UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

City of Burlington Electric Department	)	Project No. 2756-000, -003, and -008
City of Winooski	)	Project No. 3101-001 and -002
Winooski One Partnership	)	Project No. 9413-001 and -002

ORDER ISSUING LICENSE

(Issued November 3, 1988)

The City of Burlington Electric Department (Burlington) and the Winooski One Partnership (the Partnership) have filed an amended application for a major license under Part I of the Federal Power Act (FPA) to construct, operate and maintain the Chace Mill Project No. 2756 on the Winooski River, in Chittenden County, Vermont. Notice of the amended application was published on August 21, 1987, and timely comments have been submitted by interested agencies, intervenors and individuals. Two intervenors, the Woolen Mill Associates (WMA) and Winooski Two, Inc., have made filings which oppose issuance of the license. 1/ WMA is the owner and developer of the Woolen Mill building, a renovated structure containing residential apartments and commercial space, which is located adjacent to the site for the project proposed in the amended application. 2/ Winooski Two is the applicant for a preliminary permit for Project No. 9679 at a location just upstream of the site for the proposed Chace Mill project. 3/

1/ The respective filings, made on October 2, 1987, were: WMA's Protest, Petition to Intervene, Comments in Opposition to Issuance of License (hereinafter WMA's protest); and Winooski Two's Protest to Submission of License Application and Notice of Its Intent To Submit Competing Application (hereinafter Winooski Two's protest).

2/ WMA states that the Woolen Mill building has 162 apartments with over 300 residents, and 20,000 square feet of commercial space.

3/ Winooski Two filed its application on December 10, 1985. Burlington moved on March 14, 1986, that the Commission
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In considering whether to issue the license, the Commission has considered all comments filed in the proceeding. The significant arguments in opposition to the license are evaluated below. After careful review of the record we have determined that this project, with appropriate modifications, is in the public interest, and that a license should be issued.

BACKGROUND

The Site

The Winooski River flows through Vermont's Green Mountains to Lake Champlain. Ten miles upstream of the river's confluence with the lake, it passes between the cities of Winooski, on the north bank, and Burlington, on the south bank. Old mills are located on the riverbanks in these towns, including the Chace Mill in Burlington at the "upper falls," and the American Woolen Mill 4/in Winooski at the "lower falls," some 375 feet downstream. 5/ There is an old, 200-foot-long, timber crib dam at the lower falls. 6/

The proposed project would leave the existing timber crib dam in place, but by the installation of bascule crest gates

3/(...continued)
reject the application. Heretofore no action has been taken on these filings.

4/ This mill is also sometimes referred to in the record as the Forest Hills Mill.

5/ The Winooski Falls Mill District is listed on the National Register of Historic Places. The district's significance comes from its historical association with the development of water power and textile manufacturing; its focal points are the old mills and associated dams in the district. The mills have been rehabilitated as part of a revitalization of the district. The Woolen Mill building is an historic landmark which is on the National Register of Historic Landmarks. See the Commission staff's Environmental Assessment (EA) for this project, Part V.A.8.

6/ The applicants state that the dam was originally built in 1876; that in 1954 flooding washed away the top eight feet of the dam; and that the existing pool behind the dam covers about 4.9 acres in surface area. Applicants' Statement of Position, filed June 9, 1988, p. 7. In 1978 the dam was nominated for inclusion in the National Register of Historic Places.

would increase the dam's height eight feet. 7/ The applicants state that the existing dam is not strong enough to support the crest gates. Therefore the applicants propose to support the gate by building a new concrete support structure 8/abutting the downstream face of the existing timber crib dam. The effect of raising the dam's height will be to increase the existing 4.9 acre surface area of the pool behind the dam by 0.9 acres, thereby recreating the impoundment that existed behind the original dam until 1954, when its top eight feet were lost. 9/

The Application

The following facts from the lengthy background of this proceeding are pertinent to our discussion of the amended application. The Commission issued on November 29, 1977, a preliminary permit to the Green Mountain Power Company and Burlington as joint applicants for Project No. 2756. 10/ In 1980 Burlington, by itself, 11/filed an application for a 13 MW project which involved construction of a new dam at the upper falls, and diversion of substantial flows from a short but heavily used stretch of river to a powerhouse located below the lower falls. The Commission accepted the application and issued public notice, setting a competition deadline of September 5, 1980. 12/ The City of Winooski (Winooski) filed in the same year an application for a preliminary permit for Project No. 3101 at the lower falls, using excess flows not diverted by the

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7/ Because the crest gates are designed to lower in times of flood, they would allow the project operators to assure that at such times the river level would not be higher than it would have been without the project.

8/ See, as to the support structure and crest gates, the Commission's recent Order Granting Certificate as a Qualifying Small Power Production Facility, City of Burlington, Vermont, Electric Department, 45 FERC ¶ 61,009 (1988).

9/ See note 6, supra.

10/ 1 FERC ¶ 61,180.

11/ Green Mountain filed its withdrawal from the preliminary permit on September 17, 1980.

12/ See the July 28, 1980 notice of Burlington's license application, 45 Fed. Reg. 50,918.

Burlington project. This application is still pending. 13/ On August 21, 1985, the Partnership filed a license application for a 6.5 MW Project No. 9413 at the lower falls. On November 14, 1985, Burlington, in response to a request from the Acting Director, Office of Hydropower Licensing (Director), for additional information, proposed to move its project downstream to the lower falls, and to reduce the project capacity to 7.33 MW. 14/ On December 10, 1985, Winooski Two filed an application for preliminary permit for Project No. 9679, which would use the upper falls, and purportedly would not conflict with the modified Burlington proposal.

On January 9, 1986, the Director rejected the Partnership's application as untimely; 15/ but the Partnership filed a timely appeal of that order which is still pending. 16/

In 1986 and 1987 Burlington, the Partnership and Winooski, through two settlement agreements, agreed on a mutually acceptable proposal for hydropower development. 17/ Pursuant to

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13/ Winooski had originally proposed a 3.2 MW project which would have competed with Burlington's Chace Mill project, and which the Commission rejected. Winooski then filed on April 28, 1980, a modified, non-competing proposal for a 1.2 MW project. See 11 FERC ¶ 61,130 (1980). The Commission accepted this application for filing and issued public notice of it on November 24, 1980.

14/ Several commenters had questioned or challenged Burlington's original application as to its aesthetic, environmental and socioeconomic impacts, with the consequence of uncertainty, consultations and delays. Burlington's modified proposal would conflict with Winooski's permit application in that the two proposals' facilities would use the same locations.

15/ The Director acted by an unreported letter.

16/ The Partnership's application for Project No. 9413 competed with both Winooski's and Burlington's respective proposals. The Director rejected it as untimely because the deadline for filing competing applications was in 1980. The Partnership filed its appeal on January 17, 1986.

