Report of the Committee on Environment

The Committee's report highlights developments on environmental issues at the Federal Energy Regulatory Commission (FERC or the Commission) and the courts during 1989.

I. NATURAL GAS

A. Section 311

1. Notice of Proposed Penalties

On July 26, 1989, the Commission issued a notice of proposed civil penalty[1] proposing to assess civil penalties against Transcontinental Gas Pipe Line Corporation (Transco) pursuant to section 504(a)(2) of the Natural Gas Policy Act (NGPA).[2] The proposed penalties relate to Transco's alleged failure to comply with the National Historic Preservation Act of 1966[3] (Preservation Act) and its implementing regulations in the construction of two Mobile Bay area pipeline facilities built during 1987. Transco had relied both on section 311(a)(1) of the NGPA[4] and part 284 subpart B[5] of title 18 of the Code of Federal Regulations for authority to construct the pipeline facilities.

Section 284.11[6] requires that construction of facilities for section 311 transportation must comply with the conditions set forth in section 157.206(d)[7]. The conditions require, *inter alia*, that the holder of a blanket certificate shall adopt the guidelines set forth in section 2.69[8] for all activities authorized by a blanket certificate. The section further requires that all pipeline activities must be consistent with the environmental and pollution control standards of the Clean Water Act, Clean Air Act, Endangered Species Act, and Preservation Act. To ensure compliance with the latter Act, FERC adopted procedures which specify that no construction shall commence until after the certificate applicant consults with the appropriate State Historic Preservation Officer (SHPO). The SHPO may require a pipeline to perform a survey to determine whether any properties located in the area of potential environmental impact are eligible for the *National Register of Historic Places.*

In its notice of proposed civil penalty, the Commission states that prior to construction of the Mobile Bay pipeline and mainline looping, Transco was required by the Preservation Act, and the Procedures for Compliance with the

1. Transcontinental Gas Pipe Line Corp., 48 F.E.R.C. ¶ 61,189, at 61,699 (1989).

2. 15 U.S.C. § 3414(a)(2) (1988). *See* § 504(b)(6)(E) of the NGPA which provides that before assessing a civil penalty, the Commission shall provide notice of the proposed penalty and by order thereafter, assess such penalty. 15 U.S.C. § 3414(b)(6)(E) (1988).

3. 16 U.S.C. §§ 470-470W-6 (1988).

4. 15 U.S.C. § 3737(a)(1) (1988).

5. 18 C.F.R. §§ 284.101-06 (1990).

6. 18 C.F.R. § 284.11 (1990).

7. 18 C.F.R. § 157.206(d) (1990).

8. "Guidelines to be followed by natural gas pipeline companies in the planning, locating, clearing and maintenance of rights-of-way and the construction of aboveground facilities." 18 C.F.R. § 2.69 (1990).

Preservation Act,[9] to consult with the Alabama SHPO. Transco did consult with the SHPO. However, according to the Commission, Transco commenced construction prior to (1) completing the survey the Alabama SHPO required; (2) submitting the survey results to the SHPO; and (3) receiving the SHPO's determination regarding whether any property identified in the survey is eligible for inclusion in the *National Register*.[10] The FERC's Procedures for Compliance with the Preservation Act provide that construction shall not be authorized if the project sponsor and the SHPO cannot agree either on the need for or adequacy of a survey, or on the results of the evaluation of a site. Therefore, the Commission determined that Transco's construction prior to completion of the SHPO's survey was not authorized under the Commission's regulations. The Commission also determined that Transco's unauthorized construction may have damaged or destroyed archeological sites located wholly or partially within the rights-of-way of the two pipelines.[11]

The Commission did not propose to assess Transco the maximum penalty, but rather proposed to fine Transco $37 million, calculated specifically to deprive Transco of "the competitive benefits of its violations."[12] Under the Commission's theories, Transco had a four-year headstart over other pipeline applicants in operating facilities in the Mobile Bay area. The penalty, therefore, was designed to deprive Transco of any return on the facilities for that period of time.[13] The Commission also considered the penalty to be a necessary means by which to "deter Transco and others from any future violations of the Commission's self-implementing regulations."[14]

2. Section 311 Task Force

On November 27, 1989, Senator Howard Metzenbaum (D-Ohio) issued a letter to the FERC Chairman, Martin Allday, questioning the "legal basis for the construction of interstate pipeline facilities without prior case-specific Commission review and approval" pursuant to section 311. Specifically, Senator Metzenbaum was concerned that projects, such as ANR Pipeline Company's (ANR) and Panhandle Eastern Pipeline Company's (Panhandle)

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9. 18 C.F.R. Pt. 157 subpt. F, app. II (1990).

