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DEPARTMENT OF ENERGY  
Federal Energy Regulatory Commission

18 CFR Part 11

[Docket No. RM16-19-000; Order No. 838]

Annual Charges for Use of Government Lands in Alaska

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Power Act requires hydropower licensees to recompense the United States for the use, occupancy, and enjoyment of federal lands. The Federal Energy Regulatory Commission (Commission) assesses annual charges for the use of federal lands through its regulations concerning charges for the use of government lands. In this Final Rule, the Commission revises the per-acre land value component of its methodology for calculating these annual charges for hydropower projects located in Alaska. Pursuant to the Final Rule, the Commission will calculate a statewide per-acre land value for hydropower lands in Alaska. The Commission will use this statewide per-acre land value, rather than a regional per-acre land value, to calculate annual charges for use of federal lands for all hydropower projects in Alaska, except those located in the Aleutian Islands Area.

DATES: This rule will become effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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ORDER NO. 838

FINAL RULE

(Issued December 21, 2017)

1. The Federal Power Act (FPA) requires hydropower licensees that use federal lands to compensate the United States for the use, occupancy, and enjoyment of federal lands.<sup>1</sup> Currently, the Commission uses a fee schedule, based on the U.S. Bureau of Land Management's (BLM) methodology for calculating rental rates for linear rights of way, to calculate annual charges for use of federal lands. The Commission's fee schedule identifies a fee for each county or geographic area, which is the product of four components: a per-acre land value, an encumbrance factor, a rate of return, and an annual adjustment factor. The per-acre land value for a particular county or geographic area (i.e., a regional per-acre land value) is determined using the average per-acre land value identified by the National Agricultural Statistics Service (NASS) Census. This Final Rule amends part 11 of the Commission's regulations and implements the use of a revised per-acre land value component for calculating these annual charges for hydropower projects located in Alaska. Under the Final Rule, the Commission will use a statewide per-acre land value, rather than a regional per-acre land value, to calculate annual charges for use of federal lands for all hydropower projects in Alaska, except those located in the Aleutian Islands Area.

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<sup>1</sup> 16 U.S.C. 803(e)(1) (2012).

## I. Background

2. Section 10(e)(1) of the FPA requires Commission hydropower licensees using federal lands to pay reasonable annual charges, as determined by the Commission, to recompense the United States for the use and occupancy of its lands.<sup>2</sup> While the Commission may periodically adjust these charges, it must seek to avoid increasing the price to power consumers by such charges.<sup>3</sup> In other words, licensees that use and occupy federal lands for project purposes must compensate the United States through payment of an annual fee, to be established by the Commission.<sup>4</sup>

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<sup>2</sup> 16 U.S.C. 803(e)(1) (2012). Section 10(e)(1) also requires licensees to reimburse the United States for the costs of administering Part I of the FPA. Those charges are calculated and billed separately from the federal land use charges, and are not the subject of this rulemaking.

<sup>3</sup> *Id.*

<sup>4</sup> Pursuant to FPA section 17(a), 16 U.S.C. 810(a) (2012), the fees collected for use of government lands are allocated as follows: 12.5 percent is paid into the Treasury of the United States, 50 percent is paid into the federal reclamation fund, and 37.5 percent is paid into the treasuries of the states in which particular projects are located. No part of the fees discussed in this rulemaking is used to fund the Commission's operations.

3. The Commission has adopted various methods over the years to accomplish this statutory directive.<sup>5</sup> Currently, the Commission uses a fee schedule method, based on land values published in the NASS Census, to calculate annual charges for use of government lands. The Commission adopted this approach in a final rule issued on January 12, 2013.<sup>6</sup>

**A. Order No. 774**

4. In Order No. 774, the Commission adopted a fee schedule method for calculating annual charges for use of government lands, based on BLM's methodology for calculating rental rates for linear rights of way. Pursuant to § 11.2 of the Commission's regulations, the Commission publishes an annual fee schedule which lists per-acre rental fees by county or geographic area.<sup>7</sup> To calculate a licensee's annual charge for use of government lands, the Commission multiplies the applicable county or geographic area per-acre fee identified in the fee schedule by the number of federal acres used by the hydroelectric project, as reported by that licensee.

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<sup>5</sup> See *Annual Charges for Use of Government Lands*, Order No. 774, FERC Stats. & Regs. ¶ 31,341, at PP 3-20 (2013) (cross-referenced at 142 FERC ¶ 61,045) (examining the myriad methods the Commission has used or considered since 1937 for assessing annual charges for the use of government lands).

