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Van Ness Feldman is home to the premier hydropower law practice in the United States and to one of the largest and most experienced teams of attorneys available.

Our current and recent matters involve over 50 percent of all installed hydroelectric capacity in the country.

Additionally, the firm advises developers of new hydropower projects, including conventional large and small hydro, pumped storage, and emerging technologies using wave and tidal energy.

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Federal Agencies Issue Final Rules for Trial-Type Hearings

On November 23, 2016, the Departments of Agriculture, the Interior, and Commerce issued final rules for expedited trial-type hearings and submission of alternative conditions under the Energy Policy Act of 2005. The trial-type hearings are conducted to resolve disputed issues of material fact with respect to mandatory conditions and prescriptions submitted by federal resource agencies for inclusion in a Federal Energy Regulatory Commission (Commission or FERC) hydropower license. The final rules make no changes from the revised interim final rules, which took effect on April 30, 2015. The hydroelectric industry submitted extensive comments in response to the revised interim final rules which recommended improvements regarding equal consideration of public benefits other than protection of environmental resources, assignment of the burden of proof in a trial-type hearing to the party requesting a hearing, the opportunity for a trial-type hearing when a department imposes new conditions following preliminary conditions, improvements to the hearing timeline, and other matters. The Departments rejected all recommended improvements, reiterating their assertion that the requirement to give equal consideration to public benefits other than environmental resource protection applies only to proposed alternatives to departmental preliminary conditions or prescriptions, and that in a trial-type hearing the proponent who bears the burden of proof is the license applicant challenging the factual record underpinning an agency's preliminary conditions or prescriptions. The Departments did, however, affirm that there will be an opportunity for a trial-type hearing or submission of alternative conditions or prescriptions when an agency exercises reserved authority to issue new or modified conditions or prescriptions during the license term.

FERC Reexamining Policy Governing Length of Hydro Licenses

On November 17, 2016, FERC issued a Notice of Inquiry (NOI) seeking comments on whether its existing policy governing the length of original and new hydropower licenses should be modified. The length of

original licenses is governed by section 6 of the Federal Power Act (FPA) which only states that the term of any such license should not exceed 50 years. In issuing relicenses, section 15 of the FPA provides that the license shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years. This inquiry represents the first major evaluation of the matter since the 1990s when the Commission established the current policy providing for a 30-year term where there is little or no authorized redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; a 40-year term for a license involving a moderate amount of those activities; and a 50-year term where there is an extensive amount of such activities. As acknowledged in the NOI, the Commission's policy recently has been the subject of appeals by licensees challenging, in particular, the Commission's refusal to take into account even very substantial environmental and capacity improvements under a current license in setting the term for the next license. The Commission's NOI invites comments on five potential options for establishing terms of licenses.

- First, should the Commission just retain its existing policy?
- Second, should the Commission take into consideration measures implemented under the prior license, *e.g.*, capacity related investments, efficiency upgrades, environmental protection, recreational improvement, or enhanced safety measures?
- Third, should the Commission establish a default license term of 50 years, with parties other than the licensee bearing the burden of arguing that the license term should be less than 50 years?
- Fourth, should the Commission add a more quantitative cost-based analysis in setting the license?
- Fifth, should the Commission accept the longer license term agreed upon in an applicable settlement agreement?

Interested parties have until January 24, 2017 to submit comments on the NOI.

FERC Invites Comments on Methodology for Calculating Annual Charges for Use of Government Lands in Alaska

On November 17, 2016, FERC issued an NOI inviting public and agency comments on a narrow question related to its current methodology for calculating annual charges for the use of government lands in Alaska. FERC seeks to determine if regional per-acre land values based on data published in the National Agricultural Statistics Service (NASS) Census provides reasonably accurate land valuations for hydropower lands in Alaska.