10. *Transco*, 48 F.E.R.C. ¶ 61,189, at 61,700 (1989).

11. The Alabama SHPO did complete the survey in November, 1988. The SHPO found that twenty-two of the seventy-seven archeological sites were potentially eligible for the *National Register*. *Id.* at 61,700. The Commission's Notice considered each of the twenty-two sites to be a separate "knowing" violation of § 311(a)(1). *Id.* at 61,701. Furthermore, absent more specific information, the Commission also assumed that each violation commenced on March 31, 1987 concurrent with Transco's start of construction.

12. *Id.*

13. *Id.*

14. *Id.* In addition, the Commission directed Transco to study thoroughly the effects of its construction on all seventy-seven sites, as well as to investigate its eligibility for the *National Register of Historic Places* in consultation with the Alabama SHPO and Commission Staff. The Commission also issued an order directing Transco to show cause why, if construction of the Mobile Bay facilities were unauthorized based on the violations described above, (1) Transco's continued operation of the two pipelines is not in violation of § 311(a)(1) of the NGPA and (2) why Transco's construction and operation of the facilities did not violate, and are not continuing to violate, the requirements of § 7(c) of the Natural Gas Act. Transco filed a response to the Commission's show cause order on August 25, 1989. Final Commission action on this matter is pending. *Transco*, 48 F.E.R.C. ¶ 61,132, at 61,510 (1989).

proposed projects,[15] could be constructed and operated without prior economic and environmental review by the Commission.

In a response[16] dated January 5, 1990, Chairman Allday referred to the regulations implementing section 311 of the NGPA initially promulgated in Order No. 46.[17] Although Order No. 46 did not limit the size of section 311 facilities, it limited section 311 self-implementing transportation authority to (a) system supply, (b) two-year terms, and (c) best efforts service. Thereafter, in Order No. 436, the Commission clarified that it expected construction, associated with section 311, would generally involve minor facilities.[18] However, the FERC adopted section 284.11 of the blanket certificate regulations to ensure compliance with its environmental responsibilities and provide a level of oversight on the environmental effects of section 311 construction. Section 284.11 provides that any construction or abandonment of facilities, pursuant to a blanket certificate, is subject to the terms and conditions of section 157.206(d), which incorporates the environmental statutes and policies that pipelines must satisfy prior to commencing construction.[19]

Chairman Allday maintained that the regulations discourage construction of uneconomical or unnecessary facilities under section 311 because transportation rates covering such facilities place the risk of under-utilization on the pipeline. The Chairman identified various options[20] available to the Commission to prevent unnecessary or environmentally destructive facilities. These options include (1) directing a pipeline to halt construction pursuant to section 501(a) of the NGPA,[21] (2) initiating civil proceedings and assessing civil penalties as authorized under section 504(b) of the NGPA,[22] and (3) referring violations of these acts or the federal antitrust laws to the Attorney General pursuant to section 20(a) of the NGA[23] and section 504(b)(5) of the NGPA.[24]

The Commission created a task force, headed by Commissioner Elizabeth A. Moler, to review all regulations governing authorization for pipeline construction. The review is to include a determination of whether existing regulations ensure effective compliance with statutory mandates in light of the competitive forces in the natural gas market.[25] At the time this Report was prepared, the Commission had proposed and requested public comment on new regulations to deal specifically with construction of facilities utilized for

15. ANR's proposed "Lebanon Extension" and Panhandle's proposed "Indiana Ohio Pipeline" are parallel projects joining facilities in Indiana with others in Ohio.

16. Letter from Chairman Martin Allday to Sen. Howard Metzenbaum (Jan. 5, 1990) (discussing § 311 construction projects).

17. Order No. 46, 18 C.F.R. §§ 157, 281 and 284 (1990).

18. Letter, *supra* note 16 at 2.

19. *Id.*

20. *Id.* at 3.

