store all construction equipment and materials in the construction staging area on the east bank of the river to avoid conflict with boaters using the put-ins on the west bank.

The MOU between Summersville and the Park Service, which is incorporated in the license by Article 410, requires Summersville to suspend transportation of material and equipment to the construction site between 7:00 and 12:00 noon during the fall draw-down season when recreational flows are planned. Article 410 also requires Summersville to suspend all construction activities during the four-day Gauley River Festival, and to confine storage of construction material and equipment to the planned staging area during the fall draw-down period. Fayette agreed that suspending trans-

⁵⁴ EA at 26.

⁵⁵ *The spray and mist occur due to the large decrease in pressure when the water passes from the outlet pipe and out through the valve. The effect is similar to that which occurs with a spray nozzle on a garden hose.*

⁵⁶ *In weighing the benefits and impacts, we have also considered that the spray and mists at the upper put-in are themselves not of natural origin, but are a product of the existing man-made dam.*

⁵⁷ See n. 30, supra.

portation of equipment and materials between 7:00 a.m. and 12:00 noon during the draw-down season is satisfactory, because most of the boaters access the river during those hours. Article 410 also requires Summersville to maintain the access road during the period of project construction. These provisions in the license should ensure that project construction will not have significant adverse impacts on access to the river during the fall draw-down period.

Fayette and the Park Service are concerned that the cost estimates used by Summersville for the recreational facilities are lower than the actual costs of the facilities and ask that these estimates not be treated as caps. The figures used in the EA are only estimates. Their purpose is to permit a comparison of the costs of various alternatives and to determine what effect constructing and operating these facilities will have on the financial feasibility of the project. The terms and conditions of the license require Summersville to construct or provide particular recreational facilities and do not create monetary limits on Summersville's obligations to provide recreational facilities.

Whitewater contends that the EA fails to give equal consideration to the protection of recreational opportunities, as required by Section 4(e) of the FPA. Whitewater cites the omission of Whitewater from the list of entities to be consulted in the preparation of the landscaping plan and the design of the recreational facilities contained in the MOU between Summersville and the Park Service. It also notes that the stepstone bridges and angler access trails, which are required in the water quality certification, were planned without consultation with Whitewater, and are in its view dangerous to recreationists.

Section 4(e) requires the Commission to give equal consideration to developmental and non-developmental purposes of a proposed project, but does not mandate a particular outcome or require equal treatment of these purposes. With regard to recreation, the EA examined the effects of the project on recreational opportunities in the surrounding area and recommended several measures to enhance recreation. The license adopts these recommendations. We have also recommended that the stepstone bridges and angler access trails not be constructed. Whitewater's disagreement with mandatory conditions contained in the water quality certification does not alter the fact that the Commission has given equal consideration to recreational values in reaching its decision in this proceeding.

G. Endangered, Threatened, and Rare Species

The Park Service is concerned that the construction of some of the recreational facilities could adversely affect populations of Virginia spirea (*Spirea virginiana*), a federally listed threatened species. This shrub has been found in only 18 locations in five states. It grows in disturbed habitats along the scoured banks of high gradient streams.⁵⁸ The EA states that a 1990 survey found Virginia spirea occurring on the left bank of the Gauley River from about one mile below the project to the confluence of the Gauley and Meadow Rivers.

The EA states that potential impact on Virginia spirea or its habitat can be avoided by careful siting of recreational facilities, and that the facilities proposed in the MOU between Summersville and the Park Service would not be located in areas where spirea are found.⁵⁹ The Park Service is concerned

⁵⁸ *The project area is also within the range of running buffalo clover (Trifolium stoloniferum), a federally listed endangered species. A field reconnaissance found*

no suitable running buffalo clover habitat in areas which might be affected by project construction.

⁵⁹ *EA at 22-23.*

that the facilities that are required by the water quality certification could adversely affect existing Virginia spirea or suitable habitat that is available for the species' expansion. The renovated access road for fish stocking, angler access trails, and low-water stepping-stone bridges required by the water quality certification could significantly increase the number of people using the river banks and increase the likelihood that Virginia spirea are trampled, cut down, or collected.⁶⁰ As discussed above, we disagree with West Virginia DNR's recommendation to provide these facilities along the stream banks; and as the EA states, avoiding impacts is preferable to developing mitigative measures. We have therefore recommended that the river bank facilities requested by West Virginia DNR no be built.

However, as discussed above, all of these facilities are included as conditions of the water quality certification and therefore must be included in the license. Since our responsibilities under the Endangered Species Act must be carried out if Summersville is required to construct these facilities,⁶¹ we are including Article 407 in the license, which requires Summersville to file and implement a plan to protect the Virginia spirea and its habitat.

The Park Service is also concerned that construction of the downstream river bank recreational facilities could adversely affect Barbara's buttons (*Marshallia grandiflora*), a candidate for listing as a threatened or endangered plant species, which exist along the Gauley River below the Summersville Dam. The nearest population of Barbara's buttons is located on the right bank of the river about 3,000 feet downstream from the dam. The facilities required by the MOU between Summersville and the Park Service would also not affect populations of Barbara's buttons. However, the facilities required by the water quality certification could adversely affect Barbara's buttons in the same manner as Virginia spirea. The habitat for Barbara's buttons is very similar to that of Virginia spirea, so the effects of the proposed facilities on the two species would be essentially the same. The Park Service states that its policy is to treat candidate species as listed species. Because of the project's relationship to the Recreation Area, we are including Barbara's buttons in the protection plan required by Article 407.