17/ The first agreement, dated and filed November 3, 1986, is between Burlington and the Partnership, and calls for the parties to develop jointly a modified Project No. 2756, and for the Partnership to withdraw its appeal of the Director's rejection of its license application. The second agreement, dated May 15, 1987, and filed May 18, 1987, is between the

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the first of these agreements, Burlington and the Partnership would develop jointly a version of the Partnership's proposed project; pursuant to the second, the project would be modified to include various measures requested by Winooski, chiefly to protect its interests in guarding the local environment. The second agreement provides, among other things, that the parties will oppose all requests to construct hydroelectric facilities at the upper falls; and that the applicants will extend the project boundaries to include that location "insofar as possible," and will design appropriate recreational and aesthetic improvements for that location. 18/

The applicants filed the amended application for Project No. 2756 on November 3, 1986. Subsequently, on March 30, 1987, the applicants made revisions to the application, pursuant to the second settlement and in response to requests of the Commission staff. The project as proposed in the revised amended application would be a run-of-the-river project with a 6.5 MW capacity and with boundaries encompassing the upper falls. The Commission's Secretary then issued, on August 21, 1987, a notice of the amended application, setting October 2, 1987, as the deadline for comments. Pursuant to that notice, WMA and Winooski Two made their timely filings in opposition to the amended application. 19/ Following submission of these agreements with the Commission, the Commission issued, on December 16, 1987, an order approving the settlement agreements. 20/ 21/ The order provided that approval of the settlement agreements did not limit Commission consideration of any party's objections to the amended application or make any determination that it meets the FPA's requirements.

17/(...continued)
parties to the first agreement and Winooski. This agreement provides for modifications to the Chace Mill project (as agreed to in the first agreement) in order to satisfy Winooski's concerns, and obtains Winooski's agreement to withdraw its permit application upon issuance of a license for Project No. 2756 to Burlington and the Partnership, and their acceptance of such license.

18/ See paragraph 12 of the May 15, 1987 agreement.

19/ See note 1, supra. The applicants filed, on October 19, 1987, answers to each of the two protests.

20/ 41 FERC ¶ 61,329, reh'g denied, 43 FERC ¶ 61,054 (1988).

21/ That order spells out in somewhat more detail the background of the settlement agreements, and is included herein by reference.

On April 1, 1988, the Commission's Division of Project Review of the Office of Hydroelectric Licensing issued an Environmental Assessment (EA) 22/ and a Safety and Dam Assessment (SDA) for the project.

The SDA found the dam's safety adequate, and that the bascule gates would prevent upstream flooding. It further found that the project would be economically beneficial when compared to the long-term levelized cost of alternative energy to any utility in the region. A copy of the SDA is attached to this order.

The EA found that there was a need for the project power, and that the applicants could minimize project-related impacts 23/ on the environment by various mitigative measures which either they or the Commission staff had recommended. It found that the applicants had obtained from the state water quality certification for the proposed project pursuant to the Clean Water Act. 24/ The EA considered alternatives to the proposed project, including the alternative of no action, and found the proposed project preferable. The EA concluded that, on the basis of the record and the staff's independent environmental analysis, issuance of a license for the proposed project with the staff's recommended mitigative measures would not constitute a major federal action significantly affecting the quality of the human environment. A copy of the EA is attached to this order.

The Rules as to the Amendments to the Application

An additional significant background matter concerns the Commission's rules pertaining to allowable amendments to license applications. In 1980, when Burlington filed its original application, the Commission's rules allowed wide latitude in the scope of application amendments which would be allowed without affecting the filing date of the application as amended. 25/

22/ The EA was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-61.

23/ The EA specifically discussed project impacts on geology and soils; water quantity and quality; fishery resources; vegetation; and visual resources. EA, Part III.A.2.

24/ EA, Part IV.B.

25/ The filing date is important because the Commission gives priority, in cases of equally well adapted competing applications where there is no municipal or permittee
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Subsequently, in 1981 the Commission restricted, by its Order No. 183, 26/ the scope of allowable application amendments that would not affect the filing date of the application. Order No. 183 by its terms, however, did not apply to any proceeding that was pending on or before its issuance. 27/ Burlington and the Partnership designed their settlement agreement to conform to the Commission's pre-Order No. 183 regulations. 28/

THE ISSUES

Need for the Project

WHA maintains that the record fails to show that the output of the Chace Mill project is needed. 29/ WHA states, in this regard, that the applicants propose to sell the project's power on a qualifying facility (QF) basis under the Public Utilities Regulatory Policy Act of 1978 (PURPA). 30/ WHA maintains that, although utilities may be required to purchase QF power pursuant to PURPA, such purchase obligation does not mean that a need for the power has been demonstrated.

The EA analyzed the question of need for the proposed project. 31/ It found that the project would provide an estimated average of 22 million kilowatt hours (kWh) of electric energy annually for the Vermont Power Exchange. It further found that a need for additional generating resources could be

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perference (see in this regard note 69, infra), to the application with the earliest acceptance date. 18 C.F.R. § 4.37(b)(2) (1988). In addition, a changed filing date could result in the loss of possible tax advantages accruable to the applicant.

26/ 46 Fed. Reg. 55245 (1981); FERC Stats. & Regs., Regs. | Preambles 1977-81, ¶ 30,305 at Section 4.35.

27/ See ¶ 30,305 at p. 31,725.

28/ See Applicants' Answer, filed October 19, 1987, p. 14.

29/ WHA's protest, pp. 8-12.

30/ PURPA was intended, in part, to provide for the expeditious development of hydroelectric potential at existing small dams. As a means to that end, PURPA provides that qualifying facilities may obtain favorable rates for their power sold to electric utilities.

31/ EA, Part II.B.

projected to exist to meet projected load requirements, and that power from the project would be useful in meeting projected needs. The EA concluded that power from the project would be useful in meeting a portion of the region's projected need for power, and could displace fossil-fueled power generation, thus conserving nonrenewable fossil fuels and reducing emission of noxious byproducts caused by the combustion of fossil fuels.

We have reviewed the EA's analysis of the need for power and conclude that there is adequate support for its conclusions. The EA nowhere mentions or relies on the fact that because of PURPA provisions utilities may be required to purchase Chace Mill power. 32/ Accordingly, we reject WHA's contentions that the record fails to show that there is a need for the proposed project's power.

Adverse Environmental Effects

WHA alleges that the project will have adverse environmental effects. 33/ In particular, WHA states that the increased dam height will flood the riffle falls which are located a short distance above the old timber crib dam, and will eliminate the cascades which flow over that dam. 34/ WHA argues that without the sounds of the riffle, traffic noises from the nearby highway bridge which crosses the river just above the riffle falls will become a major "pollutant" to Woolen Mill residents. WHA also argues that the project will "intrude" on the natural beauty of the area.

32/ WHA makes two additional contentions regarding need for the project's power. These are: (1) that the project will confer no "capacity benefits"; and (2) that it will confer no economic benefits on Vermont ratepayers. Protest, pp. 6-8 and 12-13, respectively. The EA, however, nowhere mentioned or relied on assertions of capacity benefits or economic benefits to ratepayers in arriving at its conclusion that the project's power is needed. These contentions therefore are irrelevant to the discussion of the need for the project's power. These arguments in essence maintain that because of PURPA the ultimate consumers of the project's power will pay an unnecessarily high price for that power. If these arguments have any validity, that only reflects a disagreement with the policies of PURPA, a matter which is outside our purview.

33/ WHA's protest, pp. 14-16.

34/ The project will divert to the powerhouse a portion of the water which at present passes over the dam.