<sup>6</sup> See generally, Order No. 774, FERC Stats. & Regs. ¶ 31,341.

<sup>7</sup> 18 CFR 11.2 (2017). The fee schedule is published annually as part of appendix A to part 11 of the Commission's regulations.

5. The per-acre rental fee for a particular county or geographic area is calculated by multiplying four components: (1) a per-acre land value; (2) an encumbrance factor; (3) a rate of return; and (4) an annual adjustment factor.

**1. Per-Acre Land Value**

6. The first component – the per-acre land value – is based on average per-acre land values published in the NASS Census. The per-acre value for a particular county or geographic area is identified using the corresponding NASS-published per-acre “land and buildings” value.<sup>8</sup> This per-acre value is then reduced by the sum of a state-specific modifier (to remove the value of irrigated lands) and seven percent (to remove the value of buildings or other improvements). The end result is the adjusted per-acre land value.

7. The NASS Census is conducted every five years, with an 18-month delay before the census data is published. The Commission incorporates another 18-month delay to account for revisions, consistent with BLM’s implementation of its 2008 rule. Therefore, the Commission based its 2011-2015 fee schedules on data from the 2007 NASS Census. The Commission’s 2016-2020 fee schedules will be based on data from the 2012 NASS Census; the 2021-2025 fee schedules will be based on data from the 2017 NASS Census; the 2026-2030 fee schedules will be based on data from the 2022 NASS Census; and so on. State-specific adjustments to the per-acre land values are performed in the first year

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<sup>8</sup> The NASS Census “land and buildings” category is a combination of all land use categories in the NASS Census, including croplands (irrigated and non-irrigated), pastureland/rangeland, woodland, and “other” (roads, ponds, wasteland, and land encumbered by non-commercial/non-residential buildings).

that data from a new NASS Census are used, and will remain the same until the subsequent NASS Census data are used to calculate the forthcoming set of fee schedules.

## **2. Per-Acre Land Value for Alaska**

8. With regard to Alaska, Order No. 774 explained that the final rule would adopt BLM's approach to per-acre land values by designating lands in Alaska as part of one of the five NASS Census geographic area identifiers: the Aleutian Islands Area, the Anchorage Area, the Fairbanks Area, the Juneau Area, or the Kenai Peninsula Area. Under BLM's 2008 rule, the Aleutian Islands Area includes all lands within the Aleutian Islands chain; the Fairbanks Area includes all lands within the BLM Fairbanks District boundaries; the Kenai Peninsula Area includes all lands within the BLM Anchorage District boundaries excluding the Aleutian Islands chain, the Anchorage Area, and, the Juneau Area; the Anchorage Area includes all lands within the Municipality of Anchorage; and the Juneau Area includes all lands within downtown Juneau (i.e., voting precincts 1, 2, and 3).

9. Several commenters asserted that a per-acre statewide value, a category also reported by the NASS Census, should be used to establish assessments for federal land in Alaska.<sup>9</sup> Order No. 774 considered the arguments raised in support of a statewide per-acre value. In particular, several commenters asserted that it is inappropriate to use

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<sup>9</sup> Order No. 774, FERC Stats. & Regs. ¶ 31,341 at P 44.

regional per-acre values for Alaska because Alaska does not use county designations; the number of farms surveyed for the NASS Census in the entire state of Alaska is less than the number of farms surveyed in most counties in the lower-48 states; and, certain per-acre land values near Anchorage and Juneau are very high, resulting in a substantial increase in annual charges for the use of government lands by hydropower licensees in these areas. However, the Commission ultimately concluded that the commenters had not advanced a sufficient explanation for why it was more appropriate to use a statewide per-acre value for Alaska, rather than the smallest NASS Census defined area for Alaska – the geographic area identifier.

10. Although the Commission rejected the use of a statewide per-acre land value for Alaska in Order No. 774, the Commission clarified that it would not use rates based on the Anchorage Area and the Juneau Area values to assess annual land use charges “because these high, urban-based rates would not reasonably reflect the value of government lands on which hydropower projects are located.”<sup>10</sup> Instead, for purposes of determining a per-acre land value, the Commission decided to apply the Kenai Peninsula Area per-acre value for projects located in the Anchorage Area or the Juneau Area. Therefore, Order No. 774 explained that projects in Alaska would be assessed the Aleutian Islands Area per-acre land value if located in the Aleutian Islands chain, the Fairbanks Area per-acre land value if located in the Fairbanks BLM District, or the Kenai

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<sup>10</sup> *Id.* P 45.