H. Economic Feasibility

Fayette and Whitewater contend that the revenue figures used to calculate the economic feasibility of the project are too high and have resulted in an inflated estimate of the economic benefits of the project.⁶² They argue that a rate of 50 mills per kilowatt hour (mills/kWh) for project power is

⁶⁰ *The EA notes that one reason that the critical habitat for Virginia spirea has not been determined is because publication of critical habitat descriptions and maps would increase the vulnerability of the species to increased collection and vandalism. (EA at 23, n. 4.)*

⁶¹ *Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), requires Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of these species' habitats. Since Virginia spirea is a listed threatened species, the Commission must ensure that licensing this project will not jeopardize*

the existence of Virginia spirea or adversely affect its habitat.

⁶² *Whitewater contends that the economic analysis in the EA does not comply with the standards contained in publication No. DPR-1, "Evaluating the Economics of Hydroelectric Projects at the Federal Energy Regulatory Commission." Whitewater claims that the Commission's standards require that a project have an internal rate of return that is 5.0 to 5.5 percent higher than the interest rate the licensee will have to pay for financing. The publication Whitewater cites, which was issued by the Commission's Office of Hydropower Licensing in Sept. 1989, is a description (continued...)*

higher than Allegheny Power Systems, Inc. is currently paying, and that the current avoided cost of 15 mills/kWh should be used in calculating the financial feasibility of the project.

The economic evaluation of the project that was performed in the EA was based on Summersville's projection that it would be able to sell the project's power output to Monongahela Power Company, a subsidiary of Allegheny Power Systems, Inc., for 59 mills/kWh. After the EA was published, Summersville filed, as support for this assumption, a copy of a 1987 15-year contract for the sale of power at 74 mills/kWh from another licensed hydroelectric project to another subsidiary of the Allegheny Power System. However, the power market has changed dramatically since 1987.

In May 1992 the Commission revised its long-term estimates of regional energy values based on the Department of Energy, Energy Information Administration's (EIA) publication ANNUAL ENERGY OUTLOOK for 1992. Based on EIA's fuel cost data for the region, we now estimate that the 1994, 50-year levelized alternative energy cost would be about 41 mills/kWh. We therefore calculate the internal rate of return for the project, with all of the mitigation measures except the dissolved oxygen injection system, we estimate the rate of return at 8.1 percent, whereas if those requirements are met by spilling water over the dam for three months, the annual generation would drop from about 198 gWh to about 165 gWh, and the rate of return would fall to about 6.9 percent.

As a general matter, in the last several years we have considered hydroelectric projects with internal rates of return between 6 and 8 percent to be unattractive to investors, but potentially feasible, and projects with rates of return of less than about 6 percent to be not financeable.⁶³ In light of the above, the project may not be economically beneficial. However, there are many factors that affect project economics, and a change in any one of those factors could improve the project's economic benefits. The applicant may, for example, be able to obtain financing at a rate lower than the 11 percent rate we assumed in our calculations; to construct the project for less than we projected; or to sell the project power for more than we estimated.

Whether a licensed project is actually built is ultimately decided by the marketplace. If a licensee is unable to obtain financing, the project will not be developed. Article 316 requires Summersville to file a financing plan prior to commencing construction which shows that Summersville has acquired the funds, or commitments for funds, necessary to construct the project in accordance with this license. This will ensure that the environment is not unnecessarily disturbed by a partially constructed project that is abandoned due to lack of funds.

Whitewater contends that the EA should have analyzed the action alternative of adopting energy conservation measures instead of constructing the new generating capacity represented by the proposed project. A discussion of energy conservation measures was not included in the EA, because

(continued...)

of the general criteria used by the Commission staff in reviewing the economic feasibility of a project, and does not bind the Commission's decisionmaking. In any event, Whitewater has misinterpreted the information in the publication. The publication states that Commission staff uses a hurdle rate of 7.5 to 8.0 percent (rates generally available for municipal bonds with minimal risk) to decide whether a project should be licensed. The publication also states that there is

a rate of return spread of 5.0 to 5.5 percent between those projects which the Commission staff recommends be denied as economically infeasible and those projects which are attractive enough to potential investors that they will probably be built.

⁶³ See, e.g., *Allegheny Electric Cooperative, et al.*, 48 FERC ¶ 61,363 (1989) at p. 62,341 n. 217; *Hydroelectric Development, Inc.*, 55 FERC ¶ 61,474 (1991) at p. 62,558 n. 12.

Summersville has no distribution system and no end-use customers. As a result, Summersville itself has no opportunity to engage in programs to promote energy conservation and efficiency by end-use customers or to promote load management programs designed to reduce peak energy demands. The need for power analysis used the load and resource projections of the Allegheny Power System (the assumed receiving power system) reported by the East Central Area Reliability Coordination Agreement reliability council. Those projections include the effects of projected economical load management and energy conservation measures on internal power demand. Accordingly, Whitewater's concerns about energy conservation measures were considered in determining Allegheny's need for power rather than as an alternative to hydropower development.