21. 15 U.S.C. § 3411(a) (1988).

22. 15 U.S.C. § 3414(b) (1988).

23. 15 U.S.C. § 717 (1988).

24. 15 U.S.C. § 3414(b)(5) (1988).

25. Letter, *supra* note 16 at 1.

Section 311 service.[26]

B. Polyclorinated Biphenyls (PCBs)

During the year, the Commission did not adopt any policy on the treatment of environmental cleanup or penalty costs resulting from PCB contamination. The Commission did, however, address the first attempt by a major pipeline specifically to assign cost responsibilities to its shippers for disposal of tendered PCBs. In April, 1989, Transco filed a revised tariff sheet under which shippers would (1) reimburse Transco for costs incurred in removing and disposing of PCBs, and (2) indemnify Transco for any liability which may result from disposal of the removed PCBs.[27] Transco proposed to allocate costs based on each shipper's portion of the total gas receipts tendered during any given month at interconnections where Transco physically received gas from a shipper which tendered gas containing PCBs and associated gas liquids.[28] A number of parties intervened and protested the proposed tariff change.[29]

On May 5, 1990, the Commission issued an order rejecting Transco's tariff sheet on the grounds that the tariff language was too vague and overly broad.[30] According to the Commission, Transco had not shown specified anticipated costs, an allocation methodology, that the costs were prudently incurred, or that it would not recover costs embedded in general system rates.[31] The Commission, however, did recognize that the filing involved a potentially significant issue, namely, how to assign cost responsibility for the disposal of PCBs. Accordingly, the Commission directed the staff to convene a technical conference to address the issues identified by the Commission and to establish which receipt points are contaminated by PCBs. The technical conference was held on June 28, 1989. However, the Commission order discussing the results of the conference is still pending.[32]

C. Mobile Bay Pipeline Projects

On December 19, 1989, the Commission issued a notice of its intent to

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26. Notice of Proposed Rulemaking, *Revisions to Regulations Governing Certificates for Construction*, IV F.E.R.C. Stats. & Regs. ¶ 32,447, 55 Fed. Reg. 33,027 (1990).

27. *Transco*, 47 F.E.R.C. ¶ 61,197, at 61,685 (1989).

28. *Id.*

29. *Id.* at 61,686. In its May 3, 1989 response to the various protests and motions to intervene, Transco asserted that shippers should bear PCB clean-up and disposal costs because (a) the PCB contamination at relevant interconnections is not the result of any act or failure to act on the part of Transco; (b) the shippers are responsible "by virtue of their decisions to transport gas on the PCB contaminated pipelines;" (c) shippers are in "contractual privity with the contaminating upstream pipelines, not Transco;" and (d) the shippers are in the best position to recoup from the upstream pipeline any costs which they had paid to Transco. Letter, *supra* note 16 at 5-6. Transco also stated that the gas tendered is "ultimately the shippers responsibility" and therefore shippers' should bear the burden of bringing the gas into conformity with existing quality specifications. *Id.* at 8.

30. Transco, 47 F.E.R.C. ¶ 61,197, at 61,686.

31. *Id.* at 61,686-87.

32. Transco also requested rehearing of the order rejecting the filing. *Transco*, 47 F.E.R.C. ¶ 61,197 (1989).

prepare a comprehensive environmental impact statement (EIS) for five offshore and three onshore pipeline projects proposed in the Mobile Bay area.[33] The FERC decided to prepare a comprehensive EIS due to "the commonality of many resource issues and the similarity of routes, and hence, affected jurisdictions, and the potential for cumulative impact from these projects."[34]

In the same order, however, the FERC decided to exclude two projects from the comprehensive EIS.[35] One of the excluded projects was the Gateway project. As grounds for exclusion of the Gateway project, the FERC noted that "Gateway's conventional section 7(c) application filed in Docket No. CP88-393-000 is for the same facilities as its optional certificate proposal [and thus] the environmental analysis will not be duplicated in this EIS."[36]

On February 6, 1990, Southern Natural Gas Company, Tennessee Gas Pipeline Company, and Florida Gas Transmission Company filed a Joint Request for Reconsideration of the December 19, 1989, order. The companies further asked the Commission to reconsider its decision to prepare a comprehensive EIS for the various Mobile Bay Projects. As of the date of this report, the Commission had not issued an order responding to the pipelines' concerns.