Peninsula Area per-acre land value if located in the Anchorage BLM District excluding the Aleutian Islands chain.

**B. Fiscal Year 2016 Fee Schedule**

11. The Commission used the 2012 NASS Census data to calculate its fee schedule for the first time in Fiscal Year (FY) 2016. Due to per-acre land value increases in the 2012 NASS Census data, hydropower projects located in certain geographic areas in Alaska experienced a significant increase in federal land use charges when compared to the rates assessed in FY 2015.<sup>11</sup>

**C. Petition for Rulemaking**

12. On June 6, 2016, the Alaska Federal Land Fees Group, comprising six hydroelectric licensees with projects in Alaska (Alaska Group),<sup>12</sup> petitioned the Commission to conduct a rulemaking to revise its method of calculating federal land use charges for hydropower projects in Alaska. The Alaska Group's petition focused solely on the first component of the Commission's fee schedule – the per-acre land value – and requested that the Commission: (1) calculate an adjusted statewide average

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<sup>11</sup> In the 2012 NASS Census, changes in land values in other parts of the country varied widely: some rose significantly, some rose by relatively small amounts, and some decreased.

<sup>12</sup> Alaska Electric Light and Power, Bradley Lake Project Management Committee (on behalf of licensee Alaska Energy Authority), Chugach Electric Association, the Ketchikan Public Utilities, Copper Valley Electric Association, and Southeast Alaska Power Agency.

per-acre land value for Alaska and (2) apply this adjusted statewide average per-acre fee to all projects in Alaska, except those located in the Aleutian Islands area.<sup>13</sup>

13. In support of this proposal, the Alaska Group stated that due to the small number of farms (and associated agricultural acreage) that contribute to the data compiled in the NASS Census, there is insufficient data in any individual Alaska area (with the exception of the Aleutian Islands)<sup>14</sup> to produce a fair estimate of land values within that area.

Because there are so few farms outside of the Aleutian Islands Area, the Alaska Group indicated that the per-acre land values in the other four geographic areas of Alaska are extremely sensitive to any changes in the self-reported farm data compiled by the NASS Census.

14. For these reasons, the Alaska Group asserted that an adjusted statewide per-acre land value would better reflect the diverse topography of the state and insulate against land value fluctuations caused by individual changes in farm data. The Alaska Group

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<sup>13</sup> The Alaska Group requests that any project located in the Aleutian Islands Area continue to be assessed annual charges for use of government lands based on a regional per-acre land value.

<sup>14</sup> The Alaska Group contended that because the Aleutian Islands Area contains the greatest amount of farmland in the state (668,016 acres), the NASS Census data for the Aleutian Islands Area is “robust, reliable, and an accurate estimate of fair market value.” Alaska Group’s June 6, 2016 Petition for Rulemaking at 18. Therefore, the Alaska Group requested that the proposed statewide per-acre land value be applied to all hydropower projects located in Alaska, except those projects located in the Aleutian Islands Area.

stated that this method would produce a more accurate estimate of the fair market value of federal lands in Alaska.

**D. Notice of Inquiry**

15. On November 17, 2016, the Commission issued a Notice of Inquiry soliciting input on a narrow question related to its current method for calculating annual charges for the use of government lands – whether regional per-acre land values based on data published in the NASS Census “land and buildings” category result in reasonably accurate land valuations for projects that occupy federal lands in Alaska.<sup>15</sup> Specifically, the Commission asked whether it should: (1) use a statewide per-acre land value rather than a regional per-acre land value to calculate the adjusted per-acre land value for projects that occupy federal lands in Alaska; (2) apply such a statewide per-acre land value to (i) all projects in Alaska, or (ii) all projects in Alaska except those located in the Aleutian Islands Area; and (3) use only certain geographic regions of Alaska to calculate such a statewide per-acre land value.

16. In addition, the Notice of Inquiry encouraged commenters to submit alternative proposals for determining reasonably accurate per-acre land values for projects in Alaska, provided that any proffered alternatives were grounded in the NASS Census data. The

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<sup>15</sup> *Annual Charges for Use of Government Lands in Alaska*, FERC Stats. & Regs. ¶ 31,579 (2016) (NOI). The NOI was published in the *Federal Register* on November 25, 2016. 81 FR 85173.

notice also invited federal land management agencies to comment on how they would view reductions in annual charges for the lands they administer.

17. In response to the Notice of Inquiry, seven entities filed comments, including several Alaska licensees, a U.S. senator, the U.S. Forest Service (Forest Service), and two individuals.

