



RECENT DEVELOPMENTS IN HYDROELECTRIC REGULATION

David R. Poe and Seth T. Lucia

BRACEWELL

FIVE TOPICS TO BE COVERED

- Municipal preference in preliminary permits(Western Minnesota Municipal Power Agency et al. v. FERC, 806 F.3d 588 (D.C. Cir. 2015))
- Equity and federal preemption in headwater benefits
- Potential legislative changes to licensing process
- Presidential Memorandum on Mitigation
- Staleness of the Record and Late-Filed Motions to Consider New Facts

TOPIC 1

- Municipal preference in preliminary permits(Western Minnesota Municipal Power Agency et al. v. FERC, 806 F.3d 588 (D.C. Cir. 2015))
- Equity and federal preemption in headwater benefits
- Potential legislative changes to licensing process
- Presidential Memorandum on Mitigation
- Staleness of the Record and Late-Filed Motions to Consider New Facts

MUNICIPAL PREFERENCE IN PRELIMINARY PERMITS

- Federal Power Act contains preferences for applications for preliminary permits and licenses.
- FPA preference for states and municipalities over private developers, all other things equal.
- Since applications can be amended, a preference operates to qualify an applicant over an applicant who does not have a preference.
- “Municipality” defined as a “city ... or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power.”

WESTERN MINNESOTA MUNICIPAL POWER AGENCY V. FERC, 806 F.3D 588 (D.C. CIR. 2015)

- **FACTS:**

- FFP Qualified Hydro 14 (“FFP”) had a preliminary permit to add generation to existing COE project near De Moines, IA
- Permit expired, and both FFP and WMMPA filed for new preliminary permit the next day.
- FERC ruled that (a) municipal preference did not apply because WMMPA was located hundreds of miles away; (b) without municipal preference, the applications were equal or could be made so;
- FERC awarded new preliminary permit to FFP based on lottery drawing; WMMA appealed

WESTERN MINNESOTA MUNICIPAL POWER AGENCY V. FERC, 806 F.3D 588 (D.C. CIR. 2015)

- HELD:
 - Statute not ambiguous as to municipal preference, so FERC was not free to interpret it under Chevron
 - Distance of WMMPA from project site not relevant when FERC routinely qualifies as licensees entities located similar distances away
 - FERC also not permitted to interpret the statute based on changes in technology or the grid
 - FERC also not permitted to conclude that the result was not what Congress intended

WESTERN MINNESOTA MUNICIPAL POWER AGENCY V. FERC, 806 F.3D 588 (D.C. CIR. 2015)

- IMPLICATIONS:
 - Broad scope of municipal preference for preliminary permits
 - Implications for municipal preference for licenses or relicenses less clear – scope may not be as broad
 - New era for hydro development using partnerships with municipal entities?

TOPIC 2

- Municipal preference in preliminary permits(Western Minnesota Municipal Power Agency et al. v. FERC, 806 F.3d 588 (D.C. Cir. 2015))
- Equity and federal preemption in headwater benefits
- Potential legislative changes to licensing process
- Presidential Memorandum on Mitigation
- Staleness of the Record and Late-Filed Motions to Consider New Facts

EQUITY AND FEDERAL PREEMPTION OF HEADWATER BENEFITS

- Section 10(f) of the FPA provides:
 - *That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission.*

EQUITY AND FEDERAL PREEMPTION OF HEADWATER BENEFITS

- Case involved headwater benefits for Great Sacandaga Lake Project, P-12252, provided to 13 downstream projects on the Hudson River Basin in New York
- Series of cases under state law, before FERC and in the D.C. Circuit
- Although project built in 1920s and 30s, FPA license issued only in 2002.
- Thus, issue was headwater benefits from 2002 forward for the

HEADWATER BENEFITS FOR GREAT SACANDAGA LAKE PROJECT

- FACTS:
 - In 2002 and for years previously, HB assessed for project under NY State law by Hudson River-Black River Regulating District
 - Erie Blvd parties sued under state law, and in 2006 entered into settlement with District for assessments for 2000-2009
 - In 2006, Albany Engineering challenged District's assessments claiming federal preemption
 - FERC partially agreed, but on appeal court said FERC regulation of HB preempts the field. Albany Engineering Corp. v. FERC, 548 F.3d 1071(D.C. Cir. 2008).
 - On remand, FERC calculated HB for all 13 downstream projects, and for some parties offset future HB liability by amounts previously paid to the District prior to 2008.
 - For the Erie Blvd parties, FERC determined that offsets were themselves limited by 2006 settlement in state court.