The EA analyzed these issues. 35/ It found that only small changes in water-induced sound levels would occur as a result of project operation, and that water sounds produced by the required minimum flows over the dam would be sufficient to offset vehicle noise on the bridge. 36/ It further found that the proposed impoundment and the enhancement measures for its surroundings, portions of which were leased by the Winooski Valley Park District and contain waterfront parks and hiking and nature trails, would preserve or improve the visual environment. 37/

We have reviewed the EA's analysis of the aural and visual effects of the project, and find that there is adequate support for its conclusions that the project will not have adverse effects on the residents of the Woolen Mill building or on the project's visual surroundings.

Blasting

WMA asserts that the blasting for construction of the project will entail a significant hazard to the Woolen Mill building, and will have drastic effects on the building's residents. 38/ WMA asserts that the applicants' geologist's report does not support the applicants' contention that the blasting can take place without endangering the building or seriously affecting the building's residents.

35/ EA, Part V.A.7.

36/ The EA referred to a study submitted by the applicants which concluded that the waterfall sounds of the proposed project will, at the nearby Woolen Mill, be similar to or higher than the sounds of the waterfall as it now exists.

37/ The land that will be flooded by the recreated impoundment is steep, rock ledges. In addition to the enhancement resulting from the enlargement of the impoundment, the licensees propose to take other measures to improve the impoundment's recreational and visual attributes. These include adding a new walkway, planting trees, and landscaping the surroundings, in part to enhance the effects of the scenic upper falls. See EA, Part V.A.6.

38/ WMA's protest, pp. 16-20. In addition, WMA filed on August 6, 1987, a large number of letters and petitions opposing the project signed by residents of the building. The emphasis of the writers' concerns generally is with the noise and vibration which will accompany the blasting. Some of the writers also express concern about environmental and aesthetic effects which they assert will result from the project.

Both the Commission staff's SDA and EA considered the issue of the effects of blasting for construction of the project. 39/ The SDA concluded that property in the vicinity of the dam should not be damaged by the blasting if the applicants adhere to the State of Vermont's controlled blasting specifications. The applicants' amended application states 40/ that they have initiated proceedings in the state to comply with all state regulatory requirements. The applicants have, in addition, filed a copy of a stipulation, 41/ signed by WMA and the applicants, and presented to the state's Public Service Board, which includes an agreement regarding blasting specifications. That agreement contains assurances that construction of the project will be conducted in a manner which will not cause damage to the building or its retaining wall. 42/

Finally, license Article 416 specifies that the licensee shall, at least 60 days before the start of any blasting operations, and after consultation with principals of WMA, file for our approval a plan that establishes specific blasting criteria. 43/ That article in addition places strict limits on the blasting (e.g., blasting will be done only on weekdays between 9 and 11:45 am, and 1 and 5 pm, and only after three days' advance notice to the tenants). The EA found that, with these restrictions, the construction activity would not be expected to result in rental losses. 44/ In light of the foregoing, we find that blasting can take place without significant hazard to the Woolen Mill building and with only limited disturbances to the building's residents.

Access Road

WMA states that access to the project for construction purposes will be through a fire lane adjacent to the Woolen Mill. WMA asserts that access via the fire lane is "unacceptable" due

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39/ SDA, p. 3; EA, Part V.A.9.

40/ At p. 2.

41/ Applicants' Answer, filed October 19, 1987, Attachment A.

42/ Attachment A, supra, also contains an Exhibit A, the applicants' Controlled Blasting Specifications, which are purportedly adapted from the state's specifications.

43/ The Commission will not approve a plan which fails to comport with the state blasting specifications and controls.

44/ EA, Part V.A.9.

to noise, dust and vibrations caused by the movement of heavy vehicles and machinery. 45/

The EA considered the effects of onsite machinery and project-related vehicles on the Woolen Mill building and its residents. 46/ It stated that in order to limit disturbances, the licensees should be required to implement a plan to minimize project-induced disturbances. It concluded that if appropriate measures are implemented, the impacts that would result from constructing the project would be minor and adequately mitigated. Article 415 of the license accordingly requires the licensee, after consultation with building and planning officials from Winooski and with principals of WMA, to file, at least 60 days before any construction activities, a plan to mitigate any adverse impacts resulting from onsite construction activities. The article reserves the right for the Commission to modify the plan if necessary. We conclude, in light of the EA and this license article, that WMA's argument can be rejected as being unsupported on the record.

Rental Loss

WMA maintains that it is threatened with significant rental loss as a consequence of the project, and that it is entitled to protection from that loss. 47/ WMA states that the second settlement agreement 48/contains a provision whereby the applicants will hold Winooski harmless from any liability resulting from damage to buildings in the area. WMA argues that the Commission must impose conditions to protect WMA's interests too. WMA further argues that the Commission is obliged to determine whether imposing losses on WMA is in the public interest.

The EA found that with the restrictions on blasting which we have described above the applicants' construction activity would not be expected to result in rental losses. The record thus does not support WMA's predicate that it is threatened with significant rental loss as a consequence of the project.

45/ WMA's protest, pp. 20-21. WMA provides no evidentiary support, however, for its assertions that use of the access road will be detrimental to its property.

46/ EA, Part V.A.9. (The EA refers to the building as the Forest Hills Mill Apartments.)

47/ WMA's protest, pp. 21-23.

48/ See note 17, supra.

A second related point concerns the applicants' agreement to hold Winooski harmless. Winooski and the applicants reached this agreement on their own, without our intervention. The record shows that the applicants and WMA have reached a similar agreement, 49/ whereby the Partnership and Winooski will indemnify and hold WMA harmless against all claims arising out of blasting or resulting from groundwater seepage into the Woolen Mill building occurring after commencement of construction and resulting from the project. In addition, the Partnership and Winooski agreed with WMA to secure a $5 million bond in a form acceptable to WMA which would indemnify WMA against the liability assumed. 50/

WMA is correct that in making a determination whether a proposed project is in the public interest we are to consider threatened harm to parties affected by the project. 51/ We conclude, however, on the basis of the record as described above, that WMA is not threatened with significant harm as a consequence of the Chace Mill project.

The Appropriate Filing Date

WMA states that the Commission's Notice of Application issued on August 21, 1987, listed the filing date for the application as "July 14, 1980, and amended November 3, 1986." WMA argues that the amendment's changes in the proposed project, inter alia from a 13 MW project at the upper falls to a 6.5 MW project at the lower falls, are so significant that the application should be treated as new and should be assigned a 1986 application date. 52/

WMA notes that the applicants claim a 1980 filing date in reliance on the fact that the original license application predates 1981 amendments to the Commission's regulations contained in the Commission's Order No. 183. 53/ That order promulgated Section 4.35 of the Commission's regulations, which

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49/ Applicants' answer, Attachment A.

50/ In addition, Winooski's conditions, which are binding on the licensee (see text at note 75, infra), include a proviso (Planning Commission condition no. 22) that an insurance program should be provided, and pre- and post-blasting surveys conducted on, inter alia, the Woolen Mill property.

51/ See, e.g., City of Seattle, 26 F.P.C. 54 (1961).

52/ WMA's protest, pp. 23-24.