18. The Alaska Group's comments reiterated its position that the Commission should adopt a statewide per-acre land value for all hydropower projects in Alaska, and apply the statewide per-acre value to all projects in Alaska, except those located in the Aleutian Islands Area. Similarly, U.S. Senator Lisa Murkowski and Homer Electric, an electric distribution cooperative in the Kenai Peninsula, urged the Commission to adopt a statewide per-acre land value for Alaska. These commenters echoed concerns that the NASS Census data fails to provide an accurate accounting of land values in Alaska.

19. Kodiak Electric, a licensee of a hydropower project located in the Aleutian Islands Area, stated that the regional per-acre land values published in the NASS Census result in reasonably accurate land valuations for hydropower lands in the Aleutian Islands Area. Citing the large number of agricultural acreage reported by the NASS Census for the Aleutian Islands Area, Kodiak Electric recommended that any statewide per-acre land value for Alaska, if adopted, not be applied to projects located in the Aleutian Islands Area.

20. The Forest Service was the only commenter to provide alternative proposals for Commission consideration. Due to the small number of farms in Alaska, the Forest

Service cautioned against the use of a fee schedule based on NASS Census data. Instead, the Forest Service recommended that the Commission consider calculating federal land

charges for Alaska using BLM’s “Minimum Rent Schedule for BLM Land Use Authorizations in Alaska 2015” or a fee based on power generated, similar to BLM’s solar fee schedule.

21. Two individuals urged the Commission to decline the request to alter its current method for calculating federal land use charges for hydropower projects in Alaska. They expressed concern that the use of a statewide per-acre land value might result in the under-collection of reasonable annual charges, and questioned whether the Alaska Group sufficiently demonstrated that a statewide per-acre value would be more accurate than a regional per-acre land value.

**E. Notice of Proposed Rulemaking**

22. In an August 17, 2017 Notice of Proposed Rulemaking (NOPR), the Commission proposed to adopt the use of a statewide per-acre land value, rather than a regional per-acre land value, for the purposes of calculating annual charges for hydropower projects that occupy federal lands in Alaska.<sup>16</sup>

23. To calculate a statewide per-acre land value for Alaska, the NOPR proposed that the Commission would average the data published in the “land and buildings” category of the NASS Census for two geographic areas: the Kenai Peninsula Area and the Fairbanks

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<sup>16</sup> *Annual Charges for Use of Government Lands in Alaska*, FERC Stats. & Regs. ¶ 32,722 (2017) (NOPR). The NOPR was published in the *Federal Register* on August 31, 2017. 82 FR 41359.

Area.<sup>17</sup> The proposed rule explained that, pursuant to the Commission's current methodology, the statewide per-acre value would be reduced by the sum of Alaska's state-specific reduction to remove the value of irrigated lands and a seven percent reduction to remove the value of buildings. The Commission would then apply the resulting adjusted statewide per-acre land value to all hydropower projects in Alaska except for projects located in the Aleutian Islands Area. The NOPR also stated that the Commission would continue to apply the regional per-acre land value for the Aleutian Islands Area.<sup>18</sup>

24. The proposed rule represented an effort to respond to the issues identified by the petitioners – the prevalence of federal lands in Alaska, the sparse amount of agricultural acreage reflected in the NASS Census, and the increase in annual charges that resulted when the Commission began using data from the 2012 NASS Census. Combining the value of the farmland acreage in the Kenai Peninsula and Fairbanks Areas to calculate a statewide per-acre land value, as proposed in the NOPR, would result in a larger, more

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<sup>17</sup> As we noted earlier, the Commission does not use the NASS Census data from the Anchorage Area or the Juneau Area for the purpose of determining per-acre land values because the predominantly high, urban-based rates do not reasonably reflect the value of government lands on which hydropower projects are located. *See supra* P 9.

<sup>18</sup> As explained in the NOPR, the Commission is satisfied that the use of the regional per-acre land value for the Aleutian Islands Area results in reasonably accurate land values due to the large amount of farmland acreage represented in the NASS Census data for this particular geographic area.

robust data set that will be less prone to future fluctuation due to changes in the level of participation in NASS Census data reporting or specific anomalies in the data reported.

