

Second Circuit Vacates Issuance of Hydroelectric License Based on FERC's Procedural Missteps

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Last week the U.S. Court of Appeals for the Second Circuit offered a stark reminder to hydroelectric licensees that the relicensing process overseen by the Federal Energy Regulatory Commission ("FERC") is fraught with risk. Specifically, on August 10, 2009, in the case of *Green Island Power Authority v. Federal Energy Regulatory Commission*,¹ the Second Circuit vacated FERC's order issuing a new license to the 38.8 megawatt ("MW") School Street Hydroelectric Project ("the Project") located near Albany, New York, due to FERC's failure to adhere to various procedural requirements associated with soliciting motions to intervene near the conclusion of a more than 15-year relicensing process. The Second Circuit's decision highlights the relicensing process risk to the licensee, which can only be countered through constant vigilance and proactive involvement to ensure that all authorities with jurisdiction over the relicensing adhere to all statutory and regulatory requirements during the long and typically complex relicensing process.

The School Street Relicensing and the Second Circuit's Decision

The relicensing of the School Street Project, while perhaps more protracted than most relicensing efforts, is nonetheless not unusual in that the applicant faced significant opposition from both competitors (including a proposed downstream project) and environmental groups. In 1991, the Project licensee filed an application for a new license, which contained a proposal to add 21 MW of generating capacity. FERC subsequently issued public notice of the application and received comments from a number of groups within the established deadline. Shortly thereafter, in 1992, the applicant ran into difficulty in obtaining a water quality certification under Section 401 of the Clean Water Act from the New York State Department of Environmental Conservation ("NYSDEC"). Negotiations continued for the next 13 years, during which time FERC continued to issue annual licenses for the Project.

While negotiations between the Project applicant and NYSDEC remained ongoing, FERC prepared draft and final environmental assessments, transferred the Project's license to a new owner/applicant, and evaluated changes to the proposed capacity of the Project. In March of 2005, the applicant filed a settlement agreement signed by a number of governmental agencies and environmental organizations, including NYSDEC, seeking to resolve all issues remaining in dispute and serve as the basis for the terms of a

¹ No. 07-1737, 2009 WL 2424580 (2d Cir. Aug. 10, 2009).

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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new license. The settlement contained several changes from what was proposed in the 1992 license application, including a reduction in the increase in capacity from 21 MW to 11 MW. FERC did not issue a solicitation for motions to intervene following the filing of the settlement offer. Green Island Power Authority ("Green Island"), the proponent of a competitor project proposed to be located just downstream of the School Street Project, nonetheless filed a motion to intervene, which was rejected by FERC. Two years later, after addressing a number of motions by Green Island and others, NYSDEC finally issued its water quality certification for the Project. FERC subsequently approved the settlement agreement and issued a 40-year license.

Along with other challengers alleging a number of varied procedural errors, Green Island challenged, *inter alia*, FERC's decision not to solicit motions to intervene following the filing of the settlement offer. The Second Circuit reviewed the challenges under the application of an "arbitrary and capricious" standard of review, which is the most difficult standard for a challenger to an agency action to overcome. Nevertheless, the Second Circuit agreed with Green Island that FERC had arbitrarily and capriciously misapplied its own rules when it denied Green Island's motion to intervene without first considering whether the settlement offer materially amended the Project's license application. The court also determined that in doing so, FERC committed prejudicial error because it has a statutory duty to consider feasible alternatives, such as the alternative to be proposed by Green Island had it been permitted to intervene. As a result, the Second Circuit vacated FERC's issuance of the School Street Project's license and remanded the matter to FERC for further consideration of Green Island's motion to intervene.

Conclusion

The challenges pursued by Green Island and others to FERC's licensing of the School Street Project, although more difficult than most, nevertheless are indicative of the risks faced by owners seeking to protect their investments in hydroelectric projects through the issuance of a new project license. Such risks can be even more acute for larger projects with significant economic value, where the environmental impacts are potentially significant and a large number and range of parties seek to intervene or otherwise monitor the proceedings. The procedural pitfalls seized upon by the Second Circuit illustrate that relicensing process risks to applicants should not be underestimated, nor should an existing licensee overestimate the strength of its own position or rely exclusively upon FERC to ensure that all procedural requirements are fulfilled.

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