

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman;
J. David Hughes and A. C. Sousa.

Hydro Development Group, Inc.)	Project No. 4636-000
)	Project No. 4636-001
Mary Jane Ruderman Hirschey)	Project No. 4908-000
)	Project No. 4908-001
Crown Zellerbach Corporation)	Project No. 5800-000
Long Lake Energy Corporation)	Project No. 5923-000
Climax Manufacturing Company)	Project No. 6368-000

ORDER VACATING GRANT BY OPERATION OF LAW
OF EXEMPTIONS FROM LICENSING
OF SMALL HYDROELECTRIC PROJECTS OF 5 MEGAWATTS OR LESS

(Issued July 20, 1982)

Seven applications for preliminary permit, license and exemption have been filed to study or develop all or part of a hydroelectric site(s) on the Black River near Carthage, New York. These applications' sponsors, project numbers, type and acceptance dates are:

<u>Applicant</u>	<u>Project No.</u>	<u>Application</u>	<u>Acceptance Date</u>
Hydro Devel. Group, Inc.	4636-000	prelim. permit	6-23-81
" " " "	4636-001	exemption	2-22-82
Mary Jane R. Hirschey	4908-000	prelim. permit	8-02-81
" " " "	4908-001	exemption	2-05-82
Crown Zellerbach Corp.	5800-000	exemption	2-05-82
Long Lake Energy Corp.	5923-000	major license	4-09-82
Climax Manufacturing Co.	6368-000	major license	recently filed

In addition, Mary Jane Ruderman Hirschey and Crown Zellerbach Corporation have filed notices of intent to file license applications for all or part of the site(s). These license applications will be filed no later than September 22, 1982.

Each of these applications, as well as the two more to be filed, appear to compete with at least one of the other applications (some appear to compete with several). To the extent

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that any of the applications which have been or will be accepted for processing in fact compete with each other, the normal procedure would be to comparatively evaluate the applications to determine which represents the best proposal(s). An order would be issued to resolve the competition.

An inadvertent error, however, has upset this procedure. Under the provisions of 18 C.F.R. § 4.105(b)(4), an exemption application is deemed granted by operation of law if not acted on within 120 days of the acceptance of the application. The 120 day period for action on Project Nos. 4908-001 and 5800-000 expired on June 7, 1982, and the period for action on Project No. 4636-001 expired on June 22, 1982. Obviously, since two of the applications have not been received yet, the Commission had intended to toll the expiration of the Section 4.105(b)(4) period for Commission action on these exemption applications. Inadvertently, we failed to do so, and exemptions for Project Nos. 4636-001, 4908-001 and 5800-000 were granted. To remedy this situation, the grant of these exemptions should be vacated.

The Commission's authority to vacate the issuance of an exemption is provided by Section 313(a) of the Federal Power Act, 16 U.S.C. § 8251(a) (1976), which is applicable to exemptions issued under Section 408 of the Energy Security Act of 1980, 16 U.S.C. § 2705(d) (Supp. IV 1980). 1/ Section 313(a) of the Federal Power Act gives the Commission, upon giving reasonable notice, full authority to modify or set aside, in any manner it deems proper, any order made or issued under the Federal Power Act. 2/ In interpreting

1/ Section 313 of the Federal Power Act applies to exemptions issued under Section 408 of the Energy Security Act (Section 405(d) of the Public Utility Regulatory Policies Act (PURPA)) due to the relationship of the exemption provisions of PURPA to the licensing provisions of Part I of the Federal Power Act.

2/ The Commission retains this power until a party appeals the Commission's order and the record of decision is filed with the court of appeals.

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substantially the same language in § 10(d) of the National Labor Relations Act, 29 U.S.C. § 160(d) (1976), the Supreme Court declared that "[t]he purpose of the provision obviously is to afford an opportunity to correct errors or to consider new evidence which would render the order inadequate or unjust," and plainly confers the power to set aside orders in whole or in part. National Labor Relations Board, 304 U.S. 487, 492 (1938) (recognizing NLRB power to vacate fifteen day old order and reconsider the matter). Courts have repeatedly interpreted §19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a) (1976), which is virtually identical to § 313(a) of the Federal Power Act, 3/ in the same manner. 4/ Indeed, even where they do not possess express statutory authority to modify or set aside decisions, all administrative agencies, absent express statutory prohibition or other circumstances which warrant a prohibition, have an inherent power to reconsider decisions within a short and reasonable time period. 5/

3/ The one minor difference between the provisions is immaterial.

4/ See Placid Oil Co. v. FPC, 483 F.2d 880, 903-04 (5th Cir. 1973); Pan American Petroleum Corp. v. FPC, 322 F.2d 999, 1004 (D.C. Cir. 1963); Florida Economic Advisory Council v. FPC, 251 F.2d 643, 649 (D.C. Cir. 1957). The opportunity to seek rehearing of this order effectively gives the applicants reasonable notice of its vacation, as required by Section 313(a). Cf. NLRB v. Local 345, Bhd. of Util. Workers of New England, Inc. 612 F.2d 598, 603 (1st Cir. 1980) (where modification of order imposed additional and material burdens or removed valuable right, parties should have been given opportunity to be heard through exceptions or otherwise).

5/ See Bookman v. United States, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (comparing Civil Service Commission's inherent authority to reconsider three month old decision with FPC's express statutory authority to modify and set aside its orders); Biddle v. United States, 186 Ct. Cl. 87 (1968).

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Thus, it is clear that the Commission has ample authority under Section 313(a) of the Act to vacate the issuance of the exemptions for Project Nos. 4908-001 and 5800-000 in this order. 6/

The Commission orders:

- (A) The grant of exemptions by operation of law for Project Nos. 4636-001, 4908-001 and 5800-000 is vacated.
- (B) The exemption applications for Project Nos. 4636-001, 4908-001 and 5800-000 will not be deemed to be granted by operation of law under the provisions of 18 C.F.R. § 4.105(b)(4).
- (C) This order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313(a) of the Act. The filing of an application for rehearing does not operate as a stay of the effective date of this order, except as specifically ordered by the Commission.

By the Commission.

(S E A L)

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.

6/ Furthermore, the power of an administrative agency to correct inadvertent errors and mistakes, independent of express statutory authority to do so, is well recognized. See American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 144-46 (1958) (ICC had authority to correct inadvertent errors contained in certificates of public convenience and necessity issued three years earlier); Stone v. Dugan Bros., 61 A.2d 740, 742 (N.J. Super. Ct. App. Div. 1948) (inadvertent failure to act resulting in order of dismissal could be vacated without express statutory authority). This constitutes an independent justification for this order.