25. The NOPR did not propose to adopt the Alaska Group's suggestion of including Aleutian Islands Area values in calculating a statewide per-acre land value to be applied to hydropower projects located outside of the Aleutian Islands Area, because those values are lower than land values elsewhere in the state.<sup>19</sup>

26. The NOPR also evaluated two alternative proposals recommended by the Forest Service: (i) a method based on the 2015 Minimum Rent Schedule for BLM Land Use Authorizations in Alaska;<sup>20</sup> and (ii) a fee based on power generated, similar to BLM's solar fee schedule.<sup>21</sup> Because these alternative proposals would likely result in higher per-acre land fees for Alaska or would rely on practices the Commission has previously rejected, the Commission declined to consider these alternatives further.<sup>22</sup>

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<sup>19</sup> NOPR, FERC Stats. & Regs. ¶ 32,722 at P 27.

<sup>20</sup> See generally BLM, *Rent for Remote Non-Linear Rights-of-Way, Permits and Leases*, <https://www.blm.gov/policy/im-ak-2015-010> (instruction memorandum describing the U.S. Department of the Interior – Office of Valuation Services' April 2015 Minimum Rent Analysis & Schedule, which provides guidance and a rental schedule for land use authorizations of up to 25 acres across each of BLM's district and field offices in Alaska).

<sup>21</sup> See *Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections*, 81 FR 92122, 92217-18 (December 19, 2016) (to be codified at 43 CFR parts 2800 and 2880).

<sup>22</sup> See NOPR, FERC Stats. & Regs. ¶ 32,722 at PP 28-29.

## **II. Discussion**

27. In this Final Rule, the Commission revises the per-acre land value component of its methodology for calculating annual charges for the use of federal lands by hydropower licensees in Alaska, and amends part 11 of its regulations accordingly. As proposed in the NOPR, the Commission will calculate a statewide per-acre land value for hydropower lands in Alaska. The Commission will use this statewide per-acre land value, rather than a regional per-acre land value, to calculate annual charges for use of federal lands for all hydropower projects in Alaska, except those located in the Aleutian Islands Area.

### **A. Calculation of Statewide Per-Acre Value**

28. The Alaska Group filed comments in support of the Commission's proposal to use a statewide per-acre land value to calculate federal land charges for hydropower projects in Alaska. The Alaska Group urges the Commission to adopt the proposal set forth in the NOPR, with three "refinements." First, the Alaska Group requests that the Commission issue the Final Rule with an effective date of FY 2016 and issue refunds to any Alaska licensee that paid FY 2016 federal land use charges in excess of the amount due under the Final Rule's revised calculation method. Second, the Alaska Group asks the Commission to reconsider its decision to exclude the Aleutian Islands Area from its calculation of a statewide per-acre land value. Third, the Alaska Group reasserts its argument that the use of NASS Census data does not result in fair or accurate valuations of federal lands on which hydropower projects are located, contending that the NASS Census data



significantly overvalues federal lands in most of Alaska. While expressing support for the NOPR, the Alaska Group seeks to reserve the right to petition for further adjustments to the Commission's method for calculating federal land use charges for hydropower projects located in Alaska.

29. Jon Griffiths, a public policy research assistant at the George Washington University, expresses support for the NOPR's proposal to adopt a statewide per-acre land value for Alaska, but recommends that the statewide value be based on an average of the NASS Census data for all five geographic areas in Alaska, rather than just the Fairbanks and Kenai Peninsula Areas. In particular, Mr. Griffiths recommends that the Commission include the Anchorage Area in its calculation of a statewide per-acre land value because it has the largest number of agricultural properties in Alaska. In addition, Mr. Griffiths observes that including all five geographic areas would result in a more robust and representative data set. Finally, Mr. Griffiths asserts that the NOPR's proposal amounts to a federal subsidy for hydropower projects because licensees are paying for land at a value less than its current worth.

30. Aurora Taylor, an Alaska resident, contends that the use of NASS Census data is an inaccurate land pricing method. She questions whether the use of a statewide per-acre land value – calculated by averaging NASS Census data from only two geographic areas (i.e., Fairbanks and Kenai Peninsula Areas) – would result in a more accurate and stable

land valuation method for Alaska.<sup>23</sup> Ms. Taylor also suggests that the Commission consider an alternative fee structure based on the amount of energy generated by the project. However, as noted in the NOPR, the Commission previously rejected as unreasonable proposals based on a project's power capacity, generation, or sales revenue because such fees would result in a royalty as if the occupied federal lands themselves were producing power.<sup>24</sup> The Commission has explained that this type of fee schedule would overlook the fact that power output is the result of several factors (e.g., water rights, head, project structures), not just the acreage of the federal lands involved.<sup>25</sup>

31. The Final Rule adopts the same revised calculation method proposed in the NOPR. To calculate a statewide per-acre land value, the Commission will divide the