53/ See note 25, supra.

restricted the scope of application amendments that can be made without affecting the filing date of the application as amended. WMA acknowledges that Order No. 183 contained a "grandfather clause" exempting previously filed license applications from its provisions. WMA asserts nonetheless (but cites no Commission precedent for its position) that pre-Order No. 183 policies would have required a new application date, given differences as extensive as those between the project as originally proposed and as modified in the amended application. WMA maintains that the fundamental issue is whether a new application is required when a "totally new project" is involved. 54/

Before the issuance of Order No. 183, the Commission allowed applicants "wide latitude" in making amendments to project applications. 55/ The Commission gave as an illustration of the type of amendment which would not be allowed without a change in the filing date, a change in the location of the project from one region to another. 56/

In fact, Order No. 183 describes the preexisting practice as to upgrading a plan of development in terms that would clearly encompass amendments such as those the applicants have proposed for the Chace Mill project. Order No. 183 stated:

> Under existing practice, upgrading a plan of development -- even if such improvements are derived from the plans of a subsequently filed application -- does not affect the priority in time of the amended application.

FERC Stats. & Regs., Regs. Preambles 1977-81, ¶ 30,305, at 31,717. The changes here, while not insubstantial, are well within the wide latitude of changes which Commission policies prior to Order No. 183 allowed. 57/58/

54/ WMA's protest, p. 28. Winooski Two argues similarly (characterizing the issue as being whether "project substitution" is permissible). Winooski Two's Protest, p. 6. Our discussion of WMA's arguments on this issue applies equally to Winooski Two's arguments.

55/ Georgia-Pacific Corporation, 35 FERC ¶ 61,120 (1986), at p. 61,248, n. 2.

56/ Sacramento Municipal Utility District, et al., 23 FERC ¶ 61,175 (1983), at p. 61,381.

57/ E.g., Pacific Gas & Electric Company, 36 FERC ¶ 61,131 (1986), at p. 61,130 n. 12 ("significant changes" in plans for pre-Order No. 183 license applications are permitted); (continued...)

WMA further maintains that Order No. 183 was superseded by the Commission's Order No. 413, issued in 1985, 59/ which does not contain a grandfather clause. WMA argues that the requirements of Order No. 413, which further refined Order No. 183's restriction on amendments that could be filed without affecting the filing date of an application, apply to the applicants' amendment's revisions to the project and dictate the assignment of the later application date. WMA notes that the applicants cite the Commission's Pacific Gas & Electric Company (PG&E) decision 60/for the proposition that Order No. 413 is not applicable to their amended application, and argues that the PG&E decision does not help the applicants.

WMA's contention is without merit. PG&E, like Burlington here, filed its original application before Order No. 183, and filed significant amendments to that application after the issuance of Order No. 413. In response to the contention that PG&E's application to amend should be rejected as an untimely

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57/(...continued)
American Hydroelectric Development Corp., 19 FERC ¶ 61,296 (1982) (addition of second entity as co-applicant for permit is an allowable amendment for pre-Order No. 183 filings).

58/ WMA filed on May 5, 1988, an application for rehearing of the Commission's April 8, 1988 order denying rehearing of WMA's appeal of the Commission's December 16, 1987 order approving the settlement agreements in these dockets. (See note 20, supra.) WMA's application raised two issues: first, whether the Commission's 1980 regulations applied to the amended license application; and second, whether the Commission correctly characterized WMA's January 15 filing as a request for rehearing rather than for reconsideration. The discussion hereinabove disposes of WMA's arguments concerning the first issue. WMA's second argument arose out of concern that its rights to judicial review of the Commission's disposition of the first issue not be impaired by the Commission's characterization of WMA's filing. Inasmuch the first issue is disposed of pursuant to the aforementioned discussion hereinabove, WMA can, by filing in due course an appeal to the courts of this order, raise its objections to that issue. WMA's second argument is accordingly moot. We will therefore deny WMA's May 5, 1988 application for rehearing.

59/ 50 Fed. Reg. 11658 (1985), FERC Stats. & Regs., Regs. Preambles 1982-85, ¶ 30,632, effective June 10, 1985.

60/ 34 FERC ¶ 61,330, reh'g denied, 36 FERC ¶ 61,131 (1986).

filed material amendment pursuant to Order No. 413's revision of Section 4.35 of the Commission's regulations, the Commission stated as follows:

> Our purpose in amending Section 4.35 in Order No. 413 was primarily to clarify that regulation. Although we made Order No. 413 applicable to pending proceedings, see FERC Statutes and Regulations, Regulations Preambles, 1982-85 ¶ 30,632 at p. 31,262, we did not retroactively rescind Order No. 183's "grandfathering" provision.

34 FERC at p. 61,608, n. 19. 61/

Thus a license application such as that for the Chace Mill project, which was filed before Order No. 183, is not affected by the provisions of Section 4.35 of the Commission's regulations.

Finally, WMA asserts that the application amendments have changed the character of the applicant from an electric utility to a non-electric utility. This change results from the facts that pursuant to the first settlement agreement the Partnership, a non-electric utility, is the 51% owner of the project, while under the original application Burlington, an electric utility, was the project owner. WMA asserts that the applicants made this change in order to claim benefits under PURPA which are available only to non-electric utilities, and that this is improper because an applicant cannot claim benefits under two inconsistent theories of its identity.

We find no impropriety in the change of character of the applicant to which WMA objects. There is nothing wrong with the applicants claiming as a non-utility PURPA benefits to which they may be entitled. 62/ And WMA does not state how the applicants have claimed or received any benefits by virtue of the fact that the original application was filed by an electric utility, was never addressed and reject and in the Commission's order on the applicants' request for qualifying facility status. WMA's assertion that the applicants are claiming benefits under two inconsistent theories of their identity was moreover addressed and rejected in the Commission's order on the applicants' request for qualifying facility status. 63/

61/ See also PG&E, supra note 57, 36 FERC at p. 61,307.

62/ Cf. Niagara Mohawk Power Corp., et al., 31 FERC ¶ 61,054 (1985) (entities are entitled to take full advantage of all tax benefits available to them).

63/ See note 8, supra.

Winooski Two's protest includes a notice a intent to file a competing application, as well as a request that it be granted a waiver of the 120-day time period for making such a filing. 64/ Following Burlington's filing of the initial license application in 1980, the Commission issued a notice on July 25, 1980, which provided, among other things, that a notice of intent could be filed by September 5, 1980. Winooski Two's present notice of intent is thus seven years out of time.

Winooski Two nevertheless argues that since the applicants have now amended the initial application, Section 4.35 of the Commission's regulations requires a new notice to allow a new round of competition. We have discussed Section 4.35 above, however, and found that it is inapplicable to the amended application. We therefore reject Winooski Two's notice of intent. 65/

Alleged Abuse of Development Procedures

Winooski Two argues that the Commission should reject the amended application and establish a one-year period for the submission of competing applications, while barring the applicants from filing during that interval. Winooski Two maintains that, if the license for the amended application is issued, the Partnership will enjoy the benefit of Burlington's priority status based on the latter's 1980 application. Winooski Two argues that this is impermissible, citing the Commission's decisions in City of Fayetteville Public Works Commission 66/ and Energeology, Inc. 67/

The Fayetteville decision is not on point. In Fayetteville the Commission determined that an application for a preliminary permit or license filed jointly by a municipality and a non-municipal entity is not entitled to municipal preference under

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64/ Winooski Two's protest, p. 2.