HEADWATER BENEFITS FOR GREAT SACANDAGA LAKE PROJECT (CONT.)

- Issues:
 - To what extent could FERC use its equitable authority under Section 10(f) to compensate downstream licensees for payments made under a state regime later held to be preempted?
 - To what extent could FERC, in its exercise of equitable authority, take account of a state court settlement relating to HB payments made under a state regime later held to be preempted?

EQUITY AND FEDERAL PREEMPTION OF HEADWATER BENEFITS

- FERC determinations:
 - Commission not required to enforce state settlement of preempted HB settlement, but can use its existence to exercise equitable powers
 - Although without authority to order the District to make refunds of amounts collected under state HB regime, FERC can offset federally required HB payments by amounts paid by licensees in excess of federal HB payments

EQUITY AND FEDERAL PREEMPTION OF HEADWATER BENEFITS

- Implications:
 - HB issues appear to have received an uptick in priority within FERC
 - FERC will go to great lengths to enforce its view of HB payment liability
 - Settlements, depending on how they are worded, can have adverse unintended consequences

TOPIC 3

- Municipal preference in preliminary permits(Western Minnesota Municipal Power Agency et al. v. FERC, 806 F.3d 588 (D.C. Cir. 2015))
- Equity and federal preemption in headwater benefits
- **Potential legislative changes to licensing process**
- Presidential Memorandum on Mitigation
- Staleness of the Record and Late-Filed Motions to Consider New Facts

UPDATE ON HYDROPOWER LEGISLATION

- Senate: Bi-partisan Senate Bill (S. 2012) approved in committee in September 2015
 - In April 2016, floor vote of 85-12
- House: Bi-partisan House Resolution (H.R. 8) approved in committee in November 2015
 - In December 2015, floor vote of 249-174
- Currently awaiting action to conference the two bills

HYDRO LEGISLATION: COMMON PROVISIONS TO BOTH BILLS

- Provisions common to S.2012 and H.R. 8:
 - Designation of FERC as lead agency for the purposes of coordinating “all applicable Federal authorizations”
 - Licensing Process Improvements
 - Establish enforceable schedule for required federal authorizations

HYDRO LEGISLATION: PROVISIONS EXCLUSIVE TO S. 2012

- Amend Section 7(a) of the FPA to include Indian tribes in definition of “municipal preference”
- Amend trial-type hearings involving Section 4(e) conditions and Section 18 prescriptions
- Amend Section 15(e) of FPA to consider project improvements, upgrades and investments made under the existing license in determining the new license term
- Deadline extension for commencing construction
- Term of preliminary permits

HYDRO LEGISLATION: PROVISIONS EXCLUSIVE TO H.R. 8

- Development at Existing Non-Powered Dams
- Development of Closed-Loop Pumped Storage
- Streamlines Certain License Amendments
- Private Property Rights and Recreation

HYDRO LEGISLATION: COMPARISON OF BILLS

Senate S. 2012

- Tribes gain municipal preference
- Trial type hearings
- Past improvements for licensing terms
- Extension to commence construction
- Extension of preliminary permits

- FERC as lead agency
- Licensing process improvements
- Enforceable licensing schedule

House H.R. 8

- Development of non-powered dams
- Development of closed-loop pumped storage
- Streamline license amendments
- Protect private property rights and recreation

HYDRO LEGISLATION: CROSSING THE FINISH LINE

- Need for conference to reconcile S. 2012 and H.R. 8 versions
 - No guarantee that the bills will be conferenced
- Bi-partisan passage and support is a good signal
- But, election year adds even more uncertainty to process
 - Aiming to conference the bills before summer political convention
 - Lame duck session also a possibility
- Statement of Administrative Policy (SAP)
 - Does not recommend veto
 - Limited support

TOPIC 4

- Municipal preference in preliminary permits(Western Minnesota Municipal Power Agency et al. v. FERC, 806 F.3d 588 (D.C. Cir. 2015))
- Equity and federal preemption in headwater benefits
- Potential legislative changes to licensing process
- **Presidential Memorandum on Mitigation**
- Staleness of the Record and Late-Filed Motions to Consider New Facts

PRESIDENTIAL MEMORANDUM (PM) ON MITIGATING IMPACTS ON NATURAL RESOURCES

- PM to guide planning, permitting and other activities
- Agencies addressed by the PM include:
 - Dept. of Defense
 - Dept. of Interior
 - Dept. of Agriculture
 - Environmental Protection Agency
 - National Oceanic and Atmospheric Administration
- List does not include FERC / Dept. of Energy
 - However, several agencies have overlapping jurisdiction with FERC in the hydro licensing process