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<sup>23</sup> Ms. Taylor also expresses concern that the Commission's current method for calculating federal land use charges fails to account for the environmental costs of damming rivers. In response, the Commission explains that these charges represent a rental fee for the licensee's use of federal acreage. Therefore, it is reasonable for the Commission to seek to establish a fair market rate for the use of federal acreage, rather than a rate based on quantifying environmental costs. In any event, the Commission evaluates the environmental impacts of a proposed hydropower project during the licensing decision, and has noted that it is not possible to assign dollar values to environmental impacts. See *Great Northern Paper, Inc.*, 85 FERC ¶ 61,316, at 62,244-45 (1998), *aff'd*, *Conservation Law Foundation v. FERC*, 216 F.3d 41, 47-48 (D.C. Cir. 2000).

<sup>24</sup> See NOPR, FERC Stats. & Regs. ¶ 32,722 at P 29 n.20.

<sup>25</sup> See *Annual Charges for the Use of Government Lands*, FERC Stats. & Regs. ¶ 32,684, at P 9 (2011) (citing *Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, Order No. 469, FERC Stats. & Regs. ¶ 30,741, at 30,589-90 (1987)).

total estimated market value by the total agricultural acreage (published in the “land and buildings” category of the NASS Census) for the Kenai Peninsula Area and the Fairbanks Area to arrive at an average per-acre land and building value. Pursuant to the Commission’s current methodology, the Commission will adjust the resulting per-acre value by Alaska’s state-specific reduction to remove the value of irrigated lands, as well as a seven percent reduction to remove the value of buildings (i.e., the adjusted per-acre land value). The Commission will apply this adjusted statewide per-acre land value to all hydropower projects in Alaska except those located in the Aleutian Islands chain. Any project located in the Aleutian Islands chain will continue to be assessed the Aleutian Islands Area per-acre land value.

32. Two commenters recommended that the Commission calculate the statewide per-acre land value for Alaska using data from all five geographic areas identified in the NASS Census. One commented that the failure to incorporate data from all regions in Alaska, including the Anchorage and Juneau Areas, undervalues federal lands and amounts to a federal subsidy for hydropower projects. However, in accordance with the policy adopted in Order No. 774, the Commission has never used the NASS Census data from the Anchorage Area or the Juneau Area for the purposes of determining per-acre land values because the predominately high, urban-based rates do not reasonably reflect the value of government lands on which hydropower projects are located. No evidence has been provided during the course of this rulemaking that leads the Commission to reconsider this decision. Moreover, using these high, urban-based rates to calculate a

statewide per-acre value would likely overvalue hydropower lands and artificially inflate federal land use charges.

33. Similarly, the Commission is not persuaded by the Alaska Group's call to include data from the Aleutian Islands Area to calculate a statewide per-acre land value. The Alaska Group asks the Commission to use Aleutian Islands Area data to calculate the statewide per-acre value, but not apply the resulting statewide value to projects in the Aleutian Islands Area, which would dramatically lower the resulting statewide value, while maintaining the use of the Aleutian Islands Area's extremely low regional per-acre value (\$1.02 per acre, adjusted) for projects in the Aleutian Islands Area. This inconsistent approach would undervalue hydropower lands and artificially deflate federal land use charges across the state. Commission staff compared the FY 2017 per-acre rates for hydropower projects located in the Kenai Peninsula Area under the Commission's current methodology (\$57.97), the NOPR's proposal (\$36.53), and the Alaska Group's proposal (\$6.75).<sup>26</sup> The drastic decrease between the NOPR's proposal and the Alaska Group's proposal directly corresponds to the inclusion of the Aleutian Islands Area data. We are not convinced that this lower rate would result in fair compensation to the United States and the taxpayers for the use of public lands.

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<sup>26</sup> The NOPR's proposed calculation results in a \$36.53 adjusted per-acre land value rate for FY 2017, which represents an approximate 9 percent increase from the FY 2015 rate for the Kenai Peninsula Area (\$33.28). FY 2015 was the last year the Commission used data from the 2007 NASS Census to calculate federal land use charges.