D. Optional Expedited Certificates (OECs)

On January 13, 1989, the Commission issued Opinion No. 322. The Commission affirmed an initial decision concerning the environmental impact of the section 7(c) applications filed by Mojave Pipeline Company (Mojave) and Kern River Gas Transmission Company (Kern River).[37] The initial decision also addressed the cumulative impact of the Kern River and Mojave certificates, and the optional certificate filed by Wyoming California Pipeline Company (WyCal). The Commission determined that the National Environmental Policy Act (NEPA) gives the Commission, as a federal agency, considerable flexibility in deciding what procedures to use in making the required environmental evaluation of a specific project.[38] Further, the Commission found that NEPA requires a balancing of non-environmental and environmental issues, but no particular procedure for doing so.[39] The Commission found that a determination of need, or public necessity, for a project is made ultimately in the order granting or denying a certificate, and is not required to be made in the EIS.[40]

The Commission order also adopted the Administrative Law Judge's (ALJ) recommendation to condition the certificate authorization for the projects COMMD, thereby allowing the Commission to sequence construction

33. 54 Fed. Reg. 52,843 (1989).

34. *Id.* at 52,844.

35. The excluded projects were Southern Natural Gas Company's proposal in Docket No. CP89-517-000 and Gateway Pipeline Company's optional expedited certificate proposal in Docket No. CP89-471-000. *Id.*

36. 54 Fed. Reg. 52,843, at 52,844 (1989).

37. Opinion No. 322, *Opinion Affirming Initial Decision on Environmental Issues and Making Supplemental Findings*, 46 F.E.R.C. ¶ 61,029 (1989).

38. *Id.* at 61,153.

39. *Id.* at 61,154.

40. *Id.* at 61,156.

as necessary to mitigate synergistic impacts. The Commission approved WyCal's supplemental EIS and granted certificate authorization to WyCal's optional certificate, filed two years after the Kern River and Mojave proposals.

E. State/Federal Jurisdiction

In *National Fuel Gas Supply Corp. v. Public Service Commission*,[41] issued January 24, 1990, the United States Court of Appeals for the Second Circuit addressed the extent to which the FERC's certificate and environmental review and approval processes preempted the Public Service Commission of the State of New York (PSC) from regulating interstate pipeline facilities.[42] An interstate pipeline, National Fuel Gas Supply Corporation (National Fuel), had obtained a certificate of public convenience and necessity from the FERC to abandon a short length of interstate pipeline and to construct a replacement line and regulator station. Both lines were less than two miles long. Anticipating that the PSC might seek to require that National Fuel also obtain a state certificate to build and operate these facilities under Article VII, National Fuel brought an action in federal district court in New York. National Fuel was seeking a declaratory judgment that the PSC's regulations were preempted by Federal regulation and seeking an injunction against the PSC. The District Court ruled in favor of PSC largely on the grounds that the FERC preemption is an area with many exceptions and that the New York statute could be applied in ways which would not encroach upon the FERC jurisdiction. The Second Circuit reversed and held that regulation of interstate facilities by the New York statute was completely preempted by federal regulation. The court found that the Natural Gas Act (NGA) vested exclusive jurisdiction in the FERC to regulate natural gas pipelines used in interstate commerce. The court noted the recent decision by the Supreme Court in *Schneidewind v. ANR Pipeline Co.*,[43] which stated that the FERC had exclusive jurisdiction over rates and facilities of interstate gas pipelines. Additionally, the court found that a comparison of Article VII of the New York statute and FERC's regulation demonstrated that Congress has "fully occupied" the field that the state sought to regulate. Both the state and federal certification procedures required a finding that the facilities be found to be in the public convenience and necessity. Both also required findings and showings by the pipeline regarding the environmental impact of the facilities. The PSC argued that the state regulations could be applied "piecemeal" in areas not specifically preempted by the FERC regulations. The court found that approach inconsistent with the statutory scheme of the New York laws and in any event preempted by the FERC regulations. The U.S. Supreme Court denied petitions for certiorari seeking review of the Second Circuit's decision.

II. ELECTRIC

In an October 27, 1989, order granting rehearing in part and denying

41. 894 F.2d 571 (2d Cir. 1990).