65/ If the project which Winooski Two has in mind is the same project as that which it proposed in its 1985 permit application, i.e., a project located at the upper falls, it may not compete with the Chace Mill project as proposed in the amended application; if that is the case, no notice of intent is required.

66/ 16 FERC ¶ 61,209 (1981).

67/ 37 FERC ¶ 61,020 (1986).

the FPA. 68/ Here the applicants have not sought or obtained any municipal preference. The Commission accepted in 1980 Burlington's license application filed in that year pursuant to a 1977 preliminary permit issued to Burlington and a non-municipal co-applicant and therefore not awarded on the basis of Burlington's municipal status. 69/ This issue was also addressed in the Commission's order on the applicants' request for qualifying facility status. 70/

The Energeology decision similarly is not on point. In that case the Commission dismissed a license application because it found that a municipality abused its preference as a municipal permit holder by positioning a non-municipal entity to be first to file a license application on the expiration of the permit. 71/ Here, there was no abuse of municipal preference,

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68/ Section 7(a) of the FPA requires the Commission, when two or more applications are filed for a preliminary permit, to give preference to applications filed by municipalities, provided the applications are equally well adapted, or within a reasonable time are made equally well adapted, to develop water resources in the public interest. That section also requires the Commission to give preference to municipalities in issuing original licenses where no preliminary permit has been issued.

69/ Burlington filed the license application pursuant to the preliminary permit which had been issued jointly to it and Green Mountain Power Company. See note 10, supra. Green Mountain Power Company withdrew as co-permittee (see note 11, supra) after Burlington filed its license application. Permits are not transferable. See Section 5 of the FPA, 16 U.S.C. § 798. Consequently, only the permittee(s) can file a license application during the permit term. See Larry Pane, 24 FERC ¶ 61,326 (1983). Therefore, Burlington is not entitled to permittee preference pursuant to 18 C.F.R. § 4.37(c)(1988). However, at this point in the proceedings we will not undo the acceptance of Burlington's 1980 application, since interested persons have had the opportunity to file competing applications for the site, and there has been no use or abuse of municipal preference.

70/ See note 8, supra.

71/ The municipality agreed with the developer during the term of the permit that the developer would have the exclusive right to develop the project, and that the municipality would receive a percent of the gross power sales revenues from the project. The developer then submitted its development application at the expiration of the permit.

inasmuch as the permit was issued jointly to a municipality and a non-municipal entity. 72/ The pertinent issue here is whether it is appropriate to allow Burlington to amend its application to allow the partnership to join it as a developer of the project. We have discussed that issue above, and resolved it in favor of the applicants.

Winooski Two's remaining arguments describe problems with the Commission's pre-Order No. 183 policies which led to the issuance of Order 183. Winooski Two argues that because the pre-Order No. 183 policies were flawed, application of them to this proceeding is inappropriate. As we indicated above, the Commission issued Order No. 183 in part to deal with these problems. But in doing so the Commission included in the order the "grandfather clause" exempting from the order's provisions previously filed applications. And as we have stated above, the amended application is in accord with the grandfathered policies. We therefore reject Winsooki Two's remaining arguments.

Request for Hearing

WMA's protest asks that if the Commission does not reject the license application, it order a hearing to be held to consider issues raised by its objections to the project. 73/ We find, however, that there is adequate evidence in the record to support our conclusions herein, and that WMA's request does not show the existence of disputed issues of material fact. 74/ Accordingly no hearing need be held, and we will therefore deny WMA's request for one.

Winooski's Recommended Conditions

Winooski made, on October 1, 1987, a timely filing in response to the Commission's notice of the amended application. Winooski's filing contains a request and recommendation that the Commission incorporate in the license certain terms and conditions pertaining to the project which Winooski has formulated pursuant to the settlement agreement between Winooski and the applicants. Part III.9 of the agreement provides that

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72/ See note 69, supra.

73/ WMA's protest, p. 29.

74/ The Commission will hold a hearing where material issues of fact are in dispute. See, e.g., Joseph M Keating, 32 FERC ¶ 61,290 (1985). Mere allegations of disputed facts, however, are insufficient; petitioners must make an adequate proffer of evidence to support them. See Cerro Wire & Cable v. FERC, 677 F.2d 124 (D.C. Cir. 1982), at 128-29.

any project proposed by the applicants must receive written approval from the Winooski City Council, Planning Commission, and Design Review Board. Winooski's filing states that the amended application has Winooski's written approval.

Winooski's written approval, however, consists of documents of the city council, planning commission, and design review board, 75/ each of which contains various conditions. 76/ The conditions appear reasonable and compatible with the license. Inclusion of these conditions in the license articles is not appropriate or necessary, however. The applicants filed no objection to Winooski's filing, and pursuant to their settlement agreement with the city, which we have approved, they are bound by those conditions.

Comprehensive Plans

Section 10(a)(2)(A) of the FPA requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans (where they exist) for improving, developing, or conserving a waterway or waterways affected by the project. The Commission provided an interpretation of comprehensive plans under Section 10(a)(2)(A) 77/ that was revised by the order granting rehearing, issued April 27, 1988. 78/ In granting rehearing, the Commission instructed the Director, Office of Hydropower Licensing, to request the state and federal agencies to file plans they believe meet the revised guidelines. Until the process is completed, the staff will consider all available plans pursuant to Section 10(a)(2)(A).

The staff reviewed two plans that address various aspects of

75/ These documents comprise Attachment A of Winooski's filing. The formal "approval" is set out in the city council resolution, which incorporates the conditions specified by the planning Commission and the design review board.

76/ Altogether there are over 50 such conditions.

77/ Interpretation of Comprehensive Plans Under Section 3 of the Electric Consumers Protection Act, 52 Fed. Reg. 39,905 (October 26, 1987), III FERC Stats. & Regs. ¶ 30,773 (1987) (Order No. 481).

78/ 53 Fed. Reg. 15,802 (May 4, 1988), FERC Stats. & Regs. ¶ 30,811 (1988) (Order No. 481-A).

waterway management in relation to the proposed project. 79/ No conflicts were found.

Recommendations of Federal and State Fish and Wildlife Agencies

Section 10(j) of the FPA requires the Commission to include license conditions based on recommendations of federal and state fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife. The environmental assessment for the Chace Mill Hydroelectric Project addresses all of the concerns of the federal and state fish and wildlife agencies.

Summary of Findings

An EA was issued for the project. Background information, analysis of impacts, support for related license articles, and the basis for a finding of no significant impact on the environment are contained in the EA attached to this order. Issuance of this license is not a major federal action significantly affecting the quality of the human environment.

The design of this project is consistent with the engineering standards governing dam safety. The project will be safe if constructed, operated and maintained in accordance with the requirements of this license. Analysis of related issues is provided in the SDA attached to this order.

Based on our review of the agency and public comments filed in this proceeding, and our independent analysis, as discussed herein, we conclude that the Chace Mill Project is best adapted to a comprehensive plan for the Winooski River, taking into consideration the beneficial public uses described in Section 10(a)(1) of the FPA. 80/

The Commission orders:

(A) This license is issued to Burlington Electric Light Department and Winooski One Partnership (licensee), for a period of 40 years, effective the first day of the month in which this order is issued, to construct, operate, and maintain the Chace Mill Project. This license is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the

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79/ Vermont Rivers Study, 1986, Vermont Agency of Environmental Conservation; and Waterfalls, Cascades, and Gorges of Vermont, 1987, Vermont Agency of Environmental Conservation.