34. We are satisfied that a statewide per-acre value, based on data from the Kenai Peninsula and Fairbanks Areas, is an appropriate response to the Alaska Group's Alaska-specific concerns. The revised calculation method uses a larger data set of agricultural acreage that will be better insulated from fluctuation between census years. It also excludes extreme land values that would artificially overvalue or undervalue hydropower lands and preserves the administrative efficiency benefits of using a publicly available index of land values to calculate rates. Therefore, on balance, the Commission finds that the Final Rule's revised calculation method results in a reasonable approximation of per-acre land values for hydropower lands in Alaska.<sup>27</sup>

**B. Application of Statewide Per-Acre Value**

35. Kodiak Electric filed comments on the NOPR, reiterating its assertion that the regional per-acre land value results in a reasonably accurate land valuation for hydropower lands in the Aleutian Islands Area. Kodiak Electric expresses support for the NOPR's proposal to continue to apply the regional per-acre land value, rather than the statewide per-acre land value, for projects located in the Aleutian Islands Area. Pursuant to the Final Rule, the Commission will apply the statewide per-acre land value to all hydropower projects located in Alaska, except those located in the Aleutian Islands Area.

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<sup>27</sup> In its comments on the NOPR, the Alaska Group stated that it reserves the right to petition the Commission for future adjustments to the land valuation method for federal lands in Alaska. The Commission will consider, but may not act on, future petitions requesting it to revise its method for calculating federal land use charges for hydropower projects located in Alaska.

For projects located in the Aleutian Islands Area, the Commission will continue to apply the regional per-acre land value when calculating federal land use charges.

**C. Effective Date of Statewide Per-Acre Value**

36. The Alaska Group contends that the effective date of the Final Rule should be FY 2016, and urges the Commission to issue refunds to any Alaska licensee that paid FY 2016 federal land use charges in excess of the amount that would be due under the Final Rule's revised calculation method. We deny this request. The Commission previously considered and rejected various legal and policy arguments made by the Alaska Group on behalf of its member licensees seeking partial refunds of their FY 2016 federal land use charges because they claimed such charges were unreasonable.<sup>28</sup> The members of the Alaska Group elected not to seek judicial review of this decision, such that an attack on it now is untimely. Further, they have not asserted, let alone proved, that the past payments resulted in any hardship to the licensees in question. Accordingly, we will not revisit those arguments here. The Final Rule's revised calculation method, set forth in § 11.2(c)(1)(iv) of the Commission's regulations, will be used to calculate any

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<sup>28</sup> *Alaska Elec. Light & Power*, 157 FERC ¶ 61,111 (2016) (finding the calculation of the Alaska Group's FY 2016 federal land use charges reasonable, and not a change in Commission procedure or policy). The Alaska Group did not appeal the Commission's order denying rehearing of this issue. Additionally, the decision to adopt a revised calculation method for projects in Alaska does not negate the Commission's determination that the FY 2016 federal land use charges were reasonable and calculated appropriately.

federal land use bills for Alaska licensees that are issued on or after the effective date of this Final Rule (i.e., FY 2017 bills, onward).

### **III. Regulatory Requirements**

#### **A. Information Collection Statement**

37. The Paperwork Reduction Act<sup>29</sup> requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in final rules published in the *Federal Register*.<sup>30</sup> This rule does not impose or alter existing reporting or recordkeeping requirements on applicable entities as defined by the Paperwork Reduction Act.<sup>31</sup> As a result, this rule does not trigger the Paperwork Reduction Act.

#### **B. Environmental Analysis**

38. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant effect on the human environment.<sup>32</sup> Commission actions concerning annual charges are categorically exempt from this requirement.<sup>33</sup>

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<sup>29</sup> 44 U.S.C. 3501-3521 (2012).

<sup>30</sup> *See* 5 CFR 1320.12 (2017).

<sup>31</sup> 44 U.S.C. 3502(2)-(3) (2012).

<sup>32</sup> *Regulations Implementing the National Environmental Policy Act of 1969*,  
(continued ...)

### C. Regulatory Flexibility Act

39. The Regulatory Flexibility Act of 1980 (RFA)<sup>34</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rulemaking and minimize any significant economic impact on a substantial number of small entities.<sup>35</sup>

40. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.<sup>36</sup> The SBA revised its size standard for electric utilities (effective January 22, 2014) from a standard based on megawatt hours to a standard based on the number of employees, including affiliates.<sup>37</sup> Under SBA's current size standards, a hydroelectric generator is small if, including its affiliates, it employs 500 or fewer people.<sup>38</sup>

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Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

<sup>33</sup> 18 CFR 380.4(a)(11) (2017).

<sup>34</sup> 5 U.S.C. 601-612.

<sup>35</sup> 5 U.S.C. 603(c) (2012).

<sup>36</sup> 13 CFR 121.101 (2017).

<sup>37</sup> SBA Final Rule on "Small Business Size Standards: Utilities," 78 FR 77343 (Dec. 23, 2013).