42. N.Y. PUB. SERV. LAW art. VII, §§ 120-130 (McKinney 1989).

43. 485 U.S. 293 (1988).

rehearing in part,[44] the Commission found that the proposed merger of Southern California Edison and San Diego Gas and Electric could add hundreds of tons of additional air contaminants to the most polluted air in the nation.[45] The Commission, therefore, reversed its earlier decision and determined that an Environmental Assessment of the merger should be undertaken in accordance with section 380.4(b) of the Commission's regulations.[46]

III. HYDROELECTRIC

A. Licenses

Several judicial decisions addressed the relationship of federal and state authority over environmental impacts of hydroelectric project licenses. In *California v. FERC*,[47] the court reviewed a declaratory order by the FERC stating that it had exclusive jurisdiction to establish the permanent minimum flow rates for the hydroelectric project in California. The project sponsors petitioned the FERC for the declaratory order following issuance of orders by the local agency, the California State Water Resources Control Board, reserving the authority to set permanent minimum flow rates after completing studies. The Ninth Circuit affirmed the FERC's finding that it had preemptive authority in issuing this condition, and the court found that Congress "intended to vest regulatory authority in FERC over most aspects of hydropower projects," reserving only limited "proprietary rights" for the states.[48]

Similarly, the Ninth Circuit found that the FERC had exclusive jurisdiction over appeals of hydroelectric licensing decisions in *California Save Our Streams Council, Inc. v. Yeutter*.[49] In that dispute, the FERC had issued a license for a hydroelectric program located in a national forest, subject to certain conditions promulgated by the Forest Service, under section 4(e) of the Federal Power Act (FPA).[50] Dissatisfied with those conditions, the appellants had sought both administrative review within the FERC, and injunctive and declaratory relief against the project sponsor and the Forest Service in federal district court. The appellants alleged violations of the National Environmental Policy Act[51] (NEPA) and the American Indian Religious Freedom Act[52] (AIRFA). The Ninth Circuit affirmed the holding of the district court that the FERC had exclusive jurisdiction over the issuance and terms of hydroelectric licenses under the FPA. The court rejected the appellant's claims that suits alleging violations of NEPA and AIRFA created an independent method of challenging licensing conditions through challenge to the section 4(e) conditions proposed by the Forest Service.

The exclusive nature of the FERC jurisdiction over environmental condi-

44. Southern Cal. Edison Co. & San Diego Gas & Elec., 49 F.E.R.C. ¶ 61,091 (1989).
45. *Id.* at 61,357.
46. 18 C.F.R. § 380.4(b) (1990).
47. 877 F.2d 743 (9th Cir. 1989).
48. *Id.* at 750.
49. 887 F.2d 908 (9th Cir. 1989).
50. 16 U.S.C. § 797(e) (1988).
51. 42 U.S.C. §§ 4321-47 (1988).
52. 42 U.S.C. § 1996 (1988).

tions in hydroelectric licenses was also addressed by the United States Court of Appeals for the Third Circuit in *Pennsylvania Department of Environmental Resources v. FERC*.[53] The FERC had granted a license to a project involving a dam and contiguous properties owned by the state environmental agency, Department of Environmental Resources (DER). After the FERC found that the project would create no significant impact on the quality of the human environment, the DER intervened claiming that this environmental assessment was in conflict with its own duties. DER subsequently appealed the issuance of a license on the grounds that the license articles interfered with its own mandate to regulate Pennsylvania lands and waters. DER argued that the license should be subject to its approval because DER owned and maintained the underlying property. The Third Circuit affirmed the FERC's authority to issue the license and specifically found that the license provisions did not interfere with the narrower class of state concerns reserved by section 27 of the Federal Power Act.[54] The court agreed with the FERC that it was entitled to place its own regulatory authority in control over this project rather than defer to the state control by the DER.

On February 17, 1989, the FERC issued Order No. 511.[55] The Order sets forth a policy statement to permit certain appeals by fish and wildlife agencies that have not previously intervened in a proceeding. The policy statement is applicable until the final rule is issued on the conflict resolution procedures prescribed by section 10(j) of the Federal Power Act.[56] The purpose of the policy statement is to alleviate the need for agencies to intervene in every licensing proceeding in order to preserve their right of appeal to the Commission.[57] The policy statement allows fish and wildlife agencies to intervene in such a proceeding, within 30 days after the issuance by the FERC staff of an order rejecting or materially modifying any of its fish and wildlife recommendations, for the limited purpose of permitting that agency to appeal such action to the Commission itself. The agency's intervention and appeal must be filed simultaneously.