80/ 16 U.S.C. § 803(a)(1).

regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G:

Exhibit G-	FERC No. 2756-	Dated	Showing
1	4	3/26/87	Project Map with Boundaries

(2) Project works consisting of: (a) a 200-foot-long, 35-foot-high concrete dam situated immediately downstream and abutting the existing timber-crib dam and surmounted by a 100-foot-long, 8-foot-high bascule gate with crest elevation 136 feet N.G.V.D.; (b) a 36-foot-long bascule gate located at the right abutment; (c) a 5.7-acre reservoir; (d) a 70-foot-long intake structure having trashracks and a fish bypass facility; (e) a powerhouse containing one 6,500-kW turbine-generator unit; (f) a 45-foot-wide, 125-foot-long tailrace; (g) a fish trap facility; (h) the 13.8-kV generator leads and a 400-foot-long, 13.8-kV underground transmission cable; (i) an access road; and (j) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of Exhibits A and F recommended for approval in the attached Safety and Design Assessment.

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project and located within the project boundary, all portable property that may be employed in connection with the project and located within or outside the project boundary, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The Exhibit G described above and those sections of Exhibits A and F recommended for approval in the attached Safety and Design Assessment are approved and made part of the license.

(D) This license is subject to the articles set forth in Form L-11 (October 1975), entitled "Terms and Conditions of License for Unconstructed Major Project Affecting the Interests of Interstate or Foreign Commerce," except Article 20. The license is also subject to the following additional articles:

Article 201. The licensee shall pay the United States the following annual charge, effective the first day of the month in which this license is issued:

For the purpose of reimbursing the United States for the cost of administration of Part I of the FPA, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 8,700 horsepower.

Article 202. Pursuant to Section 10(d) of the FPA, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One-half of the project surplus earnings, if any, accumulated after the first 20 years of operations under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year after the first 20 years of operation under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 203. The licensee shall clear and keep clear to an adequate width all lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which result from maintenance, operation, or alteration of the project works.

In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. All clearing of lands and disposal of unnecessary material shall be done with due diligence to the satisfaction of the authorized representative of the Commission and in accordance with appropriate federal, state, and local statutes and regulations.

Article 301. The licensee shall commence construction of project works within two years from the issuance date of the license and shall complete construction of the project within four years from the issuance date of the license.

Article 302. The licensee shall, at least 60 days prior to start of construction, submit one copy to the Commission's Regional Director and two copies to the Director, Division of Dam Safety and Inspections, of the final contract drawings and specifications for pertinent features of the project, such as water retention structures, powerhouse, and water conveyance structures. The Director, Division of Dam Safety and Inspections, may require changes in the plans and specifications to assure a safe and adequate project.

Article 303. The licensee shall review and approve the design of contractor-designed cofferdams and deep excavations prior to the start of construction and shall ensure that construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days prior to the start of construction of the cofferdam, the licensee shall submit to the Commission's Regional Director and Director, Division of Dam Safety and Inspections, one copy each of the approved cofferdam construction drawings and specifications and the letter(s) of approval.

Article 304. The licensee shall within 90 days of completion of construction file, for approval by the Commission, revised exhibits A, F, and G to describe and show the project as built.

Article 305. The licensee shall file, for approval by the Commission, revised Exhibit F drawings showing the final design of project structures. The revised Exhibit F drawings shall be accompanied by a supporting design report showing that the project is adequate to resist uplift forces and has acceptable sliding factors of safety. The licensee shall not commence construction of any project structure until the corresponding revised Exhibit F drawing has been approved.

Article 401. The licensee, after consultation with the Vermont Agency of Natural Resources, the Soil Conservation Service, and the U.S. Fish and Wildlife Service, shall prepare and file with the Commission for approval, before commencing any

project-related land-clearing, land-disturbing, or spoil-producing activities, a comprehensive plan to control erosion and dust, and to minimize the quantity of sediment or other potential water pollutants resulting from project construction, spoil-disposal, and project operation and maintenance. The Commission reserves the authority to require changes to the plan. No project-related land-clearing, land-disturbing, or spoil-producing activities shall begin until the licensee is notified that the plan complies with the requirements of this article.

The plan shall be based on actual-site geological, soil, slope, and groundwater conditions, and on the final project design, and shall include detailed descriptions of the actual-site conditions, detailed descriptions and functional design drawings of control measures, topographic map locations of all control measures, a specific implementation schedule, specific details of monitoring and maintenance programs for the project construction period and for project operation, and a schedule for periodic review of the plan and for making any necessary revisions to the plan. The licensee shall include in the filing documentation of consultation with the agencies before preparing the plan, copies of agency comments or recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how all of the agency comments and recommendations are accommodated by the plan.

The licensee shall allow a reasonable time frame, in no case less than 30 days, for agencies to comment and make recommendations prior to filing the plan. If the licensee disagrees with any agency recommendations, the licensee shall provide a discussion of the reasons for disagreeing, based on actual-site geological, soil, and groundwater conditions.

Article 402. The licensee, after consultation with the Vermont Agency of Natural Resources (ANR), shall prepare and file a pollution abatement plan with the Commission for approval, within 6 months from the issuance date of this license, to prevent the discharge of wet concrete, petroleum products, such as diesel fuel and lubricants used in the maintenance and operation of construction equipment, and construction debris into the Winooski River during the construction period. The plan shall include measures to efficiently and thoroughly contain and clean-up any of the substances discussed above, should an accidental spill occur.

If the licensee does not agree with the recommendations of the ANR, the licensee shall explain its reasons for not concurring. The filing shall include comments from the ANR regarding the licensee's proposed plan to control construction-related pollutants. The Commission reserves the right to require changes to the plan. No project-related construction activities

that could create potential water pollutants shall begin until the licensee is notified that the plan complies with the requirements of this article.

Article 401. The licensee shall consult with the Vermont Agency of Natural Resources (ANR) in developing a water management plan for the maintenance of existing flows in the Winooski River downstream of the Chace Mill Hydroelectric Project during the construction period, to prevent degradation of water quality and to protect fish and wildlife resources in the project area. The plan shall be filed with the Commission for approval within 6 months of the issuance date of this license. The filing shall include an implementation schedule and comments from the ANR on the plan. The Commission reserves the right to require changes to the plan. No project-related construction activities that could create potential water pollutants shall begin until the licensee is notified that the plan complies with the requirements of this article.

Article 404. During periods of project operation, the licensee shall discharge over the spillway crest of the Chace Mill Hydroelectric Project dam a continuous minimum flow of 168 cubic feet per second, as measured immediately downstream of the spillway, or the inflow to the reservoir, whichever is less, for the protection and enhancement of fish and wildlife resources and for the maintenance of water quality in the Winooski River. During periods of project shut-down, the licensee shall spill all inflow to the project over the dam crest. These flows may be temporarily modified if required by emergencies beyond the control of the licensee, and for short periods upon mutual agreement among the licensee, the Vermont Agency of Natural Resources, and the U.S. Fish and Wildlife Service.