PRESIDENTIAL MEMORANDUM – GOALS AND PRIORITIES

- Policy memorandum, but directs new regulations
- Requires agencies to set a “net benefit or no net loss” goal
 - The goal applies to natural resources that are “important, scarce or sensitive ...”
- Establishes a mitigation hierarchy:
 - Avoidance
 - Minimization
 - Compensation

PRESIDENTIAL MEMORANDUM - IMPLICATIONS

- How is the “net benefits/no net loss” standard determined? How are competing “benefits” evaluated?
- In essence, the PM directs agencies to bargain harder and reduce risks of potential impacts on managed resources
 - Possible effect on Sec. 4(e) conditions and Sec. 18 prescriptions:
 - Is a mandatory condition based on “net benefits” consistent with Section 33 requirement for “equal consideration” of development and non-development factors?
 - Possible effect on settlements at FERC:
 - Is this a thumb on the scale to discourage or limit licensing settlements or certain operational requests?

TOPIC 5

- Municipal preference in preliminary permits(Western Minnesota Municipal Power Agency et al. v. FERC, 806 F.3d 588 (D.C. Cir. 2015))
- Equity and federal preemption in headwater benefits
- Potential legislative changes to licensing process
- Presidential Memorandum on Mitigation
- **Staleness of the Record and Late-Filed Motions to Consider New Facts**

STALENESS OF THE RECORD AND LATE-FILED MOTION TO REOPEN

- As FERC has observed, there are often delays in issuing new licenses, in many cases because of drawn out process of obtaining Section 401 Certification
- Result is that FERC-prepared record, including EIS/EA, often sits idle for years of annual licenses before FERC can act on application
- Result is that FERC increasingly confronted with late-filed motions to update factual record and later appeal for failure to reopen
- Examples: Green Island Power Authority cases in 2nd Circuit, NECP case in D.C. Circuit, Yadkin–Pee Dee Project case in 4th Circuit

INTERNAL CONFLICTS WITHIN THE FERC PROCESS

- FERC required to make findings on and resolve on the basis of substantial evidence, competing allegations of material facts.
- FERC's use of settlement process, even if contested, gives flexibility, but effectively closes record because of inability to consider new facts or admit new parties until settlement acted on
- Increasing incidence of motions to reopen record because of allegations of staleness, or to admit new parties

REACTIONS OF THE COURTS

- GIPA – 2nd Cir ordered remand on issue of whether scope of relicensing process had changed and whether public notice was adequate
- NECP – allegations that FERC should have reopened case to permit new license applications after material facts regarding use of project power changed - pending
- YPD – allegations that FERC should have updated EIS after 7 years re use of project power and recreational use of project pending

QUESTIONS?



David R. Poe

Counsel, Washington, DC

T: +1.202.828.5830

E: david.poe@bracewell.com

Dave Poe has more than 35 years' experience in administrative, regulatory, and multi-jurisdictional litigation (including appellate) representation and in providing advice to clients in infrastructure service industries, particularly electric utilities, hydroelectric generators, telecommunications and cable TV companies. He has been involved in federal and state legal issues specific to these industries and represents clients before the Federal Energy Regulatory Commission, Federal Communications Commission and many state public-service commissions.



Seth T. Lucia

Counsel, Washington, DC

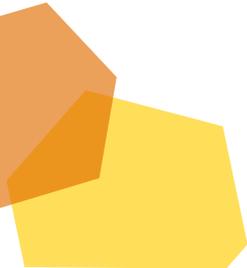
T: +1.202.828.5833

E: seth.lucia@bracewell.com

Seth Lucia counsels clients on a wide range of energy regulation and policy matters before the Federal Energy Regulatory Commission (FERC). His experience includes obtaining FERC authorizations for major energy transactions such as utility mergers and the purchase or sale of utility assets. He also has experience advising companies on wholesale power and transmission matters, participating in litigation and settlement proceedings at FERC related to transmission ownership and service, and negotiating various energy project development agreements. Seth's practice also includes representing clients in hydroelectric matters before FERC.



WE KNOW ENERGY®



TEXAS | NEW YORK | WASHINGTON, DC | CONNECTICUT | SEATTLE | DUBAI | LONDON
[bracewell.com](https://www.bracewell.com)

BRACEWELL

This presentation is provided for informational purposes only and should not be considered specific legal advice on any subject matter. You should contact your attorney to obtain advice with respect to any particular issue or problem. The content of this presentation contains general information and may not reflect current legal developments, verdicts or settlements. Use of and access to this presentation does not create an attorney-client relationship between you and Bracewell.