B. Relicensing

In *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*,[58] the District of Columbia Circuit considered the FERC's discretion to refuse to assess the need for wildlife protective conditions in interim annual licenses to operate hydroelectric projects pending completion of relicensing proceedings. Two hydro-electric projects on the Platte River had licenses which were due to expire in 1987. Prior to the deadline for filing for relicensing, the responsible local power districts filed applications for new licenses. The FERC found the applications to be deficient, and the power districts requested that correction of the deficiencies be delayed to allow for an environ-

53. 868 F.2d 592 (3d Cir. 1989).
54. 16 U.S.C. § 821 (1988).
55. Order No. 511, *Statement of Policy*, 46 F.E.R.C. ¶ 61,161, at 61,562 (1989).
56. 16 U.S.C. § 803(j) (1988).
57. 46 F.E.R.C. ¶ 61,161, at 61,563.
58. 876 F.2d 109 (D.C. Cir. 1989).

mental study to be conducted regarding the deficiencies identified by the FERC. Following lengthy delays in the completion of the study, it became apparent that the FERC would have to issue annual licenses to govern operation of the dams following expiration of the original license. The Platte River Whooping Crane Critical Habitat Maintenance Trust (Trust) intervened and requested that the FERC consider the need for environmental protective conditions in those annual licenses. The FERC refused initially on the ground that the licenses contained no reservation of authority for the FERC to condition the annual licenses. After the Trust noted that one license provided for such conditioning, the FERC denied the request again by asserting that the Commission did not have sufficient information to determine appropriate mitigating conditions.

On appeal, the D.C. Circuit rejected the FERC's argument that it was not obligated to undertake any review of the environmental impact of the project's operation. The court found that the Commission did have the authority to formulate conditions for the licenses at issue, even though it was required to reissue the annual licenses themselves. The court also rejected the FERC's argument that it lacks an adequate record to condition the licenses, because the FERC's decision had been to not even consider the need for environmental conditioning. The Trust had not asked the FERC to impose specific conditions, but only to gather information as to the need to impose environmental requirements. The court found that where the FERC had reason to believe, from prior studies and legislative history of related legislation, that the operation of the two projects on the Platte River could pose environmental concerns, the FERC was not free to refuse further study. The court remanded the case to the FERC for consideration of the evidence, while noting that the FERC was free to decide whether or not license conditions were called for by the evidence.

On May 17, 1989, the Commission issued a final rule in Order No. 513 revising its regulations regarding relicensing of hydroelectric power projects.[59] The final rule implements the relicensing provisions of the Electric Consumers Protection Act of 1986[60] by establishing procedures for processing applications to operate existing facilities with licenses approaching expiration. Further, the final rule provides for the acceleration of expiration dates under certain circumstances. The rule also provides for potential applicants to have access to existing sites to make studies necessary to prepare their applications.

In addition, the final rule establishes a three-step resource agency consultation process to be followed by potential applicants prior to filing their applications. Step one of the process involves meetings between the applicant and resource agencies to discuss the data and studies to be provided. These meetings must be open to the public. In the second stage, the applicant must perform the requested studies. The resource agencies must be provided with a copy of the final application in the third stage.

The Director of the Office of Hydropower Licensing (Director) will

59. Order No. 513, 18 C.F.R. pts. 4 & 16 (1990).

60. 16 U.S.C. § 807(b) (1988).

resolve disputes arising in the first stage of the process regarding, among other things, whether agency requested studies are needed. The Director will also resolve disputes regarding the access to the site, now required to be given by the existing licensee to potential competitors.

The final rule departs from the FERC's traditional relicensing approach in that municipal preference will no longer apply in minor-project relicensing. Further, the rule states that if an existing licensee files in conjunction with a new entity, the project will no longer be considered as an existing license.

Finally, the rule determines that the authority of the Interior and Commerce Departments to prescribe fishways for projects under section 18 of the Federal Power Act[61] also applies to relicensing proceedings.

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61. 16 U.S.C. § 811 (1988).