Article 405. The licensee shall operate the Chace Mill Hydroelectric Project in an instantaneous run-of-river mode for the protection of fish and wildlife resources in the Winooski River. The licensee, in operating the project in an instantaneous run-of-river mode, shall at all times act to minimize the fluctuation of the reservoir surface elevation, i.e., maintain discharge from the project so that the sum of the flows, as measured at the dam crest and immediately downstream of the project tailrace, approximates the instantaneous sum of inflow to the project reservoir. Instantaneous run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement among the licensee, the Vermont Agency of Natural Resources, and the U.S. Fish and Wildlife Service.

Article 406. The licensee, after consultation with the Vermont Agency of Natural Resources (ANR), shall develop a plan

to construct, operate, and maintain streamflow gages to continuously measure the inflow to the Chace Mill impoundment and the outflow from the Chace Mill Hydroelectric Project to verify that the project is operating in accordance with the requirements of articles 404 and 405. The licensee shall file the gaging plan with the Commission within 6 months of the issuance date of this license. The filing shall include comments from the ANR regarding the gaging plan. The Commission reserves the right to require modifications to the plan.

Article 407. The licensee, after consultation with the Vermont Agency of Natural Resources (ANR), shall develop a plan to ensure that operation of the Chace Mill Hydroelectric Project does not cause violation of state water quality standards nor cause nitrogen gas supersaturation. Within 6 months of the issuance date of this license, the licensee shall file with the Commission for approval a plan that includes: (1) a description of the monitoring system that would be utilized to measure dissolved oxygen (DO) and nitrogen (N_2) gas concentrations downstream of the project; (2) the locations at which the equipment that would continuously monitor the DO and N_2 concentrations would be positioned; (3) a schedule for the first 2 years of project operation indicating when the licensee would monitor downstream DO and N2 concentrations; (4) a description of procedures that would be used to ensure that project operation does not reduce downstream DO concentrations to levels that are less than the following state seasonal DO standards: (a) June 1 to September 30: 5.0 milligrams per liter (mg/l) or 60 percent saturation; (b) October 1 to May 31:6.0mg/l, or 70 percent saturation in reaches of the river that are not salmonid spawning habitat and 7.0 mg/l, or 75 percent saturation in reaches of the river that are salmonid spawning habitat; and (5) a description of procedures including the design of the spillway that would be used to ensure that the spillage of flows over the dam does not cause N2 saturation levels in the pool at the base of the dam to exceed 117 percent. The filing shall include the comments of the ANR regarding the proposed monitoring plan. The Commission reserves the right to change the plan.

The licensee shall file a report describing the effects of project operation and spillage on DO and N2 concentrations within 45 days of the first and second anniversary dates of issuance of this license. These filings shall include comments from the ANR regarding the report.

If at any time the monitoring program indicates that project operation reduces downstream DO concentrations to levels below the state's standards or spillage causes N2 saturation levels to exceed 117 percent, the licensee shall immediately implement whatever measures are necessary to comply with the state standards or reduce the level of N2 below 117 percent saturation.

In addition, the licensee shall immediately notify the ANR and the Commission's New York Regional Office that violation of the DO standards resulted from project operation or that spillage caused excessive nitrogen levels. Further, within 2 months of the violation, the licensee shall file with the Commission for approval a description of changes to project structures or operation that are needed to maintain the state DO standards or prevent N2 levels greater than 117 percent. Also, the licensee shall file a schedule for implementing those changes. Comments from the ANR regarding the proposed changes shall be included in the filing.

Article 408. The licensee, after consultation with the Vermont Department of Fish and Wildlife (DFW) and the U.S. Fish and Wildlife Service (FWS), shall develop plans for a trap-and-truck facility immediately downstream of the project dam to ensure upstream fish passage and a facility to ensure downstream fish passage past the project dam. The plans shall include: (1) functional design drawings of the trap-and-truck facility and downstream fish passage facilities; (2) the flow volumes needed to safely transport fish through these facilities; (3) a schedule for constructing and operating these facilities, including the extent of distribution of trucked fish throughout the Winooski River Basin; and (4) a description of the licensee's plan to finance the cost of construction of these facilities.

Within 1 year of the issuance date of this license, the licensee shall file the plans for Commission approval and shall include comments from the DFW and the FWS on the plans. The Commission reserves the right to change the plans that the licensee files. The licensee shall file as-built drawings with the Commission within 6 months after completion of construction of the respective fish passage facilities.

Article 409. The licensee shall implement the mitigative plan for rare plant species developed for the treatment of Anemone multifidi and Carex garberi, filed August 14, 1987, consisting of (1) the recommendations of the State of Vermont Endangered Species Committee; (2) the proposed plan for the protection, monitoring, and restoration of Anemone multifidi in Vermont; and (3) the June 1, 1987, letter from Leonard U. Wilson, Secretary, State of Vermont Agency of Environmental Conservation, accepting the recommendation and plan, and modifying the licensee's payment schedule.

Article 410. The licensee, after consultation with the City of Winooski, the Winooski Valley Park District (WVPD), and the Vermont Agency of Natural Resources, shall within 1 year from the issuance date of the license: (1) construct, operate, and maintain, or arrange for the construction, operation, and maintenance of, a walkway in front of the Forest Hills Mill and

under the highway bridge; (2) maintain the existing public access trail situated on WVPD-leased land on the west riverbank downstream of the dam; and (3) provide $150,000 to the City of Winooski for improvements associated with the proposed walkway, to include, but not be limited to, hand rails, landscaping, and planting trees. Within 3 months from the completion of the walkway, the licensee shall file with the Commission: (1) as-built drawings showing the location of the walkway; (2) documentation that the $150,000 paid to the City of Winooski has been used for the above-mentioned improvements; and (3) documentation of agency consultation.

Article 411. At least 60 days before the start of any land-clearing, land-disturbing, or spoil producing activities, the licensee shall file for Commission approval a plan to avoid or minimize visual character incompatibility of all project structures, including the new access road, with adjacent structures and the surrounding landscape. The Commission may require changes to the plan. No land-clearing, land-disturbing, or spoil-producing activities shall begin until the licensee is notified that the plan is approved.

The licensee shall prepare the plan after consultation with Woolen Mill Associates, the Vermont Agency of Natural Resources, the Vermont State Historic Preservation Officer, and the City of Winooski. The licensee shall include with the plan documentation of agency consultation and copies of agency comments and recommendations. If the licensee does not adopt agency recommendations, the filing shall include the licensee's reasons, based on visual and landscape conditions at the site.

The plan, at a minimum, shall include: (1) a description, including photographs, of the architectural character of the adjacent buildings and the surrounding landscape; (2) the licensee's strategy for blending project facilities into the architectural character of existing structures and the surrounding landscape; (3) architectural drawings of the proposed facilities, describing their exterior surface treatments; (4) a landscape drawing, which specifies the locations of site grading and plant materials; and (5) an implementation schedule.

Article 412. The licensee, at least 60 days before the start of land-disturbing or land-clearing activities at the Chace Mill Hydroelectric Project, and within 2 years of the date of the issuance of this license, shall file for Commission approval a detailed cultural resources management plan (plan) that is based on the results of consultations with the Vermont State Historic Preservation Officer (SHOP) and the Historic American Engineering Record (HAER) of the Department of the Interior.