The NOI was issued in response to a petition for rulemaking filed by a group of Alaska hydropower licensees, represented by Van Ness Feldman, who experienced drastic increases in federal land use charges of up to 71 percent in 2016. Land values increased when in February 2016, FERC recalculated its federal lands fee schedule using updated per-acre land values published in the 2012 NASS Census.

In their petition for rulemaking, the Alaska licensees proposed an alternative methodology for calculating annual charges for the use of government lands in Alaska, using a statewide average per-acre land value, rather than regional per-acre land values based on data published in the NASS Census. Petitioners argued that the NASS Census contains skewed data that significantly overvalues federal lands associated with hydropower projects in certain areas of Alaska above their fair market value. For this reason, Petitioners proposed a statewide land fee for the State of Alaska to be applied to all hydropower projects in the Kenai Peninsula and Fairbanks areas of Alaska. The Group proposed no changes to FERC's current methodology for calculating annual charges for projects in the Aleutian Islands area.

In its NOI, FERC requests comments on: (1) whether FERC should use a statewide average per-acre land value rather than a regional per-acre land value in Alaska; (2) if a statewide average per-acre value is preferred, whether the statewide value should be applied to (i) all projects in Alaska, or (ii) all projects in

Alaska except those in the Aleutian Islands area; and (3) which of the five geographic regions of Alaska should be included in the calculation of the adjusted statewide average. FERC also is accepting alternative proposals for determining a reasonably accurate per-acre value for hydropower lands in Alaska. Comments on the NOI are due on January 24, 2017.

Fourth Circuit Holds that Interpretation of Easement for Project Lands Belongs in State Court

On November 21, 2016, in *Pressl v. Appalachian Power Co.*, the United States Court of Appeals for the Fourth Circuit ruled that state court, not federal court, was the proper venue to resolve whether a hydroelectric project licensee may regulate activity – in this case installation of a boat dock – on project lands where the licensee only had a flowage easement on the property. In the easement, the landowner retained the right to use the property "in any manner not inconsistent with" the flowage easement, including recreational purposes. The case began in state court, but the licensee had the matter removed to a federal district court which found the easement gave the licensee the right to control uses of the property and that the plaintiffs had not exhausted their administrative rights before FERC.

The court of appeals disagreed, holding that the issue of whether the licensee had the right under the easement to regulate non-project activity on the property was a contractual dispute that did not necessarily raise a federal question. Since no federal question was presented on the face of the complaint, there was no federal jurisdiction. The court also rejected the licensee's claim that there was a "federal question" because the easement was granted to allow construction of a federally licensed project, stating that if there is any issue in the case that does not raise a federal question – here, interpretation of an easement – the claim does not arise under federal law. Finally, the licensee argued that federal jurisdiction was appropriate because the FPA gives federal district courts exclusive jurisdiction over suits to enjoin violations of the FPA and FERC's regulations and orders thereunder. Citing Supreme Court precedent, the appeals court held that a "duty to enforce" claim can succeed only if the suit's very success depends on giving effect to a federal requirement, which was not the case here.

FERC Invites Comments on Use of Energy Storage Resources as Transmission Assets

On November 14, 2016, FERC issued a public notice inviting post-technical conference comments on topics discussed in its November 1, 2016 Supplemental Notice of Technical Conference (Supplemental Notice) regarding the use in organized wholesale electric markets of electric storage resources, including hydropower pumped storage, as transmission assets compensated through: (1) transmission rates; (2) grid support services compensated in other ways; and (3) for multiple services. The Supplemental Notice posed numerous questions and established a discussion panel for each of these topics for a technical conference which was held at FERC and webcast on November 9, 2016. The November 14 notice specifically invited comments on the topics and questions referenced in the Supplemental Notice and discussed at the technical conference. Comments are due on December 14, 2016.