<sup>38</sup> 13 CFR 121.201, Sector 22, Utilities (2017).

41. Section 10(e)(1) of the FPA requires that the Commission fix a reasonable annual charge for the use, occupancy, and enjoyment of federal lands by hydropower licensees. To date, the Commission has issued 21 active licenses that occupy federal lands in Alaska to 15 discrete entities. Therefore, the Final Rule will apply to a total of 15 entities. Of these 15 entities, 13 entities would be impacted by the Final Rule because they hold licenses that occupy federal lands in the Kenai Peninsula, Fairbanks, Juneau, or Anchorage Areas.<sup>39</sup> The Final Rule adopts the use of a statewide per-acre land value, rather than a regional per-acre land value, for the purposes of calculating annual charges for the use of federal lands in Alaska. The Commission will apply the statewide per-acre land value to all hydropower projects in Alaska, except those located in the Aleutian Islands Area. The Commission will continue to apply the regional per-acre land value for projects located in the Aleutian Islands Area.

42. Based on a review of the 13 licensees that would be impacted by the Final Rule, we estimate that most, if not all, are small entities under the SBA definition. These 13 licensees include utilities, non-for-profit electric cooperatives, cities, and companies.

43. Any impact on these small entities would not be significant. Under the Final Rule, a statewide per-acre land value for hydropower lands in Alaska would be calculated based on a larger agricultural data set, resulting in land values that will be less prone

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<sup>39</sup> We note that six of the 13 affected licensees are members of the Alaska Group, which petitioned the Commission to revise its methodology for calculating annual charges for use of federal lands by establishing a statewide per-acre land value for Alaska.

to future fluctuation caused by changes in census data reporting. For Fiscal Year (FY) 2017, the statewide per-acre rate will be lower than the regional per-acre rates that were assessed in FY 2016 for the majority of active licenses in Alaska (other than those located in the Aleutian Islands Area). Accordingly, the 13 affected licensees' federal land use charges for FY 2017 will be lower than the total charges they should have paid in the previous fiscal year based on project geography.<sup>40</sup> The use of a statewide per-acre rate will also result in lower FY 2017 charges for each of the 13 affected licensees compared to the FY 2017 charges they would be assessed under the regional per-acre value method. Consequently, the Final Rule should not impose a significant economic impact on small entities.

44. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities.

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<sup>40</sup> During this rulemaking proceeding, Commission staff identified two affected licensees (P-2230 and P-10773) that were assessed federal land use charges in FY 2013-2016 based on an incorrect per-acre rate – an “All Areas” rate, rather than the appropriate Kenai Peninsula Area rate – resulting in lower total charges during this four year period. Under the Final Rule, these two licensees will pay charges based on the statewide per-acre land value. Therefore, while their FY 2017 charges will increase compared to the FY 2016, these two licensees have been undercharged since FY 2013 and will have lower FY 2017 charges under the Final Rule than they would under the Commission's current methodology using the appropriate per-acre land value (i.e., Kenai Peninsula Area rate).

**D. Document Availability**

45. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE, Room 2A, Washington, DC 20426.

46. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

47. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

**E. Effective Date and Congressional Notification**

48. This regulation is effective **[INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER]**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs

of OMB, that this rule is not a “major rule” as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>41</sup> This rule is being submitted to the Senate, House, and Government Accountability Office.

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<sup>41</sup> 5 U.S.C. 804(2) (2012).

List of Subjects in 18 CFR Part 11

Dams, Electric power, Indians-lands, Public lands, Reporting and recordkeeping requirements.

By the Commission.

Issued: December 21, 2017.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

In consideration of the foregoing, the Federal Energy Regulatory Commission amends part 11, chapter I, title 18, Code of Federal Regulations, as follows:

**PART 11 – ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT**

1. The authority citation for part 11 continues to read as follows:

Authority: 16 U.S.C. 792-828c; 42 U.S.C. 7101-7352.

2. In § 11.2, add paragraph (c)(1)(iv) to read as follows:

§ 11.2 Use of government lands.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(iv) For all geographic areas in Alaska except for the Aleutian Islands Area, the Commission will calculate a statewide per-acre value based on the average per-acre land and building values published in the NASS Census for the Kenai Peninsula Area and the Fairbanks Area. This statewide per-acre value will be reduced by the sum of the state-specific modifier and seven percent. The resulting adjusted statewide per-acre value will be applied to all projects located in Alaska, except for projects located in the Aleutian Island Area.

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