The plan shall contain specific proposals, together with

the results of recordation studies, that are designed to ensure that the characteristics of the Winooski Falls Mill District (district), that make the district eligible for the National Register of Historic Places, are not adversely affected. Specifically, the licensee shall include in the plan the following items: (1) documentation according to the standards of the HAER of the characteristics that make the timber crib dam eligible for listing on the National Register; (2) provisions for protecting the timber crib dam from the deleterious effects of dewatering and freezing; (3) final plans and specifications for the design and landscaping of the new powerhouse; and (4) the comments and recommendations of the SHOP and the HAER on the contents of the report.

The licensee shall prepare the plan after consultation with the SHOP and the HAER; shall submit the plan to the SHOP and the HAER, before filing it with the Commission, with the request that the SHOP and the HAER either agree that developing the project according to the plan would result in no adverse impact to the dam, or that the SHOP and the HAER explain the reasons for not agreeing; shall incorporate in the plan the SHOP's and the HAER's recommendations concerning the plan, or explain in detail the reasons that the recommendations should not be incorporated; and shall include the SHOP's and the HAER's comments and recommendations with the plan, or copies of letters indicating that the licensee has attempted to consult with the SHOP and the HAER concerning the plan. The Commission reserves the right to require changes to the plan.

Article 411. The licensee, after the Chace Mill Hydroelectric Project (project) has been constructed, and at least 60 days before commencing commercial operations at the project, shall file for Commission approval a cultural resources impact report (report) that is based on the results of implementing the cultural resources management plan that the licensee submitted for Commission approval pursuant to article 412 of this license, and on consultations with the Vermont State Historic Preservation Officer (SHOP).

The licensee, in the report, shall describe--using drawings, photographs, and a narrative summary--those impacts resulting directly and indirectly from constructing or developing project works or other facilities at the project to the characteristics of the Winooski Falls Mill District (district) that make the district eligible for listing on the National Register of Historic Places. The licensee shall report the project's adverse and beneficial impacts. The licensee shall not commence commercial operation of the project until notified that the required filing has been approved.

The licensee shall prepare the report after consultation with the SHOP; shall submit the report to the SHOP, before filing it with the Commission, with the request that the SHOP either agree that developing the project has resulted in no adverse impact to the district, or that the SHOP explain the reasons for not agreeing; shall incorporate in the report the SHOP's comments and recommendations concerning the report, or explain in detail the reasons that the SHOP's recommendations should not be incorporated; and shall include the SHOP's comments with the report, or copies of letters indicating that the licensee has attempted to consult with the SHOP concerning the report. The Commission reserves the right to require changes to the report.

Article 414. The licensee, before starting any land-clearing or land-disturbing activities within the project boundaries, other than those specifically authorized in this license, shall consult with the Vermont State Historic Preservation Officer (SHOP). If the licensee discovers previously unidentified archeological or historic properties during the course of constructing or developing project works or other facilities at the project, the licensee shall stop all land-clearing and land-disturbing activities in the vicinity of the properties and consult with the SHOP. In either instance, the licensee shall file for Commission approval a cultural resource management plan prepared by a qualified cultural resource specialist after having consulted with the SHOP.

The management plan shall include the following items: (1) a description of each discovered property indicating whether it is listed on or eligible to be listed on the National Register of Historic Places; (2) a description of the potential effect on each discovered property; (3) proposed measures for avoiding or mitigating effects; (4) documentation of the nature and extent of consultation; and (5) a schedule for mitigating effects and conducting additional studies. The Commission may require changes to the plan.

The licensee shall not begin land-clearing or land-disturbing activities, other than those specifically authorized in this license, or resume such activities in the vicinity of a property discovered during construction, until informed by the Commission that the requirements of this article have been fulfilled.

Article 415. The licensee, after consultation with building and planning officials from the City of Winooski, and with principals of Woolen Mill Associates, and at least 60 days before the start of any land-clearing, land-disturbing, or spoil-producing activities, shall file for Commission approval a plan to mitigate adverse impacts resulting from project-related vehicles and on-site construction activities.

The plan shall establish specific measures that will be implemented to minimize noise, dust, exhaust emissions, vibrations, and additional traffic that affect nearby residents. These measures may include, but should not be limited to, traffic control devices, noise reduction barriers, restrictive working hours, dust control techniques, and van or car pooling of construction personnel. Documentation of individual and agency consultation on the preparation of the plan and copies of any letters commenting on the plan received from individuals and agencies shall be included in the filing.

The Commission reserves the right to require changes to the plan. No land-clearing, land-disturbing, or spoil-producing activities shall occur at the project site until the Commission notifies the licensee that the plan has been approved.

Article 416. The licensee, after consultation with building and planning officials from the City of Winooski, and with principals of Woolen Mill Associates, and at least 60 days before the start of any project-related blasting operations, shall file for Commission approval a plan that establishes specific criteria and time frames for conducting any necessary blasting operations. This plan shall include, but not be limited to, the following criteria and time frames: (1) no blasting operations on weekends or holidays; (2) no more then 3 blasting periods each day; (3) blasting shall be restricted to the following weekday hours: 9:00 - 11:45 a.m. and 1:00 - 5:00 p.m.; and (4) no blasting any week without first notifying the tenants of the Forest Hills Mill apartments and other potentially affected persons in the immediate vicinity 3 days (the Friday before) before that week.

The plan shall, to the greatest extent possible, provide for (1) early and continuous notification of proposed blasting operation for each week; and (2) the least number of blasting episodes each day and week for the 3-month blasting period. Documentation of individual and agency consultation on the preparation of the plan and copies of any letters commenting on the plan received from individuals and agencies shall be included in the filing.

The Commission reserves the right to require changes to the plan. No project-related blasting operations shall occur at the project site until the Commission notifies the licensee that the plan has been approved.

Article 417. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority

only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and water for which the licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family type dwellings; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Hydropower Licensing, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director,

within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to insure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(E) Within 90 days from the date of this order, the licensee must file with the Commission's Secretary one original and one Diazo-type duplicate set of aperture cards showing each approved exhibit drawing. The originals must be reproduced on silver or gelatin 35 mm microfilm and mounted on Type D (3 1/4" x 7 3/8") aperture cards. The licensee must also submit at the same time a set of Diazo-type duplicate aperture cards to the Commission's New York Regional Office. The FERC drawing number shall be shown in the margin below the title block of the microfilm drawing. The top line(s) of the aperture card shall show the appropriate FERC Exhibit, Project Number, Drawing Number, Drawing Title, and the date of this order.

(F) The application for preliminary permit for Project No. 3101 filed by the City of Winooski on April 28, 1980, is deemed to be withdrawn.

(G) The Winooski One Partnership's appeal of the Director's January 9, 1986 rejection of the Partnership's license application for Project No. 9413 is deemed to be withdrawn.

(H) The Woolen Mill Associates' and Winooski Two, Inc.'s respective appeals of the Commission's order dated April 8, 1988, in these proceedings are denied.

(I) The licensee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(J) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313(a) of the Federal Power Act. The filing of a request for rehearing does not operate as a stay of the effective

date of this order or of any other date specified in this order, except as specifically ordered by the Commission. The licensee's failure to file an application for rehearing shall constitute acceptance of this order.

By the Commission. Commissioner Langdon voted present.

(S E A L)

Lois D. Cashell,
Secretary.