I. NEPA Considerations

Whitewater and the Park Service contend that the construction of the project constitutes a major federal action significantly affecting the quality of the human environment such that the Commission must prepare an Environmental Impact Statement (EIS) prior to making a decision on Summersville's application. Our decision not to prepare and EIS but to issue the license based on the EA fulfills the requirements of the National Environmental Policy Act.⁶⁴ The relevant issues are: (1) whether the areas of environmental concern have been accurately identified; (2) whether a "hard look" has been taken at the environmental issues; (3) whether a convincing case has been made for the finding of no significant impact; and, (4) if there is an impact of true significance, whether the impact has been significantly reduced as a result of changes or safeguards in the project.⁶⁵ The EA provides a detailed analysis which has addressed all of the important environmental considerations, including the project's impacts on geology and soils, water resources, fishery resources, terrestrial resources, threatened and endangered species, aesthetic resources, cultural resources, recreation, land and water use, and socioeconomic considerations. Where potential impacts from the project have been identified, the EA has recommended mitigative measures which have been included in the license. Through the analysis in the EA, the Commission has taken the requisite "hard look" at the environmental effects of this project, and our finding that issuing this license will not significantly affect the human environment is supported by substantial evidence.

Whitewater claims that the Commission must prepare an EIS because of the project's impact on the aesthetic character of the put-in area immediately below the Summersville Dam. Our decision to issue a license for this project based on the information contained in the EA does not violate NEPA. The courts have held that decisions on aesthetic impacts generally do not require the preparation of an EIS.⁶⁶ The EA considered the effects of the powerhouse and transmission lines on the aesthetic character of the area below the dam, stating that project construction will cause several adverse aes-

⁶⁴ 42 U.S.C. § 4321 *et seq.*

⁶⁵ See *Humane Society of the United States v. Hodel*, 840 F.2d 45, 62 (D.C. Cir. 1988); *Sierra Club v. U.S. Department of Transportation*, 753 F.2d 120, 127 (D.C. Cir. 1985).

⁶⁶ *Friends of the Ompompanoosuc and the State of Vermont v. FERC*, Nos. 92-4013 and 92-4015 (2d Cir. July 8, 1992); *River Road Alliance v. Corps of Engineers*, 764 F.2d 445 (7th Cir. 1985). In *River Road*, the court stated:

[a]esthetic objections alone will rarely compel the preparation of an environmental impact statement. Aesthetic values do not lend themselves to measurement or elaborate analysis. The necessary judgements are inherently subjective and normally can be made as reliably on the basis of an environmental assessment as on the basis of a much lengthier and costlier environmental impact statement.

764 F.2d at 451 (citations omitted).

thetic effects. The operation of equipment and machinery will produce noise and dust. Cleared vegetation, cofferdams, construction buildings, and staging areas will temporarily degrade the appearance of the project area. The EA concluded that through proper landscaping and other control measures these impacts can be mitigated. The erosion and sedimentation control plan required by Article 401 will include measures necessary to mitigate the short-term adverse aesthetic impacts that will occur during project construction.

J. Comprehensive Plans

Section 10(a)(2)(A) of the FPA⁶⁷ requires the Commission to consider the extent to which a project is consistent with comprehensive plans prepared by appropriate federal and state agencies for improving, developing, or conserving a waterway or waterways affected by the project. The Commission treats as a comprehensive plan one that is prepared by a state or federal agency authorized to prepare such a plan; is a comprehensive study of one or more of the beneficial uses of a waterway or waterways; includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan; and is filed with the Secretary of the Commission.⁶⁸ Federal and state agencies filed 13 comprehensive plans that address various resources in West Virginia. Of these, we identified and reviewed two plans that are relevant to this project.⁶⁹ No conflicts were found.

K. Recommendations of Federal and State Fish and Wildlife Agencies

Section 10(j) of the FPA⁷⁰ requires the Commission to include license conditions based on recommendations filed pursuant to the Fish and Wildlife Coordination Act by federal and state fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife. As discussed above, the EA for the Summersville Project addresses the concerns of the federal and state fish and wildlife agencies, and the license includes conditions consistent with the recommendations of the agencies.

L. Conclusion

For the reasons discussed above and in the EA and the Safety and Design Assessment attached to this order, we conclude that the record before us supports issuance of a license to the Town of Summersville, West Virginia, to construct, maintain, and operate the Summersville Hydroelectric Project, as conditioned by the license articles adopted herein.

⁶⁷ 16 U.S.C. § 803(a)(2)(A).

⁶⁸ 18 C.F.R. § 2.19 (1992).

⁶⁹ The two relevant plans are the Gauley River Basin plan, published in 1984 by West Virginia DNR; and

the West Virginia statewide comprehensive outdoor recreation plan 1988-1992, published in 1989 by the West Virginia Governor's Office of Economic and Community Development.

⁷⁰ 18 U.S.C. § 803(j).