FERC Issues Notice of Proposed Rulemaking to Require Electricity Market Rules to Accommodate Electric Storage Resources

In an action related to the above mentioned notice inviting comments on the use of electric storage resources as transmission assets, FERC on November 17, 2016 issued a Notice of Proposed Rulemaking to, among other things, require each regional transmission organization (RTO) and independent system operator (ISO) to revise its tariff to include market rules that recognize the physical and operational characteristics of electric storage resources and accommodate their participation in the organized wholesale electric markets. The proposed rule would supersede existing rules that do not always ensure that electric storage resources that are technically capable of providing specific services are permitted to do so. Each RTO or ISO participation model would have to satisfy specified requirements regarding services, bidding parameters, dispatch, minimum size, and pricing of resales back into the market of sales to the storage resource. Comments on the proposed rule are due on January 30, 2016. For additional information, please see VNF's issue alert on the proposed rule.

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DOE Requests Information on Challenges and Opportunities for Sustainable Hydropower Development on Undeveloped Stream Reaches

On November 9, 2016, the Water Power Technologies Office (WPTO) and the Office of Energy Efficiency and Renewable Energy (EERE) in the U.S. Department of Energy (DOE) issued a Request for Information (RFI) inviting the public to provide information on the challenges and opportunities for hydropower development on undeveloped stream reaches. Through its HydroNEXT initiative, WPTO's Hydropower Program invests in development of innovative hydropower technologies for existing non-powered dams, pumped storage, and undeveloped stream reaches. WPTO has previously made research and development (R&D) funding available for non-powered dams and pumped storage projects and now is focusing on undeveloped stream reaches. WPTO seeks responses to questions concerning challenges and opportunities for new stream-reach development and concerning transformative innovations in plant design. EERE seeks input on the focus and structure of a potential funding opportunity to support R&D of advanced and/or non-traditional transformative hydropower technologies and project designs that avoid or minimize adverse environmental and social effects of new hydro development on undeveloped stream reaches. In particular, EERE seeks input on a proposed R&D process outlined in the RFI. Responses to both requests are due by December 16, 2016.

FERC Finalizes Changes to Critical Energy Infrastructure Information Rules

On November 17, 2016, FERC issued a Final Rule implementing provisions of the Fixing America's Surface Transportation (FAST) Act pertaining to protection of critical energy infrastructure information (CEII). CEII is specific information regarding the design of energy facilities that could be useful to someone planning an attack on such facilities.

The FAST Act, among other things, requires FERC to: establish criteria and procedures for designating information as "critical electric infrastructure information;" prohibit unauthorized disclosure; establish sanctions for FERC employees or agents who make unauthorized disclosures; and facilitate voluntary sharing of CEII among agencies, owners and operators, and others. The FAST Act defines "critical electric infrastructure information" to include CEII as defined in FERC's rules. Thus, CEII will refer to critical "electric/energy" information and encompass all critical infrastructure information, regardless of which FERC-regulated industry is relevant.

FERC proposed, and the final rule provides, for separation of CEII rules from rules for "privileged" information, such as sensitive cultural resources data. The final rule requires CEII submitters to identify and segregate CEII from other information, and justify the designation and its term. Owners will still be able to obtain most CEII regarding their own facility from FERC staff without a formal request.

The FAST Act establishes a CEII designation duration date of five years unless FERC determines otherwise. FERC will continue to treat each submission claimed to be CEII as correct and treat expired CEII as non-public until a redesignation determination is made. Decision on changing the designation will only be made when and if a request for the information is made. If a request is made after the designation expires, FERC will determine whether to re-designate the information as CEII before acting on the request. A person challenging a CEII designation must file an administrative appeal with the FERC General Counsel before seeking judicial review.

The FAST Act exempts CEII from release under the Freedom of Information Act (FOIA). However, agencies have discretion to release information subject to a FOIA exemption. FERC will continue to release CEII to any requester that signs a non-disclosure agreement (NDA), but will modify its NDA forms to require the recipient not to disclose the information without prior FERC approval, require recipients to protect the information after the designation has lapsed and promptly report unauthorized disclosures to FERC.

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